EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr A Sagana	South London and Maudsley Foundation Trust

and

Held at Ashford on 30 & 31 January, 1 & 2 February 2017 and 8 February 2017 (in Chambers)

Representation	**Claimant:**	Mr A Gamboa, Lay representative
	Respondent:	Miss H Patterson, Counsel
Employment Judge Harrington	**Members:**	Mr R Shaw Mr T Lane

RESERVED JUDGMENT

The Claimant's claims are not well founded and are dismissed in their entirety.

REASONS

Introduction

1. The Claimant, Mr Alberto Sagana, was employed by the Respondent, the South London & Maudsley NHS Foundation Trust from 1 December 1995 until his dismissal by letter dated 9 March 2016 [375]. By an ET1 received by the Tribunal on 2 June 2016 [2], the Claimant brings claims of unfair dismissal, race discrimination, disability discrimination and unpaid holiday pay.

2. Following a Preliminary Hearing, held by telephone on 1 August 2016, the issues for the Tribunal were confirmed to be as follows,

Unfair dismissal claim – section 98 ERA

2.1 What was the reason for dismissal? (capability, race or disability);

2.2 If capability, was a fair procedure followed –
the Claimant contends that the Respondent should have:

i. delayed the process to enable him to recover;
ii. delayed until the outcome of his application for ill-health retirement was known;
iii. should not have relied upon unauthorised absences;
iv. should not have arranged the redeployment process for a time when the Claimant had notified them that he was on holiday;

2.3 Did the decision to dismiss fall within the band of reasonable responses?

Race discrimination claim – section 13 EqA

2.4 Was the Claimant 'forced' to use 12 days holiday when he was sick in February 2016?
2.5 If so, was that less favourable treatment than the treatment of Mr Hedges?
2.6 If so, was it because of the Claimant's race?
2.7 Was the Claimant encouraged and supported to return to work on 4 December 2015?
2.8 If so, was that less favourable treatment than the treatment of Mr Hedges?
2.9 If so, was it because of the Claimant's race?
2.10 Was the dismissal of the Claimant less favourable treatment compared to the treatment of Mr Hedges?
2.11 If so, was it because of the Claimant's race?
2.12 Is Mr Hedges the appropriate comparator? (the Respondent contends that he was able to return to his substantive post, whereas the Claimant was not able to do so);

Disability claim – reasonable adjustments – section 20 EqA

2.13 Was the Claimant a disabled person at the material times, pursuant to the definition in section 6 and schedule 1 of the Equality Act 2010;
2.14 If so, did the Respondent apply a provision, criterion or practice (PCP) that employees should be fit enough to carry out the duties of their substantive posts?
2.15 If so, did that place the Claimant at a substantive disadvantage compared to non-disabled persons, namely that he was not fit and therefore was at risk of dismissal?

Unfavouable treatment related to disability – section 15 EqA

2.16 Was the dismissal unfavourable treatment of the Claimant because of something arising in consequence of his disability namely his sickness absence?
2.17 if so, did the Respondent know that he was a disabled person at the time of dismissal?

2.18 if so, can the Respondent show that the dismissal was a proportionate means of achieving a legitimate aim?

Holiday Pay – section 13 ERA

2.19 Is the Claimant owed any holiday pay (re. 12 days holiday in February 2016)?

3. The Respondent confirmed at the beginning of the hearing that it was now accepted that the Claimant had brought his claim in time and therefore the Tribunal was no longer required to consider time limits. In respect of whether the Claimant was disabled, it was also accepted that the Claimant was disabled at all relevant times with osteoarthritis in the left ankle. The Claimant submitted that he was also disabled with a hip / groin injury and made reference to paragraph 12 of his Impact statement. The Tribunal was therefore required to consider whether this condition also amounted to a disability as defined in the Equality Act 2010.

4. At the full hearing of these claims, the Claimant was represented by Mr Gamboa, a lay representative and the Respondent by Miss Patterson, Counsel. The Tribunal heard evidence from the Claimant and from Mrs Bristow, Mrs Dibben and Mr Tsiga from the Respondent. Each of the witnesses provided a written witness statement with the Claimant producing a supplemental statement on the first day of the hearing referred to by this Tribunal as 'the Time Line' (see Claimant's Applications below). In addition, the Claimant produced a witness statement from Mr Eugene Hedges although Mr Hedges did not attend the Tribunal to give oral evidence. The Tribunal was referred to an agreed bundle paginated 1 – 450; references to that bundle appear in square brackets throughout this judgment.

Claimant's Applications

5. On the first day of the hearing, the Claimant produced an additional document entitled 'Time Line'. The Tribunal was required to determine whether the Claimant should be allowed to adduce and rely upon that document. The Tribunal gave the following judgment on the matter:

5.1 Today, for the first time, the Claimant has produced a document entitled 'Time Line'. It was not exchanged pursuant to the case management order and the Respondent says that it has novel contents not referred to in other documents – most particularly the Claimant's witness statement. Mr Gamboa tells the Tribunal that the document is a chronology and that the most pertinent parts of it are already contained in the Claimant's witness statement.

