EMPLOYMENT TRIBUNALS

Claimant: **Mr. Alan Thorpe**

Respondents: **Network Rail Infrastructure Limited**

RESERVED JUDGMENT FOLLOWING A HEARING

Heard at: **Nottingham** **On:** **2nd, 3rd,4th,5th,6th and 7th July 2023**

Before: **Employment Judge Heap**

Members: **Mr. R Jones**
Mrs. H Andrews

Representation

Claimant: **Ms. S Harty - Counsel**
Respondent: **Mr. N Bidnell-Edwards – Counsel**

RESERVED JUDGMENT

1. The reliance on post traumatic stress disorder as a disability for the purposes of the claim is withdrawn.

2. The discrimination complaints were presented outside the time limit contained in Section 123 Equality Act 2010 but it is just and equitable to extend time to allow them to be considered.

3. The Respondent discriminated against the Claimant because of something arising from his disability and the justification defences are not made out. The complaint about being required to submit Statements of Fitness for work from 1st

August 2020 is therefore well founded and succeeds. The second complaint is an inevitable consequence of the first act of discrimination.

4. The complaints of direct disability discrimination are not well founded and they fail and are dismissed.

5. If it cannot be agreed the remedy to which the Claimant is entitled will be determined at a Remedy hearing. Notice of hearing will follow.

6. The parties are to inform the Tribunal within 28 days of the date of this Judgment being sent to them whether the Respondent's application for costs is still a live issue or whether agreement has been reached about that.

RESERVED REASONS

BACKGROUND & THE ISSUES

1. This claim is brought by Mr. Alan Thorpe (hereinafter referred to as "The Claimant") against his now former employer, Network Rail Infrastructure Limited, (hereinafter referred to as "The Respondent").

2. The claim was subject of a Preliminary hearing for case management before Employment Judge Broughton on 13th June 2022. At that hearing Employment Judge Broughton made a number of Orders in the usual way, including Orders for further information to be provided by the parties.

3. At that stage it was recorded that the "something arising" from disability in respect of the complaint under section 15 Equality Act 2010 had not been identified and, indeed, it was unfortunately not identified until the time that this hearing commenced.

4. Employment Judge Broughton had listed the final hearing to take place in November 2022 over a period of 5 days and listed a separate Preliminary hearing to determine whether the Claimant was a disabled person within the meaning of Section 6 Equality Act 2010 at the material time with which the claim was concerned and also to determine any application to strike out the complaints of unlawful deductions from wages (which was at that time part of the claim) on the basis it appeared to be presented out of time. That further Preliminary hearing took place on 29th September 2022 and again it came by coincidence before Employment Judge Broughton.

5. The complaints of unauthorised deductions from wages were withdrawn on the basis that they may be pursued elsewhere and, after hearing argument from the parties, Employment Judge Broughton determined that she would not issue a Judgment dismissing that part of the claim on withdrawal so as to enable the Claimant to do so if he wished. By the time that the matter came before us, the wages complaint was therefore no longer a live issue.

6. As to the question of disability, that could not be dealt with at the September 2022 Preliminary hearing on the basis that it was common ground that the Claimant had only disclosed medical notes and records very shortly before the hearing was due to take place and had failed to provide an impact statement until the morning of the hearing.

7. Employment Judge Broughton determined that the question of disability, to any extent that it remained in dispute, should be dealt with by us at final hearing and in consequence of the need to adjourn that hearing the Respondent made an application for costs. Employment Judge Broughton determined that this Tribunal would deal with the question of costs but as it is we were told by Counsel for both parties that it is hoped that either they or those that instruct them will be able to reach agreement on that particular issue, there having been earlier constructive discussions. It was therefore agreed that we would not deal with the application for costs at this stage and would invite the parties to confirm whether agreement had been reached or not.

THE HEARING

8. The full merits hearing listed for November 2022 did not go ahead. That was because the Claimant made an application to postpone that hearing because of the state of his health which was such that he was unable to participate. That hearing was accordingly postponed and relisted for 5 days commencing on 2nd July 2023.

9. The first half day of the hearing time was to be used for reading in. As it was, we notified the parties on the first day that a longer period would be required and that we would not commence the hearing until 10.00am the following day. We were satisfied that would not affect the timetable overall because it had been set at a period of 5 days when it was envisaged that there would be some 7 or 8 witnesses to be called. As it was, we heard from only 3 individuals and we shall come to that further in due course.

10. Fortunately, by the time that the hearing before us came around the Claimant was sufficiently recovered to fully participate. We established with Counsel at the outset that the only adjustment required by the Claimant would be the provision of water and breaks when needed and that was accordingly put into place.

11. It became clear during our reading in that there are a number of preliminary matters that we needed to deal with before we were in a position to commence the evidence. In fact, we spent the entirety of the second day of the hearing dealing with those matters.

12. The first of those was that it appeared that the Claimant faced a jurisdictional hurdle. The acts of discrimination complained of were said, following clarification on the list of issues, to be as follows:

    a. Being told by his Line Manager, Ian Hardwick in late June/July 2020 to submit statements of fitness for work ("Fit Notes") from August 2020 thereby triggering his sickness absence and the sick pay regime;

    b. Further, or in the alternative the failure to pay the Claimant his full pay from August 2020 to August 2021.

13. It appeared to us that the second issue was an inevitable consequence of the first alleged act of discrimination rather than having been a discrete decision taken by anyone at that particular time. That was because the instruction to submit Fit Notes had the result of placing the Claimant onto the Respondent's contractual sick pay regime as at August 2020. It did not appear to be in dispute that the instruction given by Mr. Hardwick - irrespective of how that had come about because that was a dispute we had to resolve on the facts - had the result of commencing the contractual sick pay regime that saw the Claimant paid at full pay for six months of absence, half pay for the next six months of absence and falling to nil pay after twelve months.

14. There was no agreed date upon which Mr. Hardwick was said to have given the contentious instruction but whether that was done in June or July 2020 the complaint had either way not been presented within the applicable statutory time limits because the Claimant had not commenced Early Conciliation with ACAS until 8th November 2021 with the claim then being presented to the Tribunal on 15th December 2021. We enquired of Ms. Harty how she intended to deal with that matter given that, save as for some brief references to the Claimant's health which did not appear to suggest relevance to the issue of jurisdiction, his witness statement was entirely silent on that point. That was a matter about which we must express some surprise given that he has at all material times been instructed by a large firm of solicitors. They were aware from the Respondent's pleaded case that jurisdiction was said to be an issue, yet nothing had been done to deal with that in the Claimant's witness statement.

15. On that basis, whilst we did not feel that supplementary questions would be appropriate to deal with that matter we invited Mr. Bidnell-Edwards to consider whether if he wished to cross examine on the issue because otherwise the Tribunal would have to deal with it and our questions which would inevitably leave him unable to challenge the Claimant's evidence on those points. As it was from a mixture of cross examination questions and questions from the Tribunal we were able to understand the basis of the Claimant's position as to why the claim

Form was not presented in time. We deal with that in our findings of fact and conclusions below.

16. As we have already touched upon the issues in the claim were regrettably still not clear at the outset. Whilst the parties had sought to agree a list of issues in reality that was little more than the bare questions which a Tribunal is required to consider in any claim of this nature and was not specifically tailored to the complaints that the Claimant was advancing. For example, the allegations of discrimination were only referenced in very generic terms with the acts themselves not being properly set out.

