EMPLOYMENT TRIBUNALS

Claimant: Mr I Lowe

Respondent: Berkshire Healthcare NHS Foundation Trust

Heard at: **Reading** **On:** **27-30 August 2024**

Before: Employment Judge Findlay
And
Members: Ms. F Tankard
Ms. D Ballard

Representation
Claimant: In person, accompanied by Mrs. M Lowe, mother
Respondent: Ms. T Burton, Counsel

RESERVED JUDGMENT

1. By consent, the claimant's claim of unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996 is dismissed upon withdrawal.
2. The claimant's complaint that the respondent failed to make a reasonable adjustment by allowing him to be accompanied by a family member to sickness absence management meetings by decisions made on 14 April 2022, 20th April 2022, 21 April 2022 and 11 August 2022 is well founded and succeeds;
3. The claimant's other complaints of failure to make reasonable adjustments are not well founded and are dismissed;
4. The claimant's complaints of discrimination arising from disability under section 15 of the Equality Act 2010 are dismissed.
5. The claimant's complaint of unfair dismissal is not well founded and is dismissed.

REASONS

Reasonable adjustments at hearing

1. At the very start of the hearing, before starting to clarify the issues, the Judge asked the claimant if there were any adjustments that the Tribunal could make to assist him in participating in the hearing. The claimant asked the Tribunal to take note that he may sometimes feel overwhelmed and that he needed adequate time to answer questions in cross examination.
2. The Judge agreed to ensure that the claimant had sufficient time to answer questions from the respondent and Tribunal, and it was agreed that the claimant should raise his hand to indicate that he needed to ask either for a break or to clarify anything about the Tribunal procedure.
3. The Judge explained how the hearing was likely to proceed in terms of the order of witnesses and that the claimant would be expected to ask questions of the respondent's witnesses, and that each party would need to summarise their case at the end of the evidence.
4. In fact, the claimant did not raise his hand to request adjustments at any stage, although the Tribunal provided additional breaks with the parties' agreement if it was apparent that the claimant was becoming tired. The claimant did ask questions and ask for explanations appropriately (for example about section 207A reductions) and about the procedure in general during the hearing. Mr Lowe thanked the Tribunal for making the necessary adjustments in his closing submissions and the Tribunal felt assured that had he wished for any further adjustments, he could and would have asked.
5. On the first day of the hearing, Miss Burton asked the Tribunal about how it intended to proceed regarding closing summaries, as she intended to provide written submissions. The Tribunal checked with the claimant as to whether his preference would be to hear Miss Burton's oral closing submissions and then have some time to think about them before replying, or whether he would find it beneficial to see her closing arguments in writing. The claimant considered this while the Tribunal was reading the statements and documents and upon the parties' return at 2pm that day, he said that he would prefer to hear Miss Burton's submissions orally. The matter was revisited on day 2, when the Judge asked Miss Burton to provide the claimant with copies of any authorities she wished to rely upon by the afternoon of 29th August, and she did so. The claimant was also afforded 30 minutes after Miss Burton concluded her submissions to reflect upon those before summarising his own case.

The Issues

6. The claimant was employed by the respondent NHS Trust from the 7th of August 2017 until the 22nd of December 2022, by which time he was employed as a Healthcare Assistant/Senior Clinical Support Worker (band 3). He was dismissed, with five weeks' notice, on grounds of capability. The claimant accepts that capability (due to long term absence) was the reason for his dismissal.
7. The claimant contacted ACAS for early conciliation on the 12th of October 2022 and received an early conciliation certificate on the 16th of November 2022. He made his claim to the Tribunal on the 15th of December 2022.
8. As the claimant contacted ACAS on the 12th of October 2022, any complaint about treatment which occurred prior to the 13th of July 2022 is potentially out of time under section 123 of the Equality Act 2010.

9. In his claim form, the claimant indicated that he was making complaints of unfair dismissal, disability discrimination and arrears of pay.

10. There was a preliminary hearing for case management (by telephone) on the 16th of May 2023 in front of Employment Judge Alliot. The claimant represented himself at this hearing and the respondent was again represented by counsel. At that hearing, Judge Alliott identified that there were complaints of unfair dismissal, and in respect of disability discrimination there were complaints under section 15 of the Equality Act, discrimination arising from disability, and of failure to make reasonable adjustments under section 20(3) of that Act. There was also a claim of unauthorised deduction of wages. The details are to be found at pages 61 to 64 of our hearing file/bundle.

11. At the start of the hearing before us, the Judge clarified the issues with the parties. The Judge had identified from reading the claim form, at page 14 of the hearing file, that the claimant had said that there was a failure to make all the reasonable adjustments recommended by the respondent's Occupational Health service when he returned to work (for one day) on 29 October 2021. A report had been received following an Occupational Health appointment by telephone on 6 October 2021 (p211) which had recommended a 2-3 week phased return and various adjustments. There did not appear to be any reference to these allegations in the case management order.

12. The Judge therefore checked with the claimant whether he was intending to pursue any complaint about the alleged failure to make reasonable adjustments when he returned to work for a day on 29 October 2021. She offered the claimant time to think about that before confirming, but the claimant said that he was able to deal with the matter and that he was not intending to pursue any complaint about failure to make adjustments arising out of the report of 6th of October 2021 and in respect of his return to work on 29 October that year.

13. Also, at the start of the hearing, when discussing the issues, the claimant confirmed that although he had not known at the time, he now accepted that his network account with the respondent had not been deleted whilst he was on sick leave prior to the 14th of March 2022, but instead that it had been disabled in accordance with the respondent's policies as submitted by the respondent.

14. He also accepted that his grievance had not been upheld by the respondent although, as he pointed out, failings had been found at the preliminary fact-finding stage, and therefore he was still pursuing complaints about the respondent's failure to investigate his grievance further and its failure to accord him an appeal.

15. On the second day of the hearing, the claimant indicated during the morning that he was unlikely to pursue his complaint of unauthorised deduction of wages. The Judge made it clear that she was not going to ask the claimant to confirm whether that meant that he was withdrawing his complaint of unauthorised deduction of wages immediately but would give the claimant time to think about this. The respondent was relying on an argument that an overpayment had taken place in error because of confusion over whether the claimant was on authorised sick leave or not, at a particular point in time. At the start of the hearing, the Judge had referred to the claimant to section 13 of the Employment Rights Act 1996, and to subsection 4 of that section and invited him to consider it.

16. On the afternoon of the third day of the hearing, 29 August 2024, having considered those matters the claimant indicated that he was not going to ask any questions about the overpayment or its recovery. The Judge asked the claimant if he had reached a conclusion about whether he was going to pursue the complaint regarding unauthorised deductions. He said that he had decided not to pursue it, and that he was willing for the complaint of unauthorised deduction of wages to be dismissed upon withdrawal with his consent.

17. Again, at the start of the hearing, the respondent said that it did not intend to argue that the claimant had contributed to his own dismissal, and after the conclusion of the evidence, Miss Burton indicated that the respondent accepted that section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 did not apply to the circumstances of this case and that they would not be seeking a reduction of any compensation in that respect.

18. At the time of the case management hearing, the respondent had indicated that it denied that it knew or reasonably ought to have known that the claimant was likely to be placed at a substantial disadvantage in relation to his employment with the respondent compared to non-disabled employees because of his disability. By the time of closing submissions, however, Miss Burton modified that position somewhat in that she accepted that the claimant had been placed at a substantial disadvantage, on the evidence, compared to a person who is not disabled by not being permitted to be accompanied (to the sickness review meetings in April and August 2022) by a relative who was not also a Trust employee. However, she argued that the first of those refusals was a one-off act which was out of time and said there was no “link” to the second refusal at the meeting on 11 August 2022.

19. When the Tribunal had finished clarifying the issues on the first day of the hearing, and was about to commence its reading, the Judge asked the claimant to give some thought to whether he was alleging that his dismissal was unfair for any reason other than the matters of alleged disability discrimination. Upon returning to the hearing at 2:00pm, the claimant then provided details as to why he believed that his dismissal was unfair, as reflected in the schedule of issues attached.

20. The issues which the Tribunal decided, after clarifying them at the start of the hearing and taking account of concessions made, are set out in the attached schedule. The issues have been reordered and re-numbered to take account of the order in which the Tribunal considered it logical to consider them.

The Hearing:

21. Judge Alliott had originally listed the case for a period of five days from the 27th of August to the 2nd of September 2024. Due to a lack of judicial resources, however, on the 23rd of August it was directed that the case would now take place over four days, from the 27th to the 30th of August inclusive. Unfortunately, this message was not passed on to the parties but was explained by the Judge at the start of the hearing on the 27th of August.

22. Judge Alliott had listed the hearing to deal with liability and any potential remedy. Due to the reduction in time available, the Tribunal was able to complete the evidence and submissions and to deliberate but had

insufficient time to deliver a reasoned oral Judgement or to deal with remedy.

23. A potential remedy hearing was therefore listed, in person, before the same panel, on the **1st of November 2024**.There will now be a hearing in person at Reading on that date to consider remedy in respect of the failure to make reasonable adjustments found above, before the same panel, time estimate one day.

24. The Tribunal was provided with a hearing bundle in digital and hard copy form which contained 700 pages, and a bundle of witness statements amounting to 50 pages.

25. After clarifying the issues and discussing how the hearing would proceed, the Tribunal spent the remainder of the morning on the 27th of August reading the witness statements and the documents they referred to. The Tribunal explained to the parties that if any further documents were considered to be relevant, the Tribunal would need to be shown them during questioning.

26. The Tribunal heard from the claimant and all six witnesses for the respondent, and all of them attended to give evidence.

27. The evidence concluded on the afternoon of the 29th of August; the Tribunal having reassured the claimant that it would not expect to hear his closing summary on that day. The Tribunal decided, having heard from Miss Burton, that it would like to hear from both parties on the same day and so we heard the closing submissions of Miss Burton and the claimant on the morning of the 30th of August.

28. The Tribunal deliberated and reached its conclusions on the afternoon of the 30th of August.

The Facts

29. The claimant's attendance at work had not been good since 2019, and in June 2021, he commenced a lengthy period of sickness absence. This is broadly summarised on page 185 of the hearing file, but in a nutshell, from the 12th of June 2021 the claimant attended work on only three or four occasions, apart from attendance at sickness review meetings. During most of this time he was on certified sickness absence, although there were periods when the respondent's payroll team was not provided with his fit notes from his General Practitioner, initially due to a misunderstanding about how these should be provided.

30. Following a sickness review meeting on the 16th of April 2021, the claimant was issued with a stage 1 absence warning to remain on his file for six months, in accordance with the Trust policy at that time – p197. There had been absences for anxiety, stress and depression in February and March 2021 as well as other absences, for example due to a knee injury that was sustained during a restraint on the ward. A phased return was agreed.

31. On the 11th of June 2021, the claimant's ward manager and line manager, Mr Nazari (MN) wrote to him to ask him to attend a stage 2 formal sickness review under the policy which was current at the time - page 200. This letter shows that the claimant had several absences for various reasons, including unauthorised unpaid leave. There was a short period of absence for stress on the 14th and 15th of May 2021.

32. The letter records that the claimant had been made aware at a previous review that he had an extremely high level of sickness absence which

was unsustainable to both the service for which he worked and the respondent. Due to the procedures in place at that time, the meeting was to be conducted in accordance with the process outlined in the Sickness Absence policy and the formal stages of the Performance Management and Disciplinary policy. The claimant was warned that a formal warning may be given at this meeting and targets would be given for him to improve. He was told that failure to improve his attendance at work would lead to the next stage of the formal process being invoked, which may ultimately result in the termination of his employment. He was told that he was entitled to be accompanied by a union representative or workplace colleague. He was given details of a "Confidential Care" service for staff.

33. This meeting did not take place, however, because the claimant was certified as unfit for work from the 12th of June until the 26th of June 2021 due to depression. Subsequently, on the 29th of June 2021, the claimant was certified as unfit for work from the 27th of June until the 4th of July with PTSD (post traumatic stress disorder) and depression. We find that MN was aware that the claimant had PTSD no later than this date.

34. This sickness certificate was followed by another on the 5th of July 2021 which said that the claimant was unfit due to PTSD until the 5th of August 2021, and another dated the 10th of August 2021 which certified the claimant as being unfit for work from the 6th of August until the 20th of August 2021. Again, the diagnosis was given as PTSD.

35. On the 13th of September 2021, MN wrote again to invite the claimant to a formal sickness review meeting ("stage 2") on the 28th of September 2021. The claimant was informed that his Bradford factor score was 6966, which far exceeded the Trust's target of 100. The Bradford factor score is a means of calculating acceptable levels of sickness absence. We were told by Mr Nazari (MN) (and Mr Langan – FL) and accept, that the claimant was not subjected to the absence management policy simply because of his Bradford factor score. It is obvious from the figures that if he had, action would have been taken far sooner than it was.

36. On the 17th of September 2021, see page 208, the claimant's GP issued a fit note showing that the claimant was unfit for work from the 4th of September until the 1st of October 2021 due to PTSD.

37. The claimant did, however, attend the formal sickness review on the 28th of September 2021 by means of a virtual meeting on Microsoft Teams. The meeting was also attended by MN and an HR manager, Rozeena Toheed. The claimant was willing to engage in the meeting without representation. This was followed by a letter from MN dated the 29th of September 2021 which is at pages 209-10 in the hearing file.

38. In the letter, MN referred to the claimant having been absent since the 12th of June 2021 for reasons of stress and anxiety. MN explained that the process needed to be followed and that the purpose of the meeting was to support the claimant and for the Trust to understand his current health situation and identify how he could be helped to return to work with the assistance of Occupational Health. At the meeting, the claimant had explained that he was on a long waiting list for appropriate therapy. He had decided to access private therapy which started in July 2021 and had helped significantly.

39. The conclusion by MN following the meeting was to wait for the Occupational Health report following the claimant's assessment on the 6th of October 2021 before attempting a return to work, although MN explained that having a routine and structure may help the claimant's

rehabilitation and that the respondent would ease the claimant in gently with a phased return to work, to which the claimant agreed. The claimant said that he felt “disconnected”. MN reassured the claimant that he had no concerns regarding the claimant’s performance when he was at work. MN repeated this during his evidence, saying that the claimant was a good worker when he attended.

40. The claimants next fit note on the 6th of October 2021 said that he was unfit for work from the 1st to the 14th of October, again due to PTSD.

41. As noted above, the claimant was reviewed by the respondent’s Occupational Health provider, TP health, on the 6th of October 2021. The assessment was by telephone. The assessor is said to be a nurse - page 215. The outcome report is on pages 212 to 215 of our hearing file. The conclusion of the Occupational Health assessor was that the claimant was fit to work with adjustments. Short term or temporary adjustments were recommended and were set out on page 213, with an end date for temporary adjustments indicated as the 1st of November 2021.

42. As noted above, the claimant has confirmed that he is not making a complaint of failure to make reasonable adjustments arising out of the 6th of October 2021 assessment or his one day return to work thereafter. The adjustments recommended were to modify procedures for testing, assessment or appraisal, modify work patterns or management systems, provide supervision, reallocate work within the team, and to provide a mentor or “buddy” whilst the claimant regained confidence in the workplace.

43. The claimant attempted to return to work on the 29th of October 2021, but did not return thereafter for several months. We accept the evidence of MN at paragraphs 8 and 9 of his statement to the effect that the claimant already had a modified work pattern and access to supervision and that the intention was that work would have been allocated during the shift by the nurse in charge, taking account of the claimant’s circumstances. The claimant has not been specific about which proposed adjustments did not take place, and we can see that not all of those adjustments could have been implemented during a one day return to work in any event.

44. We accept that the claimant did not complain to MN, with whom he had a good relationship at this time, that any of these adjustments had not been carried out. At page 214, we can see that there was a recommendation for a phased return of two to three weeks, to be discussed by means of face-to-face meetings “on site”. The claimant said that he was feeling up to 70% better and in the opinion of the Occupational Health assessor was fit for a return to work. The assessor anticipated good attendance and performance in the absence of further personal stresses. The assessor believed that claimant was likely to return to work on the 14th of October 2021 and that no specific restrictions to the claimant’s days or hours of work were necessary.

45. A stress risk assessment was recommended, but again we accept that it would not be reasonable to expect this to be carried out on the claimant's first day of return to work. It was stated that the claimant's medical condition had lasted for 12 months or longer. The assessor stated that the claimant’s mood and stress symptoms could impact on his emotional resilience and that the symptoms, whilst improved, may persist. Whilst this is not binding upon us, the assessor considered that the claimant was

likely to be disabled within the meaning of the Equality Act - page 215. No review was recommended.

46. The claimant was then certified as unfit for work from the 12th of November 2021 to the 22nd of November 2021 with a viral illness. This is seen a page 216.

47. From November to December 2021, MN had regular contact with the claimant, as can be seen at pages 217 to 219. He agreed that the claimant could use some of his annual leave until the 1st of December 2021.One can see from MN's notes, which were not challenged, that various arrangements were made for the claimant to return to work but that he cancelled these for various reasons. It can be seen from these notes that MN displayed considerable patience.

48. For example, on the 11th of November the claimant sent a message saying that he thought “Monday might be a better day to return” as he was not as prepared as he thought, in terms of clothes etc. MN replied: “that's fine I will extend your annual leave until Monday. Will see you 9:00am Monday”. Patently, the claimant did not attend, because on the 15th of November MN messaged: “I was expecting you today how are you doing”. The following day at approximately 4:30pm, the claimant replied: “Man I have been struggling with my sleep, but I think it stems from nerves. Do you think I could try aiming for 12 then maybe work back to 9:00am, because I wake up late and then panic”. On the 17th of November, MN replied “Sure come at 12”.

49. However, the claimant did not come in as arranged, and on the 22nd of November MN telephoned the claimant for an update and to see how he was doing. MN reminded the claimant of a planned progress review meeting on the 6th of December 2021, and it was agreed that the claimant would come back to work on Tuesday the 23rd of November at 12 noon. However, the claimant did not attend on the 23rd of November and MN's telephone call was diverted to voicemail. The claimant then suggested, on the 26th of November, that he should try to work on Monday, Wednesdays and Fridays first. MN replied saying: “OK that sounds good we'll catch up with you on Monday”. Once again, however, the claimant did not return. The contact sheet continues in similar vein.

50. The meeting scheduled for the 6th of December 2021 did not go ahead. The claimant was still off sick and on the 21st of December, he was certified as unfit for work due to PTSD and depression from the 1st to the 27th of December 2021. This was a belatedly obtained fit note, which was, according to the evidence, a pattern of the claimant’s behaviour. It did not affect his sick pay until after MN left his role with the respondent in April 2022. This is a further example of the adjustments MN was making for the claimant.

51. The claimant was then referred to Occupational Health once more, and there is a referral outcome report dated the 31st of January 2022 at page 224 of our hearing bundle. The claimant was said to be unfit to work at that time. As with the previous report, verbal consent to proceed is recorded. On page 225, we can see that no adjustments were likely to be required, and an advised target return to work date of the 28th of February 2022 was given. However, a phased return to work was said to be required, with a duration of four weeks. As an estimate, it was advised that the claimant would benefit from a phased return where he returned on 50% of his hours for two weeks followed by a further two weeks at

75% of his hours and then full contractual hours. However, a review of the situation was recommended in three or four weeks' time.

52. The claimant reported he was managing to fulfil his activities of daily living but remained anxious about going out into public places. The claimant was described as conversing freely and had a friendly and cooperative manner. The results of a questionnaire identified moderately severe depression and severe anxiety, but the advisor noted that the claimant's care was being managed by his GP and he was managing with day-to-day functioning. The claimant reported that his medication was recently increased and that it could take four to six weeks for the medication to reach a therapeutic level. The advisor was hopeful that the claimant would start to gradually improve over the coming weeks.

53. The advisor suggested that her reports be considered together with the previous report from 6th of October 2021. The report identifies that the claimant said that he had been isolating himself and had been paranoid and is lacking in trust of people. He said that he tried to slowly go out in public but was feeling extremely overwhelmed and had a setback. The claimant said that he found the sickness review process insensitive and found it stressful and anxiety provoking. He said that each time he had these meetings he experienced an exacerbation of his symptoms and a deterioration. He felt overwhelmed when in public spaces and did not feel a sickness review meeting was likely to be beneficial at the current time. He was continuing to have therapy.

