EMPLOYMENT TRIBUNALS

Claimant: **Mx C Kimber**

Respondent: **Cardiff and Vale University Local Health Board**

Heard at: **Cardiff** **On: 8, 9, 10, 11, 12, 15 and 16 April 2024**

Before: **Employment Judge S Jenkins**

Members: **Mr M Cronin**
Mr A Fryer

Representation:
Claimant: Mr M Jackson (Counsel)
Respondent: Mr J Feeny (Counsel)

JUDGMENT having been sent to the parties on 18 April 2024, and reasons having been requested by the Claimant on 23 April 2024, in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider the Claimant's complaints of; discrimination arising from disability, harassment related to disability, victimisation, unfair dismissal, and failure to make reasonable adjustments; brought by way of a Claim Form submitted on 29 May 2023, following the termination of the Claimant's employment with the Respondent on 3 February 2023. Early Conciliation with ACAS took taken place between 17 April and 29 May 2023.

2. We heard evidence, by way of written statements and oral answers to questions, from the following witnesses:

    - The Claimant on his own behalf;

- On behalf of the Respondent:

    - Claudia Ivins, formerly Ward Manager of Duthie Ward at the University Hospital of Wales;

    - Catherine Twamley, the Respondent's Director of Nursing for Specialist Services, and formerly Director of Nursing for the Respondent's Surgery Clinical Board;

    - Leon Keogh, Deputy Ward Manager of Ward A6 South/Duthie Ward;

    - Rhianne Flood, Senior People Services Advisor;

    - Georgina Mather, Assistant Facilities Manager.

    We also considered the written statement of Gareth Jenkins, Directorate Manager, whose evidence was not challenged by the Claimant, and who therefore was not called to give oral evidence.

3. In terms of documents, we considered the documents in the hearing bundle spanning 590 pages to which our attention was drawn, together with a small number of additional pages referred to us just prior to the commencement of the hearing.

4. We considered the written and oral submissions of both parties' representatives.

Issues

5. What was referred to as an "agreed" List of Issues was provided to us shortly prior to the commencement of the hearing. However, it was clear to us that the list did not fully reflect the issues we had to determine, and the content of the list was therefore discussed before we started to hear oral evidence.

6. The parties' agreed List of Issues was as follows:

    "***List of Issues***

    The Claimant ("C)" claims against the Respondent ("R"):

    - *Disability discrimination under S15, S26 (harassment), S20 (failure to make a reasonable adjustment) and S27 (victimisation)*

    - *Unfair dismissal*

1. Disability

- *C relies on ADHD and autism as his disabilities.*
- *R reserves its position.*

a) Did C have a physical or mental impairment at the material times being 19 January 2023 to 21 July 2023?

If so:-

b) Did the impairment have an adverse effect on C's ability to carry out normal day- to-day activities?

c) Was the effect substantial (more than minor or trivial)?

d) Were any measures being taken to treat the impairment? But for those measures, would the impairment be likely to have had a substantial adverse effect on C's ability to carry out normal day-to-day activities at the material times?

e) Was the effect long term? In particular, when did it start and:

f) Had the effect lasted for at least 12 months at the material times or was likely to or recur?

2. Discrimination arising from disability pursuant to Section 15 Equality Act 2010

a) Did R know or could have reasonably been expected to know that C had the disability at all relevant times?

b) The Claimant alleges the following as the 'of something arising' in consequence of his alleged disability:

i. In terms of the dismissal – Ill health and inability to continue in his substantive role
ii. In terms of the alleged events I – IX below - Use of Medicinal cannabis

c) Were the above the "of something arising" in consequence of his disability?

d) The Claimant alleges he was treated unfavourably because of the above 'of something arising'. Was C treated unfavourably by the following alleged events, or any of them, as detailed in paragraph 32 and 34 of the details of claim:

I. Removing C from his redeployed role as a Theatre Assistant in Trauma/Major Trauma and Plastics Theatres at UHW
II. Requiring C to provide his treatment plan.
III. Requiring C to submit to OH again
IV. Subjecting C to unnecessary extensive intrusive enquires about his use of medicinal cannabis.
V. Requiring (and pressuring) C to work in the post room
VI. Refusing to grant C's request for annual leave to compel C to work in the post room.
VII. Requiring C to work in the Vaccination Centre
VIII. Requiring C to undertake a risk assessment.
IX. Telling C that OH had advised to do a risk assessment
X. Dismissing the Claimant and placing him on redeployment register on 19th January 2023 to run during the notice period.

e) Were the alleged unfavourable treatments a proportionate means of achieving a legitimate aim?

f) The Respondent contends the following proportionate means of achieving a legitimate aim:

i. In relation to paragraph 2d I – IV – the Respondent will aver that the Respondent's actions were a proportionate means of achieving a legitimate aim to ensure the Respondent's primary aim of the safety of its employees and patients.
ii. In relation to paragraph 2 d V – VI – the Respondent will aver that the Respondent's actions were a proportionate means of achieving a legitimate aim as the post room could accommodate the Claimant imminently and keep the Claimant in work whilst the Respondent required sight of the Claimant's treatment plan. The Respondent contends that the Claimant's annual leave was refused to provide the Claimant with an opportunity to start his new role in the post room and to settle in before taking leave, again a proportionate means of achieving a legitimate aim.
iii. In relation to paragraph 2 d VII – the Respondent will aver that it placed the Claimant in the vaccination centre as a means of trying to keep the Claimant in

work by offering suitable roles as part of the redeployment process, as a proportionate means of achieving a legitimate aim.
iv. In relation to paragraph 2 d VIII – IX – the Respondent will aver that the Claimant was required to undertake a risk assessment on the basis he would not provide his treatment plan. Undertaking a risk assessment was a proportionate means of achieving the legitimate aim of considering the Claimant's use of medical cannabis at work and the effects it would have on claimant, employee and patient safety.
v. In relation to paragraph 2 d X - the Respondent will aver that it gave notice to terminate the Claimant's employment and placed him on the

redeployment register, as a proportionate means of achieving the legitimate aim(s) of treating all employees equally and applying a fair and standardised approach.

3. Disability related harassment pursuant to S26 of the Equality Act 2010

a) Did R subject C to the alleged conduct set out in 2(d) I – IX above?

If so:-

b) Was the alleged conduct unwanted?

c) Was the conduct related to his alleged disability?

d) Did the alleged conduct 2(d) I - IX in question have the purpose or effect of violating C's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for C taking into account C's perceptions, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect?

4. Victimisation pursuant to s S27 of the Equality Act 2010

- *R accepts that C's grievance, submitted on 30th March 2023 was a protected act.*

a) Therefore, did R do the following: -

I. Fail to address the grievance

II. Provide an exceptionally poor response.

b) Were these alleged actions detrimental treatment?

c) If so, did R fail to address the grievance and provide a poor response because C did the protected act or R believed C had done the protected act?

5. Unfair dismissal pursuant to S111 (3) of the Employment Rights Act 1996

- *C was dismissed on 19 January 2023.*

a) Does the Tribunal have jurisdiction to hear the claim for unfair dismissal under S111(3) Employment Rights Act 1996?
If so:

b) Was C dismissed for a potentially fair reason within Section 98 ERA 1996? R relies on capability (ill health).

c) Did R act reasonably or unreasonably in treating it as a sufficient reason for dismissing C?

d) Was the dismissal within the range of reasonable responses available to R?

e) Should compensation be reduced following Polkey v AE Dayton Services Limited and, if so, by how much?

f) Should the basic and compensatory awards be reduced to reflect any culpable or blameworthy conduct by C which contributed to his dismissal?

6. Failure to make reasonable adjustments under S20/21 Equality Act 2010

a) The Claimant alleges and relies upon for the purposes of this claim that the following amounts to a 'PCP':

i) dismissing an employee who is incapable of carrying out their substantive role prior to the commencement of a redeployment process

b) Did R apply a PCP to C?

c) Did the above amount to a 'PCP'?

If so:-

d) Did the Respondent apply the above PCP? And did the application of the PCP put C at a substantial disadvantage in relation to the relevant matter in comparison with persons who were not disabled? C avers the alleged substantial disadvantage to be that he would enter a redeployment process during a notice period or extended notice period leaving him vulnerable to loss of employment on the expiry of the notice period without any further formal process to consider his employment with the stress and uncertainty arising from being in such a vulnerable position hampering the chances of a successful redeployment (requiring redeployment in itself being a difficult and stressful position to be in, particularly if disabled). Even if redeployment was successful, the ignominy of the dismissal remains.

e) Did R know, or could it reasonably have been expected to know that C was likely to be placed at the disadvantage?

f) Did R fail to take such steps as were reasonable so as to avoid the

disadvantage? The Claimant alleges that the reasonable adjustment was to not dismiss C before the redeployment process commenced.

g) Was it reasonable for R to take the above step?

7. Remedy

a) If all or any of the claims are successful, what, if any compensation is C entitled to?

b) What financial losses has the discrimination caused C?

c) If C was dismissed on procedurally unfair grounds, should any compensation awarded to him be subject to any 'Polkey' deduction?

d) What injury to feelings has the discrimination caused C and how much compensation should be awarded for that?

e) Has C suffered a personal injury due to the discriminatory conduct?

f) Should interest be awarded? How much?

g) *What declarations and/or recommendations would be appropriate?*"

7. Ultimately, the List of Issues stood as drafted, subject to the following amendments and clarifications:

    a. Paragraph 1 was deleted, as disability had been conceded by the Respondent some months prior to the hearing.

    b. Similarly, paragraph 2(a) was deleted, as the Respondent had also conceded that it had had knowledge of the disability at the relevant times.

    c. With regard to sub-paragraphs 2(f)(ii) and (iii), it was confirmed that the legitimate aim advanced by the Respondent in relation to any unfavourable treatment of the Claimant because of something arising from their disability was that of ensuring the safety of its employees and patients, as noted in sub-paragraphs 2(f)(i) and (iv).

    d. With regard to paragraph 7, the Claimant accepted that they had not suffered any personal injury as a result of any discriminatory conduct.

Although the first issue was deleted in its entirety, we did not adjust the numbering of the List of Issues in order to avoid causing problems in relation to references to the existing paragraph numbers in other places.

8. With regard to remedy, the Notice of Hearing issued to confirm the arrangements for this hearing had indicated that the hearing was to deal with both liability and remedy, which had also been noted by Employment Judge Harfield in her Preliminary Hearing Record issued following an earlier Preliminary Hearing on 20 October 2023. However, there was little remedy evidence advanced in the hearing bundle or in witness statements. It was agreed that, whilst we would consider the principles of any remedy award at the initial stage, we would not address the specific calculation of any award, which, if the need arose, would be dealt with following further evidence and/or submissions.

Law

9. Much of the relevant law had been encapsulated within the closing submissions of both representatives. Following the order of the complaints set out in the List of Issues, we bore the following principal legal principles in mind.

Discrimination arising from disability

10. Section 15(1) of the EqA, which is headed '*Discrimination arising from disability*', provides that, "*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.*"

11. In ***Pnaiser v NHS England and anor*** **[2016] IRLR 170**, the EAT summarised the proper approach to establishing causation under S.15. First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

12. The Court of Appeal, in ***Robinson -v- DWP*** **[2020] IRLR 884**, endorsed the decisions of both the EAT and the Court of Appeal in ***Dunn -v- Secretary of Justice*** **(UKEAT/0234/16)**, and **[2018] IRLR 298**, which confirmed that,

although section 15 does not require the same comparative analysis required in relation to direct discrimination claims under section 13 by the use of "less favourable treatment", both sections require the Employment Tribunal to ascertain whether the treatment (whether less favourable or unfavourable) was because of the protected characteristic and, as such, require a tribunal to look at the thought processes of the decision-maker(s) concerned. As Simler P noted in the EAT in **Dunn**, "*just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary*" if a section 15 claim is to succeed.