17. There was still no engagement with what the "something arising" from disability was said to be, no details were given of the circumstances of each of the comparators that the Claimant relied upon or the construct of a hypothetical comparator in the alternative, no detail as to how the condition of Post Traumatic Stress Disorder ("PTSD") upon which the Claimant also relied at that time was said to be engaged nor the specific legitimate aims relied upon by the Respondent in relation to the complaints of discrimination arising from disability.

18. We afforded Counsel for both parties sometime to liaise with each other to produce a revised list of issues. That was done during the afternoon of the second day of hearing time after discussion of a number of other preliminary matters and that list of issues should be read in conjunction with this Judgment. One thing that had still been omitted was the construct of a hypothetical comparator with both Counsel providing slightly different constructs in that regard. That was done orally and we have taken those into account in our findings and conclusions below.

19. As touched upon above one of the issues which we had been required to determine was whether the Claimant was at all material times a disabled person within the meaning of Section 6 Equality Act 2010. That was firstly in relation to a lung condition which the Claimant suffers from and secondly post traumatic stress disorder ("PTSD"). By the time that the hearing came before us the Respondent had conceded that the Claimant was at all material times disabled by the lung condition but not by way of PTSD. As it transpired the Claimant withdrew reliance on PTSD which was communicated to us by Ms. Harty on the second day of the hearing. We therefore did not need to deal with the issue of either disability nor PTSD at all as those no longer remained live issues.

20. We also raised as a preliminary matter with Mr. Bidnell-Edwards who appeared for the Respondent that the position adopted in relation to paragraphs 20 and 51 of the witness statements of Mr. Hardwick appeared to conflict with what had been said at the first Preliminary hearing before Employment Judge Broughton by Mr. Craven, his instructing solicitor.

21. That was to the effect that had the Claimant not provided a Fit Note then he would have been continued to have been paid on special leave during any further period of shielding. Mr. Hardwick's evidence was that was not the case and that once shielding came to an end on 1st August 2020 the only options were to return to work, to work from home if necessary and the employee was able to do so or, if they were not able to do either of those two things to submit a Fit Note. Mr. Bidnell-Edwards clarified that it was Mr. Hardwick's position that was correct and that it had likely been mis-recorded what Mr. Craven had said and that Mr. Craven had not fully checked the content of the Orders when they were sent to him.

22. We also raised that there was a reference in Mr. Hardwick's statement to a Welding Handbook upon which there appeared to be a dispute about the time frames upon which data from a weld has to be inputted before a subsequent inspection can take place. It was indicated that a copy of that would be provided and the relevant sections were subsequently admitted into evidence along with some other documents sought by Ms. Harty.

23. The Claimant, via Ms. Harty, also made an application to adduce further documentation. It was not clear and remains unclear as why that was only disclosed during the course of the hearing. Mr. Bidnell-Edwards objected to the late disclosure of the documentation. We allowed the first document to be admitted which was an email between the Respondent and the Claimant's Trade Union Representative on the basis it appeared to us that was a relevant document and one which should have been disclosed by the Respondent in all events. They were not prejudiced by its late disclosure on the basis that it contained a very narrow issue upon which instructions could be obtained relatively swiftly.

24. We declined, however, to admit the second document which was an extract from some messages in Facebook Messenger between the Claimant and a person said to be by the name of "Bill Big". In fact, that was only the name used on a Facebook account and we understand the individual to be an Andy Simpson who the Claimant appeared to wish to compare himself with as set out at paragraph 26 of his witness statement. We declined to admit the messages on the basis that Mr. Simpson had never been previously mentioned as a comparator in these proceedings, the messages did not tell us anything precisely about his circumstances and whether he would be an appropriate comparator and the Respondent now did not have time to make enquiries and obtain documentation as to their position in relation to what happened in Mr. Simpson's circumstances. We have therefore not had reference to those documents when making our decision.

25. We should observe that neither party called any of the comparators to give evidence. Indeed, for the most part before we sought to clarify those matters with them there appeared to be a lack of detail as to their circumstances such as, for example, whether they were actually disabled, with what conditions, the circumstances in which they had been absent from work and what they had actually been paid. Again, surprisingly, the Claimant's witness statement hardly

dealt with those matters at all and we had to provide time for Ms. Harty to take additional instructions. When she did she set the Claimant's position out as follows:

a. KN[1] - it was assumed that he was clinically extremely vulnerable ("CEV") and not disabled. It was said that he had been off sick in January/February with Covid 19 but had not been placed on sick leave and had been paid his full rate of pay.

b. PH - it was assumed again he was CEV and was not disabled. It was said that he was not in work from January to March 2021 inclusive because his competencies had run out but that he had been kept on full pay and not put within any sickness regime. It was argued that both he and the Claimant had not at that time been ill and not fit for work.

c. NB - again it was assumed that he was CEV and was not disabled. The Claimant's case is that he was told to go home between January and April 2021 because his girlfriend was suffering from cancer, and she was therefore CEV. It is said that he was paid on full pay rather than being placed within what was referred to as the sickness regime as the Claimant was.

26. We raised with Ms. Harty that none of those individuals appeared to have circumstances which were not materially different to that of the Claimant. The Claimant's circumstances, as we shall come to below, were that he was clinically extremely vulnerable until 1st August 2020 and he was required to shield because of the Government Guidance in place at that time but would be expected to return to work or make other arrangements such as to work from home with effect from 1st August 2020.

27. The focus in relation to KN was not during any period returning from shielding but when he was in fact taken ill with Covid during a shielding period prior to 1st August 2020.

28. In relation to PH, it appeared to be common ground that he had never been shielding in the first place and in relation to NB, again the focus was not on the position as at 1st August 2020 but during the period January to April 2021. Those issues may explain why we heard very little by way of submissions as to the comparator point.

29. As to the identities of KN, NB and PH, Mr. Bidnell-Edwards suggested that their identities should be anonymised given that there was likely to be discussion about sensitive and medical conditions. Ms. Harty had no objections to that course.

[1] We have used initials only for these individuals by agreement with the parties because they do not know that they are being referred to in these proceedings, their personal circumstances were being discussed and it will not affect the understanding of the Judgment to refer to them by initials only.

30. Nevertheless, as a Tribunal and having in the forefront of our minds of open justice we considered the application and balanced that against public interest considerations of open justice. As it was, we were required to do no more than use the initials of the individuals within this Judgment. We do not consider given the limited relevance which these individuals had to the case overall that anonymising them in this fashion would have detracted from the understanding of the public as to the findings we have made and the conclusions that we have reached and in balancing that against the fact that it would appear that none of them are even likely to be aware that their names and details having being referred to in these proceedings we determined that it would be appropriate to anonymise them in this way.

31. The evidence concluded on the third day of the hearing and we indicated to both Counsel that it would be helpful for us to have some outline submissions in relation to their respective positions on, at the least, the complaint under Section 15 Equality Act 2010 on the basis that there had been some lively argument including during the course of cross examination as to how the "something arising" would work in the context of the complaints as pleaded.

32. We finished the evidence relatively early into the afternoon of the third day and Counsel were therefore able to use the remainder of that day to prepare outline submissions. We delayed the start of the hearing further accommodate that in the event that anything needed to be finalised by either Counsel during the morning. We are grateful to both Counsel for their assistance in that regard as we and they were better placed to consider the respective arguments of each party before hearing further oral submissions.