54. The advisor states that in their opinion, the claimant's condition appeared to be chronic in nature and that his ongoing symptoms remained a barrier to return to work at the current time. She advised him to concentrate on improving his symptoms and gradual reintegration into public areas in preparation for a possible return to work. A review with a mental health practitioner had been arranged. She did not consider the claimant to be currently fit for work in any capacity due to his high level of symptoms and a severe reduction in his psychological well-being. His return-to-work date could not realistically be predicted as it was subject to an improvement in his symptoms and response to ongoing therapy. It was unlikely to be within the next 4 weeks. The advisor did not consider that the business could provide any adjustments or alternative roles at that time that would facilitate a return to work. A period of supportive workplace adjustment was likely to be required if the claimant symptoms improved and she suggested that consideration was given to an Occupational Health review when appropriate to review progress, the claimant's capabilities and symptoms. She considered that due to the chronic nature of the condition, the claimant was likely to continue to experience symptoms in the long-term future.

55. We observed that it is from this point that the respondent accepts that the claimant was disabled by all the conditions listed apart from EUPD and that it had knowledge of disability. It is not difficult to understand why, given the contents of the report.

56. The advisor continued that there appeared to be no direct link between the claimant's condition and his work. Again, a review was recommended prior to his return. Upon return the claimant was likely to benefit from a phased return pattern as previously advised. The advisor said that she did not consider the claimant was fit to attend a formal meeting or to attend a disciplinary hearing or meeting due to a reduction in his psychological well-being and some concerning symptoms. She advised

that such action was temporarily postponed until his symptoms had significantly subsided and his psychological resilience improved.

57. She considered that his future attendance was likely to mirror his past attendance. She said that the claimant can feel overwhelmed with an accumulation of stressors which may impact on his emotional resilience. She did not consider that a further referral to a specialist would aid the claimant's recovery because he was receiving support from the appropriate medical professionals. No risk assessment was recommended. She stated that the mood and anxiety symptoms could impact on the claimant's emotional resilience and in the absence of treatment his day-to-day functional ability was likely to be greatly impaired. As before she considered that the Equality Act was likely to apply

58. On the 21st of February 2022, the claimant was informed that due to his sickness absence, in accordance with the sickness and absence policy ORG O20, if he remained off sick his entitlement to full pay would expire on the 2nd of March 2022 and he would move on to half pay from the 3rd of March 2022. This letter was signed by Francisco Langan, ("FL") HR Manager.

59. The claimant's terms and conditions of employment set out his entitlement to sick leave and sick pay at page 91. The claimant's employment with the respondent started in August 2017, but as we have seen his sick pay had started in at least June 2021, when he had been employed for three complete years.

60. The claimant complained that on the 4th of February 2022, MN told the claimant that Human Resources had sent out a letter to invite him to a meeting. MN said that he had advised Human Resources about the OH recommendation and so the claimant could ignore the letter or, if the claimant wished to go ahead with the meeting it could be organised on Teams, and the claimant should let MN know what he wanted to do. Within a short while, MN informed the claimant that the letter had not been sent out at all and that the claimant should not worry. The claimant replied: "thank you so much Majid I appreciate that a letter like that would just knock me back so thank you man".

61. The claimant has complained that this incident is an example of alleged insensitivity on behalf of the respondent Trust. In fact, MN responded extremely promptly when he thought the claimant may receive a letter regarding his sickness absence and was asking the claimant how he wished to proceed. We do not regard this as an example of insensitivity on his part.

62. The claimant was then certified unfit for work from the 28th of February 2022 to the 13th of March 2022 again with the reason given of post-traumatic stress disorder (PTSD).

63. The claimant also complains that he was repeatedly receiving emails regarding his Disclosure and Barring Service clearance renewals and that this should not have been a priority. Again, we do not consider that this was any kind of unfavourable treatment, it was simply an attempt by a different part of the Trust to ensure that when the claimant was fit to return, he would be able to work and would have the right clearance to do so.

64. On the 10th of March 2022, see page 253 of the hearing file, MN wrote to the claimant to invite him to a formal sickness review meeting. MN's e-mail attaching the letter dated the 11th of March 2022 is at the foot of

page 255 in the hearing file. The e-mail starts by saying that the writer hopes that the claimant is doing well. The claimant was told that the meeting would be used to review his current health situation, hear about his progress and identify any support that could be provided to facilitate his return to work. The Occupational Health report and advice would also be considered as well as any resources the Trust could offer to support the claimant's well-being.

65. The claimant replied later that day saying that he was "a bit concerned" that before even inviting him to talk about his return to work and how to support him, the priority was a formal sickness review. The claimant said that a MN had been made aware multiple times that his sick note ended on the 13th of March (2022) and nothing had been arranged in regards to supporting his return. He said he thought this highlighted "as pointed out in his previous Occupational Health report" that the Trust was not consistent with its intention to support him and are more concerned with targeting and disciplining him, further breaking the trust relationship and potentially sabotaging any current relationship. We have noted what is in fact set out in the previous Occupational Health report is a record of the claimant's concerns rather than any opinion stated by the by Occupational Health advisor, and that, indeed, the assessor had recommended a review before the claimant recommenced work (paragraph 51 above). The claimant, also on the 11th of March 2022, made a subject access request.

66. Apart from a Teams sickness absence review meeting, the claimant had attended work for only one day in more than eight months prior to this date. According to the Trust's Manager's Toolkit for Supporting Attendance (from p137 of the hearing file), which is referred to as "guidance", at paragraph 7.1 (p144) long term sickness absence can be defined as a prolonged period of continuous absence due to sickness of 28 days or more. This policy was in effect from March 2022. Paragraph 7.2 says that the manager should maintain regular contact with his staff member if they are on long term sickness absence. The frequency of the contact should be discussed and agreed with the individual as it will vary depending on the circumstances and the reasons for their absence. The contact can be face to face or by telephone.

67. 7.3 (p145) says that it is important that prior to any formal process commencing the manager meets with staff informally to discuss their long-term absence, how they can be supported with a return to work and to consider an Occupational Health referral and that the manager should also explain that they may need to move to the formal process if the person is unable to return to work.

68. At paragraph 7.4, it is stated that when the staff member has been absent continuously for two months, the manager should contact them and arrange a further Occupational Health appointment if appropriate. A first formal review meeting will then be arranged with the staff member once the Occupational Health report has been completed and the report has been issued. Paragraph 7.5 that says that it is good practice to have regular progress meetings between the formal stages of the policy to make sure that you maintain contact and discuss the time scales for a return to work. These informal meetings should be supportive and recovery focused. We have seen ample evidence in the hearing file that MN did regularly contact the claimant informally to discuss how he was progressing and that this contact was supportive. The claimant accepted

that there had been regular contact with MN. Indeed, there had been two sickness absence management meetings at this point if one considers that which took place in April 2021.

69. At paragraph 7.8 (p146) a "final review" meeting is suggested when the staff member has been absent continuously for up to four months. This is on page 146 of our hearing file. Paragraph 7.14 on page 146 states that after a continuous period of absence for six months a formal capability hearing should be held to consider potential termination of employment on the grounds of incapability due to ill health. It was agreed before us that the Trust had not rigidly applied this provision to the claimant, as there had been no capability hearing, and none was suggested, at this stage.

70. We are satisfied that the provisions of the Manager's Toolkit were complied with by MN up to and including April 2022.Indeed, he did not stick rigidly to the guideline trigger points (such as two months' absence for a formal sickness review and six months absence as a trigger to move to a formal capability process) which are set out within the Toolkit. By contrast, he gave the claimant ample time to improve his attendance before moving to the next stage.

71. At that time also, the respondent's Sickness Absence Policy and Procedure was applicable to the claimant's absence. This refers to consideration of redeployment and eventual termination of employment if an employee remains unfit, even before sick pay is exhausted, see page 106. In this case, MN had sought appropriate advice from Occupational Health and had asked if redeployment was an option, but had been advised this was inappropriate as the claimant was unfit for work in any capacity when the January assessment was carried out.

72. That Policy was replaced in June 2022 by the Supporting Attendance Policy and Procedure (page 173). This states that a first formal stage of sickness management will take place after a continuous absence of two months, with a "final formal stage" after four months absence, with provision for Occupational Health advice to be sought at each stage. The "trigger point" for a capability hearing is said to be a continuous absence of six months. Page 181 states that the stages above will be followed sequentially, unless the advice from OH indicates that the individual will not be fit to return to work in the foreseeable future at the earlier stages. We note that the claimant had been informed that his employment could be terminated due to his levels of absence as far back as 11 June 2021.

73. Both policies refer to the Performance Improvement Policy. This reflects the three stage process of first formal meeting, final formal meeting, followed by a capability meeting where a possible outcome is dismissal (p130).Paragraph 7.2.2 says that these stages will be followed sequentially, except "where the cause of poor performance is ill health and the advice from our Occupational Health department indicates that the individual will not be fit to return to work in the foreseeable future". There had been two formal sickness review meetings, in April and 29 September 2021, by this stage, but the respondent has not chosen to rely on that which took place in April 2021.

74. On the 14th of March 2022, the claimant was due to begin a six-week phased return to work as his fit note (saying he was unfit due to PTSD) expired on the 13th of March 2022, page 236. He returned for one day on the 14th of March.

75. We can see that MN replied to the claimant's e-mail dated the 11th of March on the 14th of March at 10:09 am (page 257).MN said that he was sorry that the claimant felt that trust was broken between him and the Trust, but that if the claimant had looked at his e-mail, he would be able to see that the sickness management meeting was to enable the Trust to identify the claimant's needs and to prepare for his return to work. He pointed out that there was no mention of a disciplinary hearing in his e-mail nor in the letter attached. He confirmed that Occupational Health had confirmed that they were happy for the Trust to continue with the meeting, so the meeting was scheduled. He also requested the claimant's latest sick note as he had not yet received it. He said that he had been expecting to see the claimant that day and could the claimant please advise if he would be coming in at some point. He had forwarded the claimant's subject access request to the appropriate person to implement.

76. If an employee does not provide a medical certificate within the agreed timescales a manager may consider their absence as unauthorised and unpaid - page 141. In addition, the Trust said that if a medical certificate is produced later, it would not backdate pay so it is important that staff understand they should provide a medical certificate as soon as possible. We have seen evidence that there was something of a misunderstanding by MN and the claimant as to how medical certificates should be provided, in that MN apparently thought that the claimant could not provide photographs of his sickness certificates but should provide scanned or hard copies. The claimant said that after his scanner broke down, he did provide hard copies to reception but alleges that they did not always make their way to his managers. We have noted that the claimant's fit notes were often backdated in any case, so that they would by definition be "late". Despite this, when the claimant's certificates were received late, his pay was indeed backdated, at least until May 2022. The late production of the certificates led to some confusion, and indeed to the erroneous overpayment which originally formed the basis of the unauthorised deductions claim.

77. The claimant had said that he could not access the respondent's IT system when he returned on the 14th of March, and he drew this to MN's attention. We can see that on the 17th of March MN requested a new account for the claimant at page 679 of the hearing file, and that this was resolved just after over an hour after being requested.

78. We were referred to the respondent's Information Security Policy at page 672, which provides that if a network account is not used for 30 days for any reason (for example, maternity leave, long term sickness or suspension) then the account will be disabled. If it is not reactivated within a further 30 days, it will be deleted by the respondent's IT department, together with the employee's personal drive and mailbox. The claimant now accepts that his account was not deleted but was disabled in accordance with the policy.

79. The claimant then contacted MN on 18th March 2022, when he was next due to be in work after 14 March, to say that he had tested positive for Covid. We can see from page 277 that the claimant was unable to attend the sickness review that had been scheduled for the 18th of March as a result.

80. He had recovered by the 24th of March - see page 266- and was due to return on the following Monday, 28th March 2022. He actually returned on Tuesday 29th of March 2022, but was then absent with a flare-up of a knee injury, see page 275.

81. The claimant was then referred to Occupational Health in respect of the knee injury, and the Occupational Health report is at page 268 of the hearing file. Although MN accepted that the focus of the report was the claimant's knee injury, the outcome report, following the telephone assessment on the 4th of April 2022, was said to deal with the presenting health situation, fitness for work and to identify any workplace support required. Verbal consent to proceed with the consultation was given. The assessor found the claimant fit to work with adjustments, and short term or temporary adjustments were recommended. The adjustments were to modify work patterns or management systems with an end date of the 3rd of May 2022.

82. The health assessor commented that the claimant was fit to carry on his full contractual duties on his current phased return. The claimant stated that his symptoms were not stopping him carrying out his activities of daily living but that he had difficulty doing some tasks. The assessor noted that the claimant had anxiety and depression. The claimant told the assessor that he had woken up with a painful knee and had self-managed the symptoms through exercise and painkillers, but the symptoms had worsened. The claimant had said that he had returned to work on the 29th of March 2022. We know that this was a return for a single day.

83. The assessor said, on page 270, that he had not identified any barriers as to why the claimant could not continue to work his full contractual duties or work on his current phased return as that would be beneficial for him.

84. The assessor believed that the pain the claimant was experiencing was a sign of repetitive strain. Medical evidence was to remain active. The assessor recommended that the claimant was fit and safe to carry out his full contractual duties under the phased return with the use of best manual handling techniques and correct body mechanics. He would benefit from regular postural breaks and changes to do some stretches for one to 5 minutes after an hour or two of working to avoid the risk of aggravation of his current symptoms. The assessor said that medical evidence suggests that work is beneficial as this is a form of rehabilitation, remaining active and mobile is essential for those affected with pain. The assessor had discharged the claimant that day and had provided him with appropriate advice, self-management techniques and had emailed some exercises to assist his recovery. No further referrals to specialists were recommended.

85. Whilst MN accepted the claimant's suggestion that the focus of the report was the claimant's knee condition, the assessor was aware that the claimant was affected by anxiety and depression. He did not conclude (and nor did the claimant suggest to him) that the claimant was unfit to work due to his mental health conditions at that time.

86. Also on page 275, we can see that the claimant was suggesting following his Occupational Health review on the 4th of April that he should be "OK to come into work" the following day 5th of April, and MN said he would see the claimant at 9:00 that day.

87. On page 274 in the file, we can see that on the 5th of April 2022 MN contacted the claimant to ask if he was coming in today. This was sent at 12.12 in the afternoon. He said that he had been hoping to see the

claimant at 9:00 am but had not heard from him. The claimant replied at 3:03 pm to say he had “literally” just woken up. He had taken some painkillers when his leg woke him up in the early hours and had been asleep since. He said that he had been in much better health before he had Covid, and that this was frustrating.

88. MN then replied on the 6th of April saying he was not sure how they were going to get the claimant back to work and that they needed to have a plan. He said that it was necessary to reschedule the meeting to discuss the duration of the claimant's phased return and that for that to happen, the claimant would need to come in at either 9:00 am or 12 noon. He said that if he remembered correctly the claimant would need to do 25% of his contracted hours and that they needed to create a routine and give the claimant something to work towards.MN said that he had designated the previous day's shift as unauthorised unpaid leave, but that the claimant might prefer for it to be added to his sick leave. He asked the claimant to let him know what he wanted to do and how they were going to approach this.

89. We can see from page 273 in the file that later in the day on the 6th of April, the claimant contacted MN to say that he was going to come in for 3:15pm that day as he had the previous week so he could leave for 5:15pm and get to his therapy appointment for 6pm, or if that was not possible, the claimant suggested working from 9pm until 12. MN replied at 5:51pm that day saying that he was trying to get on with the shift patterns and there was no shift starting at 3:15. He suggested having a chat to the claimant the following day, the 7th of April 2022, to agree something.

90. The claimant did not return to work on the 7th of April.

91. On page 286 to 287, we can see that the claimant sent MN an e-mail on the 12th of April 2022 with the subject of “current struggles”. He said that he was currently “struggling a little” because one of his main issues was with his working relationship with the Trust and the Trust's ability to work with him and support him. He set out some background information about why the Trust had in his view “started upon” sickness reviews. We have seen that the sickness management process had been continuing for about a year at that stage. He said that he found it unacceptable that he worked for a Trust that provided treatment to people with mental health issues but that the Trust, in his view, had antagonised some of his symptoms such as paranoia and mistrust, and that there was a lack of any kind of compassion or common sense when it came to remedying these issues or handling someone with chronic mental health issues, as he put it.

92. Importantly, he said that he would like to reiterate that none of this reflected on MN, and he felt at the moment that MN was the only person he could trust in the process and that MN actually did understand and show him compassion and listen to what he was saying.

93. He said that dealing with “all of this” while trying to return to normality had once again hindered his recovery. He said that both he and Occupational Health had mentioned the lack of trust, but no-one had done anything to remedy that except say “sorry” in response to an e-mail. Again, we note that in referring to lack of trust the Occupational Health advisor in January 2022 had been quoting the claimant’s views rather than giving any of their own. He ended by saying that he was frustrated in that he wanted to get back to normal to continue with his recovery and he hated the fact that

the impact on his mental health was being exacerbated by the Mental Health Trust he worked for.

94. At certain points in the hearing, the claimant referred to MN as his "caregiver" turned abuser. We should point out that MN was at no point a caregiver to the claimant, but rather his line manager, albeit a supportive line manager. We reject the suggestion that MN, through applying the Trust's attendance management policies or for any other reason was abusive of the claimant. All the evidence we have seen suggests the opposite, that MN did not rigidly apply the Trust's policies but rather attempted as best he could to encourage and support the claimant to come back to work, as he regarded the claimant as a good worker when he was at work. The claimant was not a patient of the respondent trust but its employee, employed to help deliver its services to members of the community who were struggling with severe mental health difficulties.

95. The same day, 12th of April 2022, MN replied to the claimant saying he was sorry to hear that the claimant was struggling and that he had lost confidence in the Trust. He said that he had discussed the e-mail with Gilbert Orwako ("GO", the Modern Matron in charge of Bluebell Ward where the claimant worked and another ward) and Francisco Langan ("FL"). He said that the subject access data would be sent soon and that regarding the sickness review meeting, the process had been in place for a while, it was not new.

96. He said he would like to invite the claimant to a formal meeting with Gilbert, Francesco and himself on the 21st of April at 11:00am to discuss the support they could provide to get him back to work. He offered the choice of the meeting taking place on Microsoft Teams (virtually) or in person. He said if he didn't hear back from the claimant by Friday they would continue with the Microsoft Teams meeting. He said that as with any formal meeting the claimant was welcome to invite a union representative or a colleague to accompany him. He concluded by sending the claimant his kind regards.

97. Again, on the 12th of April, the claimant replied saying that, as mentioned before, he had trust issues with colleagues and therefore did not feel there was anyone at the Trust who had his best interests at heart. He accepted this may be down to his illness as such, but he requested that a reasonable adjustment be made to allow him to bring a family member or friend to the meeting in place of a colleague or union representative. He said that he was not part of a union and as mentioned before there was no one he fully trusted to bring with him, especially when the meetings can contain sensitive data.MN replied the same evening and thanked the claimant for getting back to him. He copied Gilbert and FL regarding the claimant's request saying they could provide more accurate information and advice.

98. In fact, on the 14th of April, see page 285, Francesco Langan (FL) e-mailed the claimant to say that whilst the claimant may want to bring a trade union representative or workplace colleague, unfortunately a relative or friend was not part of the Trust policies and processes.

99. In his evidence before us, FL denied that he had refused to allow the claimant to bring relative or friend who was not employed by the Trust to the sickness review meeting, saying that his role was simply to inform and advise the decision makers such as MN or GO. Looked at objectively, however, we find that the e-mail of the 14th of April 2022 from Mr Langan does include a decision to refuse the claimant permission to bring a

relative or friend to the sickness review meeting scheduled for the 21st of April 2022, and that any objective reader would have construed it in that way.

100. On the 15th of April, the claimant replied to FL, copied to MN and GO, saying that in light of recent events with the Trust being unwilling to make the reasonable adjustment to allow him to be accompanied by a friend or relative, he felt he was not being supported with his disability, going as far as being discriminated against. He said that as he would be at an unfair advantage compared to someone not coping with a disability, then he requested that the review meeting on the 21st of April be held in writing. He said that he did not feel with his current state of health, “now with the added stress the Trust is …creating" that he would be in a competent state of mind to fully comprehend the meeting face to face whilst also combating his own stresses or triggers.