13. With regard to the justification of any unfavourable treatment that may be considered to have arisen we noted that the EAT provided guidance, in the second case of ***Department for Work and Pensions -v- Boyers*** **[2022] IRLR 741**, at para. 22:

"*When assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the employer. The treatment must be appropriate and reasonably necessary to achieving the aim. The more serious the impact, the more cogent must be the justification for it. It is for the ET to undertake this task; it must weigh the reasonable needs of the employer against the discriminatory effect of the treatment and make its own assessment of whether the former outweigh the latter.*"

The EAT then referred to an earlier Court of Appeal decision in ***Hardy and Hansons PLC -v- Lax*** **[2005] ICR 1565**, which made very much the same points.

Harassment

14. Section 26 EqA notes that:

"*(1) A person (A) harasses another (B) if—*

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

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

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

…

"*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

15. In assessing whether that had taken place in this case, we would first have to assess whether the matters asserted had taken place, before moving to consider whether, if so, they amounted to "unwanted conduct", and whether they related to disability. If so, we would then have to assess whether the matters had the effect of violating the Claimant's dignity etc. The Claimant confirmed that they were not asserting that any unwanted conduct had had the purpose of violating their dignity, but contended that it had had the effect of doing so.

16. In that regard, Underhill LJ had, in the case of ***Pemberton -v- Inwood*** **[2018] ICR 1291**, at para.88, provided guidance on the subjective and objective elements of that test as follows:

"*In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances — sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.*"

<u>Victimisation</u>

17. Section 27 Equality Act 2010 provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -

B does a protected act,…"

18. We noted that the Respondent accepted in this case that the Claimant had done a protected act when they raised a grievance on 30 March 2023.

19. The test of causation in a victimisation complaint ("because") is the same as that in relation direct discrimination under section 13 ("because of"). It is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test; it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did.

20. The Court of Appeal summarised the approach to be taken in relation to section 13, and in particular the required degree of causation arising from the words, "because of", in ***Chief Constable of Greater Manchester v Bailey*** **[2017] EWCA Civ 425**, where it stated, at paragraph 12:

> "*Both sections[1] use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B.*"

21. In ***West Yorkshire Police v Khan*** **[2001] IRLR 830**, the House of Lords noted that a Tribunal must identify "*the real reason, the core reason, the causa causans, the motive*".

22. in this case, we noted that the detrimental treatment asserted to have taken place was the failure to address the grievance and the provision of an exceptionally poor response to it. We were conscious that Underhill LJ had again provided guidance on that point, in ***Dunn -v- Secretary of State for Justice*** **[2018] EWCA Civ 1998**, in which he noted at paragraph 44:

> "*There is an analogy with a not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.*"

[1] i.e. section 13 EqA and the relevant section in the predecessor legislation.

Unfair dismissal

23. Section 94(1) of the Employment Rights Act 1996 ("ERA") provides as follows:

"*94.— The right.*

(1) An employee has the right not to be unfairly dismissed by his employer."

24. Section 95 ERA then notes:

"*95.— Circumstances in which an employee is dismissed.*

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

25. In this case, the Respondent had given notice of termination of the Claimant's employment on 19 January 2023, to take effect, subject to any successful progress in redeploying the Claimant on 13 April 2023. In the event, progress was made with regard to the redeployment of the Claimant such that their employment had not ended due to the expiry of notice, and

would not have been due to end until, at the earliest the expiry of the last 12-week redeployment trial period, which commenced on 25 January 2024. However, the Claimant themselves gave notice on 26 January 2024, and their employment ended on 3 February 2024. Those circumstances engaged Section 95(2) ERA, such that the reason for the Claimant's dismissal was to be taken to be the reason for which the original notice by the Respondent was given, i.e. the Claimant's capability in the context of his ill health.

26. Section 98(4) then provides as follows with regard to the assessment of the reason for dismiss, and the determination of whether the dismissal for the particular reason is fair or unfair:

"98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

and

(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), 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."

27. As we have noted, the reason for dismissal advanced by the Respondent was the Claimant's capability by reason of their health, a potentially fair reason falling within Section 98(2)(a).

28. With regard to the assessment of the fairness of dismissals by reason of capability we noted that the Court of Session, in ***BS -v- Dundee City Council*** **[2014] IRLR 131**, had provided guidance that the critical issues are: whether, in all the circumstances, a reasonable employer would have waited longer before dismissing the employee; the steps taken to discover the employee's medical condition and likely prognosis; and the consultation undertaken with the employee about their position.

Reasonable adjustments

29. Section 20 EqA provides as follows:

"*20 Duty to make adjustments*

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"

30. Section 21 EqA then provides as follows:

> "*21 Failure to comply with duty*
>
> *(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*"

31. The questions of whether the Claimant had been put at a substantial disadvantage as a disabled person by virtue of a PCP, and then what steps were required to be taken by virtue of the duty to make reasonable adjustments, were to be identified and assessed objectively. The Employment Appeal Tribunal**,** in ***Environment Agency -v- Rowan*** **[2008] ICR 218**, noted that the Tribunal should identify the nature and extent of the substantial disadvantage caused by the PCP, before considering whether any proposed step was a reasonable one to have to take.

32. In relation to the comparison exercise required by section 20(3), the EAT, in ***Royal Bank of Scotland -v- Ashton*** **[2011] ICR 632**, at paras. 14 – 15, noted the following:

> "*A close focus upon the wording of sections 3A(2), 4A and 18B*[2] *shows that an employment tribunal in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.*
>
> "*The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect, that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except in so far as the terms to which we have referred permit it.*"

[2] The references are to the provisions in the predecessor legislation, the Disability Discrimination Act 1995.

33. In ***Fareham College Corporation -v- Walters*** **[2009] IRLR 991**, the EAT emphasised that the comparative exercise in a reasonable adjustments claim, which involves a class or group of non-disabled comparators, differs from that which is applied in the individual, like-for-like comparison required in cases of direct discrimination.

34. The EAT's decision in ***Walters***, is reflected in the Equality and Human Rights Commission's Code of Practice on Employment, which states, at para 6.16:

    "*The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.*"

35. The ***Walters*** decision was also approved by the Court of Appeal, in ***Griffiths -v- Secretary of State for Work and Pensions*** **[2017] ICR 160**, where the Court indicated that the nature of the comparison exercise that is required is clear: the question is simply whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person. with regard to that comparative exercise.

Findings

36. We set out below our findings of fact relevant to the issues we had to decide. Overall, there were few contested issues relating to the narrative of events, but, where any dispute arose, we resolved it on the balance of probability, focusing on the available contemporary evidence, which we considered to be an accurate summary of events as they had arisen.

<u>Background</u>

37. The Claimant, aged 25 at the date on which their employment with the Respondent ended, was employed by the Respondent as a Healthcare Support Worker at University Hospital of Wales in Cardiff.

38. The Respondent is the Health Board covering Cardiff and the Vale of Glamorgan, and employs some 14,500 staff serving a population of close to 500,000 people.

39. No copy of the Claimant's contract of employment was before us, but there appeared to be agreement between the parties that the Claimant was engaged as a Healthcare Support Worker on the Duthie Ward, an acute

surgical ward, and that their contract permitted the Respondent to require them to work in other wards and/or at other locations where appropriate.

The Claimant

40. The Claimant has ADHD and autism, which, as we have noted, the Respondent has accepted amounted to disabilities for the purposes of Section 6 of the Equality Act 2010.

41. The Claimant started work as a Healthcare Support Worker on the Duthie Ward on 16 August 2020. Whilst no issues appear to have arisen in relation to the quality of the Claimant's work in that role, it appears that their health had a regular impact on their ability to undertake the work required of them. By the start of 2022, the Claimant was at the informal stage of the Respondent's Managing Attendance at Work Policy, and a referral to Occupational Health was made.

42. The Occupational Health Report, produced on 18 January 2022, noted that, whilst the Claimant was at that point in work and undertaking the full remit of their role, adjustments to the role were recommended to enable them to successfully deliver in their role. They were; alterations to workload, frequent short and additional breaks during working hours, and additional time to finish tasks.

43. We noted that those adjustments were put in place, and also that a stress risk assessment was undertaken by Mrs Ivins, at the time the manager of Duthie Ward, on 7 April 2022.

44. Despite the adjustments put in place, the Claimant continued to suffer with regard to their attendance, and further discussions took place between the Claimant and Mrs Ivins. Those included, on 6 May 2022, a discussion in which the Claimant indicated that they looked to be eligible to be prescribed medicinal cannabis as a way of easing the impact of their conditions. Following that discussion, Mrs Ivins sent an email to the Respondent's Occupational Health Department, asking if there were any restrictions regarding the use of medicinal cannabis, noting that she had already discussed with the Claimant appropriate times for medicating, i.e. that it would not be taken before or during work.

45. An Occupational Health Advisor replied to Mrs Ivins on 10 May 2022, noting that they advised that as long as the medication did not impact on the Claimant's performance and safety at work it should be acceptable as it was being monitored by a medical professional, a GP and/or a Specialist Consultant. The Advisor further noted that, depending on their role, the Claimant should be reminded of their own responsibilities relating to their health and their care of patients if patient-facing. The Claimant was then

absent due to ill health from 28 May 2022, and, apart from a short period in July 2022, never ultimately returned to work in Duthie Ward.

The Respondent's Policies

46. In terms of the policies and procedures operated within the Respondent's organisation in relation to the management of sickness absence, and indeed the termination of employment on grounds of ill health, the following position prevailed.

47. The overall terms and conditions of employment for any NHS employee of the Claimant's grade were set out in Agenda for Change, the collectively agreed terms and conditions of service for NHS staff. Paragraph 11 of the Annex of Agenda for Change relating to managing sickness absence notes that:

"*Before a decision to terminate is made all other options should meaningfully be considered, including:*

- *rehabilitation;*
- *phased return;*
- *a return to work with or without adjustments;*
- *redeployment with or without adjustments.*"

48. The NHS All Wales Managing Attendance Policy, prepared in consultation with the trade unions, contains a number of "How To" procedures, including one relating to the management of long-term sickness absence.

49. The opening paragraphs at that section note that:

"*The key purpose of this how to procedure is to support employees' attendance at work and ensure any health conditions are effectively managed. The manager should look at options and practical ways to support absent employees to return to work, giving due consideration to both the wellbeing of the employee and the provision of the service.*

"*Employees absence due to long term sickness will need help and support during their recovery and their return to work. An understanding and sensitive approach should be taken by the manager in all cases.*"

50. With regard to the termination of employment, the "How To" procedure states that: "*Termination of employment will only be considered when all options have been explored*". There is then listed the following:

"- *a return to work in any capacity is unlikely in light of the medical evidence*

- *a return to work is not forthcoming despite medical advice that a return is possible*
- *redeployment*
- *there are no reasonable/tailored adjustments that would facilitate return to work*
- *there is no prospect of suitable alternative work becoming available*".