33. The submissions were concluded early into the early afternoon of the final day of hearing time and whilst we indicated that we would likely have sufficient time to deliberate and reach our conclusions we were unlikely to be able to deliver an oral Judgment so that we have reserved our decision. We appreciate the patience of the parties in awaiting that Judgment.

34. In particular, the Judge appreciates the patience of the parties as regrettably there was a delay in it being able to be finalised. That was largely due to the absence of the Judge from the Tribunal between 17th July and 5th September 2023 and other judicial work and commitments after that point.

THE EVIDENCE

35. In addition to the additional documents obtained during the course of the hearing to which we have already referred we were provided with a hearing bundle running to some 859 pages. In preparation for our reading in the Respondent had suggested a reading list and due to the volume of that it was necessary as we have already observed to extend the reading time for the Tribunal.

36. In addition to the documentary evidence that we have paid reference to we have also heard oral evidence from the Claimant on his own account and on behalf of the Respondent from Mr. Ian Hardwick, the Claimant's former Line Manager. and Mr. Marc Cooper who dealt with the Claimant's first grievance against Mr. Hardwick flowing from the June/July instruction to obtain fit notes.

THE LAW

37. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be below.

Discrimination complaints

38. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13, 15 and 39.

39. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

> *"(1) An employer (A) must not discriminate against a person (B)—*
> *(a)in the arrangements A makes for deciding to whom to offer employment;*
> *(b)as to the terms on which A offers B employment;*
> *(c)by not offering B employment.*
>
> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
> *(a)as to B's terms of employment;*
> *(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> *(c)by dismissing B;*
> *(d)by subjecting B to any other detriment.*
>
> *(3)An employer (A) must not victimise a person (B)—*
> *(a)in the arrangements A makes for deciding to whom to offer employment;*
> *(b)as to the terms on which A offers B employment;*
> *(c)by not offering B employment.*
>
> *(4)An employer (A) must not victimise an employee of A's (B)—*
> *(a)as to B's terms of employment;*

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c)by dismissing B;
(d)by subjecting B to any other detriment.

(5)A duty to make reasonable adjustments applies to an employer.

(6)Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—
(a)unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or
(b)if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7)In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—
(a)by the expiry of a period (including a period expiring by reference to an event or circumstance);
(b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8)Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms".

The EHRC Code

40. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Direct Discrimination

41. Section 13 EqA 2010 provides that:

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

42. It is for a Claimant in a complaint of direct discrimination to prove the facts from

which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

43. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

44. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

45. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246:**

> *"'Could conclude' must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like and available evidence of the reasons for the differential treatment.*
>
> *The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

46. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious, but also those where there is a discriminatory

motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450**).

Discrimination arising from Disability

47. Section 15 deals with the question of discrimination arising from disability and provides as follows:

"(1) A person (A) discriminates against a disabled person (B) if:-

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

48. There is no requirement in a Section 15 complaint for there to be identification of a comparator. All that is required is that the Claimant is able to show unfavourable treatment, in that regard some detriment, and further that there are facts from which it can again be established that that unfavourable treatment was in consequence of something arising from disability. The Code assists in the interpretation of the term "unfavourable" treatment and provides that it requires the employee to have been "put at a disadvantage" (paragraph 5.7 of The Code).

49. It is not sufficient, however, to simply show that a person is disabled and receives unfavourable treatment, that unfavourable treatment must be in consequence of something arising from the disability.

50. Equally, the unfavourable treatment in question is not the disability itself but must arise in consequence of the employee's disability – such as disability related sickness absence. This means that there must be a connection between whatever led to the unfavourable treatment and the disability (paragraph 5.8 of The Code) and which can be referred to as the "causation" question.

51. The Employment Appeal Tribunal provided a useful analysis with regard to the causation question in the context of a Section 15 EqA 2010 claim in **Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. **Weerasinghe** sets out a two-stage approach and that, firstly, there must be something arising in consequence of the disability and secondly, the unfavourable treatment must be "because of" that "something".

Jurisdiction

52. Section 123 provides for the time limit in which proceedings must be presented in "work" cases to an Employment Tribunal and provides as follows:

"Proceedings on a complaint within section 120 may not be brought after the end of—
(a)the period of 3 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.

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—
(a)the period of 6 months starting with the date of the act to which the proceedings relate, or
(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a)when P does an act inconsistent with doing it, or
(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it".

53. Therefore, Section 123 provides that proceedings must be brought *"within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".* That three month time limit is subject to an extension for the period of ACAS Early Conciliation which also "stops the clock" for period that the parties are engaged in that process.

54. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is "just and equitable" to allow time to be extended and allow the complaint(s) to proceed out of time.

55. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and will usually have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**). The burden is firmly

upon a Claimant to persuade the Tribunal that it is just and equitable to extend time, not on the Respondent to show that it is not.

56. In considering whether to exercise their discretion, a Tribunal will often consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

57. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. The guidance above should not be used as a steadfast or rigid checklist. Instead, the best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular, the length of, and the reasons for, the delay (see **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23**).

58. The burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

FINDINGS OF FACT

59. We asked the parties to note that we have only made findings of fact where it is necessary to do so in order to resolve the remaining complaints between us. We have therefore not made findings in respect of each and every area where the parties are at odds with each other where it is not necessary to do so in order to reach our conclusions.

60. The Claimant was employed by the Respondent between 1st March 2001 and 25th October 2022 when his employment terminated by reason of capability. We should note that there is no complaint before us in relation to the issue of the termination of the Claimant's employment.

61. Prior to the termination of his employment the Claimant was employed as a Welder Team Leader under the line management at the time of Mr. Ian Hardwick. As we understand it, the Claimant's normal duties in that regard would be dealing with welds trackside but its common ground that due to the Claimant's lung problems he had been doing amended duties. Those amended duties had

involved doing calibrations and inputting data and did not require him to be trackside. In relation to calibrations this involved the use of tools and some lifting was required and was generally carried out by the Claimant in an area which he refers to as "The Shed". Although that term is to some degree disputed by Mr. Hardwick we have retained reference to it in this Judgment because everybody knows the part of the Respondent's site that "The Shed" refers to.

62. As to the remainder of the Claimant's work this would be undertaken in the office where the Claimant would be seated next to Mr. Hardwick and would use his computer to input the relevant data. What we mean by the relevant data is not only the data from the calibrations that the Claimant had been undertaking but also data from the engineers who had completed welds trackside.

63. Once the engineers had completed the weld they were then required to send the paperwork, which was described by Mr. Hardwick as essentially bits of paper, to be inputted on to the computer system. The Claimant was involved at two points of the inputting process. The first of those was after he had received the paperwork he would input the details onto the Respondent's system. That would then create the information by which other engineers would be scheduled to go and inspect the welding that had been done to check that it was correct and properly undertaken. Once they had completed their inspection they would return a further piece of paperwork and the Claimant would then input the results.

64. The Respondent's Standard Operating Procedure ("SOP") required that the initial weld data should be inputted onto the system within 72 hours. There was a dispute between the Claimant and Mr. Hardwick as to the frequency with which that happened in practice. It is ultimately not necessary for us to reach any findings on that although we say more about the question of how the papers were handled during the Covid-19 pandemic below. Whatever that position, however, the crucial issue as to time was the period between the weld being undertaken and the inspection taking place and that was to be no more than 28 days. If a period of 28 days was exceeded that would lead to potential repercussions such as speed restrictions being placed on the line for operating trains. That would, of course, have an impact on the running of the network and the ability of operators to keep to their timetables. We accept that that was a crucial consideration.