101. He said he would feel he was being forced into a vulnerable situation where he could be influenced to say something he did not agree with or would not understand fully what he was agreeing to. He said that he felt his disability put him at an entirely unfair disadvantage (the e-mail says advantage, but the meaning is clear). So, he was now requesting that the formal sickness review meeting be held in writing. As FL reminded us in his evidence, this was against a background where the claimant had been seen by an Occupational Health advisor less than two weeks previously who had, with knowledge of the claimant’s mental health conditions, considered that the claimant was fit to undertake his phased return to work. Indeed, the claimant had agreed at the Occupational Health meeting that he was fit for his phased return to work to continue.

102. In his evidence before us, MN accepted that by mid-April, he was aware that due to the claimant’s declared lack of trust in any of the Trust employees apart from MN himself, which the claimant had attributed to his mental health condition, MN was aware that the claimant would be at a substantial disadvantage compared to non-disabled employees if he could not bring a friend or relative who was not employed by the Trust to the sickness review meeting.

103. On the 13th of April 2022 the claimant had sent MN, copied to FL and GO, a lengthy e-mail about the Bradford scoring system and its impact to his recovery and support. We should point out that (by this stage certainly), the Trust was not taking action with respect to the claimant’s absence based on the triggers in the Bradford scoring system but rather with regard to the length of his absence and its impact on its ability to deliver its services, and was taking an extremely flexible attitude towards the trigger points in its Manager’s Toolkit to the benefit of the claimant.

104. The e-mail expressed the claimant's feelings about the Trust sickness policy also. He said he had never received a satisfactory response to his concerns. The e-mail gives significant detail about the claimant’s ill health, including his physical health. The claimant said he was extremely confused as to why the Trust continued to use the Bradford scoring tool in a blanket approach. It is clear from the evidence and our findings set out above that, in fact, they had not applied this system to him in a “blanket” fashion but had adjusted the trigger points in their policies to a significant extent to assist him.

105. Mr Langan replied on page 283 saying that the Trust was more than happy to discuss any concerns during the sickness absence meeting

which was arranged for the 21st of April 2022. He explained that the Trust used the Bradford scoring factor to monitor sickness absence and identify members of staff that might require support to sustain their attendance at work rather than to punish or take disciplinary action against anyone. He emphasised that sickness absence review meetings were important as they gave the Trust an opportunity to have a conversation regarding well-being, and to look at what medical support was being received. They would also review the Occupational Health report and consider further referral to Occupational Health and any other support that may be required. This is on page 283.

106. The claimant replied on the 14th of April 2022 (at pages 283 and 284) suggesting that FL had not read his whole e-mail and saying that the Trust was unwilling to make a reasonable adjustment for his illness. He said it was "disheartening to feel so discriminated against" by "a Trust that is supposed to deal with mental health".

107. On the 20th of April 2022 at 9:43pm, MN emailed the claimant, copied to FL and GO, to say that the sickness management meeting was scheduled for the following day, as had been discussed the previous week. He said that he was aware that the claimant had been emailing FL with his request to be accompanied by a family member. He said that unfortunately, he had been advised that the meeting cannot take place in writing and must be face to face on Teams as it would be necessary to establish what support the claimant would need, and this should be discussed collaboratively so that the claimant was able to safely return to work and feel supported. He included a script that was normally used at the review meeting. He said that it was used as a prompt and helped to capture as much information as possible. He said that the process was about finding facts as to how the Trust could support the claimant with the difficulties he was facing. He asked the claimant to let him know if he was able to attend, and said that if not, the meeting could be rescheduled to another date. He said he could complete another Occupational Health referral if the claimant wished him to do so.

108. In the early hours of the following morning, 21st April 2022, the claimant contacted MN said that he found it unfortunate that the Trust had been unable to support him with what he thought were very reasonable requests. He said there had been little or no investigation as to whether his requests would have a business impact. The Trust was just using the excuse of applying policies. He said that policies should not directly or indirectly affect an employee's ability to do their job, including attending meetings. He said it was unfortunate that the Trust was unwilling to support him to attend the meeting to discuss how they could support him. He concluded that under threat of disciplinary action "of" (the claimant may have meant "for") non-attendance, the refusal of any support for him to attend and against his best judgement, he had no choice but to attend the meeting the following day.

109. On the 27th of April 2022, page 302/3, MN wrote to the claimant referring to the sickness review meeting which had been held on the 21st of April via Microsoft Teams. He referred to the fact that the claimant had asked if he could be accompanied by a relative during the meeting and that MN had advised him that unfortunately that was not possible in line with the Trust policies. The claimant took issue with MN's assertion in the letter that the claimant was "happy to continue unaccompanied" when he questioned MN at the hearing before us, and MN accepted that "happy"

may not be the appropriate term, but that the claimant did participate in the meeting.

110. The letter records that two previous sickness review meetings, on the 6th of December 2021 on the 18th of March 2022 had been cancelled as the claimant was off sick, and that they had last met formally to discuss the claimant's sickness absence on the 28th of September 2021. It was recorded that the claimant had seen Occupational Health on the 31st of January and 4th of April 2022 and had another appointment booked for the 26th of April 2022. The letter records the claimant's periods of absence from 12th of June 2021, including periods of paid leave between 2nd of October 2021 to 10th of October 2021 and annual leave between the 18th of October 2021 and the 1st of December 2022. It records that the claimant returned to work for one day on the 14th of March 2022 and after returning on the 29th had been off due to the issue regarding his knee. The claimant was reminded of the importance of providing sick notes as any period not covered by them would be recorded as unauthorised unpaid leave. The claimant does not appear to have been certified unfit for work at the date of the 21 April 2022 meeting.

111. The claimant had confirmed that his knee was now better and agreed with MN that the phased return would be restarted with weeks one and two at 25% of contracted hours within three days, weeks three and four at 50% of contracted hours within four days and weeks five and six at 75% of contracted hours within four or five days. FL advised that phased returns were for up to four to six weeks long and if the claimant wished to extend the period of phased return, he would need to investigate using some of his annual leave or submit a flexible working request to reduce his hours on a temporary basis.

112. In his evidence and as we accept, FL explained that phased returns were usually no longer than six weeks because of the cost and staffing implications. If a phased return continued for longer than six weeks, it would adversely impact the Trust's budget as they would have to continue to pay for agency or bank staff to cover the staff member's absence, at a higher rate than the employee's pay, the employee being supernumerary during a phased return, and that use of agency/"bank" staff led to inconsistency of support to patients. It could not be guaranteed that the same agency worker would attend consistently, and this reduced the level of support to in-patients. These were the reasons why a phased return was not usually extended beyond 6 weeks, but if it proved to be necessary, the Trust would ask employees to consider using annual leave or to submit a flexible working request to work for fewer hours and therefore less pay, which would, at least, reduce the impact on the Trust's budget.

113. We find that in the meeting on the 21st of April 2022, FL did not say that the claimant could not have a phased return of more than six weeks if that was considered to be appropriate once the phased return had commenced. He was simply advising that if a phased return of more than six weeks was required or requested, the claimant would have to consider using up some of his annual leave or submitting a temporary flexible working request for reduced hours. In fact, whether to extend the phased return for more than six weeks was never considered as the claimant never re-commenced his phased return.

114. The claimant had agreed to text MN over the weekend to confirm his start date for the week commencing 25th of April 2023. The claimant

had told MN that he attended face to face therapy on Wednesdays at 6:00pm and MN advised he would take account of that when allocating shifts. They had also agreed that the claimant would start at 9:00 am.

115. At the meeting, it was agreed that the claimant would let MN know if he felt that anything at work was contributing to his stress and that he would reach out before feeling too stressed. It was agreed that the claimant would liaise with the nurse in charge to inform them how he was feeling on the day and that he would build up his tasks gradually.

116. MN agreed that a sickness absence meeting would be arranged for the last week of the claimant's phased return so that progress could be reviewed and to identify any further support the claimant might require. This reinforces our view that the claimant was not told within the sickness review meeting on the 21st of April 2022 that a phased return of more than six weeks was out of the question or could not be offered, but rather that a review would take place in the last week and that if a phased return of more than six weeks was requested or required the claimant would have to consider using the measures suggested by FL

117. MN informed the claimant that he would be leaving the ward on which the claimant worked soon and moving to another post within the Trust, but that he would feed back the outcome of the meeting to GO so that the claimant had a consistent point of contact until a new ward manager started. The claimant was again informed about the Trust's Confidential Care service. He was encouraged to contact MN if he had any questions about the meeting or the process.

118. The claimant had not returned to work by the 26th of April 2022, when he did attend an Occupational Health review. This took place by video. Again, there was verbal consent from the claimant to go ahead with the review.

119. The assessor found that the claimant was fit to work with adjustments and that short term or temporary adjustments were recommended. These were to modify work patterns or management systems and that the adjustments should end by the 7th of July 2022. The advised target return to work date was the 26th of April 2022, that is the day of the review.

120. The Occupational Health advisor said that a phased return to work was required with a duration of "four weeks plus". This is on page 297.

121. The claimant had told the advisor that he had returned to work today, the 26th of April 2022. He told the advisor that a six-week phased return had been agreed. Due to the nature of the claimant's mental health diagnosis and prolonged absence, a referral consultation had been made to the Occupational Health physician by the advisor, who is described as a Mental Health Practitioner.

122. In his statement at 26.3, the claimant says that during the meeting on the 21st of April 2022 he felt pressured and "cornered" into agreeing terms that he did not fully understand or that he did not think were in his best interest. He says that the "coercive environment" exacerbated his anxiety and reinforced his belief that the Trust was "intentionally setting me up for failure to expedite my removal on grounds of capability. Despite my vulnerability and clear expressions of distress, the Trust persisted in subjecting me to these intimidating and stressful situations, contrary to the compassionate and collaborative approach promised by FL".

123. Having heard and seen both MN and FL, we consider that looked at objectively, the sickness review meeting on the 21st of April 2021 was not conducted in a pressurised or coercive manner, although subjectively the claimant may have viewed it in this way.

124. The claimant confirmed that he had been made aware of the referral to Occupational Health prior to the date of the consultation and provided further verbal consent to proceed that day. We say this because the claimant has complained in his witness statement that he did not consent to the Occupational Health referrals or the Occupational Health advisors becoming aware of his condition. The claimant had been made aware of the general content of the report and had requested to receive a copy via e-mail at the same time as the employer.

125. The advisor acknowledged that disability under the Equality Act 2010 is not a decision she could make but based on the information with which she had been provided, she considered that the claimant may be covered by the Equality Act due to the chronic long-term nature of his condition and the likelihood of recurrence. She advised that reasonable adjustments be considered if required.

126. In answer to whether the claimant was fit to continue in their current post, she replied “pending review with the Occupational Health physician”. In respect of whether the claimant was medically fit to attend a disciplinary hearing or meeting, she said that due to the nature of the claimant’s mental health diagnosis and prolonged absence from the workplace, fitness to work and recommendations would be provided in full by the Occupational Health physician. She said that the claimant's medical condition had lasted for 12 months or longer and for the first time she referred to the diagnosis of EUPD as well as PTSD and other conditions. The claimant informed us that he had not previously told the Trust's medical advisors about his diagnosis of EUPD. He told us on several occasions in his evidence that he did not believe that the occupational health advisors (including the physician he saw in June 2022) were competent to deal with his particular circumstances and that he did not trust them. The advisor recorded on occasions the claimant struggled with tasks of daily living – p299.

127. The claimant was off sick again by the 27th of April 2022 - page 301. FL was going to ask the Occupational Health physician to clarify a couple of matters before advising on the next steps – p301. He states that Occupational Health had agreed with the phased return and plan, although it was now known that the claimant was not able to sustain his attendance. MN was clearly not aware that the claimant was off sick again when his letter was sent out on the 27th of April – p302.

128. On the 28th of April 2022, at p305, FL wrote to the Occupational Health advisors asking for confirmation of the date and time of the claimant’s appointment with the Occupational Health physician. FL attached the claimant’s job description for consideration by the physician. He asked if the physician would be able to assess whether there would be any benefit in considering redeployment options for the claimant and secondly the claimant's ability to effectively manage a sustained return to work in view of his sickness absence record, which was attached. The outcome letter from the 21st of April sickness review was also attached. By the morning of 29th of April, FL had been told that Occupational Health did not think the physician’s appointment with the claimant would take place until after the June bank holiday due to availability of appointments.

129. On the 10th of May 2022, the claimant's GP issued a statement of fitness for work which said that the claimant had been unfit from the 24th of April 2022 to the 10th of May 2022 by reason of PTSD. As with previous fit notes, this was issued significantly after the first day of absence. On the 27th of May 2022, a further fit note was issued showing that the claimant was not fit for work from the 10th of May to the 29th of May again due to PTSD. Then, on the 7th of June 2022 the GP certified that the claimant was not fit for work from the 29th of May to the 6th of June again due to PTSD. At this point, due to either late receipt of fit notes or a failure by the reception to pass them on to the claimant's manager, the period of absence from the 25th of May 2022 to the 12th of June 2022 and subsequently until August 2022 was recorded as unauthorised unpaid leave. This was later rectified.

130. At paragraph 26.4 of his statement, the claimant says that the transition to a new manager and the sharing of personal information with Occupational Health were conducted without his knowledge or consent. We accept the evidence of MN that the transition to a new manager, because MN was leaving his post as ward manager, was communicated to the claimant on the 21st of April 2022 and that the claimant was aware of and had consented to the referral to Occupational Health and the consequential sharing of personal information.

131. The claimant was then reviewed by the Occupational Health physician by telephone on the 23rd of June 2022. The report starts at page 311. The claimant was recorded as fit to work and that no adjustments were likely to be required. A target of a return-to-work date of the 27th of June 2022 was advised. A phased return of two weeks was recommended. The substance of the report is on page 313. It is stated to be completed by Dr Imtiaz Yusuf, a consultant occupational physician. Doctor Yusuf refers to two mental health issues, PTSD and EUPD, the latter of which was not currently impacting on the claimant's life. Dr Yusuf said that PTSD was the main reason for the claimant's current sickness absence. He said the claimant had developed symptoms of paranoia, fear and anxiety, and insomnia. He said that the claimant was now feeling better and intended to return to work on the 27th of June 2022. He said that the claimant could now manage the normal activities of daily living and that his cognitive function was normal. He had advised EMDR (rapid eye movement) therapy. He thought the prognosis was no better.

132. In answer to the questions posed, he said that in his opinion the claimant's current ill health was not caused by his work. He was fit to return to work on the 27th of June 2022 to his normal role. He advised that for the initial two weeks, the claimant should work half days. After this he may resume his full hours. His opinion was that the claimant was covered by the Equality Act. He believed it would be a reasonable adjustment to allow the claimant a higher trigger for sickness absence management, although we have seen that the respondent did not rigidly apply its sickness management triggers to the claimant in any event. He said that he did not believe that redeployment was needed. His opinion was that the given the nature of the claimant's mental health conditions, future relapse was possible, but he could not estimate the frequency or severity. He could not predict the claimant's future attendance. He did not believe that any other referrals were necessary. The situation should be reviewed as required. As we have noted above and referred to below, the claimant did not accept Dr Yusuf's conclusions, and he told us that he did

not consider the doctor competent to assess his condition. He told us that he did not always share full details of his condition with the occupational health advisors or physician.

133. At paragraph 30.1 of his statement, the claimant complains that although he had agreed with MN that they would communicate by text, GO failed to contact him in accordance with his wishes and had tried to contact him via a disconnected landline. In his evidence, however, the claimant was unclear as to whether the landline had been disconnected or that, as he said, he never answered the landline in any case. On page 320 we can see that by the 13th of July, GO had decided to try to contact the claimant on his personal e-mail and was asking him to share his personal contact numbers so that he could contact him. The claimant replied six days later, on the 19th of July, saying that he had just seen the e-mail. He said that his house phone had been disconnected for about a year and that he had updated that when he updated the Trust about his mobile phone number. He says that sometimes if there was a call from an unknown number on his mobile phone, he may divert those calls.

134. We accepted the evidence of GO that he did try to call the claimant both on his landline and on his mobile phone on several occasions between the 27th of April and early July 2022. We also accepted his evidence that at the time he was extremely busy, because, as the Modern Matron with oversight of two wards, he was additionally having to carry out an operational role in respect of management of both wards, as both ward managers had left and had not been replaced.

135. Whilst we accept that GO would have been extremely busy at that time, we do think that it would have been reasonable for him to have attempted to contact the claimant by other means earlier than he did, and certainly before the claimant attended his next Occupational Health meeting on the 23rd of June 2022. GO eventually contacted the claimant on his personal e-mail after speaking to MN about his difficulty, and we were given no reason why he could not have spoken to MN about this and obtained the email address earlier. We also note, however, that in the respondent's Sickness Absence policy and procedure at page 104 and the Supporting Attendance policy and procedure (from June 2022) at page 178, employees also have a responsibility to communicate with their manager. According to the evidence we have seen, the claimant had not communicated directly with GO prior to the latter's email of 13 July 2022, despite having been told that GO was to manage him from late April 2022.

136. Although there was no complaint from the claimant about lack of contact from GO in the form of emails or other contact with the Trust before the 19th of July, once he had read GO's e-mail and had replied to it, he did begin to complain about lack of contact. We can see this on pages 321 of the bundle.

137. On the 28th of July, the claimant contacted FL to say that he was frustrated by having been contacted only once since MN left. He said he had not had confirmation of the sick notes or correspondence he had delivered, and no one had given him any information. He had not received any pay and not been told why, and this was affecting his mental health. FL replied to the claimant, copying in Michelle Mbayiwa ("MM"), to say that Michelle was supporting GO in the interim whilst a new ward manager was recruited and that Michelle had arranged a meeting to catch

up, review the claimant's well-being and discuss options moving forward. FL believed that the meeting invitation was already in the post.

138. We can see on page 341 that on the 19th of July Hannah Jungius, an HR advisor, had contacted MM asking for her availability for a final formal sickness review meeting to take place. She said it was interesting that the recent Occupational Health report advised that the claimant was fit to return to work and that MM may want to consider referring again to get up-to-date advice or if there were questions that needed to be clarified.

139. The claimant has laid stress on the fact that a "final" formal sickness review meeting is referred to. He has suggested that this indicates that there was some plan or conspiracy to get rid of him. In fact, we have seen that the respondent's Management Toolkit does talk about there being a first sickness absence management review and then a "final" formal sickness absence management review before moving on to the capability stage of the procedure. We do not consider that anything more than that can be read into Ms Jungius' use of this phrase.

140. The claimant then sent FL two further emails on page 322, firstly on the 28th of July to say that he did not want MM to have any involvement with him. He left her team in 2019. He makes various comments about MM and asked why he had not received confirmation of correspondence he had sent, including a doctor's letter which had cost him £25. On the 29th of July, he added that he thought FL was ignoring his emails and questions. He said that this was the opposite of supporting him. He said that if FL would like him to attend a meeting to offer support, FL should respond to his questions and emails instead of ignoring them. He said he would not be attending a meeting for support until he was confident that the Trust was doing what they could to support him, including responding to his questions. On the same day, he asked FL to send him the formal grievance policy, absence and sickness policies and any other policy that he was referring to in his process. He said he wanted the full policies, not shortened or incomplete policies and if the policy referred to another policy he expected to see the referenced policy also.

141. On the 29th of July at 13.02, FL replied, apologising for the delay in getting back to the claimant and hoping that he was well. He said he was not always as available to reply to his emails as he would like to be. He said he was very concerned about what the claimant said about MM and asked if a formal complaint had been submitted at the time. He referred to a previous letter (from 2019) when the claimant advised Michelle that he was grateful for having had the opportunity to work with her.

142. FL confirmed that the claimant's absence was recorded as unpaid leave since the 25th of May 2022. He said that GO was on leave and should be returning the following Monday. FL would ask him to confirm the last time he received a sick note from the claimant and if he had received any other correspondence. He attached the Sickness Absence policy and Early Resolution policy. He said he was looking forward to meeting the claimant as he thought it was always better to catch up face to face (even if it was over a screen) rather than by e-mail but asked the claimant not to hesitate to contact him in the meantime if he had any further queries.