51. The section was not, in our view, particularly well drafted, but we interpreted it as meaning that termination would only take place where a return to work in any capacity was unlikely, taking into account any adjustments that might be appropriate, and where there was no prospect of suitable alternative employment becoming available.

52. We noted that, in her oral evidence, Ms Flood, the only HR witness who gave evidence to us, confirmed that she understood, and we took from that that the Respondent corporately understood, the reference to "exploring options", particularly to exploring redeployment, as encompassing only a discussion of the option as opposed to taking any substantive steps.

53. The Respondent also operates its own specific Redeployment Procedure, which covers not only redeployment in circumstances of ill health, but also in circumstances of incapability i.e. under-performance, disciplinary action, and where relationship issues have arisen. The Respondent's witnesses also referred to the Policy being implemented in circumstances where reorganisations were required.

54. As well as providing detail on the management of the redeployment search and any trial periods, the Redeployment Policy also contains a section, Section 7, dealing with the end of the redeployment process. That states:

    "*Should the search for alternative employment prove unsuccessful, employment may be terminated in line with contractual notice provisions. The substantive manager must ensure that payroll is informed of this by completing a termination form towards the end of the 12-week search.*"

    That suggested to us that notice would be given towards the end of any search period if it was proving to be unsuccessful.

55. The Redeployment Policy also contains a flow chart, which states "*Redeployment meeting - 12 weeks' notice to search for alternative role. Notice given*"

    That, in contrast to Section 7, suggested to us that notice would be given at the start of the trial period.

56. Regardless of the documented procedures, Ms Flood was clear, as was Mrs Twamley, who confirmed that she had dealt with many ill health dismissals as a manager, that the Respondent's practice was to serve notice of termination at the start of the redeployment search, which would then be paused if a suitable redeployment opportunity arose.

The Claimant's absences

57. A long-term sickness interview, under the Respondent's Managing Attendance at Work Policy, took place between the Claimant and Mrs Ivins on 15 July 2022. The notes of that meeting, taken by Mrs Ivins, record that the Claimant had been approved for medicinal cannabis, and that they found that extremely helpful. The notes also record that the Claimant felt ready to return to work, and a phased return was to commence the following week, on 18 July 2022.

58. At the end of that week however, on 23 July 2022, the Claimant was unable to work, and a telephone conversation took place between the Claimant and Mrs Ivins, on 25 July 2022, during which the Claimant reported that they were unable to manage their phased return due to feeling overwhelmed and stressed by the work environment.

59. A further telephone conversation took place between the Claimant and Mrs Ivins on 2 August 2022, in which the Claimant indicated that they were going to obtain a Fit Note. The Claimant also indicated in that conversation that they had been offered a job with The National Autism Society, which they felt would be much better for them.

60. A further long-term sickness meeting under the Respondent's Managing Attendance at Work Policy took place on 15 September 2022. In addition to the Claimant and Mrs Ivins, Ms Flood was also present to provide input from an HR perspective, and she was a consistent source of HR advice in relation to the Claimant from that point on.

61. The notes of the meeting, taken by Mrs Ivins, record that the Claimant indicated that they continued to use medicinal cannabis, that that had recently been reviewed with a decision to trial other strains, which the Claimant had found very helpful as the new strain helped them to sleep. They reported that they had used the strain before the meeting to help them concentrate.

62. The notes also record that the Claimant had asked Mrs Ivins if she had sought advice on the use of medicinal cannabis before attending work, and that Mrs Ivins replied that the advice she had received was that the Claimant was not to medicate before coming to work as previously advised by Occupational Health as that could affect their judgement. We observed

however, that Mrs Ivins' recorded comment did not accurately reflect the content of the Occupational Health Advisor's email of 10 May 2022.

63. The notes record that the Claimant stated that they felt that it could be beneficial for them to medicate before attending work, and it was agreed that they, i.e. the Claimant, would discuss that further with Occupational Health, but that Mrs Ivins' advice that the Claimant should not be medicating before attending work stood.

64. During the meeting, the Claimant indicated that they did not feel ready to return, and that they did not think that there were any other adjustments which would assist their return to work. Mrs Ivins raised the option of the Claimant attending for some therapeutic days, where they could go in at any time and with no obligation to stay for any specific period, and could use the time to interact with the team or to do mandatory training on a computer before moving on to attempt another phased return. Mrs Ivins also discussed the prospect of a temporary redeployment to a less acute area, to which the Claimant was amenable. The Claimant noted that they would like to return to work at some point, and that their long-term plan was to train as a paramedic which they planned to do the following year, i.e. in 2023.

65. A further long-term sickness meeting took place on 27 October 2022, with the same attendees. During this meeting the Claimant reported that they felt ready to return to work, feeling that their mental health had improved, but that they had concerns that if they returned to Duthie Ward they would deteriorate again. They therefore indicated that they wished to consider redeployment.

66. The notes record that Ms Flood explained the process for permanent redeployment to the Claimant, and that they would have a 12-week period to find an appropriate post with support from HR and management. Once a post was found, the Claimant would then be allowed a trial period of up to 12 weeks, and would be allowed two such trial periods. The notes also record that Ms Flood stated that the Respondent would need Occupational Health agreement to start the process, and that an appointment with Occupational Health was currently awaited.

67. Ms Flood, in her evidence, indicated that she also explained that notice of termination would be given alongside the 12-week search period, and that, if no suitable alternative arose, the Claimant's employment would end at that point. The Claimant, in their evidence, had no recollection of any such discussion regarding the service of notice, and had complained, at the final long-term sickness meeting in January 2023, that the first they had heard of notice of termination being given was in the letter scheduling that final meeting.

68. The notes of the 27 October 2022 meeting make no reference to notice, and nor did notice feature in Mrs Ivins' statement. On balance therefore we considered that notice had not been referred to in that discussion.

69. The meeting concluded with the Claimant indicating that they felt ready to return to work soon, and that they had a Fit Note up to 15 November 2022, but felt able to trial a phased return in a different area before that. Ms Flood indicated that it may be worth looking into temporary redeployment at that stage, but that any temporary redeployment may not have the potential for a permanent role at the end of it. The notes of the meeting record that Mrs Ivins would discuss with other senior nurses if there were any temporary redeployment options within the Surgery area, and that Ms Flood would investigate temporary redeployment options more broadly.

70. The indicated Occupational Health Assessment took place on 2 November 2022, with the Occupational Health Report being produced on 3 November 2022. In that, the Occupational Health Physician recorded the Claimant's conditions and the difficulties they caused, which were:

    - Difficulty in the early mornings, causing problems with punctuality for a 7.00am shift;
    - Finding a 12-hour shift too tiring, and not allowing time to unwind in the evening;
    - Feeling overwhelmed with busy periods of work;
    - Having difficulty with sustained concentration; and
    - Sensory overload from autism.

    The Physician recorded that, in their opinion, the Claimant was not fit to return to their substantive role i.e. to the role of a Healthcare Support Worker in Duthie Ward, but would be fit to be redeployed to an alternative role. Specifically, that would be to a role which had a lower workload, which allowed the opportunity of frequent breaks, with a more regular "day-shift" pattern of 9.00am to 5.00pm.

71. The Occupational Health Physician also recorded that the Claimant had raised the question of whether they could take medicinal cannabis, which the Claimant had confirmed was a prescribed medication, during work. The Physician recorded that their recommendation was that the Claimant be allowed to take that as per any prescribed medication. They noted that if there was any concern from the Respondent regarding any negative effect on performance at work, it was recommended that that be monitored, and that Occupational Health be contacted if any concerns arose. The Physician noted however, that the medicinal cannabis should positively impact the Claimant's performance.

72. Following the meeting on 27 October 2022, Mrs Ivins communicated with the Claimant by email in relation to possible temporary redeployment options. On 3 November 2022 she emailed the Claimant about a possible role in the Pre-op Assessment Clinic ("POAC"), although shortly afterwards it was confirmed that there was no longer any capacity there. Mrs Ivins confirmed that in an email to the Claimant on 7 November 2022, in which she also asked the Claimant for proof of their medicinal cannabis prescription and use, so that she could pass that on to any department the Claimant may be redeployed to.

73. Mrs Ivins sent the Claimant a further email on 14 November 2022, noting another possible temporary redeployment role in Ophthalmology, which also did not ultimately come to fruition. In the email, Mrs Ivins also noted that she would not be informing any other areas of the Claimant's medicinal cannabis use at that point, but that the Respondent still required the Claimant's evidence, i.e. evidence of the medicinal cannabis prescription and use. She asked the Claimant to bring that to the next meeting. The Claimant replied shortly afterwards noting, we presumed with regard to the medicinal cannabis evidence, that they guessed that they would have to speak to their GP on the following day.

74. A further long-term sickness meeting then took place on 23 November 2022, at which the Claimant, Mrs Ivins and Ms Flood were again present. With regard to redeployment, the notes record the Claimant's disappointment that the POAC redeployment had become unavailable, and that the Claimant was due to meet the Lead Nurse in Ophthalmology the following day to discuss that redeployment.

75. With regard to the use of medicinal cannabis, the notes record that a discussion took place regarding, "*the OH Report stating that [the Claimant] be allowed to take [their] medicinal cannabis during work hours*". We observed however, that no Occupational Health Report existed at that point which addressed the use of medicinal cannabis by the Claimant during working hours.

76. The notes also record that the method of taking medicinal cannabis was discussed, with the Claimant confirming that they took it either by mouth as an oil, or in a vape. The notes further record that the Claimant said that they had chosen to take the oils to ingest as part of their treatment plan to enable them to take it at work.

77. The Claimant reported that, on 21 November 2022, their treatment plan from their private clinic doctor had been due to be passed to their GP, and that they would then be able to provide the treatment plan so that they could be open and honest with their future employers, which we took to be a

reference to a future manager within the Respondent's organisation rather than an entirely new employer.

78. Mrs Ivins discussed a concern that there had been a cannabis smell when the Claimant had attended the previous long-term sickness meeting, and the Claimant replied that they did also smoke and vape the cannabis, but that they had chosen oils for when they returned to work as that would not have any smell.

79. The meeting concluded on the basis that the final long-term sickness meeting would be arranged in readiness for the permanent redeployment process. Ms Flood reiterated the permanent redeployment process, i.e. that there would be a 12-week period to find an appropriate post with support from HR and management, and that, once a post was found, the Claimant would be allowed a trial period of up to 12 weeks in the role, and would only be allowed a maximum of two trial periods.

80. Ms Flood, in her evidence, again indicated that she had confirmed to the Claimant in this meeting that the 12-week period during which permanent redeployment opportunities would be sought would include the formal service of notice. However, there was again no reference to that within the notes or in Mrs Ivins' witness statement. We again therefore considered that the discussion did not encompass the service of notice, or at least not with sufficient clarity to enable the Claimant to be aware that they would be put on notice of termination when they started the permanent redeployment process.

81. Following the meeting, Mrs Ivins sent an email to the Claimant, on 28 November 2022. In that, she stated that, following on from the 22 November meeting, and in readiness for moving forward with getting the Claimant into a redeployed post, she would be touching base with Occupational Health again to clarify the Claimant's use of their medicinal cannabis within the workplace, as Occupational Health had not provided a huge amount of information on that.