5.2 The Tribunal considers that the document is reasonably lengthy and seems to go beyond what would normally be seen in a chronology. It includes narrative. The Tribunal also notes that the Claimant's witness

statement is brief and that the Claimant is representing himself with the assistance of a lay representative.

5.3 On balance and taking account of the overriding objective, the Tribunal considers that it will be assisted with reference being made to the Time Line as the witness statement does not appear to address the entirety of the claims before the Tribunal. However the Tribunal is indeed mindful of the Respondent's concerns – we are going to release the parties this afternoon to carry out our reading and we anticipate that the Respondent will be able to use this time to consider the Time Line in detail and to take instructions upon its contents. Obviously we will allow the Respondent's witnesses to be asked any additional questions in chief to address any new matters referred to within the document.

6. On Wednesday 1 February 2017, following his cross examination, the Claimant made an application to amend his case. Following consideration of this application, the Tribunal gave the following judgment:

6.1 Today, on day 3 of this 5 day hearing and following the Claimant's evidence and the closing of his case, the Claimant makes an application to substantially amend his claim. He now wishes to argue that he is, and was at all relevant times, disabled by reason of depression. His complaint which flows from this new alleged disability is a failure to make reasonable adjustments - namely the Claimant submits that the Respondent should have adjusted the redeployment policy to accommodate the difficulties he contends he experienced as a result of his depression.

6.2 This complaint is not included within the Claimant's ET1, nor was it raised at the case management hearing held on 1 August 2016. The Claimant produced an additional witness statement, which this Tribunal has referred to as a Time Line, on the first day of this hearing – again, this complaint and newly alleged disability does not appear to feature in that document beyond a fleeting reference to 'mental issues'. Suffice to say that this morning is the first indication from the Claimant that he wishes this to form part of his case.

6.3 When pressed on why his application is made so late, the Claimant submitted to the Tribunal that symptoms of his depression, namely forgetfulness and difficulties in concentrating, had prevented him from raising the issue before.

6.4 The Respondent objects to the Claimant's application. Miss Patterson has referred to the timing of the Claimant's application and the prejudice which arises. In particular, Miss Patterson submits that if the application is allowed, an adjournment would be necessary. This observation would seem to be entirely correct as the Claimant would need to be called to give evidence as to the new claim, the Respondent would need to cross examine the Claimant upon these new issues and

the Respondent's witnesses would need to be afforded the opportunity to consider the claims and to give evidence on the new issues including the production of any documentary evidence in support.

6.5 In deliberating on this matter, the Tribunal has considered the submissions from both parties in detail. We have reminded ourselves that regard must be had to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. We must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.

6.6 The Claimant seeks to amend his claim by the addition of a disability and new factual allegations. In essence the Claimant seeks to bring a new claim of a failure to make reasonable adjustments. The existing claim for a failure to make reasonable adjustments is put in terms of it being reasonable to have given the Claimant a longer period of sick leave. The new complaint is verbally described by the Claimant as adjusting the redeployment policy to take account of the Claimant's difficulties in engaging, arising from his depression. We have taken into account the timing and manner of the Claimant's application as set out above, the fact that this complaint is out of time and therefore whether the time limit should be extended to allow the new complaint to proceed.

6.7 The judgment of this Tribunal is that the application to amend is refused. The timing and manner of the application inevitably causes significant prejudice to the Respondent and would result in an adjournment of this full merits hearing. The evidence before the Tribunal in respect of the Claimant suffering depression is modest. There is a single reference in a document from the Claimant's GP, which we were handed today, that shows a diagnosis of depression on 3 May 2016 and that the Claimant was prescribed an antidepressant on that day. This document was apparently printed by the Claimant's GP surgery on 12 May 2016 – the Tribunal has no further detailed or more recent evidence in respect of the Claimant's medical conditions.

6.8 The Claimant contends that the symptoms of his depression were such that he was unable to put forward this part of his case at an earlier time. There is no evidence before this Tribunal that would lead us to conclude that the Claimant's depression is of a such a severity as would have prevented him from bringing his complete case in good time. His claim was presented to the Tribunal in June 2016 - some 7 months ago and he has had opportunity to seek to amend his claim during this time. Accordingly, applying the overriding objective and taking account of all of the circumstances of this case, the Tribunal does not consider that the amendment should be allowed. We do not consider it would be equitable to extend time to allow the claim to be brought and the prejudice caused to the Respondent if the amendment

were allowed at this stage is simply too great. In other words we are satisfied that the Respondent would suffer great prejudice if the amendment were allowed.