143. The claimant replied the same day saying that most people remaining within a company will not make accusations against their

managers. He made further allegations about MM. He said he wasn't looking forward to the face-to-face meeting as it was going to be very stressful for him - he would feel backed into a corner and unsupported whilst forced to work within the Trust's policies and restrictions. He said that he had been off for a long time and had consistently provided doctors' notes, and it was ludicrous to assume that he was no longer covered by one. In fact, as we have seen, the claimant often supplied backdated GP's certificates long after the previous fit note expired. He said he thought it was "unlawful deduction of wages" not to pay him. He said he had provided notes constantly and dropped them off at reception and it was not his responsibility to make sure the Trust kept his correspondence up to date. He complained again about the lack of contact. He said that the absence policy sent had an expired review date of 2021 and that he wanted an updated version.

144. During evidence, the respondent pointed out that the claimant had forwarded the attachments from FL's e-mail to his brother, who is said to be a Human Resources professional. The claimant says, and we accept, that his brother's role was simply to help him deal with written documents and try to ensure that the claimant looked at them objectively, rather than with a distorted perspective due to his mental health condition.

145. FL replied again on the 29th of July - page 324, to say that the Trust could not work upon assumptions about an employee's fitness and needed to see the originals of sick notes. He repeated that GO should be back on the following Monday and so would be able to confirm whether or not the sick notes had been received in reception or by post. FL attached the Supporting Attendance policy (p173) which replaced the Sickness Absence policy from June 2022. He said that anyone who was already being supported under the previous policy would continue to be supported under it (which would apply to the claimant), but this would not put anyone at a disadvantage as the principles were the same.

146. GO replied on the 1st of August 2022 saying he was attending "smart week", which is a training week, the week the claimant replied to his e-mail and was on annual leave the week after. He said that due to the volume of work he had to cover (due to the lack of a new manager for Bluebell ward), MM would be taking over the sickness management for his case and working with FL to move things forward. He would give them the claimant's new contact number so they could support him. On the 1st of August 2022, the claimant replied to say that he was more concerned about what happened to his sick notes and why he hadn't been paid. We have seen that the claimant was informed that his sick pay was due to run out back in March 2022, but had been reinstated after he returned to work briefly.

147. The claimant said that the requirement to hand deliver fit notes was causing unnecessary anxiety and exacerbating his condition. He said he had taken advice and that if the respondent continued to refuse to accept an electronic copy and stopped his sickness payments as a result, this would amount to an unlawful deduction of wages and discrimination on the grounds of his mental illness. He copied this e-mail to his brother. He asked the Trust to confirm if it was willing to accept photographic evidence of his fit notes for its records -p326.

148. GO replied again the same day saying he appreciated it would be difficult for the claimant without having any payments that may be due. He asked when the claimant had sent in his sick notes and who rejected

or declined to receive them. He said he had not requested that the claimant hand delivered his sick notes. He was aware that staff could forward electronic sick notes to line managers. He said that to date he had not received any sick notes covering the claimant's absence. He pointed out that the sickness policy highlights how pay would be impacted in relation to sickness absence. He said the sickness absence management meeting had been set up for the 8th of August 2022 when concerns could be discussed further.

149. On the 1st of August, the claimant replied that he was previously scanning the sick notes himself and sending them to MN via e-mail. He said he no longer had a scanner available so he sent in photo evidence and was told that payroll wouldn't accept this. He said he was told to send a scanned copy or hand over a copy to be scanned. He had subsequently photocopied versions and arranged for them to be handed into reception by a friend, usually in the evening.

150. On the 2nd of August, the claimant received a letter from the respondent's Head of Payroll Services informing him that he had been overpaid due to delayed notification that the claimant had been on unpaid leave between the 25th of April and 30th of June 2022.

151. Also on the 2nd of August 2022, the claimant wrote to FL and GO thanking them for the Teams invite for the sickness review on the 8th of August. He said he wanted to confirm a few things before he could confirm his attendance. He asked whether Michelle was still going to attend and if so in what capacity. He said he was still waiting for the issue of his pay to be resolved and wanted confirmation that photo evidence could be used. He said that there appeared to be delay on the part of the Trust in this respect. He also asked for written confirmation as to whether he had now exhausted his entitlement to sick pay. If his sick pay was not exhausted, he asked for an emergency payment. He said that he could not in good faith go ahead with the meeting with the aim of supporting him when the Trust was presenting him with “extra hurdles” to his transition back to working. He said the issues were having a negative impact on his mental health and causing unnecessary stress. He said he did not have funds to purchase his medication and that this was preventing his return to work. If the issues were not resolved by the 5th of August at 1:00pm he would not be mentally capable of attending the sickness review. Once the matters were resolved, he would be open to having the meeting rescheduled.

152. On the 4th of August, FL replied to say that Michelle was not involved in the process at all. Only GO and FL would be attending the meeting with the claimant. He confirmed that payroll services were happy to receive a digital copy of the fit notes. He asked that the claimant send them to GO to be forwarded to payroll. He said that according to information provided by payroll services, the claimant had not exhausted his entitlement to sick pay. The claimant then forwarded the most recent three sick notes on the 5th of August at 2:00pm.

153. On the 7th of August 2022 the claimant wrote to FL, copied to GO, to say that he would not be attending the meeting scheduled for Monday the 8th because, he said of the Trust's inability to support him and resolve issues within a reasonable time frame. He complained that it had taken 3 days to confirm if he could send a photograph of a sick note. He complained also that he should have been informed of the dates for which sick notes were required. He complained that he had only just been

told in August that payroll did not have sick notes for most of May and June. He complained about a lack of response when he sent in his sick notes, and that when he sent in three sick notes on the 5th of August, he was not told immediately that there were some missing and that the Trust had lost more than three. He referred to the letter from payroll suggesting that he had been overpaid as a threatening letter. He complained that those matters amounted to unsupportive conduct and contributed to his current mental health state. He would like the Trust to define what they meant by "support". He commented that he thought that the Trust may be in breach of the GDPR if they had lost track of the sick notes he had handed in. He wanted to know what had been done to investigate this. He expected a confirmation of his e-mail. He wanted a detailed explanation for all of his issues.

154. 7th of August was a Sunday so on the 8th of August FL replied. He said that it was unfortunate that the claimant had decided not to attend the meeting arranged for that afternoon, as the purpose of the meeting was to discuss how the Trust could support the claimant and discuss any issues that the claimant believed needed resolving. He dealt with various matters referred to in the claimant's e-mail. He gave a direct contact number and e-mail address for the respondent's payroll services. He sent the claimant further copies of the old sickness absence policy, the new supporting attendance policy and the Manager's Toolkit. He said that they contained relevant information about supporting members of staff during sickness absence. GO had informed FL that he had checked with reception but that the fit notes had not been received at the hospital. He confirmed that a sickness absence meeting had been rearranged for the 11th of August to review the claimant's well-being and any support that he may require as well as discussing in further detail the claimant's concerns.

155. On the 8th of August also, the claimant replied to FL and copied GO complaining about the Trust's inability to support him to attend the meeting and disputing much of what FL had said. He did not accept that his fit notes had not been received by reception. He complained again about lack of contact from GO. He referred to guidance on the ACAS website.

156. On the 8th of August also, p376-7, a letter was sent by GO to the claimant. It confirmed that GO had rescheduled the meeting for the 11th of August 2022 via Microsoft Teams. The letter explained the purpose of the meeting and said that in addition to hearing about the claimant's progress and identifying any support that the Trust could provide to facilitate his return to work, the Occupational Health report dated 23rd of June would be reviewed as well as any advice it provided. They would also explore any resources the Trust may be able to offer to support the claimant's well-being and improvement in his current sickness levels. The claimant was told the meeting would go ahead in his absence if he failed to attend without providing a valid reason and he was offered the right to be accompanied by a trade union representative or work place colleague. The claimant was again referred to the confidential care service.

157. The claimant replied on the 10th of August to Hannah Jungius, copied to FL and GO. He said that he would attend the meeting "under duress and at the end of bullying and harassment and being held to ransom to do so". He said he couldn't assure the Trust that he would attend in a fully fit state of health "with these highlighted issues and taking

account of the current [level of] engagement" he had received so far for his concerns, but he had been made aware that he had no other choice.

158. The claimant did attend the sickness review meeting on the 11th of August. GO and FL attended also. The claimant had repeated that he was attending the meeting under duress but GO informed him that the intention of the meeting was to get an update on his well-being and that GO was not forcing him to attend. The letter also says that the claimant acknowledged that he was entitled to be accompanied by a trade union or work colleague, but as the Trust's policies did not make provision for family members "you were happy to go ahead on your own". The claimant again took issue with this phraseology, and GO accepted, in answer to a question from Tribunal member Ms Tankard, that it would have been more appropriate to say that the claimant was willing to go ahead on his own.

159. We concluded from the content of the letter that there had been discussion at the sickness absence review meeting as to whether the claimant was to be allowed to bring a family member with him and that this had been refused.

160. At the meeting, there was a discussion about the sick notes and GO agreed to liaise with payroll services to ensure that the claimant was paid. He said he was sorry that the claimant had not been able to return to work due to his mental health. There was a discussion about the Occupational Health report dated the 23rd of June 2022 and its content. The claimant advised GO that he did not agree with the report and that he did not currently feel fit to return to work. He said he did not think it was appropriate for someone who had not worked full time for nearly two years to return to work on a phased return of two weeks. FL advised the claimant that the advice provided by OH was only guidance and that the Trust could discuss a phased return to work that worked for the claimant once he confirmed he was ready to return to work.

161. The claimant was asked if there was anything that could be done to support his return to work. He repeated his concerns about the issue with the sick notes and said it was not appropriate to have suggested that MM should be involved. GO explained the reasons that this had happened, namely that he was having to cover two wards from an operational point of view as well as the Modern Matron role.

162. The claimant complained that he had never been sent a copy of the reasonable adjustments policy and FL said that he would send the claimant a copy of it. The claimant said that he had more questions but felt that he was not getting appropriate responses so would not ask them.

163. GO told the claimant that he felt that there was no further support he could offer to support the claimant's return to work and sustain his attendance. He said that he had made the decision to refer the claimant to a capability hearing so that a Divisional Director could review the support that had been offered and decide what to do. He told the claimant that the potential outcome could include a further review period, a referral to Occupational Health, redeployment, or termination of his employment with the respondent. The claimant complains that in the letter inviting him to the meeting there had been no mention of the capability meeting. Whilst this is true, the claimant had also been supplied with copies of the current and previous Sickness management procedures and of the Managers' Toolkit, which refer to that possibility.

164. The claimant was again informed about the respondent's "Well-being Matters" psychological support and advice service. In evidence before us, the claimant accepted that he had received information about those services but said that he was already accessing therapy privately and that it was not advisable to seek two sources of psychological support at once.

165. On the 16th of August 2022, page 383, the claimant was again certified as unfit for work from the 11th of August 2022 to the 1st of October 2022 with PTSD.

166. The claimant sent further sick notes for the period when the respondent said they had not been received on the 19th of August 2022, page 385. On the same date, the claimant sent a formal grievance to the respondent, see page 387. Hannah Jungius ("HJ") acknowledged receipt of the grievance on the same day.

167. The grievance is on pages 388 to 414. The claimant says that he was writing in line with the early resolution policy ORG 022, p109, and that it was a formal grievance. He said that due to the nature of his complaint and its contents he did not believe that it would be appropriate to handle this under the informal resolution procedure and wanted it to be dealt with under the formal resolution procedure. The grievance runs to 20 paragraphs and covers most of the matters raised in his claim to the Employment Tribunal (apart, for example from his complaint that he should not have been transferred to be dealt with under the capability policy and complaints about the capability meeting and his dismissal, and about the outcome of his grievance), and some additional matters such as the respondent's failure to hold a workplace passport meeting with him after the reasonable adjustments policy was implemented in June 2022. Of course, the claimant had not been at work (save for the meeting by Teams on 11 August 2022) since the implementation of the reasonable adjustments policy, nor had he indicated that he was ready to return to work.

168. The Early Resolution Policy and Procedure, ORG 022, starts on page 109 in our bundle. Page 115 provides information about the formal resolution procedure. Paragraph 7.2 says that an employee should confirm in writing if they wish to progress their complaint under the formal procedure. The written notification should be sent to the line manager unless there is a conflict of interest, in this case the complaint should be raised with the line manager's manager or the HR department. In this case the claimant had made complaints about his line managers and submitted his grievance to HR.

169. Paragraph 7.3 on page 116 says that the employee should explain why their complaint is being raised through the formal resolution procedure and outline what outcomes they were seeking to resolve their complaint.

170. If it is not appropriate for the line manager to undertake any initial inquiries, paragraph 7.4 provides that an alternative manager will conduct the preliminary fact finding. The purpose of this stage is to assess whether the complaint warrants full investigation or whether further consideration should be given to any of the informal resolution options outlined in 6.3. At this stage, the outcome may be that there is insufficient evidence to support the allegations and therefore a full investigation is not required, and the matter will be closed. Paragraph 6.3 on page 115 refers to the options available to support informal resolution, including a

resolution meeting between individuals, informal discussion within the department, mediation, a facilitative conversation, coaching or mentoring.

171. On the 26th of August, the claimant was notified that he had exhausted his sick pay, see pages 417-419. He was sent information about various sources of help. Stuart Overhill, HR Lead for Business Partnering, acknowledged that the process had been stressful and exhausting for the claimant.

172. On the 6th of September 2022, the claimant received a further letter from the respondent's payroll services explaining that his absence had now been corrected from unpaid leave to sickness absence and that this meant he should have received half sick pay from 26th of April 2022 and no sick pay from the 3rd of June 2022. There had been an overpayment of £1719.98. This amount was recovered from the claimant's final salary and the claimant has withdrawn his complaint of unauthorised deduction of wages in this respect.

173. On the same date, the claimant was informed on behalf of Bernadine Blease, the Interim Divisional Director for Community Health Services West, that she was commissioning an initial fact-finding process under ORG 22 in response to his complaint, and that she had appointed Leah McGrath, an independent investigating officer, to complete an initial fact find. The claimant was told that Leah McGrath would contact him for further input if necessary. He was told that the purpose of the fact-finding process was to clarify his complaint to establish the facts and to decide whether a full investigation into the issues was warranted. Once the fact-finding process was concluded, Ms McGrath would present her findings and recommendations to Bernadine Blease for a decision as to how to proceed.

174. Leah McGrath was in touch with the claimant between the 8th and the 12th of September to confirm her involvement and to ask him questions, and the claimant had responded to her by the 12th of September. This is apparent from pages 434 to 436. The claimant contacted Miss McGrath to ask about progress on the 20th of September, and she replied on the same day to say that she had submitted her report to the commissioning manager the previous week so the next step was for the Trust to arrange a time to feedback the investigation findings and next steps.

175. On the 9th of September, HJ had been in touch with the claimant to say that a preliminary fact find, such as carried out by Ms McGrath, should not take longer than three days to complete, although there may occasionally be specific circumstances which mean it cannot be completed within that time scale. He was told that once Ms McGrath had completed the fact find exercise, the Commissioning Manager (BB) would review the facts and recommendations and would decide how to proceed.

176. It is apparent from the documents in our hearing file that Leah McGrath had sought further information from FL and his response dated 7 September 2022 is on pages 445 to 447. Further information was provided at page 451- 455.

177. Miss McGrath had completed her fact-finding report by the 14th of September 2022. She explained that this was slightly outside the usual three-day period, due to the number of issues raised in the grievance letter and the need to communicate with the claimant via e-mail which meant she took additional time to gather the necessary information. Her report runs from page 461 to 472 in our hearing file. As well as contacting

the claimant and FL, the investigating officer spoke to GO and MM. She also spoke to various former human resources managers and advisors to identify previous grievances raised by the claimant.

178. Although she found various learning points, and incorrectly indicated in her summary that a full investigation was warranted, in the substance of her recommendation at page 470, Leah McGrath recommended that a full investigation was not required. She said that she had not identified evidence to support unfair treatment of the claimant or that he had been discriminated against. She had found some management and process issues which she refers to in the section headed ”Learning and/or system or process changes needed”, but she found that overall management had acted in accordance with Trust policies with the benefit of Occupational Health guidance and had supported the claimant by agreeing to his request for reasonable adjustments and additional support.

179. She noted that changes in line management had interrupted the flow of communication but said that this was not a deliberate attempt to treat the claimant unfairly. The reasonable adjustments that had been made included an extended phased return to work and options to extend this longer through annual leave and flexible working and allowing a more generous trigger point for managing the claimant’s absence. She considered that the claimant could have been provided with the Trust policy on reasonable adjustments prior to his sickness absence review meeting (in August 2022), however the discussions held during that meeting were in the spirit of the principles of the policy, and whilst the issuing of a workplace passport could be revisited it was unlikely to produce any other results than those that had already been discussed. Although it was unfortunate that the claimant did not have access to the policies that affected him at an earlier stage, the investigating officer did not consider this to be a deliberate attempt to discriminate against him, more a lack of understanding from management that he would not be able to access the Internet during long term absence.

180. The learning points and/or system or process changes were identified on page 472. These were as follows: line managers to ensure that staff have access to policies that may affect them, particularly when staff are on long term sickness absence and do not have access to the Internet; line managers to ensure that at least two methods of contact are agreed when an employee is on long term sickness absence (e-mail, mobile or text); line managers to be clear that scanned or photographic evidence of fitness to work notes are accepted by payroll; consideration given to whether it would be beneficial to the claimant to revisit reasonable adjustments through the workplace passport in accordance with the reasonable adjustments policy ORG111; Management continue to proceed with the sickness absence management procedure in accordance with the supporting attendance policy ORG020. Informal employee relations are to be recorded on a tracker (this is a reference to the claimant’s complaint about previous informal grievances that he had raised – pages 467-8).

181. On the 23rd of September 2022, Stewart Overhill wrote to the claimant to say that the fact-finding exercise about his concerns had been concluded and that the commissioning manager, BB, had reviewed the fact-finding report and would like to meet with him. On the 27th of September, the claimant replied to say that he would prefer it if the

feedback was provided by e-mail as he did not feel safe enough to attend meetings. He said that previous meetings had caused a direct decline in his mental health or mental injury and had not been held in a supportive manner.

182. The claimant then sent two further e-mails asking when he could expect a response to his request for e-mail contact, on the 4th of October 2022. He had not had a response by the 11th of October when he sent a further inquiry. These are on pages 493 and 494. On the 11th of October, also at page 493, the claimant said that he had received an out of office reply from Stuart Overhill and that if Stuart was going to be out of the office for longer than 24 hours, he would like this to be handed to someone who is available. He said it was totally unacceptable and showed a lack of compassion, contingency, competence and care. He said the grievance process was having a direct impact on his mental health and well-being. On the 12th of October, Stuart Overhill confirmed that he had been unwell and had returned to work that day. He said the claimant would receive a letter from Bernadine Blease "this week" regarding the outcome of his grievance.

183. This was followed by an e-mail from Hannah Jungius to the claimant on the 17th of October saying that BB had been on leave, and she apologised for the further delay in him receiving the outcome of his grievance in writing. He would receive a reply that week. The claimant complained on the same day that he had been told last week that he would get the letter, now he was being told this week. He said he had requested feedback by e-mail and not letter.

184. The outcome letter, which was sent by e-mail on the 20th of October 2022, is dated 19th of October 2022 and is at page 497 - 501 of the hearing file. The letter explains that whilst the claimant had asked for a formal process to be applied, the process under the early resolution policy was for a preliminary fact find to be undertaken to assess whether the concerns raised warranted a full investigation.

185. BB stated that she concluded that a full investigation was not required. She then set out a summary of Leah McGrath's findings and recommendations. On page 501, she concluded that as the matter had been explored in detail a full investigation was not required, and that the fact-finding exercise found there was no evidence to support that the claimant had been treated unfairly or discriminated against. She noted that some process and management learning was required, which she would take away and discuss with the relevant people. She said that she hoped this addressed the claimant's points and she would like to acknowledge the distress that the matter had caused the claimant and apologised for that. She thanked him for his cooperation with the process and wished him the best for the future.

186. BB did not offer the claimant an appeal against her conclusion, as the Trust Early Resolution policy only permits an appeal against the decision following a full investigation- see page 117.