82. Mrs Ivins then sent an email to Occupational Health on the same day, seeking further clarification on the Claimant's use of medicinal cannabis. She noted that the Claimant had recently had a discussion with the Occupational Health Physician, and had asked whether they could take medicinal cannabis, said to be a prescribed medication, in work, and that it had been recommended that that should be allowed. Mrs Ivins asked for clarification of the acceptable boundaries, how frequently the medicinal cannabis should be taken, and what method was acceptable, noting that the Respondent operated a no smoking site.

83. The Occupational Health response was provided on 30 November 2022. The Physician noted that it, i.e. Mrs Ivins' queries, was not something they were really able to answer, except to state that the Claimant should take medicinal cannabis as per any prescribed medication. The Physician noted that if it was prescribed it was likely to be as a supplement, which could be taken in the privacy of any location. They thought that the medicinal cannabis was unlikely to be smoked if provided on prescription. They recommended that the Claimant provide a copy of the prescription to their Line Manager, which should show the documented form of the medicine, and it would then be for the employer to provide an appropriate location for that to be consumed. The Physician concluded by noting that if the Claimant was unwilling or unable to do that then that should present as a "red flag" to the employer.

84. On 5 December 2022, Mrs Ivins then emailed the Claimant again regarding their medicinal cannabis use. She noted that she had had further advice from Occupational Health and HR, and that both had requested that the Claimant provide a copy of their prescription and treatment plan before medicating in work. She asked if the Claimant's private doctor had provided their GP with the treatment plan, as had been discussed at the previous long-term sickness meeting. She noted that the issue was something that was needed to be organised for when the Respondent was moving the Claimant forward in the redeployment process, to ensure that they were covered to medicate in work should they need to. Mrs Ivins asked the Claimant to forward the required information as soon as they could.

85. Mrs Ivins referred to the issue again in an email sent to the Claimant on 28 December 2022, in which she reminded the Claimant that the Respondent was still waiting on their treatment plan for their medical cannabis, and stated that it was needed to ensure that the Claimant would be able to medicate in work should they need to once redeployed. She referred to it again in an email on 5 January 2023, noting that, as she was asking the Claimant to contact their GP to provide a Fit Note, it might be a good time for the Claimant to request a copy of their treatment plan, so that the Respondent would have it in readiness to support the Claimant if successful in finding a redeployed role.

<u>The final long-term sickness meeting – 19 January 2023</u>

86. In the meantime, Mrs Ivins had emailed the Claimant on 19 November 2022, noting that the final long-term sickness meeting, and the completion of the permanent redeployment paperwork, had been organised for 19 December 2022. That was confirmed in a letter dated 12 December 2022. The letter stated that the purpose of the meeting would be to discuss the Claimant's attendance record, together with the recent Occupational Health advice, and to consider the possibility of commencing the formal

redeployment process. It was noted that whilst the Respondent empathised with the Claimant's current medical problems, their non-attendance had been a concern, and therefore consideration would be given to whether the Claimant's employment could continue or would have to be terminated. The Claimant was reminded of their right to be accompanied by a Trade Union Representative or work colleague.

87. In the event the Claimant's Trade Union representative was not available on 19 December 2022, and the meeting was then rearranged for 19 January 2023. A letter confirming the arrangements for that meeting, which contained the same information as the letter of 12 December 2022, was sent to the Claimant by Mrs Ivins on 5 January 2023. The final long-term sickness meeting then took place on 19 January 2023 as scheduled. Prior to that, Mrs Ivins had, on 11 January 2023, sent her formal report and appendices to the Claimant.

88. No notes of the meeting were in the hearing bundle, apart from very brief handwritten notes taken by Ms Flood. There was, however, a template script for the manager, and the outcome letter sent following the meeting was comprehensive.

89. In Ms Flood's handwritten notes, she recorded the Claimant as disputing having had any understanding that termination was a possible outcome of the meeting until they had received the letter inviting them to attend the meeting and that she had responded by reminding the Claimant that it had been discussed in previous meetings when discussing the redeployment process.

90. The meeting was chaired by Mrs Twamley, being of sufficient seniority to effect a termination of employment within the Respondent's policies and procedures. Mrs Ivins and Ms Flood were present, as were the Claimant and their Trade Union Representative, Laura James.

91. Mrs Twamley considered the report produced by Mrs Ivins, which included the Occupational Health recommendations of 3 November 2022, and she took into account the Claimant's comments. Whilst they referenced the Claimant's concerns that they had not understood that their substantive employment was at risk, Mrs Twamley also noted that the Claimant accepted that it was not viable for them to remain in their substantive post on Duthie Ward, but that the Claimant was keen to return to work and remain in more sustainable employment with the Respondent. Mrs Twamley also noted that the Claimant had raised a concern that they felt singled out by being asked to provide a treatment plan in relation to their medicinal cannabis use, and that she had assured the Claimant that that was not the case, and that it had not, in any way, been a contributing factor to her decision.

92. Ultimately, Mrs Twamley concluded that the Claimant's attendance record had been unsatisfactory, and had not improved despite a number of adjustments. She considered that there was nothing to suggest any improvement or any ability to return to work in the Claimant's substantive role in the foreseeable future. She noted that the Occupational Health advice was that the Claimant was not fit to return to their substantive role, but would be fit to be redeployed in an alternative role, and that there had been an impact on the operation of the Ward due to the Claimant's absence.

93. Mrs Twamley concluded that the Claimant could not continue in their substantive post, and that their employment as a Healthcare Assistant on Duthie Ward should be terminated on the grounds of capability due to ill health. She noted however, that the Occupational Health Report had advised that the Claimant could be permanently redeployed to an alternative role with adjustments.

94. Mrs Twamley then confirmed that the Claimant would enter into a 12-week redeployment search period which would run parallel with their notice period, which would mean that, if no suitable alternative post was found during the 12 weeks, the Claimant's contract of employment with the Respondent would end on 13 April 2023. However, if a suitable post was found within the 12-week period, the Claimant's service would be extended for a period of up to 12 weeks to allow them to take full advantage of a work trial, after which a decision about the Claimant's future employment would be made.

95. Mrs Twamley confirmed her decision in writing in a letter dated 25 January 2023, entitled "*Final Sickness Meeting Outcome Letter – With Redeployment*". In that, she reminded the Claimant of their right to appeal the decision within 14 calendar days. She made no reference to the Claimant's use of medicinal cannabis.

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

96. The Claimant submitted an appeal on 8 February 2023, in which they noted that they were appealing because they did not believe that all reasonable adjustments recommended by Occupational Health had been followed. They noted that they were asking for a fair approach to be taken and for the outcome to be reconsidered.

97. There was a delay in processing the appeal, and it was not acknowledged until 27 March 2023. Then, the Respondent's Head of People Services wrote to the Claimant, acknowledging the appeal and apologising for the

delay in doing so. She noted that although the Claimant had briefly outlined their grounds of appeal, she required more detail of those grounds.

98. The Claimant then provided further clarification of their appeal on 20 April 2023. In that, they noted that their employment in their substantive role had been terminated before redeployment had been explored, which was felt to be discriminatory. The Claimant also noted that the action taken appeared to be outside the scope of Agenda for Change, the collectively agreed terms and conditions of service for NHS staff, which applied to employees of the Claimant's grade, which stated that, before the decision to terminate was made, all other options should be meaningfully considered, which included redeployment.

99. An appeal hearing was then arranged for 12 June 2023, with Mr Jenkins being the decision maker. He was supported by an HR Manager. Mrs Twamley was also present to present the management side, and the Claimant attended, accompanied by Ms James.

100. Ultimately, Mr Jenkins upheld the decision to terminate the Claimant's employment on grounds of capability due to ill health, and dismissed the Claimant's appeal. He confirmed that decision in writing in a letter dated 13 January 2023, noting that, in his view, all reasonable adjustments in relation to the Claimant's role in Duthie Ward had been implemented before the decision had been reached.

101. Mr Jenkins did however conclude, with regard to a concern raised by the Claimant that consideration should have been given to extending the redeployment search period, that an 8-week extension to the period would be reasonable, and that the Claimant would have an additional consecutive 8-week extension to the already agreed search period.

102. We observed that, in his witness statement, Mr Jenkins made the point that, had he upheld the Claimant's appeal, that would have meant that they would have returned to the substantive role in Duthie Ward, which had already been demonstrated not to be appropriate, and to which the Claimant had confirmed they could not return.

<u>The first redeployed role</u>

103. Following the long-term sickness meeting on 19 January 2023, permanent redeployment opportunities were sought, and a position was found quite swiftly. That was a role as a Theatre Assistant in the Trauma/Major Trauma and Plastic Theatres, also at the University Hospital of Wales. Ms Flood wrote to the Claimant on 7 February 2023, confirming that the Claimant would commence the trial redeployment with effect from 13 February 2023, with a phased return over the initial four weeks, increasing from one shift to

four over that period. It was understood that the pace of work in that role would be slower and more planned than in Duthie Ward. The Claimant started their redeployment as scheduled and it appeared to have gone well.

104. Prior to the commencement of the redeployment trial, Mrs Ivins emailed Karen Addis, the Clinical Leader in the Trauma Theatres, on 6 February 2023, asking for a call to discuss the Claimant's phased return. Further emails were then exchanged between Mrs Ivins and Ms Addis in relation to the Claimant later that day, and on 7 February 2023, relating to the dates the Claimant would work over their first two weeks, and who would work with them.

105. Ms Flood then corresponded with Ms Addis by email over the letter to be sent to the Claimant in relation to the trial, and over the transfer of the Claimant's cost allocation. Neither Mrs Ivins nor Ms Flood made any reference to the Claimant's use of medicinal cannabis in these email exchanges or letters.

106. On 13 February 2023, Mrs Ivins, who still was substantively the Claimant's Line Manager at this point, held a return-to-work meeting with the Claimant on their return. Mrs Ivins had made a broadly contemporaneous note of the discussion, which again we accepted as broadly accurate.

107. During this meeting, the Claimant showed Mrs Ivins their treatment plan on their phone, noting that they were not willing to provide a copy. Mrs Ivins noted that the plan was from a private company she did not recognise, and that it stated the different varieties of flowers and oils that could be inhaled or ingested. She also noted that it was stated that the plan was up for review at the end of February 2023, and Mrs Ivins and the Claimant discussed how the Claimant would be able to pay for that.

108. In her witness statement, Mrs Ivins recalled seeing a reference to "THC", which is the main psychoactive ingredient in cannabis, and which provides the "high", but no reference to that was made in her contemporaneous note, and we doubted that her recollection in her witness statement was therefore accurate as a result.

109. Mrs Ivins left the Respondent's employment shortly after that, with her Deputy, Mr Keogh, taking over the management of the Claimant in her stead. In her witness statement, Mrs Ivins stated that the Claimant's case was, in her view, closed as they were moving on to redeployment. She did not leave any action points for Mr Keogh or Ms Addis to pick up with the Claimant regarding their use of medicinal cannabis.

110. On 6 March 2023 the Senior Nurse for Surgery, Sarah Rees, emailed the Claimant, asking them how they were getting on in their new role, to which

the Claimant replied, on 7 March 2023, noting that they were getting on well so far. The Claimant noted that the 8.00am to 5.00pm shifts were a lot easier for them, which they were finding made a big difference. They also noted that the team were nice, and that the workload was not too much. They commented that they were still finding some days hard, but overall were having a positive experience. Ms Rees reported that exchange to Ms Flood by email on 8 March 2023, and asked if there was anything more for her to do, or whether they would wait until 19 April when the redeployment trial was over. Ms Flood then emailed Ms Rees and Ms Addis on 17 March 2023, looking to arrange a mid-way review of the trial.