65. The Claimant's lung condition had required him to be placed on the amended duties which we have described above and which we understand he had been undertaking for some time. The Claimant had been referred to Occupational Health by Mr. Hardwick in order to ensure that he was able to undertake the amended duties. We accept the Claimant's evidence that the majority of his work – 70 to 80 percent – was inputting data and that calibrations were a much lesser part of his amended duties.

66. On the third day of the hearing the Respondent produced a report dated 11th February 2020 from Occupational Health which reported that there had been a consultation with the Claimant that day and that he had reported that he continued

to work his full hours on amended office duties and that based on his assessment he remained fit to undertake those duties with the current adjustments but that he was unfit to undertake his substantive role. That is because that required work welding trackside which the Claimant was unable to do.

67. That report was produced approximately one month before the UK entered the first of the Coronavirus pandemic national lockdowns. At that time the Government issued guidance to all of those who were classed as being CEV to shield, i.e. to stay at home. Letters were issued to those considered to be CEV to give some advice in that regard. The Claimant was the recipient of one such letter because of his lung condition which placed him at greater risk of catching Covid 19 and, if he did, suffering serious effects from it. All of the Respondent's employees who were required to shield were told by the Respondent to remain away from the workplace. During that period of time, they received enhanced payments which was not only their basic pay but also the enhancements that they would have received as if they had been at work such as overtime shift premiums etc. That included the Claimant.

68. There were three people within the line management of Mr. Hardwick who were required to shield at that time. They were the Claimant, KN and NB. We do not need to go into the reasons why anyone else other than the Claimant was required to shield.

69. Towards the end of June 2020, the Government issued a statement indicating that shielding would be relaxed and would come to an end on 1st August 2020. That triggered a discussion within the Respondent about how those shielding members of the workforce would thereafter be dealt with and guidance was issued to relevant managers on 1st July 2020. Whilst only three individuals within Mr. Hardwick's line management were shielding there were, of course, a great many more across the Respondent generally given the size of its operations.

70. We accept that during 2020 the position on shielding and the relaxation of the restrictions was a unique one for both the UK generally and for employers and employees. There was therefore uncertainty both for returning employees and for managers who had to facilitate that.

71. The Respondent therefore determined that guidance should be issued to assist both managers and employees. That was done by Human Resources ("HR") on 1st July 2020 and included a pack called "The Return to the Workplace Pack" which provided additional information both for the shielding employees and also for managers. The guidance set up a four step mechanism by way of which managers could assist those who had been shielding to return to the workplace.

72. That included a workplace recovery assessment taking place, consideration as to any reasonable adjustments and if there were concerns about returning to the workplace from a health risk perspective, arrangement of an Occupational Health referral before agreeing the final plan with the employee concerned.

73. The position as Mr. Hardwick understood it to be was that there would be three options. The first of those was that there would be a return to the workplace by the shielding employee, the second that there would be continuation where possible and necessary of existing home working arrangements and the third was that if the employee was not fit to return to work then they would have to obtain a Fit Note and would then be placed on sick pay and sick leave.

74. Mr. Hardwick approached the return to work for the Claimant, KN and NB not by way of the return to work assessment as he should have in accordance with the HR guidance but instead with an initial referral to Occupational Health. There has been some confusion around the dates upon which various things happened and most significantly a telephone conversation between the Claimant and Mr. Hardwick at which a return to work was discussed. We come to the details of that below.

75. It is not unusual with the passage of time and taking into account that the Claimant now has memory problems as a result of suffering from long Covid that the precise dates cannot be identified. What we consider is important is not the preciseness of the dates but the preciseness of what happened on each of those occasions.

76. It is not in dispute that there was a conversation between Mr. Hardwick and the Claimant in late June 2020 and Mr. Hardwick's evidence was that at that time he had been contacted by each of the three members of staff who were shielding to ask what the position would be in relation to a return to work. We accept that on those occasions he told each of them that he did not know what the position was because he was awaiting guidance from the Respondent. That would make logical sense because the guidance from HR was not in fact issued until 1st July 2020 and therefore Mr Hardwick would not have known at the back end of June 2020 what was going to happen. As we have already observed, this was a unique and unprecedented situation.

77. We accept that after the guidance was issued Mr. Hardwick then had a further conversation with each of the three individuals to ask them to consent to an Occupational Health Report. That must have also included the Claimant because such a report was provided and consent would have needed to be obtained and to let him know that an appointment was being arranged for him.

78. The key conversation is what we will refer to as third conversation which occurred after the receipt of the Occupational Health Report. The Claimant was candid in his evidence that he could not recall if there had been a third conversation and we remind ourselves that he has suffered significant memory problems as a result of long Covid.

79. We find that there was a third conversation because if the two earlier discussions between the Claimant and Mr. Hardwick had, however it had come about, resulted in the Claimant being required to obtain a Fit Note after shielding ended then there would have been no reason for Mr. Hardwick to have made the Occupational

Health referral because it would have been common ground that the Claimant was not returning to work after 1st August 2020.

80. The Claimant had originally set out that he believed that the conversation in question had taken place in July 2020. It was only in his witness statement that that position changed, on reflection, to late June 2020. However, that was only on the basis that he believed that he would have contacted Mr. Hardwick about that time because that was the stage at which the Government announced that shielding would be coming to an end and that he needed to know what would be happening. However, as he could not remember if there had been a conversation after the receipt of the Occupational Health Report (i.e. the third conversation) we find it more likely than not that the Claimant is mis-remembering the precise date upon which that discussion took place. Again, as we have already said it is the preciseness of what happened during the third conversation that we are concerned with and not the exact date.

81. We have found ourselves unable to unanimously reach agreement as to whose evidence we prefer as to what exactly was said during the third conversation. The Employment Judge and Mrs. Andrews were able to reach agreement in that regard but Mr. Jones found himself unable to prefer the word of the Claimant over Mr. Hardwick and vice versa without there being more in support and found that it more likely than not that what happened fell between two stools as to the evidence of both of them.

82. However, as to the finding of the majority of the Tribunal we prefer the version of events of the Claimant. With the exception of the date, the details of exactly what happened have been consistent, as Ms. Harty rightly submits, throughout the grievance process that he raised, in his Claim Form to the Tribunal, in his witness statement and in his evidence before us. We shall come to the detail of that this conversation further below.

83. In the meantime, before that conversation had taken place and as we have already observed Mr. Hardwick had obtained a report from Occupational Health. That report followed on from a referral made on 14th July 2020 and was dated 17th July 2020.

84. The relevant part of the report said this:

> *"Mr. Thorpe has done very well to shield at home for the past several months, he is aware of his vulnerability and plans to continue following the Government Guidance as long as needed and follow the medical advice he is given in relation to Covid 19. Even without the Covid 19 shielding guidance in my clinical opinion I do not think Mr. Thorpe is fit to return to work, he remains very breathless and is still under cardiac investigation to establish the underlying cause to his exacerbated symptoms. I will therefore refer Mr. Thorpe's case to an Occupational Health Physician for further assessment and an updated opinion on fitness for work will be provided at this review".*

85. It is Mr. Hardwick's position that during the subsequent telephone call after receipt of the Occupational Health Report (i.e. what we have earlier referred to as the third conversation), which would have taken place at some time in mid to late July given the date of the report, the Claimant told him that his doctor had said that he was not fit for work and in consequence would not be returning after shielding ended. It is Mr. Hardwick's position that he then told the Claimant that in those circumstances he would need to obtain a Fit Note.