187. The claimant was again certified as unfit for work from the 1st of October 2022 until the 30th of November 2022 with PTSD. This certificate was issued on the 14th of October 2022 and is at p491, but as set out below we have found that it was not submitted to the respondent during his employment.

188. On the 21st of October 2022 Teresa Wyles, the respondent's Mental Health Inpatients Delivery Director (TW), wrote to the claimant

inviting him to a capability hearing in line with the Trust sickness absence policy and performance improvement policy. The capability hearing was to take place on the 2nd of November 2022. The claimant was told that GO would present the management report and would be supported by FL. TW would be supported by Jean Ward, HR business partner. The claimant was supplied with a copy of the management report and appendices (see p605) and was told that he had the right to be accompanied at the hearing by either his trade union representative or workplace colleague.

189. The claimant was reminded that the outcome of the hearing may result in the termination of his employment and that he would be notified in writing of the outcome of the hearing. He was informed that his Occupational Health reports were included as evidence, but these would only be viewed by those present at the hearing, given their relevance to the decisions that needed to be made. The claimant was told that if he had any concerns about those attending the hearing having access to the information, he should contact Jean Ward, the HR business partner.

190. On the 31st of October 2022, Hannah Jungius emailed the claimant to say that she had received an automatic notification that he had declined the Teams meeting invitation for the capability hearing on the 2nd of November. She asked him to confirm if this meant he would not be attending the hearing.

191. The claimant replied at 3:00pm the same day (p512) saying “I think it is quite clear that I am not being taken into consideration here. I have raised grievances that have admitted to failings yet refusal to investigate. So, it is very clear that this is all completely out of my hands and there is a predetermined decision here. The advice I have been given is to protect my mental health by not attending meetings with people who have caused me mental harm already.”

192. So, the claimant was making it clear that he did not intend to attend the capability meeting on the 2nd of November 2022 or indeed any further meetings.

193. TW then wrote to the claimant again on the 3rd of November 2022, send by e-mail on the 4th of November, pages 516 and 517 and 519, to say that as he had not attended the hearing on the 2nd of November 2022, she would confirm that the hearing had now been rescheduled for Wednesday the 9th of November 2022 at 9:30am via Microsoft Teams. The claimant was told that the hearing would go ahead in his absence if he failed to attend. The same individuals were to attend on behalf of the Trust. The same information was given about the right to be accompanied. The claimant was told that if he had any information that he wished to have considered at the hearing, TW would be grateful if it would be submitted two working days prior to the hearing to Jean Ward.

194. The same information was repeated about access to the claimant's Occupational Health reports and that the outcome of the hearing may result in the termination of his employment He was told that if he had any queries regarding the process of the contents of the letter, he should contact Jean Ward.

195. On the 5th of November, the claimant replied to Hannah Jungius, copying TW, FL, GO and Jean Ward regarding the rescheduled capability hearing. The claimant wrote: “I did not fail to attend; I chose for my own safety not to attend. My disability is not being supported to attend meetings and regardless of whether you choose to ignore my statements

or not they still remain a fact. As I mentioned in my grievance, I will not attend any meetings without adequate reasonable adjustments to support my disability to attend such meetings. I do not accept that the Trust has the qualifications to define what is a medical need for me nor have they asked for evidence of this. I will also not attend a meeting with people I have raised grievances about regardless of how the Trust fails to handle the grievance. I understand I am not senior manager, nor do I work in back office functions so I'm not subject to the leniency and protection the aforementioned are provided. So therefore, I will not enter a dangerous situation in which I am at risk of mental harm while being in the presence of people who have a complete lack of duty of care."

196. The respondent's Performance Improvement Policy at page 132, paragraph 7.3.4, provides that if the employee postpones the capability hearing, it will be rearranged once for an alternative date. "We are unable to postpone the hearing a second time." If the employee does not attend, the hearing may proceed in their absence (the reference to an appeal panel as opposed to a capability hearing is an error). The supporting attendance policy and procedure which was implemented in June 2022 also cross refers to the Performance Improvement Policy in respect of capability hearings-page 182, paragraph 6.5, as does the previous policy at page 106.

197. In this case, however, TW decided to reschedule the capability hearing again, and a letter was sent to the claimant on the 10th of November by e-mail, p523-525, informing him that the capability hearing would now go ahead on the 17th of November 2022 at 9:30am and would take place online via Microsoft Teams. The claimant was again warned that the hearing would go ahead in his absence if he failed to attend.

198. On this occasion, TW stated that she would like to ask and encourage the claimant, if he did not intend to go to the capability hearing on the 17th of November, to prepare a report to be considered which should be emailed to Jean Ward and copied to Hannah Jungius in advance of the hearing. Otherwise, the information which had been provided before (including the risk of dismissal), was repeated.

199. The claimant did not attend the capability hearing on the 17th of November 2022 and did not send in any written report or information in his own support. He did not reply to the e-mail letter sent on the 10th of November.TW decided to dismiss him on the grounds of capability with notice, with the dismissal taking effect from the 22nd of December 2022, p527-8.

200. TW says in her witness statement (paragraph four) that she had no prior knowledge of the claimant and had no prior involvement in the matter of his sickness absence or capability procedure. We accept that evidence.

201. In her statement at paragraph 6, she refers to the Occupational Health Physician's report dated the 23rd of June 2022 which said that the claimant had been fit to return to work and did not say that he was not fit to attend any formal meetings. TW states that the most recent sick note that the Trust had received said that the claimant was not fit for work during the period up until 1st of October 2022, page 383.

202. The claimant was asked by the Judge during the hearing whether he had supplied the Trust with the fit note at page 491 of the bundle (which would have covered his absence including the date of the capability hearing). TW stated that she had not seen that fit note until it

was disclosed by the claimant during the Tribunal proceedings. The claimant's reply was that he "could not really say" if the Trust had received that fit note. This struck us as a strange response, as the claimant had been adamant that other fit notes had been delivered to the Trust, and by the 14th of October he had been told that photographic evidence of fit notes were acceptable to the Trust. On the balance of probabilities, we find that the claimant did not submit the fit note at page 491 to the Trust at the time that it was issued by his General Practitioner, and therefore that neither TW, GO, any of the human resources professionals involved knew about it at the date of the capability hearing.

203. We accept TW's evidence that she was not aware that the claimant had previously asked to be accompanied to meetings by a friend or relative and that this had not been permitted. She had not been involved in dealing with the grievance submitted by the claimant. We accept that if the claimant had made such a request for the capability hearing, she would have considered that request and would have made a decision about it. TW had made it clear in the letter sent to the claimant that she was willing to accept additional written information from him, but the claimant did not avail himself of that opportunity.

204. TW sets out her reasons for reaching her decision to dismiss the claimant at paragraph 13 to 16 of her witness statement, and we accept that evidence. It was not substantially challenged by the claimant. She did not consider that there was a need for a further Occupational Health report, as the Occupational Health physician had advised the claimant was fit for work in June 2022. This was not the first time that Occupational Health had advised that the claimant was fit to return to work with adjustments, but he had not returned. At the time of the capability hearing, as we have said, TW did not know that the claimant had once again been certified as unfit for work by his GP. As she says in paragraph 13 of her statement, at the time of the capability hearing, her decision was based on Occupational Health advice that the claimant had been fit for work in June 2022, and there was no current fitness for work note saying otherwise, although the claimant was saying he was not fit to return and, as she says in paragraph 13, the claimant had still not been able to achieve a phased return to work nearly 5 months later. She was concerned that the constant pressure of whether he could or could not manage a return to work would have a detrimental impact on the claimant.

205. TW took account of the Occupational Health physician's advice about allowing the claimant a higher "trigger" for absence management purposes, and she considered that 17 months of absence was a higher threshold. This is not surprising considering as we have set out above, the usual trigger for a capability hearing was six months absence. The respondent had shown flexibility over the trigger points for the various stages of the absence management procedure at every stage. She took account of the fact that the most recent Occupational Health report stated that they did not believe that redeployment was required, and the claimant had not suggested that he should be redeployed. TW took account of the fact that the inpatient wards upon which the claimant worked needed to be staffed. Whilst he was off sick, the Trust could not recruit substantively to cover his position. His work was being covered by "NHS professionals", in other words bank/agency staff, which incurred a higher cost. She also took account of the fact that consistency of support is important for the inpatients on the mental health wards, that this includes the identity of

those providing care, and that consistency could not be guaranteed where agency or bank workers were used as opposed to permanent members of staff. She took account of the impact of the claimant's absence on the wider workforce as well as support for the patients, and that his work may need to be covered at times by higher level workers.

206. It is apparent from the letter on page 527 that TW also took account of the fact that the claimant had run out of sick pay, and that the Occupational Health report of June 2022 stated there was no direct link between the claimant's condition and his work and that it did not consider that the respondent could provide any adjustments or alternative roles at this time which would facilitate a return to work.

207. TW considered whether she should give the claimant a further opportunity to attend but concluded that this was not necessary as he had already stated that he would not attend a hearing. We accept that she took account of the nature of his ill health, the fact that there was no indication that he would return to work, the need for his work to be done, the impact of his absence on the wider workforce and the length of his absence and concluded that it was not reasonable for the Trust to keep the claimant's job open for him any longer.

208. TW concluded that the claimant was not capable of continuing in his role due to ill health. The claimant has accepted within these proceedings that capability was the reason for his dismissal.

209. TW informed the claimant that he had a right to appeal against her decision to terminate his employment, and that if he wished to exercise the right, he should do so within 10 working days of receiving her letter. She also stated that should the claimant's mental health stabilise, and should he feel that he was able to return to work, she would be happy to receive an application from him as she noted that no time had there been any concern with his performance whilst at work and he was a valued member of the team. She acknowledged that this had been a very difficult time for the claimant. Whilst the claimant has said that he found that it added insult to injury that TW had included those comments, we find that it was evidence that TW had considered her decision carefully and that she was doing what she could to ameliorate the effect of it.

210. The claimant did not appeal.

Relevant Law

211. We set out the relevant law in the order in which it has been applied to the facts of the case.

212. **Time limits:** It was not suggested that the claim for unfair dismissal was made outside the relevant time limit, and it is plainly in time.

213. The respondent argued that, based on the date that the claimant sought early conciliation, 12 October 2022, any allegation of discriminatory acts or omissions arising before 13 July 2022 was potentially out of time.

214. Section 123 of the Equality Act 2010 (EA10) provides that subject to section 140B, early conciliation, proceedings on a complaint under section 120 (here a failure to make reasonable adjustments and of discrimination arising from disability) may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates or be such other period as the employment Tribunal

thinks just and equitable. Subsection 3 provides that for the purposes of this section, conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it. Miss Burton agreed that in the case of the issues in the current case, there were dates when the respondent's employees decided not permit adjustments sought by the claimant, and she argued that subsection 4 of section 123 was not relevant in those circumstances.

215. We note in any case that the subsection provides that in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something (a) when they do an act inconsistent with doing it, or (b) if they do not do an inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

216. **Burden of proof:** section 136 EA10 subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the Tribunal must hold that the contravention occurred. Subsection 3 provides that this does not apply if the respondent shows that it did not contravene the provision.

217. We have reminded ourselves of the principles in **Igen v Wong and Hewage 2012 ICR 1054 SC.** In the context of this case it is necessary that the claimant establishes some evidence that the duty to make reasonable adjustments has arisen and that there are facts from which breach of the duty could reasonably be inferred. In the context of section 15 of the Equality Act, the claimant bears an initial burden to establish that he has been treated unfavourably because of something arising in consequence of his disability, but if the respondent wishes to rely on the treatment being a proportionate means of achieving a legitimate aim, the burden is on the respondent to show that.

218. We reminded ourselves that we may consider all of the relevant evidence at the first stage of the process to decide whether there are facts from which we could decide that there had been a contravention of section 20 or section 15 EA10, before considering the respondent's explanation. It is good practice for the Tribunal to address the issue of the burden of proof and how it intends to address it. In this case, neither party made specific submissions about the burden of proof, but we adopted the two stage process set out above.

219. **Code of Practice:** Section 15 of the Equality Act 2006 provides that a Code of Practice issued by the Equality and Human Rights Commission shall be taken into account by a Court or Tribunal in any case in which it appears to the Court or Tribunal to be relevant. In 2011, the EHRC issued a Code of Practice on Employment.

220. Paragraph 6.28 of the Code sets out some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take in the context of a duty to make reasonable adjustments. First of all whether taking any particular step would be effective in preventing the substantial disadvantage in question ; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer's financial or other resources; the availability to the employer of financial or other systems to help make an adjustment such as advice through Access to Work; and the type and size of employer.

221. Paragraph 6.29 states that ultimately the test of the reasonableness of any step is an objective one and will depend on the circumstances of the case.

222. **Reasonable adjustments:** Section 20(1)-(3) (EA10) provides that:

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.

Section 212(1) of the EA10 provides that a substantial disadvantage is one which is more than minor or trivial. The Tribunal must identify the nature and extent of the disadvantage to the disabled person in comparison to non -disabled persons to whom the requirement is applied.

223. It is helpful if the claimant can identify the reasonable steps relied upon. “Avoid the disadvantage” does not mean eliminate the disadvantage, it is sufficient if there is evidence from which the Tribunal can conclude that there would have been a chance that the disadvantage would be alleviated or reduced. If the claimant has identified what appears to be a reasonable step that can ameliorate the disadvantage, the burden shifts to the respondent to show that the disadvantage will not be reduced or that the adjustment is not a reasonable one for it to make.

224. Neither party suggested that the second or third requirement under section 20 EA10 was applicable to the issues in this case, and we did not consider that the allegations in this case included a dispute about the provision of an auxiliary aid, even taking account of section 20(11), which provides that a reference to an auxiliary aid for these purposes includes an auxiliary service.

225. Section 21 EA10 provides that:

(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.

226. Schedule 8 applies where a duty to make reasonable adjustments is imposed on an employer.

227. Paragraph 2(2) of schedule 8 provides that the reference in section 20(3) to a provision, criterion or practice is a reference to a provision, criterion or practice applied by or on behalf of A. By paragraph (3) of schedule 8, in relation to the first requirement in section 20, a relevant matter is (a) a matter specified in the second entry of the first column of the applicable table in Part 2 of this schedule or (b) where there is only one entry in a column, a matter specified there.

228. The applicable table is in paragraph 5 of Part 2 of schedule 8, and the only relevant entry in the first column is “Employment by A”.

229. Under paragraph 20 of schedule 8, A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, in any case referred to in Part 2 of this

Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

230. Where the respondent disputes that it could reasonably be expected to know that the claimant was likely to be placed at the relevant disadvantage, it is necessary for the Tribunal to consider the nature and extent of the substantial disadvantage in question, and to make findings as to what the respondent knew (or could be expected to know following reasonable inquiry) about that disadvantage.

231. Ms Burton referred the Tribunal to the cases of **NCH v McHugh**, **Doran v DWP** and **London Underground v Vuoto,** and she provided the claimant with copies of those cases on the 29th of August. In **McHugh** (obiter but approved of in **Doran**) HHJ McMullen found, in the context of a claim about failure to permit a phased return to work, that the duty did not arise unless and until the claimant indicated her intention or wish to return to work. Miss Burton pointed out that a different conclusion had been reached in the Vuoto case, but that case could be differentiated because the evidence showed that the claimant was absent partly due to stress caused by the respondent's treatment of him, so that the respondent could be expected to take reasonable steps to alleviate that stress.

232. In closing submissions, the Judge asked Miss Burton if she was saying that the duty to make reasonable adjustments was not triggered if an adjustment was required in the context of a workplace meeting such as a sickness review or capability meeting, if the employee was not fit to return to work immediately. Miss Burton accepted that was not the case, and that, for example if an employee was not fit to return to work but was invited to a workplace meeting, and was physically disabled and could not otherwise get to a meeting on the second floor of the building, then the duty to make reasonable adjustments would be activated. She did not suggest that the duty would not arise in appropriate circumstances in relation to such meetings if the nature of the impairment was mental rather than physical.

233. **Discrimination arising from disability**: section 15 of the Equality Act 2010 provides that:

(1) A person (A) discriminates against a disabled person (B) if—

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

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

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

234. To establish causation under section 15, the Tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused the treatment. This may require examination of the conscious or unconscious thought processes of the alleged discriminator. The Tribunal must then consider whether the reason for the treatment was something arising in consequence of the claimant's disability. This is an objective question. In the case of **Sheikholeslami v Edinburgh University,** Simler J (as she then was) said that if the "something" was more than a trivial part of the reason for the unfavourable treatment then the first stage of the test is satisfied.

Whether the "something" arose in consequence of the disability is a question of objective fact for the Tribunal to decide in the light of the evidence. There must be a connection of some kind. There may be more than one link in the chain of causation.

235. The test of whether the treatment is a proportionate means of achieving a legitimate aim is an objective one. The Tribunal must critically scrutinise the employer's justification by weighing it against the discriminatory impact. We must consider whether the means chosen correspond to a real need on the part of the respondent, whether the means chosen are appropriate in order to achieve the aim in question and are reasonably necessary to that end. Cost alone is unlikely to be adequate justification. A measure will not be proportionate if less discriminatory measures could achieve the same objective.

236. Any failure to make reasonable adjustments must be considered as part of the balancing exercise in considering questions of justification.

237. **Unfair dismissal:** It is accepted in this case that the claimant was dismissed for the purposes of Part X of the Employment Rights Act 1996 (ERA 96) and that the reason for his dismissal was capability for performing work of the kind which he was employed by the respondent to do. This is a potentially fair reason within section 98(1) and (2)(a) of the ERA 96.

238. Under section 98(3)(a), *"capability",* in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality. In this case, it is said that the claimant was incapable of performing work of the kind which he was employed by the respondent to do by reason of his ill health.

239. According to section 98(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.

240. The range of reasonable responses test applies to both the decision to dismiss and the procedure that was followed in reaching the decision. Where the reason for dismissal is capability based on long term sickness absence, we need to consider whether the respondent in all the circumstances could have been expected to wait any longer for the claimant's return. This involves consideration, for example, of the adequacy of any consultation with the claimant and whether proper/adequate medical advice has been obtained. Consideration should be given to whether it would have been possible to employ the claimant in some other capacity to ensure an effective return. Entitlement to ill health benefits is also relevant.

241. The purpose of consultation with the claimant is to establish his medical condition and to update the employer on the claimant's progress and keep the employer up to date with the respondent's position, particularly if the employer is considering dismissal.

242. We should consider factors such as whether there are any other staff available to cover the claimant's absence, the nature of his illness, the likely length of his absence, the cost of continuing to employ him and of course the size and nature of the organisation.

243. We need to consider the effect of any failures to make reasonable adjustments and whether or not the respondent had followed its own procedures appropriately.

244. Section 123(1) of the ERA 96 provides that (subject to certain other provisions that are not currently relevant) the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

245. Sometimes reductions are made under this section in the circumstances set out in **Polkey v AE Dayton Services Ltd 1988 ICR 142** – that is, there is a reduction where it is just and equitable to do so to take account of the likelihood that the claimant would still have been dismissed in any event had a fair procedure been applied and in all the circumstances of the case. The Tribunal must consider both whether the employer could have dismissed fairly and whether this particular employer would have done so (see **Hill v Governing Body of Great Tey Primary School 2013 ICR 691 EAT).** An employer who wishes the Tribunal to consider making a Polkey reduction should present the Tribunal with some evidence from which it could draw such a conclusion; if the claimant can put forward an arguable case that she would have been retained had a fair procedure been adopted, the evidential burden shifts to the employer to show that the dismissal might have occurred even if a correct procedure had been followed.

APPLICATION OF LAW TO FACTS

246. **Reasonable Adjustments**: the first provision, criterion or practice complained of is that the respondent had a policy of not permitting employees to be accompanied by a relative who was not employed by the Trust at formal meetings.

247. In her closing submissions, Miss Burton accepted that on the available evidence, the respondent did have a policy/practice of refusing to allow employees to be accompanied by relatives or friends who were not Trust employees, and that this was applied to the claimant on the 14th of April 2022 – see page 285.