111. On 20 March 2023 however, i.e. after the Claimant had been working for five weeks in their redeployed role, and at the point where they were working full time in that role, they, i.e. the Claimant, contacted Occupational Health to check if they could vape medicinal cannabis at work. They spoke to a nurse and not a physician, and the nurse was not someone who was familiar with the Claimant's case.

The Claimant's suspension from their Trauma Theatres role

112. The nurse told the Claimant that they should not be working, and then telephoned Mr Keogh to say the same to him, and that the Claimant should be sent home. Mr Keogh then acted on that advice and sent the Claimant home in order to investigate further. He did not make contact with Ms Addis at this point.

113. Mr Keogh confirmed, in his oral evidence, that he had had a general overview of the Claimant's medicinal cannabis use at the time, and had seen the Occupational Health Report of 3 November 2022, which had noted that its use was acceptable, but, having only been in the role for two weeks, he had not had that report in mind at the time.

114. Whilst neither Ms Flood nor Mr Keogh made reference in their statements to a conversation about the Claimant's medicinal cannabis use, an email from Mr Keogh to Ms Flood on 21 March 2024 indicated that Ms Flood had suggested to Mr Keogh that he ask the Claimant for their treatment plan. Mr Keogh referred to the fact that, following a conversation he had with Ms Flood that morning, he had contacted the Claimant to ask for their treatment plan. Mr Keogh confirmed that the Claimant had replied that they would not provide the treatment plan, and had asked for written evidence as to why they should provide it. Mr Keogh also recorded that the Claimant had told him that they had told their Line Manager, who we presumed to have been Ms Addis, about the medicinal cannabis use and that she had had no issue with it.

115. The Claimant then sent Mr Keogh six WhatsApp messages within the course of approximately half an hour on 23 March 2023, relating to the request that they provide their treatment plan. They noted that they had been told, we presumed by their Trade Union Representative, that if they did not feel comfortable providing the information to their manager it would be reasonable to request to be able to show it to Occupational Health instead. They also commented that Mrs Ivins had seen a copy of the treatment plan, and that surely that was proof enough. Finally, they sought information as to what would happen with the treatment plan, wanting to know what it would be used for, who would see it, and any other relevant information.

116. Mr Keogh replied by email on the same day, noting that he had asked HR about the Claimant's request for clarification regarding the treatment plan, and whether it could be seen by Occupational Health and not the Line Manager. Mr Keogh also commented that the plan had been seen by Mrs Ivins but that it was needed in writing.

117. The Claimant replied soon after, noting that, whilst it was frustrating that they had not provided a copy of their treatment plan, they had concerns about its use as it was their medical information. They noted that they had not been provided with any information regarding the use of the medical information, and that they had attached a letter from the private doctor as a form of evidence of the prescription, and of the legal purchase of medical cannabis. The Claimant confirmed that they were happy to provide a copy of the treatment plan to Occupational Health, but were not willing for a copy to be kept until their concerns had been addressed. We observed that no reply was ever sent to the Claimant addressing those concerns.

118. Ms Flood emailed Mr Keogh on 23 March 2023, to suggest that he should draft a letter to the Claimant explaining the reasons for requesting a copy of the treatment plan, and that he should contact Occupational Health to see if they were prepared to provide the required advice in the circumstances of the Claimant providing the treatment plan to them. Ms Flood noted that Mr Keogh would need to ask specific questions regarding the form of medication, and when and how it was taken, and whether Occupational Health could confirm that the Claimant was safe to work in the redeployed role whilst taking the medication. Ms Flood also asked Mr Keogh to contact Ms Addis to update her on the situation.

119. Ms Flood also noted that it would be necessary to pause the Claimant's redeployment trial, and that Mr Keogh should consider if there was a non-clinical role to which the Claimant could be moved pending the Occupational Health Report. She suggested that the Claimant could possibly provide support with admin or work in the post room, noting that it

was important that the Claimant was supported to stay in work whilst the matter was resolved.

120. Mr Keogh effected the referral to Occupational Health, and an appointment was made for 3 April 2023. Mr Keogh also contacted Ms Addis by email on 24 March 2023, to update her. She replied the following day, noting that the Claimant had mentioned their use of medicinal cannabis to her the week before, and that she was supportive but did have some concerns, which were that they were dealing with major trauma patients which could be very emotionally challenging for staff and that they needed staff to be fully functioning. She went on to say however that, having said that, the Claimant had settled in, was picking things up, and was doing very well in the role.

121. Mr Keogh also drafted a letter to the Claimant which, after liaison with HR, was sent to the Claimant on 30 March 2023. In that, he confirmed the Respondent's need to obtain further information regarding the Claimant's medicinal cannabis use.

<u>The exploration of alternative temporary roles</u>

122. Mr Keogh also looked into temporary redeployment opportunities for the Claimant in non-clinical roles, and arranged for the Claimant to work in the post room between Monday 27 March and Monday 3 April 2023. Mr Keogh emailed the Claimant about that on Friday 24 March 2023. He also noted that an appointment had been made with Occupational Health for 3 April 2023, and that, hopefully, they could then carry on with the Claimant's redeployment trial. That indicated to us that Mr Keogh saw the post room very much as a place where the Claimant could continue working for a week, whilst the issues that had been raised regarding their medicinal cannabis use were addressed.

123. The Claimant replied later the same day, asking if there was a possibility of taking annual leave instead of being redeployed again. Mr Keogh replied, pointing out that it was too short notice to have annual leave, and that it would, in any event, be a good thing for the Claimant to attend the redeployment in the post room, as they had accommodated the Claimant graciously with not a lot of notice. He suggested that if the Claimant contacted him on Tuesday, 28 March 2023, he could see about annual leave on the Thursday or Friday of that week i.e. 30th or 31st, but noted that he would like the Claimant to have a couple of days to settle in first, just in case there was a need to stay a bit longer after the Occupational Health appointment.

124. The Claimant then replied to Mr Keogh in the evening of Friday, 24 March 2023, noting that the request to work in the post room had been made at very short notice, and that they intended to discuss the issue with their

Trade Union representative first. They noted that the representative was away until Monday 27 March 2023, and they would not therefore be attending the post room on that day.

125. The Claimant's representative, Ms James, then emailed Mr Keogh on 27 March 2023, noting that an Occupational Health appointment had been made for 3 April 2023 for the Claimant to share their treatment plan relating to their prescribed medicinal cannabis. She asked Mr Keogh to outline exactly what he meant by a treatment plan, pointing out that she understood that the Claimant had already provided a letter from their Consultant Psychiatrist, which she also attached. Ms James also asked Mr Keogh to confirm the policy being followed in relation to the request for the treatment plan, the purpose of the request, and a detailed explanation of the safety concerns that had been mentioned to the Claimant. She concluded by reiterating the request that the Claimant be allowed to take annual leave.

126. Mr Keogh replied to Ms James, copying in the Claimant, on 28 March 2023, noting that, whilst the letter from the Consultant Psychiatrist had been received, the Respondent needed further information which it was expected the Occupational Health appointment would confirm. He explained the purpose of the referral was to ensure that the medicinal cannabis did not have a negative effect on the Claimant's performance, and did not pose a threat to patient safety. He concluded by saying that he had not granted annual leave to the Claimant, as the trial in the post room had been made for the staff there to get to know the Claimant, and they could potentially offer further work if required. He confirmed however that annual leave was still up for negotiation.

127. Ms James replied, later that day, noting that the prescribed medicinal cannabis had had a positive effect on the Claimant's performance, and was one of the main driving factors in their return to work. She referred to the Occupational Health Report of 3 November 2022 having stated that the medicinal cannabis should positively impact on the Claimant's performance. Ms James noted that the Claimant did not feel supported in relation to the trial week in the post room, and asked that the request for annual leave be further reconsidered.

128. Mr Keogh replied to Ms James the following day, again copying in the Claimant. He noted that annual leave could be reconsidered, but that the post room may potentially not have any further opportunities for them. Following further exchanges, it was agreed that the Claimant would be recorded as having taken two weeks' annual leave.

129. The letter from the Claimant's Consultant Psychiatrist that the Claimant and their Trade Union Representative had provided to the Respondent was dated 21 March 2023. Whilst no specific details of the Claimant's

prescription were provided, the letter did confirm that the Claimant was a registered patient, and that medicinal cannabis was legal for the Claimant to use on a named patient basis to manage their symptoms, as long as they adhered to guidance on safe legal use, either by vaping or oral use.

130. The letter also confirmed that the Claimant was aware that they must not drive or operate dangerous equipment if impaired, and that they had had a thorough discussion around potential side effects or risks and the expected duration of any psychotropic effects. The letter also confirmed that the use of medicinal cannabis would be regularly reviewed, at least every three months, to monitor the Claimant's response.

131. Unfortunately, whilst the Occupational Health appointment took place on 3 April 2023, it did not resolve matters. The Occupational Health Physician, a different one to the one who had advised in November 2022, produced a draft Report on 6 April 2023, but it was subject to the Claimant's review, and the Occupational Health Physician wrote to Mr Keogh on that day to confirm that. Mr Keogh then emailed the Claimant on 8 April 2023, to note that, as Occupational Health had not yet reported on whether or not the Claimant was safe to work in a clinical environment, they would not be in a position to work in Theatres.

132. There was then a delay in the Claimant providing their consent for the release of the Report to the Respondent, and it was not released until 24 April 2023. In the end, whilst the Occupational Health Physician reported that the Claimant had been helpful and informative regarding the prescription, in order to confirm the appropriateness of their prescription, and to answer Mr Keogh's further questions regarding potential side effects and implications of patient safety, the Physician preferred to contact the Claimant's Psychiatrist to seek further advice. He confirmed that the Claimant had given their consent for that, and he had, in fact, written to the Psychiatrist, on 11 April 2023, to request further information.

133. Ultimately, whilst the Psychiatrist wrote to the Occupational Health Physician on 5 May 2023, no copy of that was before us, only a further letter sent to the Psychiatrist by the Occupational Health Physician on 15 May 2023. That letter indicated that the Psychiatrist had not provided any substantive answers, and it does not appear that any further correspondence between Occupational Health and the Psychiatrist then took place.

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

134. In the meantime, on 30 March 2023, the Claimant raised a formal grievance under the Respondent's Respect and Resolution Policy. In this, they noted the delay in progressing the appeal against dismissal, that their employment

had been terminated before redeployment had been explored, which was felt to involve a failure to make reasonable adjustments, that no review meeting had been held in relation to their Theatres role, that whilst adjustments in that role had been implemented they had been told that they could not necessarily be continued, and that it had been implied that a number of concerns had been raised about the Claimant's role in Theatres, whereas the only concern brought to their attention had been about working until 6.00pm and not 5.00pm, which the Claimant had already indicated they were happy to do. The grievance also raised concerns about the request for information regarding the Claimant's use of medicinal cannabis.

135. The grievance letter concluded by noting that the Claimant requested the following outcomes;

- that their appeal be heard without delay;
- that all reasonable adjustments, including the redeployment process be explored before their employment on Duthie Ward be terminated;
- that a fair review be held in relation to their Theatres role; and
- that all reasonable adjustments be maintained in their Theatres role.

136. The grievance meeting took place on 10 May 2023, with Ms Mather being the decision maker, supported by an HR Advisor. The Claimant was in attendance, supported by Ms James.