Factual Background

7. From 1 June 2015 the Claimant carried out the role of Unit Co-ordinator on Brook Ward. Brook Ward is a medium secure forensic unit in River House at Bethlem Royal Hospital. The Claimant's line manager was Mrs Helen Bristow, Ward Manager. It is of some relevance to this case that for a period up until 2011 the Claimant was based at another of the Respondent's facilities referred to as Hopton Road. It appears that following a redundancy exercise, this facility was closed with the Claimant being transferred to another of the Trust's sites.

8. On 16 June 2015, shortly after the Claimant had commenced working on Brook Ward, the Claimant suffered an accident at work. A patient became agitated and aggressive, requiring the Claimant to restrain him using various physical manoeuvres. It was during this physical contact that the Claimant was head-butted by the patient and moved in a way that his legs became parted unnaturally. It is beyond question that the Claimant sustained serious physical injuries as a result. It is also beyond question that the Claimant was not to blame for this incident.

9. On 18 June 2015 the Claimant commenced sick leave. On 13 August 2015 he was assessed by Dr Haq, Occupational Health Physician [144]. It was noted that the Claimant had sustained a head injury and subsequently developed left groin and pelvic pain. The Claimant was referred for further assessment with a physiotherapist. A further review was carried out by Dr Haq on 29 September 2015 [150]. It was recorded at that stage that the Claimant was able to return to work as of the date on his fit note - this date was 5 October 2015 [154]. The physiotherapist had recommended that the Claimant return to work in a non-clinical role and Dr Haq supported a phased return [151]. The Claimant wished to use some of his annual leave to provide him with a constant income and Dr Haq considered the use of annual leave and therefore a gradual increase in the physical demands of working was appropriate.

10. Mrs Bristow met with the Claimant on 2 October to discuss his return to work. It was agreed that a phased return would take place over an 8 week period resulting in a full week at work commencing on 23 November 2015. During his phased return the Claimant would undertake administrative tasks including E Learning. The outcome of this meeting was confirmed in writing to the Claimant in a letter dated 27 November 2015 [193]. In the penultimate paragraph of this letter reference was made to the fact that if the Claimant continued to be unfit for the ward environment he would be considered for medical redeployment [195].

11. On 3 November 2015 the Claimant was again assessed by Dr Haq [159]. It was recorded that the Claimant was fit to work in his current non clinical role with restrictions / adjustments. However Dr Haq did note that the Claimant felt he should be able to return to his clinical work at the end of his phased return and she felt it would be '*fair to give him a trial'* [160]. On 12 November the Claimant attended Fire Warden refresher training. He experienced pain in his groin area, hips and knees whilst negotiating some stairs on that day.

12. Mrs Bristow learned of the set back in the Claimant's recovery at a supervision session meeting on 13 November 2015. Mrs Bristow had had ongoing contact with the Claimant through his phased return to work and had generally been concerned about his physical well being at this time. At the meeting, the Claimant was using a stick and there was a discussion between the Claimant and Mrs Bristow that the Claimant's return to clinical duties at Brook Ward did not seem feasible. Due to the Claimant's ongoing difficulties options of redeployment and ill health retirement were discussed [168].

13. On 23rd November 2015 [169] the Claimant emailed Mrs Bristow apparently referring to the options which had been discussed at the earlier meeting. He stated,

    'So before I make a formal decision on how to proceed, I will need to consult with OH, GP, Union and solicitor (if needed).'

14. On 24 November 2015 the Claimant again consulted Dr Haq [183]. It was recorded that the Claimant required alternative duties with restrictions / adjustments. At this time the Claimant told Dr Haq he did not wish to consider redeployment and that he felt if given time to recuperate further and have more physiotherapy, he hoped to be able to return to his '*usual role'*. Dr Haq noted in her report that she advised the Claimant to discuss this proposal further with management and HR. The Claimant also told her that if he did not improve, he wished to apply for ill health retirement. Dr Haq informed the Claimant that a prerequisite to that application would be exploring redeployment options [184].

15. There was a further meeting with the Claimant and Mrs Bristow on 25 November during which it was agreed that the Claimant could take a period of annual leave beginning in December 2015. Mrs Bristow's approval of this leave resulted in an entry being made on the E rota system displaying approved leave for the Claimant. Later that day the Claimant sent a grievance to the Respondent [190]. The grievance focused on the redundancy exercise in 2011 and how that had resulted in the Claimant being posted to Brook Ward. A further email was sent by the Claimant on 26 November 2015, said to include a '*complete grievance report'* [190]. The Tribunal notes that Miss Hall, the Respondent's Director of Human Resources, responded to the

Claimant's grievance by a letter dated 16 December 2015. In summary, the grievance was rejected as being considerably out of time.

16. On 4 December 2015 a medical redeployment at risk meeting was held. This meeting was chaired by Mr Wilmart Tsiga, Clinical Service Lead (Forensic and Offender Health Pathway) and attended by Mr Daniel Ordu, HR Advisor (Employee Relations), Mrs Bristow, the Claimant and his union representative.