248. She also accepted, on the basis of the evidence given by MN, that in the context of the sickness review meeting on the 21st of April 2022, MN and therefore the respondent knew that the claimant was at a substantial disadvantage in relation to his employment in comparison with persons who are not disabled because the claimant's mental health conditions meant that his perception of the respondent's actions and behaviour was distorted causing him to mistrust the respondent's employees except for, at the time, MN. Although there was no suggestion at the time that the claimant might be subject to a formal warning, the claimant was concerned that this may be the case. This distorted perception also caused him to be anxious and overwhelmed during the meeting. A non-disabled person would not have experienced such disadvantages.

249. Miss Burton accepted that the duty to make reasonable adjustments would apply to a workplace meeting of the nature of the sickness absence review on the 21st of April 2022 which the claimant attended or indicated his intention to attend.

250. The claimant has argued that it would have been a reasonable step for the respondent to have permitted him to be accompanied by a relative to that and subsequent sickness absence management and capability meetings, so that the relative could provide support and assist the claimant to interpret the respondent's words and behaviour more objectively.

251. We have reminded ourselves that we need to focus on whether it is likely that such a step would ameliorate or reduce the disadvantage to the claimant. We accept the claimant's evidence that his mother, who accompanied him to the hearing, and his brother were helping him to interpret objectively the respondent's oral and written communications at the relevant time. We consider that if the respondent had permitted the claimant to bring a relative to the sickness absence management meeting on the 21st of April 2022, the claimant would have had an opportunity to speak to someone that he trusted in order to ensure that he understood properly what the respondent was suggesting and why. This would have had the significant benefit that the claimant's anxiety levels would have been reduced, and that he would have had assistance to consider what the respondent was saying objectively. In relation to the meeting on 21 April 2022,in the light of Ms Burton's concessions we find that there is evidence from which we could conclude that there has been a breach of the duty to make a reasonable adjustment of the kind suggested by the claimant under section 136 EA10 and therefore the burden passes to the respondent to show that it would not have been reasonable to allow the claimant to be accompanied by a relative at that meeting.

252. So, we consider that allowing the claimant to bring a relative to the sickness absence meeting on the 21st of April 2022 would have been effective to substantially reduce the disadvantage to the claimant caused by his disability. The sickness absence management hearing was taking place via Microsoft Teams. It would have been entirely practicable for the respondent to take this step as it simply involved informing the claimant that he could have a relative present with him during the meeting. If the relative became obstructive or was hindering the progress of the meeting in any way, it would have been simple for the respondent to terminate the virtual meeting at the press of a button.

253. The step would cost the respondent nothing and was unlikely to cause any disruption; if as we have indicated, the relative did cause disruption, it would not have been difficult for the respondent to stop the meeting. The respondent did not require any assistance in order to make the adjustment. This is a public sector employer of reasonable size.

254. The respondent did not identify any particular difficulties that allowing the claimant to have a relative present would cause in these circumstances. At page 285, Mr Langan refers to the fact that having a relative or friend present is not part of the Trust's policies and processes. This begs the question of whether the process or provision

in question should be adjusted to take account of the substantial disadvantage to the disabled person.

255. In her closing arguments, Miss Burton argued that it would not have been reasonable to permit the claimant to be accompanied by a relative to the meeting on the 21st of April 2022. She pointed out that there had been an Occupational Health report 10 days previously where no concerns were raised about the claimant's ability to attend meetings. Both the claimant and MN accepted that the focus of that report was the claimant's knee, not his mental state, and in any case, whether or not the Occupational Health report dealt with the matter, MN accepted that he knew by April 2022 about the claimant's difficulties with perception as a consequence of his mental health condition, and his feelings of mistrust of the respondent as a result.

256. Miss Burton points out that the policy allows for the claimant to bring a trade union representative or colleague, and that, as she put it he could have joined the trade union at this stage. Again, this ignores MN's acceptance that by this stage the claimant did not trust his other colleagues due to his disability and, as the Tribunal pointed out, in most cases trade unions will not allow individuals the benefit of their representation if they seek to join the union after an employment dispute has started.

257. Miss Burton pointed out that as the meeting was on Microsoft Teams, the claimant was not required to physically attend the respondent's premises, but as we have indicated and as MN accepted, the claimant's concern was not about physical attendance but due to his distorted perception of how the Trust was behaving and what might happen at the meeting.

258. Miss Burton pointed out that MN had sent the claimant a sample of the script that would be followed in advance, but again that does not answer the point about the claimant's distorted perception and his anxiety. Nor does the point that MN would be present at the meeting - Mr Langan would be present too, to give advice to MN, and the claimant had indicated that he did not trust anyone else at the respondent. Miss Burton's point that the claimant had said that he was ready to come back to work on the 14th of March, and therefore that he was not so affected by his condition that he could not work with patients, does not answer the point that due to the claimant's disability, he perceived that the meeting was part of a disciplinary process at which he might receive a formal warning, and that he did not trust the respondent's staff, whom he perceived had an agenda to terminate his employment. Attendance at the meeting is a different situation from working with patients on a ward, and in any case, by the 14th of April, it was obvious that the claimant had not in fact been able to maintain a consistent return to work.

259. The respondent accepts that it knew that the claimant was a disabled person by reason of all of the relevant conditions apart from one by the 14th of April 2022, when the claimant was told he could not bring a relative to the sickness absence management meeting on the 21st of April. Miss Burton accepted that nothing turned on their ignorance of the condition EUPD at that time.

260. So, the duty in section 20(3) of the EA 10 was triggered, the respondent had the requisite knowledge, and there was a reasonable step that the respondent could have taken to avoid the substantial

disadvantage to the claimant, namely allowing him to bring a relative with him to the Microsoft Teams sickness absence management hearing. The claimant's claim of failure to make a reasonable adjustment therefore succeeds in this respect.

261. Next, the claimant complains that the respondent had a provision criterion or practice of not permitting formal sickness review hearings to be held in writing rather than face to face. The respondent accepts that it had such a provision criterion or practice.

262. The respondent's evidence was that a face-to-face meeting, whether in person or virtual, was necessary to allow collaborative discussion about the claimant's condition and ability to return to work and any steps that could be taken to support him. It says that such a collaborative discussion could not effectively take place via e-mail or otherwise in writing. This would be, as we accept, an overly protracted and cumbersome process. In addition, Ms Blease made the point (which we accept) that given the nature of the services that the respondent provides to the community, that is inpatient services to persons who have significant levels of mental illness, it is important that the Trust's staff actually see the employee who has been off sick in order to make an assessment of how they present themselves and whether therefore it is feasible to permit them to return to work in such an environment. In his disability impact statement, the claimant has set out the effects that his conditions have on him from time to time, including their effect on his ability to provide basic care for himself.

263. We have considered whether the provision that the sickness absence meeting on the 21st of April 2022 must be face to face, whether in person or by virtual meeting, rather than by written means, placed the claimant at a substantial disadvantage in relation to his employment by the respondent in comparison with persons who are not disabled. The disadvantage asserted by the claimant is that if he had to attend a face-to-face meeting without a family member, he would become overwhelmed by anxiety due to his mistrust of the respondent's staff and as a result would have a distorted perception of what they were saying due to his mental health conditions, so would agree to proposals that he could not fulfil and not be supported in his return to work. He suggests that would not be the case if written communication was used.

264. We do not consider that the Trust's requirement for a face-to face meeting rather than communication in writing did place the claimant at this substantial disadvantage in comparison to non-disabled employees. Both non-disabled employees and the claimant would, in our judgement, be more rather than less likely to misconstrue what was being said or draw unjustifiably adverse conclusions if the communication was solely in writing. Indeed, during the course of the evidence, we saw many examples where the claimant had misconstrued written communications to him, including invitations to sickness absence review meetings at which the respondent was hoping to understand how to support him. For example, he made unsubstantiated accusations that MN was abusing him by inviting him to such meetings without prior discussion in April 2022, suggesting that this was an unexpected development. In fact, the claimant knew that previous meetings had been set up under the respondent's policies and had been postponed to take account of his ill health, so would need to be reorganised at some point. The

claimant often asserted that written communications had distressed him and caused his health to deteriorate.

265. Even if we are wrong about that, there is no evidence before us (beyond the assertion of the claimant) that there was a significant chance that having such a process in writing would have ameliorated or reduced the claimant's misperceptions or lack of trust in the respondent (or his anxiety about the process). On the evidence before us, we consider that if the absence management process had taken place entirely in writing, it is more likely to have exacerbated the claimant's anxiety, misperceptions and loss of trust in the respondent. In those circumstances, we consider that having the sickness review in writing does not pass the threshold of appearing to be a reasonable step, and the burden of proof does not pass to the respondent.

266. For those reasons (and also taking account of those given by the respondent's witnesses), we do not consider that it would have been a reasonable step for the respondent to hold the sickness absence management meeting in April 2022 by written means. We do not consider that there was a chance that this would effectively reduce any disadvantage that a face-to-face meeting posed for him in comparison to non-disabled persons. For that reason, the claimant's claim that the respondent failed to make a reasonable adjustment by failing to allow the sickness absence management meeting on the 21st of April 2022 to take place by written means must fail.

267. Next, the claimant asserts that the respondent applied to him a provision criterion or practice at the sickness absence review on the 21st of April 2022 to the effect that phased returns to work lasting more than six weeks were not permitted.

268. The respondent denies that this was the case. We heard evidence from the claimant, FL and MN about this. We took account of the outcome letter which is on page 302 to 305 in the hearing file. As set out above, we have found that the respondent did not refuse to allow the claimant to extend his phased return beyond six weeks. Instead, FL informed the claimant that if he did wish to extend the period of the phased return, he would need to consider using some of his annual leave or submit a flexible working request to reduce his hours on a temporary basis. This is not a refusal to allow a phased return of more than six weeks. Indeed, on page 303, MN records that it had been agreed that there would be a sickness absence meeting for the last week of the phased return so that the respondent could review the claimant's progress and identify any further support he might require. We accepted that this could include an extension beyond six weeks of the phased return.

269. FL was not saying that the claimant could not have a phased return of more than six weeks, he was simply indicating that if a phased return of more than six weeks was required, consideration would have to be given as to how this could be implemented. This was for the reasons set out in our findings of fact, that there were significant budgetary and practical implications of a person being supernumerary during a phased return of more than six weeks. There would be substantial implications in terms of cost, on the service provided to in patients, who we accept benefit from consistent care by permanent members of staff rather than having to rely on agency staff, and on other permanent staff members who may have to cover (and arrange for cover).

270. Therefore, as no provision criterion or practice of the nature suggested by the claimant was applied to him, no duty to make reasonable adjustments arose. We accept that the respondent and the claimant would have needed to see how the claimant's return progressed before deciding whether a phased return of more than six weeks was required in any case. The claimant did not return after the sickness absence meeting on the 21st of April 2022.

271. Even if the duty had arisen, there was no evidence before us beyond the claimant's assertion that there was a substantial chance that if more than six weeks phased return was permitted, he would have made a successful return to work. This was not supported by any medical evidence and, indeed, as the respondent pointed out, none of the Occupational Health reports that were obtained said in terms that more than six weeks would be required. The claimant's evidence about the more flexible approach taken in his new job was not relevant as it related to a later time period and a different role.

272. The complaint of failure to make a reasonable adjustment in this respect at the meeting on the 21st of April 2022 therefore fails.

273. Next, we considered the situation in respect of the meeting which took place on the 11th of August 2022. We accept that there is no record of a written request for the claimant to be accompanied by a relative at that meeting prior to the meeting taking place. It is clear from the outcome letter on page 381, however that there was some discussion at the start of that meeting about whether at that meeting, which was again by Microsoft Teams, the claimant could be accompanied by a relative as opposed to a trade union representative or colleague. FL was aware of the claimant's previous request. The claimant's evidence was that, as the letter records, he was told that he could not have a family member present as this was against the Trust's policies, and so felt pressurised to agree to proceed unaccompanied. We accept that, and that the respondent applied the provision criterion or practice in question on that occasion.

274. We accept that the claimant was again at a substantial disadvantage compared to someone who did not have a disability, because his mental health conditions had an adverse effect on his ability to consider the information he was being given objectively, leading him to mistrust his colleagues and misunderstand them, with the risk of him agreeing to proposals he did not fully understand as a result. The respondent was aware of this from April 2022. Although there had been an Occupational Health report in June 2022 which suggested the claimant did not need adjustments beyond a phased return, the claimant had remained off sick and was again expressing his feelings of being bullied and harassed and of being pressurised to attend in his emails in early August 2022, see for example page 378. This should have alerted the respondent to the fact that the claimant was, objectively, misconstruing their genuine attempts to apply the sickness absence policies and to support his return to work.MN accepted that he was aware of the disadvantage to the claimant as early as April 2022. The claimant's misperceptions and lack of trust caused him to feel extremely anxious during the sickness absence meeting.

275. For the reasons that we have given above in relation to the April meeting, we do consider that it would have been a reasonable step for the respondent to permit the claimant to be accompanied by a relative

at this meeting. It would have cost the respondent nothing and as we have said, if the relative caused any disruption or hindrance, the meeting could easily have been stopped and rescheduled.

276. We considered that allowing the claimant to be accompanied by a relative at this meeting would have significantly ameliorated the disadvantage to him because the relative would have been able to reason with the claimant and to help him to deal with the information being provided objectively and for him to respond appropriately. We rejected the respondent's arguments that it would not have been reasonable for them to have to take this step

277. So, the claimant's complaint of failure to make reasonable adjustments by refusing to allow him to have a relative present at the sickness absence meeting on the 11th of August 22 also succeeds. We should make it clear, however, that whilst the attendance of a family member at the meeting would have helped the claimant to understand that he was not being refused a six week return to work and would have reduced his anxiety at the meeting, we do not consider that if the respondent had allowed a family member to attend it would have caused the claimant necessarily to say that he was returning to work or that he would have returned to work thereafter. The claimant made it clear at the meeting and subsequently that he did not consider that he was fit to return. This is even though family members would have had ample opportunity to explain after the meeting, having seen the outcome letter from the 11 August meeting subsequently, that the Trust was not refusing a phased return to work which could potentially exceed six weeks. There is no evidence before us (beyond the claimant's assertion) that the reason that he did not return was because he believed he was being told that he could not have a phased return of more than six weeks. Subsequent fit notes refer to PTSD and do not make any link with the claimant's work.

278. For the reasons given above also, the claimant's contention that this meeting should have taken place by means of written communication fails. The claimant did not request that this meeting should take place in writing. In any case, for the reasons given above in relation to the April meeting we do not consider that he was placed at a substantial disadvantage compared to a non-disabled person by being told that the meeting must go ahead face to face rather than in writing, but even if he was, holding the meeting by written means would not, in our view, have reduced or ameliorated any disadvantage to the claimant. Instead, it is likely to have magnified the possibility of miscommunication and misunderstanding and rendered it more difficult for the respondent to assist the claimant to return to work. It would not have been a reasonable step to take. That complaint is therefore dismissed.

279. Next, the claimant complains that he was placed a substantial disadvantage by the respondent's provision criterion or practice of refusing to allow a phased return of more than six weeks. We find that, during the meeting on the 11th of August, the respondent did not refuse to allow the claimant to have a phased return more than six weeks. The claimant complained that the Occupational Health physician had suggested, on the 23rd of June 2022, a phased return of approximately two weeks and he said this was insufficient. FL did not disagree with the claimant but advised the claimant that the advice provided by

Occupational Health was only for guidance purposes, and that once the claimant confirmed he was ready to return to work a phased return that worked for the claimant could be discussed. This is not a refusal to allow a phased return of more than six weeks.

280. So, the respondent did not apply a provision criterion or practice to the claimant to the effect that he could not have a phased return of more than six weeks, and the duty to make a reasonable adjustment does not arise in this respect.

281. In any case, at this stage, the claimant was not indicating that he was ready to commence a phased return. He was indicating that he was certified as unfit for work, although the respondent could not locate his fit notes at that time. This is not a case where there is evidence, beyond the claimant's assertion, that it was the respondent who was causing his inability to work. Indeed, the report from the Occupational Health physician on the 23rd of June 2022 indicated the opposite. In all circumstances, therefore, we do not consider that a duty to make reasonable adjustments regarding the return to work arose at this point, applying the case of **DWP v Doran**.

282. For those reasons, the claimant's complaint that there was a failure to make reasonable adjustments by the refusal of a phased return to work lasting more than six weeks at the sickness management meeting on 11 August 2022 is dismissed.

283. The claimant alleges that there was a failure to make a reasonable adjustments by failing to permit him to be accompanied by a relative at the capability meeting before TW on the 17th of November 2022 (or presumably at the two previously scheduled capability meetings).

284. We consider that different considerations apply in respect of the capability meetings compared to the sickness absence review meetings We have found that on the 31st of October 2022, at page 512, the claimant made it clear to Hannah Jungius on behalf of the respondent that he did not intend to attend any further meetings, and that he believed that decisions about his capability were "predetermined". He said that he had been given advice not to do so in order to safeguard his mental health, but did not say by whom. This was in response to the invitation to the first of the capability meetings, scheduled for Wednesday 2nd of November 2022.

285. When the capability meeting was rescheduled, for 9th November 2022, the claimant wrote again to Ms Jungius to say that he had chosen (for his own safety) not to attend previously and would not attend any meetings without adequate reasonable adjustments to support his disability. He said that he would also not attend a meeting with people he had raised grievances about "regardless of how the Trust fails to handle the grievance". He said he would not enter a "dangerous situation" in which he was at risk of mental harm while being in the presence of people who had a complete lack of duty of care as he put it.

286. The claimant did not specify what reasonable adjustments he meant, but in any case, made it very clear that whether or not reasonable adjustments were made, he would not attend the capability meetings because he thought the outcome was predetermined, and also that he would not attend meetings with persons named in his grievances, such as GO and FL. During the evidence, the Tribunal asked GO if there was anyone to whom he could have handed responsibility for the claimant's case other than MM, to whom the

claimant had objected. GO said that he could not think of anyone to whom it would have been appropriate to hand the case given the shortage of staff at a senior level, and that it would not have been appropriate to hand the case to junior staff because of its sensitive and confidential nature. The claimant did not ask any further questions about this or suggest that there was anyone else to whom GO could have handed responsibility, and we accepted GO's evidence. We also accepted that it would not have been reasonable to expect anyone else at a similar level of responsibility to take over the presentation of the management case given the complexity of the case and the staff shortages and recruitment problems we heard about. So, the claimant made it clear that he would not attend a meeting at which GO was present, and there is no evidence before the Tribunal to suggest that anyone else could have presented the management case at the capability hearing, and the claimant had made it clear that he was not going to participate because he thought the outcome was predetermined in any case.

287. We accepted TW's evidence that if the claimant had requested any adjustments, she would have considered them, and she gave the claimant an opportunity to make written representations if he chose not to attend. He did not take that opportunity. TW was not involved in the claimant's grievance and did not know that he had complained about not being accompanied by a family member. The respondent did not, therefore, apply any provision, criterion or practice of refusing to allow the claimant to be accompanied by a family member at this stage. The issue did not arise as the claimant was simply refusing to attend the meeting.

288. Even if the Trust was under a duty to suggest that the claimant be accompanied by a relative at the capability meeting which took place (or any of those which the claimant did not attend) in the absence of a direct request from the claimant, however, on the evidence before us this would not have ameliorated any disadvantage to the claimant, because the claimant had made it clear that he would not have attended the meeting in any case because of the presence of GO and FL. It would not, therefore, have been a reasonable step for the Trust to have to take within the meaning of section 20(3).

289. The claimant's complaint of failure to make a reasonable adjustment by failing to allow him to be accompanied by a family member to the capability hearing therefore fails.

290. For the reasons we have given before, we do not consider that the claimant was placed at a substantial disadvantage compared to a non-disabled person because the meeting was face to face rather than by written means. Nor do we consider that there was a chance that having the meeting by written means would have ameliorated or reduced any disadvantage to the claimant; as we have said before, we consider that it is more likely to have increased the chance of miscommunications and misunderstandings rather than improving trust and reducing the chance of misperception and would therefore have increased rather than reduced the claimant's anxiety. TW did in fact give the claimant the opportunity to provide written information to be considered at the capability meeting and he did not take it. It would not have been a practicable step to take because, as BB told us, given the nature of the claimant's illness, it was important for the managers responsible to see

the claimant to gauge whether he was in a fit state to return to work with patients who have serious mental ill health conditions. Holding the meeting by written means at the stage, when his absence had effectively continued for seventeen months, would have been overly cumbersome and protracted. The claimant's complaint that there was a failure to make a reasonable adjustment by not having the capability meeting by written means therefore fails.

291. TW did not apply a provision, criterion or practice that the claimant could not have a phased return of more than six weeks. She considered whether a further attempt at a phased return was appropriate and concluded that it was not, as there was no indication that the claimant would be able to return within the foreseeable future and she was concerned that the pressure of continually being expected to try to return was detrimental to the claimant's health. The claimant had not taken the opportunity to provide any written submissions to TW suggesting that he was ready to return if he was afforded a phased return of more than six weeks. She was not asked to consider that option specifically and did not apply any provision, criterion or practice that any phased return should be of no more than six weeks in duration. In any event, there was no evidence before TW that the claimant would be placed at a substantial disadvantage compared to non-disabled persons by a failure to offer a phased return of more than six weeks at this stage. Nor is there any such evidence before us, beyond the claimant's assertion that this was the case. As we have said, the claimant had not given any indication that he was ready to return to work at that point, or within any reasonable period at all. Following the case of **Doran v DWP,** the duty to make a reasonable adjustment by allowing a phased return did not arise in those circumstances, and that complaint must fail.

292. In any event, by this stage, we do not consider that it would have been a reasonable step for the respondent to have to offer the claimant a phased return of more than six weeks at this point. There was no evidence that the claimant was ready to return at all or that if a phased return of more than six weeks was offered to him, there was a substantial chance that he would return successfully. On the balance of probabilities and taking account of all the evidence, we find that if, at this time, TW had offered the claimant a phased return of more than six weeks, he still would not have returned to work.

293. Finally in respect of reasonable adjustments, Miss Burton argued that the refusal to allow the claimant to be accompanied by a relative, which was communicated to him on the 14th of April 2022 and repeated before and at the meeting on 21 April 2022, was out of time. She said that it was not conduct that continued over a period within the meaning of section 123 of the EA 10 because there was no link between the refusal on the 14th of April and what we have found to be a refusal on the 11th of August 2022. However, there was a link: it was FL who gave the advice on the 14th of April 2022, and FL who was again advising GO on the 11th of August 2022. In those circumstances, we find that there was conduct extending over a period in that the respondent continued to refuse to allow the claimant to be accompanied by a relative at sickness absence meetings on the 21st of April and the 11th of August 2022 and in both cases, FL was the person who gave advice that this should be done. This conduct is therefore to be treated as done

at the end of the period that is on the 11th of August 2022 and is therefore made in time.

294. Even if we are wrong about that, we would extend time on the basis that it is just and equitable to do so in respect of the refusal on the 14th - 21st April 2022, because the claimant suffered from significant mental ill health difficulties throughout the period until he sought an early conciliation certificate in October 2022 and this continued, thereafter, even though he did not submit his final sickness certificate to the respondent in time for the capability hearing. Although he was able to write letters and to seek assistance eventually from ACAS, we find that he was significantly mentally impaired and for those reasons we consider it just to extend time, even if we are wrong about the complaint in April 2022 being made in time.

295. Finally, at some points the claimant appeared to be suggesting that the respondent should not have applied its sickness management policies to him at all and should effectively have left him to recover and return when he was ready rather than inviting him to sickness management and capability hearings. Although this was not part of the agreed issues, we do not consider that this would have been a reasonable step for the respondent to take given the nature of the services it provides and the importance of having a sufficient number of permanent staff at work to provide effective patient care.

296. **Discrimination arising from disability:** we started by considering whether the claimant was treated unfavourably by the respondent. The claimant now accepts that his network account was not deleted whilst he was on sick leave. He has not pursued that allegation before us, having accepted that it was disabled rather than deleted in accordance with the respondent's IT policy, and so he accepts that he was not unfavourably treated in that respect. If we had needed to rule upon the matter, we would have found that even if this did amount to unfavourable treatment, however, and even if the treatment was because of something arising in consequence of his disability, namely his absence from work, it is apparent that the reason that the account was disabled was to comply with the policy. We would have concluded that disabling the account was a proportionate means of achieving the legitimate aim, namely the smooth running of the respondent's large internal IT network and in accordance with the respondent's information security policy, to ensure the security of data. When the claimant returned to work on the 14th of March 2021, his network account was reinstated within three days, so that, in our view, as well as there being a reasonable need for this step, the means used was effective and proportionate.

297. The next complaint, **issue 4.1.2**, is that the respondent refused to allow the claimant a phased return to work for a period of more than six weeks and transferred him to be dealt with under the capability policy. The alleged refusal relates to the meetings on 21 April and 11 August 2022. As set out above, we have not accepted that the respondent refused to allow the claimant a phased return for a period of more than six weeks at these meetings. Rather, the claimant was told in the meeting on the 21st of April that his progress would be reviewed and further consideration given to means of supporting him, and that if a period of more than six weeks was indicated, he should consider using annual leave or temporarily reducing his hours of work. This was not a

refusal. Likewise in the meeting which took place on the 11th of August 2022, the claimant was told that a period of phased return that worked for him would be considered once he indicated that he was ready to return to work. Again, this is not a refusal of a phased return of more than six weeks. So, the claimant was not unfavourably treated by being refused a phased return of more than six weeks.

298. Issue 4.1.2 also complains that the claimant was unfavourably treated by being transferred to be dealt with under what is referred to as the capability policy. We understand this to be a complaint about GO deciding, in accordance with the sickness absence management policies and the performance improvement policy to refer the claimant to a capability hearing after the meeting on 11 August 2022. As there was a possibility that the claimant would be dismissed at the capability hearing, we consider that this decision is capable of being unfavourable treatment.

299. In the case management hearing before Judge Alliott and again when the matter was clarified at the start of the final hearing, the claimant alleged that the alleged refusal of more than six weeks for a phased return and the transfer to the capability process were because of something arising in consequence of his disability, namely his need for a phased return to work in excess of six weeks. We find however, that the transfer to the capability process, by GO in August 2022, was because the claimant had been continuously absent, apart from a few days, since the 12th of June 2021, and even in August 2022 was not indicating when he would be fit to return to work, rather than because of his need for a phased return for more than six weeks. Likewise, when the capability process was continued in October 2022 it was because the claimant had remained absent, with no indication that he would return in the foreseeable future. As noted above, we do not accept that the claimant proved that he needed a phased return of more than six weeks in any event. The letter included in the bundle from his counsellor, page 538, post-dates his dismissal by four months and does not suggest that he was fit to return at the time of the capability hearing, whether under a phased return or otherwise. As indicated by the Occupational health reports and the respondent's witnesses, we find that it would not be possible to predict the length of the phased return that was required with any accuracy before the claimant started work again, when reviews of his progress could be carried out.

300. Although it is not the claimant's pleaded case, however, we can see that the reason for the referral to the capability hearing was because of something arising in consequence of the claimant's disability that is, his prolonged and continued sickness absence. It was not because he needed a phased return to work of more than six weeks.

301. That being the case, if we had needed to decide upon whether the respondent was justified in moving to a capability hearing in August 2022, we would have found that this was a proportionate means of achieving a legitimate aim. The legitimate aim is set out in paragraph 30.4 of the amended response and is that the respondent wished to manage absence in its organisation effectively in order to ensure effective patient care and service. We would consider, balancing the disadvantage to the claimant of being called to a capability hearing (with the potential for being dismissed) against the disadvantage to the Trust of not doing so, taking account of its reasonable need to ensure

effective patient care and service, that it was proportionate for the Trust to call the claimant to a capability hearing at this time. By this stage, there had been 5 Occupational Health referrals, and several attempts at a phased return to work, but there was still no indication that the claimant could sustain a return to work.

302. We heard evidence from MN, FL GO, BB and TW to the effect that the claimant's continued absence was having significant financial repercussions in that it was necessary for the Trust to use bank or agency staff to cover his absence at a higher cost than would have been the case had he been at work. There was also an impact on the Trust's ability to deliver its services to in-patients because, as we accept, it was important that the patients had regular contact with the same member of staff to build up relationships and develop a therapeutic relationship (and trust) with staff. There was also an impact on the workload of other staff employed by the Trust. So, the consideration was not cost alone, although obviously cost is of some importance in the context of public provision of health services.

303. The respondent had a real need to manage the attendance of its staff to ensure provision of its services. The means chosen, applying a capability process, was appropriate to ensure that staff were capable of doing their jobs and maintaining attendance. Having a capability process was reasonably necessary to ensure that there was adequate staffing. and the appropriate care was given to patients. The claimant did not suggest that less discriminatory measures could have been chosen, but if he intended to argue that it would have been open to the respondent to wait and see if the further offer of a phased return was effective before moving to a capability hearing, we do not consider that this was a realistic option, when the claimant was not indicating in the August 2022 sickness absence meeting (after which he was referred to the capability process) that he was ready to return to work. Numerous earlier attempts to encourage him to return to work had failed.

304. In these circumstances, as we say, we consider that it was proportionate of the Trust to call the claimant to a capability meeting after 14 months of absence, particularly when its policies suggest this step after six months absence. We have weighed the discriminatory impact on the claimant against the Trust's real need to ensure adequate patient care and support. We have found that the Trust's needs outweighed the discriminatory impact on the claimant, especially as steps had already been taken to ameliorate the effect on the claimant by waiting much longer than the policy suggested to give him a chance to return before taking this step. If the claimant's case had been that the "something arising" was his sickness absence, we would therefore still have dismissed this complaint as the respondent has justified its treatment of him in this respect.

305. Next, **issue 4.1.3**, the claimant complains that he was unfavourably treated because, although failings were found because of the claimant's grievance, the respondent did not investigate the matter further and did not afford the claimant an appeal. We do not consider this to have been unfavourable treatment, as it was an option which was available to the respondent under its Early Resolution Policy and Procedure. As we have seen above, where a formal grievance is received, the first stage is that there will be an investigation to carry out preliminary fact finding to decide whether the complaint warrants full investigation or not, or

whether further consideration should be given to any of the informal resolution options. This is at paragraph 7.4 of the policy on page 116.

306. An independent person, LM, was appointed to carry out the preliminary fact-finding investigation. After this, a senior manager, BB, reviewed it and reached a conclusion that the complaint did not warrant further investigation. As she told us, she concluded that there had been a thorough investigation already, and although learning points were identified solutions were to be implemented, so she did not consider that any further investigation was required. She did not consider that there needed to be any further informal resolution either. As the claimant's grievance was resolved in this manner, he was not entitled to an appeal under the policy.

307. These conclusions were open to BB under the relevant policy. As a result, we do not consider that, looked at objectively, there was unfavourable treatment of the claimant in this respect. A reasonable employee in his position would not consider themselves to be placed at a disadvantage by this decision as there had already been a thorough investigation and learning points indicated.

308. If we are wrong about that, and this was capable of amounting to unfavourable treatment, we do not consider that the treatment was because of something arising in consequence of the claimant's disability. The claimant argued that BB's decision was because of the content of his grievance (alleging disability discrimination), and also due to his alleged inability to attend capability meetings. We do not consider that BB was at all influenced by the fact that the grievance referred to disability discrimination. We consider that she reviewed LM's report carefully and intended to (and did) implement the recommendations for improvement but given the nature of the findings, did not consider that any further investigation was required. That was because she thought that the investigation which had already been done was adequate and that no further action was necessary beyond implementation of the learning points. This decision meant that the claimant was not entitled to an appeal under the policy.

309. There is no evidence that BB was influenced by the claimant's alleged inability to attend capability meetings in reaching her conclusion, and we do not accept that she was. The capability process was paused while the claimant's grievance was dealt with and further invitations to attend a capability meeting were issued after the outcome of the grievance. The claimant made it very clear to HJ on two separate occasions, on the 31st of October and 5th of November 2022 (pages 512 and 520), that he did not intend to take part in a capability hearing for the reasons he stated. There is no evidence beyond the claimant's assertion that he was unfit (as opposed to unwilling) to attend a Teams meeting to discuss his capability at that stage, as opposed to being unfit to return to work, and as we have said, these events took place after the outcome of the grievance was known and cannot have influenced BB.

310. Even if for some reason it were to be found that BB's decision to take the claimant's grievance no further did arise in consequence of his disability, we would have found that her decision was a proportionate means of achieving a legitimate aim. The legitimate aim is set out at paragraph 30.3 of the amended grounds of response and is that she was seeking to implement "Just Culture", the NHS ethos of supporting a fair culture which seeks to resolve matters at the earliest possible stage

by applying the policy in question. As the investigation carried out by LM was thorough and identified learning points which were to be implemented, we consider that this was a proportionate means of dealing with the claimant's grievance. It was reasonably necessary for the respondent to seek to resolve the issues at the earliest possible stage and any disadvantage to the claimant was outweighed by the respondent's need to avoid disputes becoming protracted and interfering with the resources available to deal with patient care.

311. Finally, **issue 4.1.4**, the claimant complains that he was unfavourably treated by being invited to capability hearings, by the capability hearing being held in his absence and by being dismissed.

312. As we have indicated above, being invited to a capability hearing is capable of being unfavourable treatment, as is the holding of a capability hearing in the claimant's absence and the claimant's dismissal.

313. The claimant says that the unfavourable treatment was because of something arising in consequence of his disability, namely his alleged need for a phased return to work of more than six weeks, his raising of a grievance on the 19th of August 2022 alleging disability discrimination and his inability to attend capability meetings. We have already found that the claimant has not established that he needed a phased return to work of more than six weeks, nor has he established on the balance of probabilities that he was unable (as opposed to unwilling) to attend the capability meetings.

314. There was no evidence before us from which we could conclude, nor do we accept, that the reason the claimant was invited to capability meetings from the end of October 2022 was because he had brought a grievance alleging disability discrimination. The claimant did not ask HJ or TW about this or suggest that this was why he was invited to capability meetings when he was. We accept that the reason that the claimant was invited to capability meetings was that the Trust was extremely concerned about his prolonged sickness absence and was trying to follow its sickness absence management policies. They had already significantly extended the trigger point for moving to this step, which could have been taken after six months' absence. GO had already informed the claimant in the sickness absence meeting on the 11th of August 2022 that there would be a capability hearing, that is, before the claimant raised his grievance. The invitations following the conclusion of the grievance were simply a continuation of the application of that policy.

315. Although this is not part of the claimant's pleaded case, it seems to us that his continued and protracted sickness absence was something arising from his disability and that this was a substantial cause of him being invited to a capability meeting, of the meeting proceeding in his absence and of him being dismissed.

316. If we needed to determine the point, we would have found that inviting the claimant to capability meetings, holding capability meeting in the claimant's absence and dismissing him were proportionate means of achieving a legitimate aim as set out at paragraph 30.4 of the amended grounds of resistance. The legitimate aim was again the effective management of absence in the respondent's organisation to ensure effective patient care and provide its services to inpatients. We consider that the respondent acted proportionately in respect of these matters by

extending the time that it was prepared to allow the claimant to remain absent before calling him to a capability meeting, rescheduling the capability hearing twice (rather than once in accordance with its policy) to give the claimant an opportunity to attend, and by encouraging him to submit written information that it could consider if he was unable or unwilling to attend.

317. As set out above, we have balanced the disadvantage to the claimant (losing his job) against the reasonable needs of the respondent to manage its workforce effectively to ensure effective patient care. The claimant was at risk of losing, and did lose, his job, but he had been given many opportunities to return with the promise of a flexible attitude to his return to work and the respondent had extended its "trigger points" for action at every stage and had sought advice about how to help him. It had tried to consult with him about what it could do to assist him. He was not suggesting, in November 2022, that he was ready to return even if an extended phased return was offered. On the other hand, we have borne in mind the significant impact on patient care for in-patients with serious mental ill health by the absence of a permanent member of staff who would give them consistency of care. We have taken account of the additional cost of covering the claimant's absence over such a long period by having to pay for bank or agency staff or higher-grade staff to cover the claimant's role. There was also an impact on other permanent staff by having to manage the claimant's absence and on occasions cover his role. The extra costs had an impact on the Trust's budget, but as set out above, cost was not the only consideration. Objectively, we do not consider that there was, at this stage any less discriminatory measure that the Trust could take, as numerous attempts at encouraging and supporting the claimant to return to work had failed. Even if, contrary to our findings, the claimant was incapable of attending a capability meeting by that stage, we consider that it was proportionate for the respondent to continue with the meeting as it had waited long enough. Expecting the respondent to wait longer would have had a disproportionate impact on its ability to provide adequate patient care and deliver its services.

318. We have balanced the discriminatory impact upon the claimant against the Trust's real need to ensure adequate patient care and delivery of its services by managing the absences of its staff. The means chosen, applying the absence management and capability process after significantly adjusting its trigger points to allow the claimant several opportunities to return, is an appropriate means of achieving the aim of adequate patient care and service delivery.

319. In those circumstances, we consider that even if the claimant had pleaded his case as suggested above, it would have failed.

320. We should make clear that we do not consider that even if the respondent had invited the claimant to attend the capability meetings with a family member or friend who was not employed by the Trust, that the claimant would have attended. The claimant had made it clear in his emails to HJ that he would not attend if anyone named in his grievance was present, and it was necessary for GO and FL to attend to present the management case. By this time, he believed that the outcome of the capability hearing was predetermined and therefore was refusing to participate, as he had indicated to Hannah Jungius in his email on 31 October 2022, page 512. Nor do we consider that if the respondent had

allowed the claimant to attend the earlier sickness absence management meetings with a family member that this would have resulted in him attending the capability meetings, for the same reasons.

321. So, for all those reasons, the claimant's claims of discrimination arising from disability are dismissed.

322. **Unfair dismissal:** The claimant agreed that the reason for his dismissal was capability. The underlying question is whether in all the circumstances the respondent had acted within the reasonable range of responses in concluding that it could not be expected to wait any longer for the claimant's return and therefore to dismiss him.

323. The respondent had afforded the claimant numerous opportunities to return to work on a phased basis between 12 June 2021 and 11 August 2022. None of those had been successful, despite the patience exhibited by MN (in particular). We consider that the respondent had made it clear to the claimant that it would be flexible in its approach to a phased return, both in April and August 2022, and that if he required a return of longer than six weeks, that would have been accommodated, although they would have expected the claimant to consider using his annual leave that had been accumulated, or consider a temporary reduction in hours of work in order to do so. This had been recorded in writing so that the claimant could discuss the contents of the letters after the meetings with his family. The respondent acted in good faith and took account of the advice of its occupational health advisors, although it was prepared to depart from that advice for the claimant's benefit should that prove necessary – see outcome letter, p382. In those circumstances, we do not accept that the claimant was not given substantial support to return.

324. The respondent had consulted with the claimant on many occasions, formally and informally, to establish his current condition and his progress. The claimant did not complain of lack of contact between late April and July 2022 until GO contacted him to apologise for this, and indeed, in April 2022, seemed to be suggesting to MN that the respondent should not be contacting him about his absence. In any event, the claimant had been referred to Occupational Health in June 2022 so that the respondent could be kept up to date with his progress. Although the claimant had not been allowed to take a family member to the meetings in April and August 2022, he was given a further opportunity to put his views across and provide relevant information at the capability meetings arranged in November 2022 and chose not to attend. In addition, he was given the opportunity to provide such information in writing at the capability meeting and chose not to do so.

325. The respondent had not rigidly applied its absence management policies to the claimant but had given him considerable leeway, both before and after deciding to move to a capability hearing. For example, the policy provides that the capability meeting will not be rescheduled more than once. The respondent rescheduled it twice to give the claimant an opportunity to attend. In all the circumstances, we consider that the respondent acted within the reasonable range in seeking to consult with the claimant about his medical condition and his progress and that TW was entitled to conclude on 17 November 2022 that sufficient efforts had been made.

326. Specifically, as stated above, we do not consider that, had the respondent expressly offered the claimant the opportunity to be

accompanied at the capability meeting by a relative who was not employed by the Trust, the claimant would have taken that opportunity. The claimant, as noted above, had made it very clear to HJ that he was not going to attend the capability meeting, and not just because he considered that reasonable adjustments were not being made. He said that he would not attend if anyone implicated in his grievance was going to attend, and as we have found above, it was necessary for GO and FL to attend to present the management case. He also said that he considered that the outcome was predetermined and would not be attending for that reason. TW gave the claimant the opportunity to make a written representation, but he did not take it. She rescheduled the meeting more than once. We conclude that it was within the reasonable range for her to conclude that sufficient attempts had been made to engage with the claimant in those circumstances.

327. The respondent had referred the claimant to its Occupational Health service on five occasions. At the time of his dismissal, the claimant had not submitted his most recent sickness certificate, and as far as the respondent was concerned his absence was unauthorised, although TW accepted that he was unfit to work at that time. He had not taken up TW's invitation to supply any written material or suggested that the Trust should contact his GP or any other medical advisor.

328. The claimant now complains that the respondent did not get an additional report from his General Practitioner, but the General Practitioner reports were consistent in saying that the reason for his absence was PTSD and not the respondent's treatment of him. There was no indication that the GP thought the claimant was ready to return, on a phased return or otherwise.In those circumstances, we think it was well within the reasonable range for the respondent to take the view that it was not necessary to contact the claimant's General Practitioner, especially as at the time of the dismissal, the claimant had not submitted a current sickness certificate and had not said he was ready to return.

329. The claimant suggested at the hearing before us that the respondent ought to have contacted his therapist for a prognosis as to when he was likely to be able to return to work. The claimant did not suggest this at the time of the capability meeting, and as neither he nor anyone else was suggesting that he was fit to return to work at the date of the capability hearing or within the foreseeable future, we think it was within the reasonable range for the respondent not to do so.

330. By the time of the capability hearing, the claimant had run out of sick pay. The most recent Occupational Health reports had indicated that the claimant was fit to return to work on a two-week phased return, but the claimant had never returned to work and had remained off sick. The claimant has criticised the respondent for not obtaining a further occupational health report in November 2022. TW had seen the sickness absence review outcome letter dated 15 August 2022, which recorded on page 381 that the claimant did not accept the content of the recent Occupational Health physician's report in any case. In all the circumstances, we consider that it was within the reasonable range for the respondent to decide that no further medical evidence was necessary. As noted above, the claimant was not indicating that he would return to work in the foreseeable future or at all. The respondent had waited 17 months to see if the claimant was going to be able to

return. If it obtained a further Occupational health report, there was no guarantee that the claimant would accept any recommendation that he was fit to attempt a return. There was a considerable impact on patient care, other staff and on its budget from a permanent staff member remaining absent for so long.

331. The respondent could have referred the claimant to a capability meeting in accordance with its policies, in our view, after receipt of the Occupational Health report in January 2022, which said that the claimant was not fit to return in the foreseeable future. At that time, he had been absent, apart from attempting to return on one day, for more than seven months, and had already been subject to an absence management process before that, in April 2021. His sick pay would have terminated in March 2022 if he had not returned for a further day at that point.

332. The respondent had previously specifically asked its Occupational Health providers if redeployment was an option and had been told that this was not necessary. In any case, the claimant had not suggested that he would be fit to return to an alternative post, and his case has always been that he enjoyed the job he was doing. In those circumstances, we consider that it was within the reasonable range for TW to decide that redeployment was not an appropriate option.

333. Whilst we have concluded above that there was a failure to make reasonable adjustments at the sickness absence meetings in April and August 2022, by failing to allow him to be accompanied by a family member who is not employed by the Trust, we do not consider that this impacted on the fairness of the process of dismissal overall. As noted above, under the respondent's policies, they could have moved to a capability hearing after receipt of the Occupational Health reports in January 2022. They did not do so but offered the claimant two additional meetings to discuss his sickness absence, his likely return to work and to offer him a phased return. The purpose of the proposed reasonable adjustment in the sickness absence meetings was to assist the claimant to process and understand the information he was being given in the meetings. The family member would have reduced the disadvantage to the claimant by giving him an objective view of what the respondent's employees were saying. For example, the family member could have explained that the claimant was not being refused the opportunity for a phased return of more than six weeks. This does not mean that had the family member attended the sickness absence meetings, it is likely that the claimant would have returned to work. Based on the evidence available to us, we do not consider that he would. It was clear from the outcome letters following the meetings that the respondent was prepared to be flexible about the length of the phased return and the family member could have explained that when they were shown the letters.

334. There is nothing in the Occupational Health Physician's report dated 23rd of June 2022 which suggests that the reason the claimant was not returning to work was because he was being refused a more than six-week phased return, or because he had not been able to take a family member to the sickness absence meetings. As we have said, if the claimant had asked TW if he could be accompanied by a family member, she would have considered that, but he did not. His emails to

HJ make it clear that he would not have attended anyway for the reasons given.

335. There is nothing in the Occupational health physician's report from 23 June 2022 which suggests that the reason for the claimant's illness was because of the respondent's treatment of him.

336. In summary, we consider that the respondent had made inquiries about the claimant's condition which were within the reasonable range and had consulted with him to an extent that was within the reasonable range. They had not rigidly applied their policies to him but had allowed him significant leeway to encourage his return to work, as they valued him as an employee. The claimant was offered the opportunity to appeal against TW's decision but decided not to do so.

337. The claimant asserted that his dismissal was predetermined, but he did not ask either GO, FL or TW any questions about this. The claimant suggested that more time was spent on his grievance than his capability hearing, but that ignores the fact that the capability process commenced in August 2022 (rather than at the end of October 2022) and was paused while his grievance was dealt with, and that it was preceded by an extended absence management process. Having heard from the respondent's witnesses, and in particular TW, we do not accept that she had a closed mind or that the claimant's dismissal was predetermined. She was anxious to hear what he said and gave him the opportunity to provide written information. If the claimant had provided such information or had asked to be accompanied by a relative, she would have considered this.

338. The claimant argued that TW had not taken account of his mental health, his disability or his good performance in reaching her decision. It is apparent from her letter informing the claimant of his dismissal that she did take these factors into account (see page 528) and we accepted her evidence that she did. As we have noted, she did try to encourage the claimant to participate by rescheduling the meeting twice and to accommodate him by giving him the opportunity to make written representations.

339. We have considered the issue of whether the respondent had adequate staff to cover the claimant's absence. As set out above, we find that it had to resort to using more expensive agency and bank staff to cover his absence, and that sometimes other permanent staff had to cover his duties, which was to the detriment of patient care. In terms of the nature of the claimant's illness and the likely length of his absence, even after 17 months the claimant was not indicating when he would return. Occupational health reports had referred to his condition as long term and chronic. If the respondent had continued to employ the claimant, it was not paying him as he had run out of sick pay, but it would have continued to incur the higher cost of using agency staff, bank staff or (sometimes) higher-grade staff to cover his absence. His absence also had an impact on permanent staff by having to manage his absence. This was more costly and less beneficial to it and its patients than employing someone else as a permanent member of staff. We have borne in mind the nature of the respondent's organisation, which is an NHS Trust delivering mental health services to the community, and in the claimant's case, to inpatients. As a matter of common knowledge, we are aware of this scarcity and value of such

inpatient resources and their importance to the community at large of the Trust being able to provide its services effectively.

340. By the time of his dismissal, the claimant had attended three sickness absence meetings since he initially went off sick on the 12th of June 2021. There had previously been a sickness absence management meeting in April 2021. He then had the opportunity to attend a capability meeting after 17 months, although the respondent's usual trigger point is six months.TW had given the claimant the opportunity to provide written information to the capability meeting. The respondent had received no fewer than five Occupational Health reports about the claimant, but all attempts to support his return to work had failed. The claimant had not indicated at that stage that he was likely to return to work in the foreseeable future and had not provided any evidence from his GP or therapist to that effect. In all those circumstances, we consider that the process adopted by the respondent was within the reasonable range, and that it was within the reasonable range of responses for the respondent to dismiss the claimant when it did. We consider that it was within the reasonable range of responses for the respondent to decide that it had waited long enough for the claimant to return by the 17th of November 2022. In all the circumstances, we consider that the respondent acted reasonably in treating the claimant's lengthy sickness absence as sufficient reason for dismissing him with notice on 17 November 2022.

341. **Section 123(1) ERA 1996:** In any case, given the facts we have found, we consider that even if there was any defect in the process, the respondent could certainly have dismissed the claimant fairly at the point that it did given the length of his absence and the lack of any indication that he was fit to return, and that it would have done so, given the evidence we heard. As we have indicated, even if the respondent had said that the claimant could bring a family member to the capability hearing, we consider that he would not have attended. He was not covered by any sickness certificate at that point, had declined to participate and the respondent had waited far longer than it usually would, according to its policy, before convening a capability hearing. The claimant has not provided any evidence that he was fit for work at the date of the capability hearing, and in fact we now know that his GP had certified him to be unfit at that time. There is no evidence, beyond the claimant's assertion, that if the respondent had sought medical evidence from his GP or therapist between August and November 2022, they would have said that he could return to work within any reasonable period.

342. Based on what the claimant told us in evidence, if the respondent had sought a further occupational health report after the 11 August sickness absence meeting, the claimant would not have accepted the result and is unlikely to have been frank with the occupational health practitioner. We do not accept that the claimant would have recommenced work within a reasonable period even if the occupational health adviser had recommended that. At the start of the hearing before us, the claimant said that he believed that his health had been declining at that time, and this is also reflected in the issues identified by Judge Alliot. The claimant had been warned repeatedly that the capability hearing may lead to his dismissal. The claimant was not indicating any intention to return. His absence was having a significant impact on the

Trust's budget and its ability to deliver adequate inpatient services. It was also having an impact on the workload of his colleagues. Having heard from TW, we consider that in these circumstances, even if any procedural defect occurred and was cured, she could and would still have fairly dismissed the claimant when she did. There is no significant chance that she would not have done so, and so it would not have been just and equitable to make a compensatory award even if the claim of unfair dismissal had succeeded.

343. The claimant has not provided any evidence that if his GP or therapist had been contacted, they would have given a firm return to work date within the foreseeable future. He is not suggesting that he was fit to commence a phased return in November 2022. If for any reason we are wrong about the fairness of the dismissal, we would have reduced the claimant's compensatory award to nil for the reasons set out above.

344. The remedy hearing in respect of the successful reasonable adjustments complaint will now take place on **1 November 2024** as previously indicated. As the hearing listed for 27-30 August was originally intended to cover remedy if time allowed no further documents or statements should be required, but if either party requires further directions they must inform the Tribunal as soon as possible.

_____

Employment Judge **Findlay**

_____

Date: 30 September 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

9 October 2024

FOR EMPLOYMENT TRIBUNALS

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

SCHEDULE OF ISSUES

Time limits / limitation issues

1.1 Were all of the claimant's complaints presented within the time limits set out in the Equality Act 2010? Dealing with this issue may involve consideration of subsidiary issues including whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures and consideration of whether time should be extended on a "just and equitable" basis.

Disability

2.1 The respondent accepts that the claimant is a disabled person by reason of the combined effect of his emotionally unstable personality disorder, PTSD, depression & anxiety.

The Tribunal clarified the concession made by the respondent in its amended grounds of resistance, paragraph 3, Page 67, at the start of the hearing. Miss Burton stated that the respondent accepted that the claimant was disabled by depression and anxiety from January 2022 and from the other two conditions, PTSD and EUPD from June 2022 and that it knew of those conditions from those respective dates. In her closing submissions, Miss Burton accepted that the respondent knew of all of the conditions apart from EUPD by January 2022 and that the claimant was disabled by all of the conditions except for EUPD by that time. She accepted that the respondent's failure to accept that it knew that the claimant had EUPD or that he was disabled by it before June 2022 has no practical bearing on the decisions we have to make.

2.2 The claimant does not rely on chronic obstructive pulmonary disease.

Reasonable adjustments: EQA, sections 20 & 21

3.1 Was the respondent unaware, and could it not reasonably have been expected to know that the claimant was a disabled person? Note: see the concession above regarding knowledge of disability, but the respondent initially disputed that it had knowledge that the claimant was likely to be placed at the substantial disadvantages complained of at 3.5/3.6 below. In closing submissions, however, Miss Burton accepted that the evidence showed that the respondent knew that the claimant was likely to be placed at a substantial disadvantage if he could not be accompanied by a relative at the sickness review meetings in April and August 2022 (evidence of Majid Nazari in cross examination).

3.3 Did the respondent have the following PCP (provision, criterion or practice):

3.4.1 The Sickness Absence Policy ?

The Tribunal sought to clarify with the claimant the aspects of the sickness absence policy which he alleges placed him at a substantial disadvantage in his employment compared to non-disabled people at the start of the hearing. He agreed that, in line with the other issues set out by EJ Alliot, the aspects of the sickness absence policy that he was relying upon (as provisions, criteria or practices applied to him by the respondent) were as follows:

3.4.2 the policy that employees cannot be accompanied to formal meetings by friends or relatives not employed by the Trust, only fellow employees or trade union representatives;

3.4.3 the practice whereby sickness review meetings were held face to face (including by video call) rather than in writing;

3.4.4 the alleged practice or policy that the respondent would not allow a phased return to take place for a period of more than six weeks.

3.5 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that [to be read together with 3.6]:

3.5.1 On 12 April 2022 the claimant sent a request by email to Majid (his line manager) and Fran Langan (HR) to be allowed to be accompanied by a relative at a formal sickness review hearing. This was refused as being against Trust policy.
3.5.2 On 15 April 2022 the claimant sent an email requesting that the formal sickness review hearing be held in writing rather than face to face. This was refused as being against Trust policy.
3.5.3 At the formal sickness review on 21 April 2022 the claimant requested a phased return to work of more than six weeks. This was refused as against Trust policy.

3.6 Did these refusals put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that:

3.6.1 The claimant felt forced to attend the formal sickness review hearing under the threat that he may be given a formal warning. This greatly distressed him, and he agreed to things that he was not fully understanding due to his levels of anxiety.

3.6.2 The claimant was not supported in his return to work.

3.6.3 If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

3.7 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as

follows:

3.7.1 Allowing him to be accompanied by a relative to all sickness absence and capability meetings.
3.7.2 Allowing the meetings to be heard in writing.
3.7.3 Allowing the claimant a phased return to work of more than six weeks.

3.8 It is the claimant's case that the failure to provide reasonable adjustments continued for all further meetings and hearings.

3.9 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

EQA, section 15: discrimination arising from disability

4.1 Did the respondent treat the claimant unfavourably as follows?

4.1.1 Deleting the claimant's network account whilst he was on sick leave (rather than disabling it as per policy) such that it was not available to him when he returned to work on 14 March 2022:
Note: at the start of the hearing, the claimant stated that whilst he had originally thought that his account had been deleted, he was now aware that it had been disabled in accordance with the policy rather than deleted. He made it clear in his closing submissions that he was no longer pursuing this as a complaint of unfavourable treatment.
4.1.2 Refusing the claimant a phased return to work of more than six weeks and transferring him to be dealt with under the capability policy.
4.1.3 Despite finding failings as a result of the claimant's grievance, failing to investigate the matter further and not according him an appeal.
Note: At the start of the hearing, the claimant accepted that his grievance had not been upheld, although failings had been found on the part of the respondent. He indicated that he was still pursuing complaints that the failure to investigate further or to give him an appeal were unfavourable treatment because of something arising in consequence of his disability.
4.1.4 Inviting the claimant to capability hearings, holding it in his absence and dismissing him.
4.2 Did the following thing(s) arise as a consequence of the claimant's disability?

4.2.1 The claimant's sickness absence prior to 14 March 2022.
4.2.2 The need for a phased return to work in excess of six weeks.
4.2.3 The raising of a grievance on 19 August 2022 alleging disability discrimination.
4.2.4 An inability to attend capability meetings.

4.3 Did the respondent treat the claimant unfavourably in any of those ways and/or dismissing the claimant because of any of those things?

Note: at the start of the hearing, the Judge clarified with the claimant that he is arguing:

4.3.1 that the refusal of a phased return in excess of 6 weeks /transfer to a capability process was because of his need for a phased return of more than 6 weeks, which he says arises in consequence of his disability (4.2.2 above)
4.3.2 the failure to investigate his grievance or afford him an appeal was because he had raised a grievance on 19 August 2022 alleging disability discrimination (4.2.3 above) and due to his inability to attend capability meetings (4.2.4) both of which things he alleges arose in consequence of his disability
4.3.3 he was invited to capability hearings, a capability hearing was held in his absence and he was dismissed because of 4.2.2 ,4.2.3, and 4.2.4 above, all of which are alleged to arise in consequence of his disability.

4.4 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent has set out details of the legitimate aims relied upon in its amended grounds of resistance at page 74, paragraph 30:

“30.1 the Respondent's process to deactivate inactive accounts on its IT system was not akin to deleting the account and the Respondent contends that this was a proportionate means of achieving the legitimate aim which includes the smooth running of a large internal IT network and was in accordance with the Respondent's Information Security Policy; (the claimant no longer pursues this allegation as above)

30.2 the Respondent agreed to allow the Claimant a six-week phased return to work. This was in line with the advice from Occupational Health, which did not recommend any further extension to the phased return. The Respondent was prepared to allow the Claimant to extend this phased return period beyond six weeks either through the use of the Claimant's annual leave and/or a flexible working arrangement. The Claimant did not engage with the Respondent about agreeing a phased return to work beyond six weeks. The Respondent contends that this was a proportionate means in that it followed the advice of Occupational Health in order to achieve a legitimate aim which includes the good and effective management of its workforce in order to ensure service delivery to patients;

30.3 the Respondent did not uphold the Claimant's grievance as alleged. The Respondent conducted an initial fact-finding investigation into the Claimant's complaint in accordance with its Early Resolution Procedure. The initial investigation concluded that a formal investigation was not required and there was no right of appeal. The Respondent's Early Resolution Procedure implements 'Just Culture', an NHS ethos of supporting fair culture which seeks to resolve matters at the earliest stage possible. The Respondent contends that its initial fact-finding investigation was a proportionate means of achieving the aim of complying with its own Early Resolution Procedure and the wider NHS ethos of fostering a Just Culture. The Respondent contends that this was proportionate because the Respondent had conducted as much investigation as was fair and reasonable in the circumstances; and

30.4 the Respondent scheduled three separate capability hearings which the Claimant refused to attend. The Respondent held the capability hearing in the Claimant's absence and provided the Claimant with an opportunity to make representations at the hearing in his absence. The Respondent contends that this

was a proportionate means of effectively managing absence in its organisation in order to ensure effective patient care and service. Given the number of times the Respondent had rescheduled the capability hearing to accommodate the Claimant, this was a proportionate step to take.

4.5 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disabilities?

The respondent accepts that it knew of all of the disabling conditions except for EUPD by January 2022, and Ms. Burton accepted in closing submissions that nothing turns on the lack of knowledge of EUPD, of which the respondent knew by 23 June 2022.

Unfair dismissal

5.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

The claimant was dismissed by the respondent. The respondent asserts that the fair reason for dismissal was capability and the claimant accepted that this was the reason in evidence. Capability is a potentially fair reason for dismissal within section 98(2)(a) of the ERA 1996.

5.2 Did the respondent genuinely believe in the reason for dismissal and was that belief based on reasonable grounds following a reasonable investigation?

5.3 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and did the respondent in all respects act within the so-called 'band of reasonable responses'? On the 27th of August at the hearing, the claimant indicated that his case was that his dismissal was unfair for the following reasons:
5.3.1 the investigation was unfair, as the respondent did not seek information from his GP or therapist;
5.3.2 the respondent should have given him a better opportunity to recover or improve by means of a longer phased return;
5.3.3 That he was not given substantial support to return;
5.3.4 that there was no consideration given by the respondent to any business justification when deciding whether or not to make adjustments to take account of his disability and the policies were applied in a blanket fashion;
5.3.5 there was no real attempt by the respondent to discuss matters with him;
5.3.6 the claimant's good performance, mental health and disability were not considered during the investigation leading up to his dismissal;
5.3.7 at the capability hearing, no account was taken of his disability or that his health was declining, nor was it suggested that he was difficult to manage;
5.3.8 the respondent relied upon an outdated Occupational Health report from 23 June 2022 because it fitted their agenda to dismiss the claimant;

5.3.9 that (according to the claimant) the respondent did not investigate whether the reasonable adjustments suggested, or any other reasonable adjustment, could be made and should not have held the capability hearing in his absence
5.3.10 the relative time spent on considering his grievance as opposed to the time spent on the capability hearing was evidence of an agenda to dismiss him.

5.4 Would the claimant have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? If so, by how much?