137. After hearing what the Claimant and Ms James had to say, Ms Mather adjourned and considered her response. With regard to the Claimant's four requested outcomes, she concluded the following:

- that she would contact HR to arrange the appeal meeting without delay;
- that the process under the Respondent's Managing Attendance at Work Policy was to issue notice at the start of the redeployment process, and any concern about that would need to be taken up at the appeal meeting;
- that a review meeting had now been scheduled; and
- that the Claimant's ongoing reasonable adjustments could be discussed at that review meeting.

Ms Mather then reconvened the meeting, and informed the Claimant of her decision on those points, and she confirmed that in a letter the same day. She confirmed that the Claimant had the ability to appeal against her decision, but no appeal was made.

Further temporary redeployment

138. Following the delays in relation to the Occupational Health advice, Mr Keogh and Ms James discussed possible short-term. non-clinical, options for the Claimant in the interim. Mr Keogh emailed Ms James on 12 April 2023 to note that there were possible options in the Vaccination Centre, and the Claimant commenced work there shortly afterwards.

139. In the meantime, following a request from Ms James, Mr Keogh confirmed, on 18 April 2023, that the Claimant did not need to worry about his notice period, as that had been paused when his redeployment trial in Theatres had been paused.

140. On 24 April 2023, the Claimant emailed Mr Keogh to confirm that he had been unable to go into work that day, noting that he found the environment in the Vaccination Centre very stressful and anxiety-inducing, and very over-stimulating. The Claimant did not then continue in that role.

141. Although the Theatres trial was paused, the proposed mid-way review took place on 23 May 2023. Present were Mr Keogh and Ms Flood, and the Claimant and Ms James. Ms Addis had been unable to attend at short notice.

142. The Claimant stated that they were enjoying the placement and were disappointed to be removed from it, and Mr Keogh confirmed that Ms Addis had given good feedback, and that the Claimant's work had always been completed to a good standard. He reported that Ms Addis's only concern had been that the Claimant finishing at 5.00pm meant that the other Theatre Assistants were having to do all the tidying up. The Claimant confirmed that they would change their hours on return.

143. Mr Keogh reported that Occupational Health had not provided enough information in relation to the Claimant's use of medicinal cannabis, and that HR had advised that a generic risk assessment be completed, between the Claimant, Ms Addis and Mr Keogh, to decide whether there was any risk from the Claimant working whilst using medicinal cannabis. Mr Keogh confirmed that he would look to arrange a meeting for that to take place.

144. The Occupational Health Physician then provided a further report on the Claimant on 30 May 2023. In that, he referred to having been unable to obtain precise information on the specific points that had been raised. He referred to having seen a letter of support from the Claimant's Consultant Practitioner, which, whilst not specifically addressing the areas of concern, would hopefully give the Respondent reassurance that the Claimant's prescription was medically based and overseen by an appropriately qualified practitioner. The Occupational Health Physician noted that he was

unable to offer any further opinion, and that it was for the Respondent, as the Claimant's employer, to decide on an appropriate deployment for the Claimant based on the information currently available.

145. On 13 June 2023, Mr Keogh emailed the Claimant, noting that the Occupational Health Report had been received whilst he was on annual leave. He commented that HR had advised that the best thing would be for he and Ms Addis to meet with the Claimant, and a representative if they wished, to complete a review/risk assessment together. He noted that Ms Addis was not in work at that time, and that he was waiting for a name of another manager from Theatres who could attend with him.

Trauma Theatre issues

146. Later in June however, the Team Leader for the Respondent's Main Theatres wrote to Mr Keogh, noting that it was not appropriate for the Claimant to return to Theatres, specifically Trauma, as the Respondent was working through conduct issues in that team. It transpired that a number of HR and cultural issues needed to be addressed within the Theatres area, which meant that there were significant changes and gaps in the overall Theatre management structure, and a temporary management structure had been put in place to address those issues.

147. Although those issues were impacting on the Theatres team in June 2023, the Claimant was not told of any impact they would have on them until late July. Mrs Twamley, in fact, told Mr Keogh, in an email on 22 June 2023, not to mention the issues when meeting the Claimant to assess their ability to return, and not to mention where the Claimant would return to, it being anticipated that another role as a Theatre Assistant would be available, and could then be discussed once it had been confirmed that the Claimant could return.

148. After some difficulties in making arrangements, the risk assessment was undertaken on 21 July 2023. Mr Keogh was accompanied by a senior nurse, and the Claimant was accompanied by Ms James. During the meeting, the Claimant explained how they took medicinal cannabis, and stated that they felt that it had no impact on their cognitive function, and were able to complete all tasks in their role. The Claimant commented further that, without medicinal cannabis, their ADHD symptoms heightened, and their capacity to carry out their duties reduced. Ultimately, Mr Keogh scored the Claimant as being of low risk of having an incident at work. The Claimant was then considered to be able to return to a clinical role.

149. At this point, on 27 July 2023, Mr Keogh spoke to the Claimant and emailed them to confirm that they would not be able to accommodate them in Trauma Theatres but would be able to accommodate a trial redeployment in

the Surgical Short Stay Unit ("SSSU"). He commented that the Claimant would essentially be completing the same role, but in another area. He also commented that the Trauma Theatres were unable to support any trial redeployments at that stage due to their organisational change, and that their inability to accommodate the Claimant had nothing to do with the Claimant's skills, abilities or anything personal. He confirmed that Ms Addis's feedback about the Claimant had been positive.

Redeployment to SSSU

150. A meeting then took place on 15 August 2023 to discuss the Claimant's return to the SSSU theatres, at which Mr Keogh, two theatre managers, the Claimant and Ms James were present. It was confirmed that the Claimant would commence a 12-week trial redeployment as a Theatre Assistant in the SSSU theatres, starting with a phased return over four weeks. That was confirmed in a letter from Ms Flood on 16 August 2023, and she confirmed in her evidence that this redeployment was considered to be a replacement for the Claimant's first trial redeployment, as the first had not worked out due to circumstances beyond the Claimant's control.

151. The Claimant commenced the trial redeployment in the SSSU theatres as planned and a mid-way review took place on 25 September 2023. The outcome letter from that meeting, issued on 11 October 2023, noted that the Claimant had indicated that, during their time working in the spinal area of the SSSU theatre, there were times when, for significant periods, there was nothing to do, which they struggled with. It went on to note that the Claimant felt that they would be more suited to an area where there were more lists, such as the eye area. It was agreed that, as well as a reduction in the Claimant's hours of work from 36 to 27.75 per week, they would start a rotation in eye surgery on 2 October 2023.

152. The Claimant then completed the trial, but, in an end-of-trial review meeting on 8 November 2023, they explained that the role and environment had not been suitable. They explained that there were long periods with nothing to do, which they found difficult, and that there were also issues arising from the bright lights and loud noises. The Unit Manager suggested that the trial be extended by four weeks to give the Claimant a full understanding of the role, but they ultimately decided not to proceed with that extension.

153. Ms Flood then confirmed, in a letter dated 13 November 2023, that the redeployment search would resume on 13 November 2023 and would then run until 11 January 2024. Ms Flood confirmed that the redeployment search period would include, and run parallel to, the Claimant's notice period, which meant that, if no suitable alternative post could be found, the Claimant's contract of employment with the Respondent would come to an

end. Ms Flood then liaised with the Claimant in relation to possible redeployment roles.

The second redeployment search

154. Mr Keogh held a mid-way review meeting in relation to the redeployment search with the Claimant and Ms James on 22 December 2023. It was noted that no suitable roles had come up, and that, due to the lack of opportunities over the Christmas period, Ms James had asked if the redeployment search could be extended. Mr Keogh agreed that the search would be extended to 25 January 2024, and he confirmed that in a letter to the Claimant on 22 December 2023.

155. In January 2024, a further potentially suitable role, in Trauma and Orthopedics in University Hospital, Llandough, came up, which the Claimant elected to take up. Ms Flood confirmed in a letter to the Claimant on 24 January 2024, that a 12-week redeployment trial would commence on 25 January 2024, with a phased return over the first four weeks. Ms Flood noted that, whilst it was hoped that the trial would be successful, if it was not, then the Claimant's contract of employment with the Respondent would come to an end.

The Claimant's resignation

156. However, on 26 January 2024, and without having started work at Llandough on the trial, the Claimant emailed Mr Keogh, giving notice of their resignation. They commented that, as their notice period was two weeks, their last day would be 9 February 2024. The Claimant confirmed in their oral evidence that they had secured a role with Cardiff Airport, which had come to fruition at short notice. They also confirmed that the National Autistic Society role, that they had initially applied for in the middle of 2022, had also been confirmed in January 2024, but that they had decided against taking up that role due to the length of time it had taken to confirm it.

157. Mr Keogh spoke to the Claimant, and then emailed them on 29 January 2024, noting that, as the search period had finished on 25 January 2024, if the Claimant did not wish to continue with it, they did not need to give any notice. Mr Keogh confirmed that he had noted that the Claimant would shortly start training for their new role, and it was agreed that their contract with the Respondent would then terminate on 3 February 2024, with the Claimant using up most of their outstanding annual leave up to that point, meaning that they did not need physically to attend work.

Conclusions

158. Taking into account our findings of fact and the applicable legal principles, we then reached our conclusions in relation to the issues we had to decide. We use the numbering of the List of Issues for ease of reference.

Discrimination arising from disability (Section 2)

159. We noted that the Respondent had accepted that the two "somethings arising" from the Claimant's disability, that of their ill health and their inability to continue in their substantive role, which applied in relation to sub-paragraph 2 (d) X; and their use of medicinal cannabis, which applied to sub-paragraphs 2 (d) I – IX; did indeed both arise in consequence of their disability. However, the Respondent disputed that the use of medicinal cannabis was the reason for all of the alleged acts of unfavourable treatment at sub paragraphs I to IX.

160. Our initial focus therefore, applying the ***Pnaiser*** guidance, was on whether the asserted matters amounted to unwanted conduct, and, if so, whether that unwanted conduct was because of the something arising from the Claimant's disability, before moving to consider the issue of justification, if required. We considered each asserted act of unwanted conduct in turn.

Sub-paragraph I

161. We were satisfied that the removal of the Claimant from his redeployed role as a Theatre Assistant in the Trauma Theatre had been unfavourable. The Claimant had enjoyed the role in the six weeks or so that they had worked in it, their performance had been positively assessed by their line manager, and there was clearly a prospect that the trial could prove successful, and would then result in the Claimant being permanently redeployed. The removal of the Claimant from that role was therefore clearly an act which was unfavourable to the Claimant.

162. We were also satisfied that that act arose from the Claimant's use of medicinal cannabis. It was clearly the reason for the step taken by the Respondent at the time.

Sub-paragraph II

163. Our view differed in relation to this, and we therefore reached a conclusion on a majority basis in relation to this single asserted complaint.

164. The majority view was that, whilst it was not unreasonable to ask the Claimant to provide their prescription for medicinal cannabis, it was unreasonable, and therefore was unfavourable treatment, to ask them for

their treatment plan. That could have contained broader personal, and further medical, information and therapy goals, which had no bearing on the Claimant's ability to undertake their duties. Asking for the treatment plan was therefore, in the majority view, an act of unfavourable treatment. It was also then clearly an act which arose because of something arising in consequence of the Claimant's disability.