17. At the meeting Mr Tsiga wished to review the Claimant's sickness absence and to consider the latest occupational health report and the possibility of redeployment. It is agreed that at this meeting the Claimant requested compensation arising from the redundancy exercise, which took place in 2011. The Tribunal is satisfied that the Claimant was pre-occupied by this issue during the meeting and raised it extensively.

18. In reaching this finding of fact, the Tribunal has accepted and preferred the evidence of Mr Tsiga and Mrs Bristow to that from the Claimant. The Tribunal found the Claimant's evidence to be vague and unsatisfactory. We accept the description from Miss Patterson that the Claimant's case has been 'built on shifting sands'. The Tribunal was particularly struck by what appeared to be a lack of frankness on the Claimant's part in respect of his non-receipt of important correspondence from the Respondent. The correspondence was sent recorded delivery but was unable to be delivered to the Claimant's address and was not collected by the Claimant from the post office. In addressing this point, the Claimant told us that he had been house bound and was unable to get to his local sorting office. However this would not explain the Claimant failing to receive correspondence sent after the meeting on 4 December 2015, particularly when the Claimant was obviously able to leave his house as shown by his attendance at a meeting on 15 December with Mrs Bristow where he again refused to accept copies of correspondence which Mrs Bristow attempted to hand to him. Further, when it was put to the Claimant that if he were indeed house bound, he would have been present at his house to accept initial delivery of the recorded delivery letters, the Claimant asserted that he *'could have been on the toilet'*. The Tribunal considers that the Claimant was disingenuous in this evidence. The Tribunal was also struck by various bald assertions which were made by the Claimant without evidential support – the most striking of which was that the Claimant had travelled to the Philippines in February 2016 to obtain medical advice and treatment. However the Claimant failed to particularise any medical advice and treatment sought – for example, names of doctors or hospitals attended or details of appointments. Nor was any documentary evidence produced to support his assertions in this regard.

19. At the meeting in December 2015, the Claimant stated that he did not wish to return to his substantive role nor did he wish to work at River House. He also said that he did not wish to be redeployed [204]. The Claimant was back at work at this stage, carrying out non-clinical duties. The Respondent therefore determined to commence the redeployment process from Monday 7 December 2015. The Claimant agreed in evidence that he was notified of this, that he understood what was meant by the process and that he further understood that the process would run for a 12 week period concurrently with his notice period. Accordingly if a suitable role could not be found, the Respondent could terminate the Claimant's contract of employment on grounds of capability on 4 March 2015.

20. The Respondent confirmed the outcome of the meeting in a letter dated 7 December 2015 [203]. Delivery of this letter was not accepted by the Claimant. The Tribunal notes that further attempts were made to give the Claimant a copy of this letter both in a later meeting with Mrs Bristow on 15 December and by recorded delivery which was attempted on 16 December 2015 [309]. In any event the Claimant understood the outcome of the meeting on 4 Decemer 2015 as further demonstrated by his email to Mrs Bristow on 7 December which states,

'By now you would have received and read the email sent by Daniel Urdo regarding my redeployment. The dates when it will begin and end. And as I have told you this is not what I have wanted. I am just going to the motion now.' [207]

21. In this email, the Claimant went on to raise the issue of annual leave that he wished to take from 9 December until 3 February 2016. During email dialogue on 7 – 9 December, Mrs Bristow raised concerns about the Claimant being on annual leave during his period of redeployment. The Claimant referred to having time to get a programme to rehabilitate himself following which he might have no choice but to go on medical redeployment. On 9 December Mrs Bristow reminded the Claimant that he was actually already on medical redeployment and in those circumstances she was unable to sanction the length of leave he was requesting when he should be at work and available for work [206]. Following receipt of this email the Claimant took steps to cancel a booked trip to the Philippines.

22. On 15 December 2015 the Claimant met with Mrs Bristow to discuss his annual leave. It is agreed that the meeting was fraught with the Claimant becoming very angry. Mrs Bristow attempted to hand the Claimant a copy of the letter summarising the meeting of 4 December 2015 – the Claimant refused to accept the correspondence. Mrs Bristow was shocked by the Claimant's behaviour and left the meeting in tears. During his evidence to this Tribunal, the Claimant apologised to Mrs Bristow for his conduct. Mrs Bristow confirmed to the Claimant his annual leave entitlement in a letter dated 15 December 2015 [211]

(again a letter not accepted by the Claimant and returned to the Respondent sender on 4 January 2015).

23. From 15 December 2015 the Claimant was signed off sick from work with pelvic and groin pain [214]. In the event the Claimant did not return to work prior to the termination of his employment.