86. The Claimant's position is very different. His position is that he wanted to know what was going to happen in relation to a return to work. It is common ground that he could not return to his substantive post as a Welder because he was unfit to work trackside but that he enquired about returning to his amended duties upon which he was told that there was no room for him.

87. As explained by Mr. Hardwick's evidence the Respondent had had to put into place Covid safe measures which meant that the number of people who were able to work in the workplace in one particular area had reduced. For example, only a certain number of people were permitted in the canteen and benches that had previously occupied six people now only occupied three. We accept that was the information which was given to the Claimant by Mr. Hardwick and that he was effectively told that he was not able to return to work or at least safely return to work and be accommodated in that way.

88. We also accept that Mr. Hardwick told the Claimant at that stage to go and obtain a Fit Note. The majority accept the Claimant's evidence that at that stage he was fit to return to work doing his amended duties and that had he been permitted to do so then he would have done. The only thing that prevented him from returning was what he was told by Mr. Hardwick.

89. Whilst the content of the July 2020 Occupational Health Report is noted, we accept that the position was no different for the Claimant in terms of his ability to perform his amended duties as it had been from the earlier Occupational Health Report in February 2020 shortly before the pandemic hit. Whilst the July 2020 Occupational Health report made reference to the Claimant not being fit for work there was a clear qualification to that opinion that there was going to be a referral to an Occupational Health Physician (i.e. someone more senior) for further assessment and an updated opinion provided at that review.

90. The majority accept the Claimant's evidence that he did not tell Mr. Hardwick that he was not fit to return to work because in fact he viewed himself as being able to return on amended duties. The real change in the Claimant's condition came later when he in fact contracted Covid 19 and was hospitalised for a lengthy period as a result.

91. Although there was some suggestion by Mr. Bidnell-Edwards that a subsequent report which is at pages 416 to 418 of the hearing bundle and dated 4th August 2020 came as a result of a different referral from Mr. Hardwick, Mr. Hardwick himself has no recollection as to whether that was the case and we have not seen any copies of referral forms which we understand to be done either over the telephone, by email or completion of a section on the Optima Health website which might support that suggestion.

92. The more logical conclusion is that the report of 4th August 2020 is the follow up report because it is signed by a Consultant Occupational Physician which was who the follow up report was to be from as set out in the July report. It followed on shortly from the earlier report and we have no other follow up report which would suggest that there was some other advice given by that further referral from the initial Occupational Health Advisor. The assertion that it was from a different referral entirely came only from Mr. Bidnell-Edwards and not from any evidence given by the Respondent.

93. The report from the Consultant Occupational Health Physician said this:

> *"Mr. Alan Thorpe is unlikely to return to work and remains unfit for work on welding and grinding or other trackside duties because of his poor breathing and I cannot say when he will be well enough again so there is no planned returned date. He is also unfit for physically demanding work like yard or stores but is physically capable of office based work subject to necessary training for the foreseeable future".*

94. We do not accept the spin which Mr. Bidnell-Edwards places on the reference to "necessary training" as meaning that the Claimant was not fit to undertake his amended duties and there was some debate on that point during the course of cross examination. Firstly, the suggestion that the Claimant would need additional training because of what was said in the Occupational Health Report was not at any point put to the Claimant during cross examination to give him an opportunity to deal with it. It was only raised for the first time during Ms. Harty's questions of Mr. Hardwick. Secondly, no clarification of what was meant by that term has ever been sought as far as we are aware from Occupational Health and it appeared to us that Mr. Bidnell-Edwards was seeking at times to give evidence as to his belief over what the Occupational Health Advisor had in mind. Thirdly, he was not able to assist us with what training he might envisage the Claimant actually requiring in order to undertake the office based role which he had been working in prior to shielding with no apparent difficulties.

95. We therefore reject the suggestion that the reference to "with training" meant that the Claimant was unfit for his amended duties. That further report, albeit that it came after the third conversation, is consistent with the Claimant's position that he was fit to return to work on his amended duties and supports what the majority have found that the Claimant told Mr. Hardwick. That report was received after the Claimant had been told to submit a Fit Note and during a period when Mr. Hardwick took the view that the Claimant would be self-certifying. The Claimant's

Fit Note was not received until a number a days later, on 10th August 2020, and the majority accept that it only came as a result of the direction from Mr. Hardwick during the third conversation to obtain one.

96. As we have already observed, we accept that the bulk of the amended duties that the Claimant was doing were inputting data. All that he needed in order to undertake those tasks was a laptop and the "pieces of paper" produced by those doing the welds and the inspections. During the pandemic the data once returned to the Respondent was quarantined to prevent the potential spread of coronavirus. That meant that there had to be relatively swift action taken after that period to input the data to meet the 72 hour target under the standard operating procedure. Mr. Bidnell-Edwards points out that the Claimant could not, for example, have worked from home undertaking the inputting work because the Respondent could not have delivered potentially contaminated documents to him which may have put him and others at risk.

97. However, we find it difficult to accept that an organisation the size of the Respondent and with the resources that it had could not have found some way to deal with that such as using email to transmit the data rather than "pieces of paper" or scanning and emailing them to the Claimant. Most workplaces had to adapt to new ways of working during the pandemic, often very swiftly, and it is difficult to conceive that the Respondent could not have altered things to accommodate the Claimant if he was genuinely not able to be safely accommodated back into the workplace after shielding ended.

Conflict in the medical evidence

98. Mr. Hardwick's view, which he told us had been passed to him from senior management, was that a Fit Note would always trump what was said in an Occupational Health Report. That was important because there was a clear dichotomy between what an Occupational Health physician was saying on the one hand and what the Fit Note was saying on the other.

99. Mr. Bidnell-Edwards suggests that the Claimant's General practitioner ("GP") would not have produced a Fit Note unless they had been told that he was unfit for work. However, the majority accept the Claimant's evidence that the reason that the Fit Note was produced by his GP was because he had told him that the adjusted duties that he had been undertaking were no longer available – which is what he had been told by Mr. Hardwick - and on that basis he was certified as not being fit for work and given a Fit Note. That is supported by the August 2020 report which echoes the Claimant's evidence that he was fit to undertake the amended duties that he had been undertaking immediately prior to shielding.

100. In fact, the understanding held by Mr. Hardwick that a Fit Note automatically "trumped" an occupational health report was not the Respondent's policy at all and the reverse was in fact the case.

101. The relevant part of the Conditions of Service Stood Off Network Rail, which formed part of the Claimant's terms and conditions and which Mr. Hardwick accepted that he was familiar with, said this:

> *"Employees covered by the red, blue and green books with permanent medical conditions that prevent them from performing their current role should be accommodated into their current role with reasonable adjustments where feasible as per Network Rails the Company's obligations under the Equality Act 2010. Those who cannot be accommodated should have their permanent restrictions detailed by their GP and the Company's Occupational Health OH provider. Where there is a difference between the opinion of the GP and OH with regard to the employee's restrictions the view of OH shall be preferred".*

102. We find it troubling that having had contrary indications as to the Claimant's fitness for work that there was no further contact with him from Mr. Hardwick, and indeed, any contact that there was little more than an acknowledgment of receipt of a Fit Note and a single telephone call instigated by the Claimant's wife after the Claimant contracted Covid 19.

103. In that regard, in February 2021 the Claimant unfortunately contracted Covid 19 and he became extremely unwell. He was hospitalised and at one stage was in a coma and being treated in the Intensive Care Unit. He remained in hospital until April 2021. We accept thereafter he remained extremely unwell including have to use a wheelchair and re-learn many basic everyday tasks. He was subsequently diagnosed with long Covid.

104. The issue of Stood Off is also relevant in that the Blue Book required the Respondent to at the very least consider, if not positively implement, in circumstances where someone could not longer do their own job (the majority accept that that was not the case for the Claimant but it is very much the Respondent's case) placing employees on fully paid "stand off". That could be for a period up to two years until an alternative post could be found. That would have been reasonable if it was believed that the Claimant could not be accommodated in the workplace at that time because of social distancing until those restrictions were lifted.

<u>Reduction in pay</u>

105. Following his recovery from Covid 19 and associated difficulties, the Claimant discovered that with effect from February 2021 his pay had reduced under the Respondent's sick pay scheme to half pay. There is no dispute between the parties that those were the sick pay provisions in force at the time nor that throughout the relevant period the Claimant had been submitting Fit Notes.

106. With the assistance of his Trade Union Representative, John Flood, on 19th May 2021 the Claimant raised a grievance with the Respondent. The grievance said this:

> *"This is a grievance against my Manager, Ian Hardwick. Last year I was shielding until August as I was classed as extremely vulnerable due to COPD and severe asthma. I phoned Ian in July to see what would happen in August 2020 when shielding finished, I was told by Mr. Hardwick to put in fit notes to continue and to stay at home. Following this instruction, I continued to submit these fit notes right through until February 2021 even though shielding was brought back in January 2021 with a second wave of Covid 19. Unfortunately, at the beginning of February I caught Covid and was hospitalised on 16th. After a week in hospital, I deteriorated as I caught pneumonia on top of Covid. I was in a coma for a month followed by two further weeks on life support before going onto a ward to recover. When I first contracted Covid prior to hospitalisation I should have had an isolation note and not a fit note as per the Government Guidelines. I did not realise until I returned home from hospital that members of staff have been off work for over a year on full pay plus enhancements as per roster whereas I had to send fit notes and was on flat money when the first shielding ended in August 2020. Because of the fit note I was told to submit from August my six months full pay finished and I was put on half pay when I was in a coma with Covid. I have spoken with staff from other depots not just at Mercia House who following formal shielding ending were left at home and were not told to submit fit notes. All names will be given if needed but I am sure HR will know who they are. All this I believe to be orchestrated by Ian Hardwick to deliberate put myself and my family into financial difficulties. We have not had a good working relationship since I won a grievance against him in 2019 around bullying and harassment. Since coming out of a coma I have been diagnosed with Post Traumatic Stress Disorder, I have not had any help from management or Network Rail except a text for Validium which I am using for counselling. I know staff from the Welding Department are either at home on full pay due to stress yet I am being treated differently. In all the time I have been off I have not received any welfare calls from my Line Management. The only contact is when I phoned management. Even when I was in hospital my wife phoned acting RM Stuart Cobley to inform him she had been told to expect the worst from Doctors, she was told to get a sick note. I believe my bad working relationship with Ian is because I won a previous grievance against him. The outcome of the grievance was that Ian writes a letter of apology to me in addition his behaviour was to be monitored every three months for a year, to date none of this has been done. I feel so bad putting in this grievance as I love my job and love working for Network Rail but I feel I have been treated unfairly".*

107. The grievance was passed to Marc Cooper to deal with and he met with the Claimant on 2nd August 2021. Mr. Cooper also met with Mr. Hardwick. We considered the notes of both of those meetings and it has to be said that in our view Ms. Harty was right to submit that Mr. Cooper at no point robustly challenged or drilled down into exactly what had happened in relation to the third conversation with Mr. Hardwick. He instead came to view the situation as a "he said she said" one without making any finding at all as to exactly what had been said.

108. In our experience, it is frequently the case that something will be "he said she said" unless and until such time as those who are tasked with investigating a grievance drill down into and challenge to the accounts given by those who are at odds with each other. That did not happen in this case.

109. Mr. Cooper wrote to the Claimant following a reconvened grievance meeting on 1st December 2021 to confirm his findings and conclusions. By that time the Claimant had dropped to nil pay. The relevant parts of Mr. Cooper's letter said this:

"Based on my review of the relevant evidence and taking into account all the points you and your representative made at the initial and subsequent hearing my findings are as follows:

As per your grievance letter to Will Buxton dated 19 May 2021 you stated you were told by Mr Hardwick to put in fit notes to continue shielding after you phoned Ian in July to enquire what would happen in August when shielding finished. I have been given conflicting statements, in Ian's interview he stated you told him that your Doctor had advised you to go sick and that the instruction didn't come from him which is why he asked you to send in your fit note. The requirement for a workplace assessment would therefore be irrelevant after production of a fit note and thereby you were in receipt of Company sick pay. I have seen the sequence of fit notes commencing 10 August 2020 and running until 6 February 2021 which goes beyond the commencement date of the Governments 3rd National Lockdown whereby you state in your interview that Ian instructed you to go sick and provide a sick note as further Company policy. Due to no supporting evidence from either party, I am unable to uphold this part of the grievance. You state that in all the time I have been off I have not received any welfare calls from management the only contact is when I phone management. When I interviewed Ian he could only provide me with a text that had been sent to your wife as per his contact list, there was no further evidence of calls or texts made from either party. I uphold this part of the grievance due to Ian carrying out the bare minimum of what is expected as a duty of care during any sickness absence. I will be recommending Ian receives appropriate coaching for any future sickness cases to be reviewed over a 12 month period. Ian should also be considered for HR Bite Sized Managing for Health Module".

110. The letter advised that the Claimant of his right of appeal which the Claimant duly exercised. The decision in relation to the first part of the grievance did, however, remain unchanged.

111. The Claimant raised a second grievance in respect of delays in referring him to Occupational Health. That grievance and its outcome are not relevant to the matters before us and therefore we say little about them save as that for the fact that the second grievance was upheld and resulted in a not insignificant sum being paid to the Claimant by way of back pay.

Circumstances of the Claimant's comparators

112. We deal finally with the circumstances of the comparators that are relied upon by the Claimant. We have in fact found from the evidence that their circumstances were different both from the Claimant and also from the description of them as they were relayed to us by Ms. Harty after she had taken instructions.

113. With regard to KN we accept the evidence of Mr. Hardwick that KN contracted Covid 19 during his period of shielding. Because Mr. Hardwick was not carrying out the welfare checks that he should have been doing he did not know until sometime later that KN had been in hospital with Covid 19. Steps were not then taken to go back and put him on sick leave during that period of time.

114. In relation to AH, he was never shielding at all. He was placed on special leave during a period of time when he was not allowed for personal reasons, which were entirely unconnected with a matter of disability, to be trackside. We do not need to say what those personal reasons were because the parties are aware of them but unlike the Claimant's circumstances it might be said that AH was not placed on special leave through no fault of his own.

115. In relation to the situation with NB, the parties are at odds with each other as to how long NB was away from the workplace. Mr. Hardwick submits that it was approximately a week whilst the Claimant believes it to be more like two months. We have no way of resolving that factual dispute because we have no documentation relating to NB and no other evidence. To all intents and purposes, the length of absence does not particularly matter. We accept the evidence of Mr. Hardwick, because it makes logical sense, that NB was sent home from the workplace and was paid full pay because his partner had Cancer and was classed as CEV. That was, however, at the second wave of shielding and at that stage Mr. Hardwick and the Respondent did not know whether shielding would be applied to those who were themselves CEV or also extend to family members and dependants who were CEV. It turned out that it was the former only and at that stage NB was asked to return to the workplace.

JURISDICTIONAL FINDINGS OF FACT

116. For ease, we deal separately with our findings of fact in respect of the jurisdictional issues.

117. The Claim Form was presented on the Claimant's behalf on 15th December 2021 following an earlier period of time spent in early conciliation.

118. We accept the Claimant's evidence that he believed in the first instance that he was doing the right thing by submitting Fit Notes and the majority have found that that was because he had been told to do that by Mr. Hardwick. It was not until February 2021 when the Claimant was placed onto half pay as a result of being placed into the sick pay regime six months earlier so that drop in pay was not something that he was aware of as at August 2020. Indeed, it was not something

that he discovered until April 2021 or thereabouts when he left hospital after a lengthy stay because of suffering from Covid 19 and complications arising from that. There was nothing that the Claimant could do about issuing proceedings whilst he was in hospital because for the majority of that time he was in a coma in intensive care.

119. After he discovered that he had been placed onto half pay the Claimant was in touch with his Trade Union representative who advised him to raise a grievance. Nothing at that stage was said about bringing an Employment Tribunal claim and we accept the Claimant's evidence that he did not know anything about that either and had never involved himself in such a process previously.

120. The advice from the Claimant's Trade Union official was also to the effect they should allow the grievance process to conclude first and only then consider an Employment Tribunal claim. The Claimant was not told anything at that point about time limits and we accept his evidence that in fact that he did not know anything about time limits until he attended the first Preliminary hearing after these proceedings had been issued. It is clear from emails which we have seen from his Trade Union representative that the Claimant's finances were the pressing issue that he needed to seek to resolve at that time and that is where the focus lay rather than litigation.

CONCLUSIONS

121. We turn now to our conclusions in relation to the claims that remain before us.

Jurisdiction

122. We deal firstly with the issue of jurisdiction because if we lack jurisdiction we cannot go on to substantively determine the claim. We accept the submission of Mr. Bidnell-Edwards that the claim has been presented out of time. That is because we accept that everything that happened in relation to the Claimant's pay was triggered by the July 2020 conversation (i.e. the third conversation) between the Claimant and Mr. Hardwick. It was Mr Hardwick's instruction in July 2020 that the Claimant was to obtain a Fit Note which placed him on the sick leave and sick pay regime and which later had the consequence of seeing him move from full to half pay and then half pay to nil pay. There was no separate decision made in relation to those matters in February 2021 or August 2021.

123. Whilst Ms. Harty refers to the effects as being a continuing one, and thus a continuing act, we do not agree. Whilst the ***effects*** of the initial decision continued this was nevertheless a one-off decision. The situation was not akin to the authority relied upon by Ms. Harty[2]. That authority related to a disciplinary situation with many, at the time of the initial commencement of that process, unknown steps which were due to take place and might then feasibly require further complaints of discrimination to be added as and when they occurred. That

[2] Hale v Brighton & Sussex University Hospitals NHS Trust EAT 0342/16.

was not the case here, however, where nothing else happened other than the Claimant continuing to submit Fit Notes. There was also no continuing discriminatory regime. It was a one off act/decision by Mr. Hardwick which had continuing consequences.

124. The claim should have been therefore presented by no later than mid-October 2020. We can say no better than that because nobody is certain of the date of the third conversation. It was not presented until 15th December 2021 and therefore is some 14 months out of time. The Claimant cannot reply on time spent in early conciliation as "stopping the clock" because that was not entered into within the primary three month limitation period.

125. We therefore need to consider whether it is just and equitable to extend time. We are required to take all relevant factors into account and to balance the prejudice as between the Respondent and the Claimant when considering whether to allow the claim to be considered out of time. Particularly pertinent are the reasons for and length of the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the Respondent co-operated with any request for any information, the promptness with which the Claimant acted once he knew of the facts giving rise to the course of action and the steps taken be the Claimant to obtain professional advice once he knew about the possibility of taking action.

126. We have little hesitation in concluding that it is just and equitable to extend time to allow us to substantively determine this complaint.

127. Firstly, the Claimant understood - or he believed initially at least - that he was doing the correct thing in submitting Fit Notes and did not question it further at that time. The matter came into sharper focus when he began to receive half pay which was not until February 2021 and not something that he discovered until April 2021 or thereabouts when he left hospital.

128. At that time, he was in touch with his Trade Union representative who advised him to raise a grievance. Nothing at that stage was said about bringing an Employment Tribunal claim and we accept the Claimant's evidence that he did not know anything about that either and had never involved himself in such a process previously.

129. The advice from the Claimant's Trade Union official was also to the effect they should allow the grievance process to conclude first and only then consider an Employment Tribunal claim. The Claimant was not told anything at that point about time limits and we have accepted his evidence that in fact that he did not know anything about time limits until he attended the first Preliminary hearing after these proceedings had been issued. It was not in our view unreasonable for the Claimant to follow the advice given by his Trade Union, particularly in view of the fact he was in a poor state of health and was trying to resolve the matter internally. That is clear from emails which we have seen from his Trade Union representative that the Claimant's finances were the pressing issue that he needed to seek to

resolve rather than resorting to litigation.

130. Whilst the delay is relatively significant there are valid reasons for it and it is clear that once the outcome of the grievance was delivered on 1st December prompt action was taken to present the Claim Form. There has been no suggestion in submissions made by Mr. Bidnell-Edwards that there is any prejudice to the Respondent in permitting the claim to proceed out of time and, indeed, we have had a full hearing of the matter rather than it being hived off for a jurisdictional Preliminary hearing.

131. Whilst there are clear issues as to recollection of the precise dates of certain events the parties were nevertheless prepared and able to give evidence at a five day hearing which does not suggest any particular prejudice in relation to the ability of the Respondent to defend its position. Neither parties' stance has changed in relation to what the precise content of the third conversation was and it is likely that the issue of dates on the Claimant's side in all events would have been a little confused no matter what date the Claim Form was issued because of him suffering from the effects of long Covid.

132. In addition to that, there was a period where the Claimant was, of course, hospitalised and in a coma. Mr. Bidnell-Edwards sensibly and rightly accepts that there was nothing that the Claimant could have done between February and April 2021 at the least to have taken steps to present a claim. Whilst he points to the fact that the Claimant was able to raise a grievance in March 2021, that was clearly written for him by his Trade Union as the email grievance plainly shows and again it is not wrong for the Claimant to want to seek to try to resolve matters internally without reference to the Employment Tribunal and to the follow the advice he was being given by his Trade Union representative.

133. For all of those reasons it is just and equitable to extend time to allow us to substantively determine the complaints before us.

Direct discrimination

134. We deal firstly then with the complaints of direct discrimination. None of the comparators which are relied upon by the Claimant had circumstances which were not materially different from his. Whilst both KN and NB did return to work after shielding it is not that return to work which is relied upon by the Claimant in the context of the direct discrimination complaint. That is said to be a period when they were said to have been sent home on full pay or not placed into the sickness regime. Therefore, their circumstances were not the same as the Claimant who was submitting Fit Notes but was in fact saying that he was fit for work. However, for completeness we have dealt with the position in relation to each of those individuals.

135. With regard to KN we accept the evidence of Mr. Hardwick that KN contracted Covid 19 during his period of shielding. Because Mr. Hardwick was not carrying out the welfare checks that he should have been doing he did not know until

sometime later that KN had been in hospital with Covid 19. Steps were not then taken to go back and put him on sick leave during that period of time.

136. In relation to AH, he was never shielding at all. He was placed on special leave during a period of time when he was not allowed for personal reasons, which were entirely unconnected with a matter of disability, to be trackside. We do not need to say what those personal reasons were because the parties are aware of them but unlike the Claimant's circumstances it might be said that AH was not placed on special leave through no fault of his own.

137. In relation to the situation with NB, the parties are at odds with each other as to how long NB was away from the workplace. Mr. Hardwick submits that it was approximately a week whilst the Claimant believes it to be more like two months. We have no way of resolving that factual dispute because we have no documentation relating to NB and no other evidence. To all intents and purposes, the length of absence does not particularly matter. We accept the evidence of Mr. Hardwick, because it makes logical sense, that NB was sent home from the workplace and was paid full pay because his partner had Cancer and was classed as CEV. That was, however, at the second wave of shielding and at that stage Mr. Hardwick and the Respondent did not know whether shielding would be applied to those who were themselves CEV or also extend to family members and dependants who were CEV. It turned out that it was the former only and at that stage NB was asked to return to the workplace.

138. None of those comparators therefore had circumstances that were not materially different to those of the Claimant and there are therefore no actual comparators.

139. We have considered whether a hypothetical comparator in the same circumstances as the Claimant but who was not disabled would have been treated any differently and not asked to submit Fit Notes and placed into the sickness pay regime. There are no facts advanced which support that position. The claim of direct discrimination therefore fails and is dismissed.

140. We turn then to the complaints of discrimination arising from disability. We firstly need to identify what is the relevant treatment. That is Mr. Hardwick directing the Claimant to obtain Fit Notes which the majority are satisfied had happened. That had the knock-on effect of placing the Claimant onto the sick pay regime when shielding ended on 1st August 2020.

141. We then need to consider whether being required to obtain Fit Notes was unfavourable treatment.

142. Mr. Bidnell-Edwards referred to the sick pay regime as being a benefit therefore suggesting that it could be seen to be unfavourable treatment and he relied on the authorities of **Cowie v Scottish Fire and Rescue [2022] EAT 121** and **McAllister -v- Commissioners of Her Majesty's Revenue and Customs [2022] EAT 87**. We do not consider that those authorities assist us in this case.

143. The Claimant here, unlike in both **Cowie** and **McAllister**, was not being afforded an advantage which he would not have had but for being unable to work due to disability or because he was disabled. All employees have the benefit of the same sick pay regime and the argument advanced as to that being a benefit and thus not unfavourable treatment overlooks the fact that there are trigger points in that regime which drop the Claimant first to half pay and then to nil pay. If the Claimant had not been required to obtain Fit Notes then he would have been back at work and would not have triggered the reductions in pay. We are satisfied that that was therefore unfavourable treatment.

144. The question then is whether that unfavourable treatment was something arising from the Claimant's disability. He relies, of course, on the fact that he had been shielding. We are satisfied that the causal link in that regard is made out. It is not a particularly high test and can be satisfied with more than one link in the chain. The July 2020 conversation was triggered by the fact that the Claimant had been shielding, that is the something arising from his disability. If the Claimant had not been shielding then firstly, the conversation would not have taken place and secondly, there would have been room for him to be safely accommodated in the Respondent's premises as happened with other employees.

145. We are satisfied that the unfavourable treatment therefore arose from the fact that the Claimant had been shielding. He was required to shield because his disability made him more susceptible to contracting Covid 19 or being made seriously ill by it. Shielding was therefore something arising from his disability. We do not have to consider the "second something arising" which was, if we had found that the Claimant was on sickness absence of his own volition that sickness absence itself, because it was made plain by Ms. Harty that would only have come into play if we were against the Claimant on what happened in relation to the third conversation. The majority accepted the Claimant's account in that regard.

146. The Claimant was therefore subjected to unfavourable treatment because of something arising from his disability.

147. That is not the end of the matter, however and we then need to consider whether the Respondent has made out either of the legitimate aims relied upon. We are satisfied they have not.

148. Those aims were said to be *"the effective monitoring and recording of sickness absence and sick pay entitlements following the expiry of shielding, including the correct administration of contractual payments and the correct use of public money"* and/or "*compliance with collectively agreed policies and contractual obligations and the avoidance of non-contractual cost exposure in respect of public finances"*.

149. Whilst the aims identified could be described as legitimate ones, they cannot in this context because the Claimant did not tell Mr. Hardwick that he was not fit for work and therefore he should not have been put onto the sick pay regime at all. The majority are satisfied that he told him entirely the opposite and what the Claimant said in that regard was later supported by the Occupational Health Physician. Mr. Hardwick's reliance on a Fit Note "trumping" what Occupational Health had said was both wrong and not what the Respondent's policy provided for.

150. If we had found that the Claimant had said that he was not fit for work and that he was not returning after shielding then the legitimate aims would have been ones which could then have been relied on but acting in accordance with policies that the Claimant should never have been placed onto cannot be legitimate aims in this context.

151. Secondly, even if that had not been the case there were clearly less discriminatory ways of dealing with matters if Mr. Hardwick believed that the Claimant could not be accommodated due to the need for social distancing. The Respondent did not follow the provisions of the Blue Book which formed part of the Claimant's terms and conditions of employment and could have resulted in the Claimant being placed on "stand off" for a period up to two years until an alternative post could be found or social distancing arrangements were lifted/relaxed.

152. There were also a number of other things that the Respondent could have considered which would have had a less discriminatory effect. The Respondent did none of the following things which would have had a less discriminatory impact:

    a. Placing the Claimant on a period of special leave akin to that which PH was placed upon;

    b. Considering exceptional pay;

    c. Considering further deployment options for the Claimant;

    d. Consideration of working from home arrangements to deal with the inputting of data which was the bulk of the work that the Claimant did; and

    e. Whether the quarantining system as to paperwork could have been modified to allow the Claimant to safely work from home as we have already referred to above.

153. For all of those reasons the complaint of discrimination arising from disability is well founded and succeeds.

154. Given the relatively modest sums sought by the Claimant the Tribunal hope that the parties will be able to work sensibly to reach a resolution without the need for the matter to return for a remedy hearing.

155. As observed to the parties at the close of submissions the Tribunal are impressed with how the Claimant and the witnesses in these proceedings have conducted themselves. Hearings in discrimination cases are inevitably difficult for all concerned but both the Claimant and the Respondent's witnesses have conducted themselves professionally and with a spirited of goodwill and congeniality towards each other which has been refreshing to see.

Employment Judge Heap

Date: 6th October 2023

JUDGMENT SENT TO THE PARTIES ON

12/10/2023.....

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FOR THE TRIBUNAL OFFICE

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