165. The minority view was that the request did not amount to unfavourable treatment. The minority agreed with the majority that it was not unreasonable to ask the Claimant for their prescription, as the report of the Occupational Health Physician on 3 November 2022 recorded only that the Claimant had told them that they had been prescribed medicinal cannabis. The minority noted however, that both parties had referred to a treatment plan, indeed the Claimant themselves referred during the long-term sickness meeting on 23 November 2022, to their treatment plan having been due to be passed to their GP by their private clinic doctor two days earlier. In the minority view, that led to the use of the term treatment plan, and to both parties using the terms prescription and treatment plan broadly interchangeably, such that any request to the Claimant to provide their treatment plan, as opposed to only their prescription, was not to be considered to be unfavourable treatment.

Sub-paragraph III

166. We did not consider that requiring the Claimant to submit to Occupational Health, we presumed this referred to the referral in March 2023, was unfavourable treatment. We considered that, whether or not the Respondent should have reacted to the contact from the Occupational Health nurse in March 2023 regarding the Claimant's use of medicinal cannabis in the way that it did. it would not have been detrimental to the Claimant to attend a further Occupational Health appointment. At worst the appointment would have had no impact on the Claimant's position, whereas it might have led to additional input into the Claimant's condition and its management, which would then have been positive for them.

Sub-paragraph IV

167. As noted in relation to sub-paragraph II, in our view it was reasonable for the Respondent to ask to see the Claimant's prescription, which was seen by Mrs Ivins on 13 February 2023. The reminders that she had sent prior to that in November, December and January about seeing the prescription were not therefore unreasonable. However, Mrs Ivins then took no steps to seek further clarification, even though she knew that the Claimant was, that same day, commencing a trial in the Trauma Theatre.

168. Then, when the Occupational Health nurse contacted Mr Keogh in March 2023, he did not take any meaningful steps to clarify the position before taking action. Whilst he was aware of the Occupational Health Report from November 2022, confirming that the Claimant should be allowed to take medicinal cannabis as per any prescribed medication, and that it should positively impact on their performance, Mr Keogh confirmed that he did not have that in his mind at the time.

169. Mr Keogh also took no steps to check with Ms Addis as to whether she had any concerns that the Claimant's performance in the Theatre Assistant role had, in any way, been impaired. Indeed, when he did contact Ms Addis, she confirmed that she was supportive of the Claimant, and the only concern she expressed seemed to relate to the potential impact of the work in theatres on the Claimant's mental health, rather than anything arising from the Claimant's use of medicinal cannabis. Indeed, she confirmed that the Claimant had settled in, was picking things up, and was doing very well in the role.

170. Soon after the concern had been raised, the Respondent was also in receipt of the letter of 21 March 2023 from the Claimant's private doctor, which, as the Occupational Health Physician ultimately noted on 30 May 2023, whilst not providing specific information, should have given Mr Keogh reassurance that the Claimant's prescription was medically-based and overseen by an appropriately qualified practitioner.

171. Some of the subsequent delays in obtaining further information were not down to the Respondent, but arose from the Claimant's delayed return of their consent form and the Claimant's private doctor not answering specific questions. However, in our view, any concerns raised by the Occupational Health nurse about the Claimant's use of medicinal cannabis could have been addressed from the information available at the time or very shortly afterwards, possibly encompassing the sort of risk assessment which was ultimately undertaken, during which Ms Addis's views, in our view the most relevant person as the Claimant's direct Line Manager in their new role, could have been considered. Overall, therefore we concluded that the enquiries made of the Claimant in relation to his use of medicinal cannabis were indeed unnecessary, and amounted to unfavourable treatment.

Sub-paragraph V

172. Whilst the request to work in the post room only arose because the Claimant had been removed from their role in Theatres, we did not consider that, other than in that "but for" causative sense, the request for the Claimant to work in the post room was because of something arising from the Claimant's disability.

173. We did not consider that Mr Keogh's arrangement for the Claimant to work in the post room amounted to a requirement. In our view, it was only a proposal put forward by Mr Keogh, in circumstances which, whilst as we have noted, might have been avoided had the Respondent reacted differently to the call from the Occupational Health nurse, were nevertheless challenging for him. Mr Keogh was doing his best to make the best of a difficult situation, and was concerned to find an opportunity for the Claimant to remain gainfully employed whilst the Occupational Health referral was in process, having a concern that the Claimant's entitlement to sick pay might be limited due to his lengthy absence between May 2022 and February 2023.

174. Furthermore, whilst Mr Keogh sought to persuade the Claimant to take up the post room role, we did not see that that amounted to a requirement that they work there, or to pressure that they do so. In any event, we did not consider that the request, even if it amounted to a requirement and/or to pressure, would, other than again in a "but for" causative sense, have been because of something arising from the Claimant's disability. Whilst the request clearly would not have arisen if the Claimant had not been removed from his role in Trauma Theatre, we did not consider that the request was motivated by the consequences of the Claimant's disability, taking into account the guidance provided in ***Robinson***.

Sub-paragraph VI

175. We viewed the initial refusal to grant the Claimant annual leave in a similar manner. Again, we did not consider that the refusal qualitatively amounted to unfavourable treatment. Mr Keogh's emails at the time demonstrated that he was concerned that, if the Claimant did not at least start working in the post room, any opportunity for them to work there on a longer term basis could be lost if the need to do so arose.

176. Then, when the Claimant and their Trade Union Representative confirmed that the Claimant would prefer to take annual leave, Mr Keogh confirmed that it was a request that he could consider, whilst maintaining his view that it would be in the Claimant's best interests to at least start working in the post room. Finally, when the Claimant and their representative confirmed that the Claimant did not wish to work in the post room, Mr Keogh granted the annual leave request.

177. Overall, therefore, we did not consider that the request amounted to unfavourable treatment. Again, if our view had been that it had, we did not consider that the treatment could have been because of something arising from the Claimant's disability other than in a basic, "but for", sense.

Sub-paragraph VII

178. We did not consider that, in the circumstances that then prevailed, requiring the Claimant to work in the Vaccination Centre amounted to unfavourable treatment. We were not satisfied that there was any requirement that the Claimant work in the Vaccination Centre, it was simply put forward as an option, in circumstances where the Respondent's decision that the Claimant should not work in a clinical role was proving to have a longer term impact due to the delays in getting answers from Occupational Health. We also noted that the Claimant agreed to work in the Vaccination Centre.

179. Similarly, again, other than in a basic, "but for", sense, we would not, in any event, have considered that any unfavourable treatment that may have arisen from the suggestion, or even had we considered it to be a request, to work in the Vaccination Centre had been because of something arising from the Claimant's disability.

Sub-paragraph VIII

180. We formed the same view in relation to the requirement that the Claimant undertake a risk assessment. The Respondent had been waiting for any concerns regarding the Claimant's ability to work in the Trauma Theatre to be addressed by way of Occupational Health advice, but, by the end of May 2023, it was clear that that would not be forthcoming. Moving then to undertake a risk assessment was very much to the Claimant's advantage, as it paved the way for him to return to work. It did not therefore, in our view, amount to unfavourable treatment.

Sub-paragraph IX

181. We did not consider that there was any evidence that Occupational Health had advised the Respondent to do a risk assessment, or that the Claimant had been told that that was the case. The Occupational Health Physician, in his report of 30 May 2023, made no such suggestion, simply saying that it was for the Respondent to decide upon an appropriate deployment for the Claimant on the basis of information then available. Mr Keogh then, in his email to the Claimant on 13 June 2023, noted that HR had advised that a risk assessment be completed. This allegation was therefore simply not made out in fact.

Sub-paragraph X

182. The Respondent accepted that its service of notice on the Claimant to run during the redeployment search period was an act of unfavourable treatment.

Justification

183. We then moved to consider, in relation to the acts of unfavourable treatment we concluded had occurred, whether the Respondent could justify its treatment of the Claimant as a proportionate means of achieving a legitimate aim or aims. That involved a consideration of sub paragraphs I to IV and X, the particular sub-paragraphs where we considered that unfavourable treatment because of something arising from disability had taken place.

184. The Claimant had accepted that the aims relied on in relation to those sub-paragraphs were legitimate. Our focus therefore was on the proportionality of the Respondent's actions in terms of fulfilling those aims.

185. We considered closely the guidance of the EAT, in the second ***Boyers*** case, and of the Court of Appeal in ***Lax***, that we needed to balance the discriminatory effect of the treatment against the reasonable need of the employer, and that the more serious the impact the more cogent must be the justification for it.

186. With regard to sub-section I, as we have noted, the Claimant had started their trial role as a Theatre Assistant well; they were enjoying the role, and their line manager was happy with their performance. Their removal from the role, even though anticipated to only last for some two weeks initially, was therefore significantly disruptive for the Claimant, particularly as it turned out that the issues within the Trauma Theatres meant that the Claimant was unable to return there.

187. With regard to the needs of the employer, whilst we accepted that the Respondent could not ignore the call from the Occupational Health nurse, no-one in the Respondent appeared to have checked the Occupational Health advice that had previously been provided by the Occupational Health doctor, or to have checked with the Claimant's then line manager as to whether any issues had arisen in the workplace regarding the Claimant's performance. Had they done so, it would have been clear that they had not.

188. In our view, removing the Claimant from the Trauma Theatre role for more than a day or two, whilst the underlying medical and practical situations were addressed, was not a proportionate means of achieving the Respondent's aim of maintaining patient and employee safety.

189. With regard to sub-paragraph II, the majority view was that the Respondent had had sight of the Claimant's prescription on 13 February 2023, which obviated the need for them to see the Claimant's treatment plan, which, as previously indicated, the majority view felt was an unreasonable request and therefore was a disproportionate step. The minority view was that, as

noted, the references to treatment plan and prescription were interchangeable, and it was then proportionate for the Respondent to make the request for either or both the prescription and the treatment plan following the Occupational Health advice on 3 November 2023.

190. With regard to sub paragraph IV, whilst it was not inappropriate for the Respondent to react to the contact from the Occupational Health nurse by seeking further information, they had much of that information already, and received further information from the Claimant's private doctor very soon after. In addition, had the Respondent simply sought input from Ms Addis about the Claimant's performance, their concerns would have been allayed.

191. Again therefore, we concluded that the Respondent's actions were not a proportionate means of fulfilling their legitimate aim of maintaining employee and patient safety.

192. With regard to sub paragraph X, the Respondent relied on a different legitimate aim, that of treating all employees equally and applying a fair and standardised approach.

193. We had some concerns over the fundamental legitimacy of that aim, as it appeared to ignore the statutory duty on an employer to make reasonable adjustments, which fundamentally requires an employer not to treat all employees equally in the context of employees with disabilities. However, we noted that the Claimant had accepted the legitimacy of that aim.

194. We were however, in any event, not satisfied that the Respondent's actions were a proportionate means of achieving that aim. We noted the clear steps indicated, by both Agenda for Change and the Managing Attendance at Work Policy. Both indicated that a redeployment search would be considered, and would be meaningfully (the word we noted was used in Agenda for Change) considered, before notice of termination was given. The Redeployment Policy itself also suggested that notice would not necessarily be given at the outset of the redeployment process, although it was equivocal on that point.

195. Regardless of the wording of the relevant policies however, or the consistency of the Respondent's approach, and we noted the evidence of Ms Flood and Mrs Twamley that the serving of notice at the start of the redeployment process was an action that the Respondent consistently took in ill health cases, we were not satisfied that the service of notice at that time was a proportionate means of achieving the Claimant's aim.