24. The Respondent corresponded with the Claimant about redeployment opportunities. Examples of this correspondence are to be found in the bundle (31 December 2015 [221], 4 January 2016 [251], 25 February 2016 [331], 4 March 2016 [365]). Although the Claimant did not receive delivery of the letters sent via recorded delivery (because the letters were not signed for nor were they collected), he did receive some correspondence by normal post. He opened this and the job descriptions sent which he considered were unsuitable for him. The Claimant did not contact the Respondent to discuss the job roles further.

25. On 5 January 2016 the Claimant had a telephone consultation with Dr Haq [304]. She noted that he was unfit for work and that a review was necessary in 4 weeks time. Around the end of January 2016 the Claimant decided to rebook his trip to the Phillipinnes. On 2 February 2016 the Claimant attended for an appointment with Dr Haq [315]. She recorded that a specialist opinion was needed and that a medical report had been requested (see letter dated 9 February 2016 [318]). Dr Haq reported that the Claimant was due to go to the Philippines 'on holiday' from 15 February 2016 until 24 March 2016.

26. Upon receipt of this report, Mr Ordu emailed Dr Haq querying both the annual leave and the impression that the Claimant was unaware he was subject to the redeployment process [320-321]. On 12 February Mr Ordu telephoned the Claimant. His principal concerns were the Claimant's lack of engagement in the redeployment process and the apparent extended annual leave the Claimant was proposing to take. During the telephone conversation the Claimant was informed that the review meeting, to take place prior at the end of the redeployment period, was due to take place on 22 February 2016. Prior notification of this meeting had been given in the letter of 7 December 2015 – with reference being made to a review meeting taking place *'one week prior to the end of you redeployment notice period..'* [204]. Mr Ordu transferred the Claimant's call to Mr Tsiga to further discuss his attendance at that meeting. The Claimant accepted that he had not sought prior approval for his proposed leave from Mrs Bristow and that he was fully aware he was currently subject to a 3 month redeployment process ending on 4 March 2016. He told Mr Tsiga that the process had to wait until he was fully fit and that he was going away to receive treatment for his ongoing health problems. He requested that Mr Tsiga hold the review meeting at another time and date. Mr Tsiga was unwilling to change the meeting date. It is agreed that the Claimant

then said Mr Tsiga should *'do what he wanted to do about the meeting because that was what he always did anyway'*.

27. The Claimant had previously made contact with the Respondent's pension provider to obtain advice relating to retirement. He had received a benefits estimate prior to the meeting on 4 December 2015. By a letter dated 3 March 2016 [340] Mr Ordu forwarded a further benefit estimate to the Claimant.

28. On 9 March 2016 Mr Tsiga wrote to the Claimant confirming that his contract was terminated on grounds of capability on 4 March 2016 [375]. Before writing the letter Mr Tsiga had spoken with Roseanna Mellon and Daniel Ordu. There having been no contact from the Claimant, Mr Tsiga made a decision to confirm the Claimant's dismissal. Mr Tsiga confirmed in evidence that had the Claimant attended the review meeting on 22 February 2016 the redeployment process would have been reviewed with the option of extending the redeployment period taking into account what had happened to date and the medical evidence.

29. The Claimant appealed the termination of his employment by a letter dated 5 April 2016, received by the Respondent on 12 April 2016 [377]. The Respondent considered that the appeal was received out of time and therefore did not proceed to consider it [385]. From around September 2016 the Claimant began to undertake nursing assignments with various agencies [433, 437].

Submissions from the Parties

30. Both parties made closing submissions. On behalf of the Respondent, Miss Patterson submitted that there had been no evidence presented that the Claimant's dismissal was either because of his race or disability. In her submission there was no real dispute that the dismissal arose as a result of the injury suffered by the Claimant at work. She addressed each of the allegations of unfairness with regards to the dismissal before summarising that the Claimant was ultimately dismissed because of his inability to do his substantive post and his refusal to engage in the redeployment process. Miss Patterson submitted that the Claimant's dismissal was fair in all the circumstances and fell within the band of reasonable responses.

31. In respect of race discrimination, Miss Patterson contended that no prima facie case had been established because there was no evidence about any alleged discrimination on the grounds of race – in particular, there was no mention of race discrimination in the Claimant's witness statement or Time Line. In respect of reasonable adjustments, it was submitted that the adjustment suggested would not have alleviated the disadvantage facing the Claimant as there was no suggestion that extending the length of time on sick leave would have enabled him to return to his substantive post.

32. With regards to the Claimant's section 15 claim, the Respondent submitted that its dismissal of the Claimant was justified. The Respondent's legitimate aim was effective sickness management and, in the circumstances, it had acted proportionately by dismissing the Claimant – the Claimant had accepted he couldn't return to his usual role and the Respondent had been keen to explore redeployment and had supported the option of ill health retirement, so far as it could. Finally in respect of holiday pay, the Respondent submitted that the Claimant had been paid in full and therefore no monies were owed.

33. In his submissions on behalf of the Claimant, Mr Gamboa stated that the Tribunal should look at whether the Trust went the '*extra mile'* and whether the Trust had exercised its discretion appropriately. He explained that the Claimant had been disgraced and that the issue here was one of rehabilitation. Mr Gamboa described redeployment as not fair and reasonable and that the Claimant was too unwell to proceed with redeployment. Again he represented that going the *'extra mile'* would have meant extending the redeployment period.

34. In respect of the race discrimination claim, Mr Gamboa accepted that there was no evidence before the Tribunal to prove the claim.

The Law

35. Sections 98(1) and (2) of the Employment Rights Act 1996 ('the ERA 1996') set out the potentially fair reasons for dismissing an employee. The list includes a reason related to capability (section 98(2)(a)).

36. Section 98(4) of the ERA 1996 deals with the fairness of dismissals. It reads in part as follows:

> (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 understanding) 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 the equity and the substantial merits of the case.'

37. In respect of the meaning of 'reasonable' I refer to the guidance from the EAT in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17. The EAT stated that the correct approach in answering the questions posed by Section 98(4) of the ERA 1996 was as follows:

(a) The starting point should always be the words of section 98(4) themselves.

(b) In applying this section the Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether the members of the Employment Tribunal consider the dismissal to be fair.

(c) In judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(d) In many though not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another.

(e) The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within a band then the dismissal is fair. If the dismissal falls outside the band it is unfair.

38. It is not for the Tribunal to substitute its own personal decision in this case. Rather, the Tribunal must consider whether the Respondent acted reasonably and whether the decision to dismiss the Claimant in all of the circumstances fell within the band of reasonable responses. As was detailed by Lord Denning MR in **British Leyland (UK) Ltd v Swift** 1981 IRLR 91, CA, the correct test is was it reasonable for the employer to dismiss the employee,

'If no reasonable employer would have dismissed him then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness within which one employer might reasonably take one view and another quite reasonably take a different view.'

39. The employer is not required to prove that the employee was incapable of performing his job but rather that it had an honest belief on reasonable grounds that the employee was incapable. It has long been established that before dismissal an employer should inform an employee what is required, inform him of the ways in which he is failing to perform adequately, warn him of the possibility that he may be dismissed and provide him with an opportunity to improve. In cases of lack of capability due to ill-health, the employer should find out about the current medical position before dismissing. This usually requires obtaining the employee's consent and requesting a medical report from the appropriate doctor.

40. Once the employer understands the medical position, the employer should also consider whether the employee is to be regarded as disabled and, if so, whether any reasonable adjustments should be made. The employer should also consult with the employee. It is important to consider whether an employee can be offered an alternative position. It has been said that in cases of ill health, the central question is often whether a reasonable employer would have waited longer to dismiss and, if so, how long.

41. The relevant provisions of the Equality Act 2010 ('EqA 2010') in this case are as follows:

41.1 Section 4: disability and race are protected characteristics;

41.2 Section 6: disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities;

41.3 Section 39: an employer must not discriminate against an employee.

41.4 Section 13: a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

41.5 Section 15: a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The section does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability.

41.6 Section 20: details the duty to make reasonable adjustments. In outline, there are three requirements – firstly, where there is a provision, criterion or practice of A's which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Thirdly a requirement, where a disabled person would, but for the provison of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

42. The burden of proof in respect of the EqA 2010 is contained in section 136. That provides that if there are facts from which the court could decide, in the absence of any other explanation, that A contravened the

provision concerned, the court must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision. It is therefore for the Claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed a discriminatory act. If the Claimant does that, the Tribunal shall uphold the complaint unless the Respondent proves that he did not commit that act.

43. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246.

44. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis by the Tribunal the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Court of Appeal reminded Tribunals that it was important to note the word 'could' in respect of the test to be applied. At this point, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. The Tribunal must assume that there is no adequate explanation for those facts. It is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

45. Guidance from the Court of Appeal in Madarassy emphasised that the burden of proof does not shift to the employer simply if the Claimant establishes a difference in status (in this case, for example, race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude on the balance of probabilities the Respondent had committed an act of discrimination. 'Could conclude' must mean that a reasonable Tribunal could properly conclude from all the evidence before it (see Madarassy). As stated in Madarassy, 'the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination'.

46. If the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of

discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed. The Court of Appeal said in Igen that at this stage, it is for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

47. The Tribunal also reminds itself of the guidance set down in the Equality and Human Rights Commission: Code of Practice on Employment (2011) although neither party referred to any specific provisions in this case.

48. Pursuant to section 13 of the ERA 1996, an employer shall not make a deduction from wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

Conclusions

Unfair Dismissal

49. The Tribunal is entirely satisfied that the reason for the Claimant's dismissal was capability. In other words, the Claimant was unable to continue to perform his substantive role. The Claimant accepted that it was not reasonable to return to his substantive role and in his evidence referred to the fact that *'if only the accident had not happened, I would not have been here'*. The Claimant's dismissal clearly arose as a result of the injury he suffered from the accident at work in June 2015. The Tribunal found no evidence to suggest that either race or disability formed part of the reason for his dismissal.

50. In respect of the fairness of the dismissal, the Claimant raises a number of challenges which the Tribunal has considered in turn:

Redeployment process -

51. The Claimant asserts that the Respondent should have delayed the process to enable him to recover. At the heart of the Claimant's case on this point is a contradiction – on the one hand the Claimant clearly accepted that he was incapable of returning to his substantive role. He said this in the meeting on 25 November 2015 with Mrs Bristow and repeated the point during the meeting at 4 December 2015, adding at that stage that he also did not wish to return to River House. On the other hand, shortly after 4 December 2015 meeting, in an email dated 8 December 2015 [206] the Claimant makes reference to a programme

of rehabilitation. This is again referenced in the telephone call on 12 February 2016 when the Claimant is explaining the purpose of his trip to the Philippines.

52. The Tribunal is satisfied that it was entirely reasonable, in all of the circumstances, for the Respondent to commence the redeployment period on Monday 7 December 2015. In light of the Claimant's repeated acceptance that he would be unable to return to his substantive role, there was little option but to consider what other roles might be performed by the Claimant in accordance with the Respondent's policy. This is not a case where further delay would have opened up the possibility of the Claimant returning to his substantive role and there was therefore nothing to be achieved by it.

53. Next, the Claimant asserts that the Respondent should have delayed its process until the outcome of his application for ill health retirement was known. The Claimant did not actually complete an application for ill health retirement until after his dismissal (in the event, an application was never actually made because the Claimant was unable to find a medical professional who was willing to complete the relevant section of the form). The Respondent had no control over any application made by the Claimant other than completing section A. This they did on 29 April 2016, when requested by the Claimant post dismissal. In light of the fact that the Claimant did not apply for ill health retirement until after his dismissal, the Claimant is entirely mistaken in his argument that the Respondent should have delayed its procedure to accommodate the pensions provider considering any application.

54. The Claimant's next challenge is that the Respondent should not have relied upon unauthorised absences. The Tribunal accepts the Respondent's argument that this submission is misconceived. The Respondent did not rely upon any unauthorised absences. The only relevant absence appears to have been the Claimant's trip in February 2016 to the Philippines and despite the Claimant not seeking approval for this leave in the usual way, it was recorded (to his benefit) as being annual leave.

55. The Claimant alleges that the Respondent should not have arranged the redeployment process for a time when he had notified them that he was on holiday. The Claimant had not sought approval for his annual leave in February 2015. When he booked this trip he was aware that the redeployment process was ongoing and that he would be away when the review meeting was due to take place approximately a week before the end of the 12 week period. Essentially the Claimant's argument is that the Respondent should have delayed the review meeting to a time when the Claimant had returned from his trip.

56. As a matter of fact Mr Tsiga did not reorganise the meeting. In the circumstances the Tribunal does not find that that was inappropriate and we refer to the following reasons: firstly, the Claimant was fully

aware of the redeployment process and the dates which applied to it from 4 December 2015 meeting. Secondly, he was aware of the fact that he was not to take extended leave during the relevant 12 week period from Mrs Bristows' email dated 9 December 2015. Thirdly the Claimant also knew that the 12 week period was his opportunity to pursue opportunities for redeployment. The Claimant chose not to engage in the redeployment process. Finally, the Claimant neither sought approval for the annual leave nor notified the Respondent other than by referring Dr Haq to the matter.

57. In broad terms we accept the evidence of Mr Tsiga that as of 12 February 2016 the Claimant was presenting as entirely disinterested in redeployment and failing to comply with even basic policies of the Respondent for example, in respect of obtaining approval for taking leave.

58. Further, although the Claimant asserted that he was going on the trip to seek medical advice and treatment, no evidence was produced to support that assertion. In fact, the trip was described to Dr Haq as a holiday [316]. A holiday was not a reason to suspend the redeployment process and the Tribunal is satisfied that the Respondent acted entirely appropriately in not rearranging the process.

59. The Tribunal finds that the Respondent's decision to dismiss the Claimant fell within the band of reasonable responses. The dismissal was a fair dismissal. In light of this judgment, the Tribunal has not been required to consider issues relating to Polkey or contributory fault.

Race Discrimination

60. The Claimant failed to give evidence in respect of the allegations of race discrimination set out in paragraphs d), g) and j) of the Case Management Order [44]. For example, the Claimant has alleged that he was 'forced' to use 12 days holiday when he was sick in February 2016. The Tribunal however heard no evidence to suggest that this treatment, if proven, was on the grounds of race.

61. Further the Claimant has identified Mr Hedges as a comparator. As noted, the Tribunal heard no oral evidence from Mr Hedges but the material contained in his statement dated 28 November 2016 demonstrates that his circumstances are materially different to those of the Claimant. For example Mr Hedges, despite high sickness absence levels, has been able to return to his substantive role. It was not suggested to the Tribunal that a comparable situation occurred with Mr Hedges but that he had received different treatment.

62. Due to the Claimant's failure to detail his case in respect of this claim, The Tribunal concluded that the Claimant has failed to establish a prima facie case and the burden of proof does not shift to the Respondent. The Tribunal notes Mr Gamboa's acceptance during his

closing submissions that there was no evidence before the Tribunal to prove the race discrimination claim.

Disability

63. As set out above, it is accepted that the Claimant is a disabled person for the purposes of the Act. The Claimant additionally contended that he suffered from a further disability namely a hip / groin injury.

64. The Claimant suffered a hip / groin injury as a result of the accident on 15 June 2015. This necessitated physiotherapy treatment as recommended by Dr Haq and the Claimant was referred to Professor Field, a Professor of Orthopaedic Surgery. There is evidence that the Claimant required the use of a walking stick – this was apparent in November 2015 and June 2016 [428]. Further, the Claimant was certified as unfit for work because of groin / hip problems from June 2015 until his phased return to work and then again from 15 December 2015 until 10 August 2016 [427].

65. When considering the issue of disability, the Tribunal has also had regard to both the Claimant's Impact statement and the letter from Tomislav Smoljanovic, dated 15 June 2016, which confirms the Claimant's relevant physical condition – namely, a labral degeneration with intra substance tear with thinning or fissuring of the articular cartilage.

66. Taking account of the entirety of the evidence on this issue and considering this evidence and the definition of disability as set out in Section 6 of the Equality Act 2010, the Tribunal is satisfied that the Claimant was disabled not only by his ankle osteoarthrisitis but also by his groin / hip injury.

Reasonable Adjustments

67. The Claimant makes a claim of a failure to make reasonable adjustments. There is no dispute between the parties as to the provision, criterion or practice relied upon by the Claimant – the PCP being that employees should be fit enough to carry out the duties of their substantive post. Nor is there any dispute between the parties that the Claimant was substantially disadvantaged by this PCP, when compared to non-disabled persons. The issue in this case is whether there was a reasonable adjustment to be made. The Claimant identifies that adjustment as being given a longer period of sick leave.

68. In circumstances in which the Claimant had entirely accepted he was unable to return to his substantive post, there was no reason to afford him a longer period of sick leave nor would such a longer period of leave have had any affect on his ability to return to his substantive role. Rather the reasonable adjustment for an employee physically unable to return to their substantive post by reason of a disability would be the

following of a redeployment process to attempt to identify an alternative role for that employee. This of course, the Respondent attempted to do, identifying a number of roles that, the Claimant accepted when giving evidence before us, were potentially suitable. The Tribunal also notes Mrs Dibben's evidence that in her long experience there was at least a 90% chance of identifying a suitable role for the Claimant at band 6 which could have been adjusted to suit his needs.

69. Accordingly the Tribunal is not satisfied that there was an obligation upon the Respondent to make a reasonable adjustment to the PCP nor to make the reasonable adjustment specifically identified by the Claimant.

Discrimination arising from disability

70. In respect of this claim, it is accepted by the Respondent that the Claimant's dismissal was unfavourable treatment. It is also accepted by the Respondent that it had the requisite knowledge. In other words, the Respondent did know that the Claimant was a disabled person at the time of dismissal.

71. However the Tribunal is entirely satisfied that, in the circumstances, the Claimant's dismissal was a proportionate means of achieving a legitimate aim. In other words, the Respondent's treatment of the Claimant is justified. The Tribunal has considered the three elements to this objective test: appropriate, necessary and proportionate. We have also taken care to consider the Claimant's particular treatment in this case and to consider whether it was a proportionate means of achieving a legitimate aim.

72. The Tribunal accepts the Respondent's submission that the aim in question was effective sickness management. The Respondent had a real need to ensure its employees were fit to carry out their substantive roles and a pressing need for the Claimant to perform his substantive role or some other available role. In circumstances in which the Claimant was unfit for his substantive role and he had failed to engage in the redeployment process, the Respondent's dismissal was appropriate and reasonably necessary. Further, taking account of the circumstances of this case, the Claimant's dismissal was also proportionate. It is extremely difficult to identify any alternative where the Claimant was presenting such a contradictory picture to the Respondent – failing to engage with redeployment opportunities but unfit for his substantive role. The Tribunal notes that the Respondent was also supportive of the Claimant's application for ill health retirement.

73. In summary, the Claimant has not established before us facts from which the Tribunal could properly conclude that the provisions of the Equality Act 2010 have been contravened. Where relevant, there are no inferences to be drawn and the burden of proof is not reversed.

Holiday Pay

73. The Claimant was paid for the leave he took in February 2016. There is therefore nothing owed to the Claimant in respect of holiday pay.

Employment Judge Harrington

31 March 2017