196. As we have referenced, the Equality Act places a positive duty on an employer to make reasonable adjustments to remove or alleviate substantial disadvantages for disabled employees in comparison with the

workforce generally. Whilst that analysis has no direct bearing on the Section 15 claim, we considered that, mindful of its obligations under Section 20, a more proportionate way of achieving the Respondent's aim would have been to delay the giving of notice until towards the end of the redeployment trial period.

197. If that had been done in this case, it would have been after an 8-week trial period had been undertaken, at a point when, if no potential options had been found, the writing may have been rather "on the wall" for the Claimant, and they therefore would perhaps have found the service of notice at that stage unsurprising and unobjectionable. Up to that point however, the Claimant would not have been in a position of knowing that, if their search proved fruitless, then their employment would end at a defined point, as was the case.

198. Overall therefore, we considered that the service of notice on 19 January 2023 was not a proportionate means of achieving a legitimate aim.

199. With regard to the Claimant's Section 15 complaint overall, that meant that in relation to sub paragraphs I, II, IV and X, the complaint was made out.

Harassment (Section 3)

200. Our views in relation to sub-paragraphs III and V to IX of sub-paragraph (2)(d) were identical to those we formed in relation to the Claimant's Section 15 claim. We similarly concluded that the acts complained of did not, for the purposes of the harassment claim, amount to unwanted conduct.

201. With regard to sub-paragraphs I, II and IV, whilst we had considered that the matters complained of were acts of unfavourable treatment because of something arising from the Claimant's disability, we did not consider that they were also acts of unwanted conduct related to the Claimant's disability which had the effect of violating their dignity.

202. We noted the terms of sub-section 26(4) of the Equality Act, and the guidance provided in ***Pemberton***, that the test involved both subjective and objective elements.

203. With regard to the subjective element, we noted that the Claimant did not particularly object to any of the three acts of the Respondent. With regard to sub-paragraph I, whilst the Claimant was not happy about their removal from the Trauma Theatre, they did not particularly object to the step being taken, whether immediately or when it proved to be longer than initially anticipated.

204. Similarly, with regard to sub-paragraphs II and IV, the Claimant did not raise any objection to being asked to provide their treatment plan or to being asked about their use of medicinal cannabis, until they raised the point in their grievance. Their approach was to be broadly co-operative in relation to both matters.

205. We were not therefore satisfied that the Claimant materially perceived the act or acts as those of unwanted conduct relating to disability. However regardless of that, we were also not satisfied that the objective element of the assessment was made out. We noted, in that regard, that the Claimant had confirmed, on more than one occasion, in his oral evidence that he could, looking at things now with the benefit of hindsight, understand why the Respondent might have acted in the way that it did.

206. Ultimately, we concluded that the complained of acts of unwanted conduct did not have, in our view, subjectively, or should not, in our view, objectively, have had the effect of violating the Claimant's dignity. The Claimant's claim of harassment related to disability therefore failed.

Victimisation (Section 4)

207. We noted that the Respondent accepted that the Claimant had done a protected act by raising their grievance on 30 March 2023. The detrimental acts then said to have arisen from the protected act were; a failure to address the grievance, and the provision of an exceptionally poor response to it.

208. We noted the guidance in ***Dunn***, that the mishandling of a grievance is not, of itself, discriminatory, simply because the grievance related to discrimination.

209. We also noted that, whilst Ms Mather might have investigated matters further herself, she focused on the Claimant's four requested outcomes, and addressed them, either directly or by noting that other meetings were shortly to take place which would address them. We were not therefore satisfied that these allegations had been made out as assessed.

210. However, even if they had, we were unable to discern the required element of retaliatory action on the part of Ms Mather, required by the assessment of the acts needing to have been "because of" the protected act, as discussed in ***Bailey***.

211. We saw nothing to suggest that Ms Mather was motivated to do what she did by the fact that concerns that discrimination had occurred were included within the grievance, and considered that she would have addressed the grievance in the same way had it not referenced any such claims.

212. Overall therefore, the Claimant's victimisation claim was not made out.

Unfair dismissal (Section 5)

213. We noted that the Claimant did not dispute that the reason for their dismissal was capability, a potentially fair reason for the purposes of the Employment Rights Act 1996. Our focus was therefore on the fairness of dismissal for that reason. We also noted that the terms of Section 95(2) of the Act provided that, in the circumstances of the way the Claimant's employment ultimately ended, it was the Respondent's reason for which notice was given that was to be assessed.

214. That was the reason for issuing notice on 19 January 2023. We noted Mr Jackson's submission that it was only matters which took place before notice was given, i.e. before 19 January 2023, that should be taken into account. However, we noted that the assessment required is of the fairness of the dismissal, and not just of the giving of notice, although there is usually very little difference, if indeed any, between the two.

215. In this case however, we were conscious that, whilst notice was given on 19 January 2023, it was clear that that was not completely cast in stone at that point. The letter issued by Mrs Twamley, following the meeting on 19 January 2023, focused very much on the arrangements for the redeployment search, and noted that, if a trial was undertaken, notice would be paused.

216. We noted that that had then happened, and that although the Claimant's employment could potentially have ended as early as 13 April 2023, it had not actually ended until 3 February 2024, and then by virtue of the Claimant's actions rather than by reference to the Respondent's decision the previous January. Had the Claimant not left the Respondent's employment when they did, and had they undertaken the trial then employment would not even quite have ended by the end of the hearing in this case, and then only if the trial had proved unsuccessful.

217. In view therefore, of the potential flexibility of the expiry of notice, and the actual termination of the Claimant's employment, we considered it appropriate to take into account not only the events which led up to the service of notice on 19 January 2023, but also to take into account subsequent events when assessing the fairness of the dismissal.

218. In terms then of whether dismissal for that reason was fair or unfair in the circumstances, as we have noted in relation to the Section 15 claim, we did not consider that service of the notice by the Respondent in January 2023 was a proportionate or appropriate step to take. The step was not within the

scope of Agenda for Change, or indeed the All Wales Managing Attendance at Work Policy. The former talks expressly about other options being meaningfully considered, and the latter talks about all options having been explored. We felt that a reasonable employer applying those policies would have done more than just discuss the option of redeployment before giving notice, and would have actively taken steps to search for redeployment opportunities before serving notice.

219. We were mindful that that was in the context of the Claimant not being capable of working in an acute surgical ward, but where the Occupational Health advice was that they were capable of being redeployed to other areas. We were also mindful of the fact that the Claimant performed well in the Trauma Theatre role when undertaking their trial there.

220. We were also conscious that the Respondent is, by any estimate, a very large employer, and would be likely to have a fairly consistent flow of vacancies arising from retirements, resignations and promotions.

221. We were also conscious of the guidance provided in ***BS -v- Dundee City Council*** relating to the fairness of decisions to dismiss in relation to ill health capability.

222. Overall, we did not consider that the Respondent's action, in putting the Claimant on notice of dismissal in January 2023 before embarking on the start of the search for redeployment opportunities, was the action of a reasonable employer acting reasonably in the circumstances that prevailed.

223. It seemed to us that this was a case, possibly different to the usual type of long-term sickness case where a return to work into any role may be quite unlikely, where there was every prospect of a redeployment opportunity arising. In our view, a reasonable employer would have waited longer before taking the step of serving notice, and, notwithstanding that the ramifications of that step were limited in practical terms, we considered that the Respondent's actions amounted to an unfair dismissal.

224. We did however reach further conclusions in relation to the compensation arising from that unfair dismissal, which we address further below.

<u>Reasonable adjustments (Section 6)</u>

225. We noted that the Respondent accepted that it had applied a PCP, in the form of the policy of serving notice at the start of a redeployment search in circumstances of an employee being unfit to carry out their substantive role. We then needed to consider whether that PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled.

226. We noted that Section 212 of the Equality Act 2010 provides that "substantial" means more than minor or trivial, and we felt that the service of notice on the Claimant in January 2023, whilst not ultimately, due to the extension of the employment for the next year, having a large impact on the Claimant, nevertheless had a more than minor or trivial impact on them.

227. There was, in our view, the potential anxiety arising from the sheer fact of being put on notice, and knowing that, in the absence of a redeployment opportunity, their employment would end on a specified date. In addition, there was also, in our view, an impact in terms of potential pressure on the Claimant by virtue of circumstances akin to a ticking clock, which potentially made the redeployment search more fraught for the Claimant. We were therefore satisfied that the disadvantage the PCP placed the Claimant under was substantial, in the sense of being more than minor or trivial.

228. We were also satisfied that that substantial disadvantage arose in the relevant comparative circumstances. Applying ***Griffiths,*** we considered that the appropriate comparison would be with the Respondent's workforce at large, with whom the Claimant was clearly at a comparative substantial disadvantage. Even, however, if we approached matters more narrowly, and assessed the comparison with those going through the redeployment process, we noted the Respondent's evidence that those going through redeployment, for example because of organisational change, would not generally be served notice at the outset of any redeployment search. We presumed, on the basis that it was anticipated that the employee would be able to successfully complete any redeployment trial.

229. In comparison with employees in such circumstances, in our view the Claimant was clearly at a substantial disadvantage by virtue of being served notice at the outset of the redeployment search.

230. We then concluded that a reasonable, and relatively straightforward, step the Respondent could have taken to have removed that disadvantage would have been to have implemented the redeployment search before giving notice. That would have been effective to have removed the disadvantage, and would have left the Claimant in a position where they would only have faced notice of their employment ending at a point where the search, and/or any redeployment trials, had not been proceeding well. Overall therefore, we felt that the Claimant's claim of failure to make reasonable adjustments was also made out.

<u>Remedy (Section 7)</u>

231. Having reached our conclusions on the Claimant's complaints, although we did not hear evidence to make specific monetary awards of compensation,

we were able to reach some general conclusions over the approach to calculating those awards.

232. We noted that the Claimant will be entitled to a basic award for unfair dismissal, pursuant to Section 119 of the Employment Rights Act 1996, with none of the possible reductions set out at Section 122 having any impact on that assessment.

233. With regard to the compensatory award, we noted that Section 123(1) of the Employment Rights Act notes that, it should be "*such amount as [we] consider just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequences of the dismissal insofar as that loss is attributable to action taken by the [Respondent]*".

234. In that context, we noted that, had the Respondent's processes worked their way through, the Claimant would still have been in employment at the conclusion of the hearing in this case, as his second trial period in Trauma and Orthopedics in Llandough would not have been due to expire until 18 April 2024. Had that trial proved successful, and we noted that the Claimant had performed well in his Trauma theatre role so there was every chance that it would have been, then the Claimant's employment would not have ended at all.

235. The Claimant had ultimately taken the step of bringing their employment to an end, by informing the Respondent of their future employment in January 2024, and that they were bringing their employment to an end to take up a new job with a different employer.

236. In our view, that meant that any loss sustained by the Claimant in consequence of the dismissal, and no evidence was put before us of the detail of any such loss, would not be loss attributable to action taken by the Respondent for the purposes of Section 123(1). It would, instead, be loss attributable ultimately to the Claimant's own actions.

237. We considered that our view in relation to the compensatory award would have similar application to the compensation to be awarded to the Claimant in respect of the breaches of the Equality Act, although they would still be entitled to compensation for injury to feelings in respect of those complaints.

238. We will reconvene to address the calculation of compensation awards, if the parties are unable to agree them.

Employment Judge S Jenkins
Dated: 20 May 2024

REASONS SENT TO THE PARTIES ON 21 May 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche