EMPLOYMENT TRIBUNALS

Claimant: Mr O I Osadugba

Respondent: St George's Hospitals NHS Foundation Trust

Heard at: London South Croydon, in public, in person initially and latterly by CVP

On: 30-31 January & 1-2 February and in Chambers 3 &13 February 2023

Before: Employment Judge Tsamados
Members: Ms L Gledhill
Ms G Mitchell

Representation

Claimant: Mr U Alukpe, Solicitor
Respondent: Ms H McLorinan, Counsel

RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

The Claimant's complaints of unfair dismissal, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment related to disability, damages for breach of contract and unauthorised deductions from wages are ill-founded. The claim is accordingly dismissed.

REASONS

Background

1. The Claimant, Mr Osadugbe, was employed by the Respondent, an NHS Foundation Trust, as a Senior Staff Nurse, from 26 June 2000 until either 26 October or 27 November 2020 (the Respondent disputes this and states that the Claimant was dismissed with notice on 12 October 2020 and his effective date of termination was 4 January 2021).

2. He presented his claim to the Employment Tribunal on 9 March 2021, following a period of Early conciliation which started on 30 December 2020 and ended on 10 February 2021.

3. His claim raises complaints of unfair dismissal, direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, harassment related to disability, wrongful dismissal and entitlement to payment in respect of accrued but untaken annual leave.

4. In its response, the Respondent denies the claim in its entirety.

5. On 22 February 2022, I conducted a case management discussion at which the Claimant was represented by Mr Alupke, as he is here, and the Respondent was represented by Ms Sherwood. At that hearing, I identified the claims and issues, and set a series of case management orders which the parties were required to comply with on certain dates. The final hearing had already been listed for 5 days commencing 30 January 2023.

6. One of the case management orders that I set was for the Claimant to provide further information of his complaints of discrimination arising from disability. This information was provided in a document dated 10 April 2022 at pages 70 one to 76 of the bundle.

7. At the start of the final hearing, Mr Alukpe made an application for witness orders to oblige attendance at the Tribunal by two Respondent staff, Ms Ekendu and Ms Nyawade. Ms McLorinan objected on the basis that they were not required. She explained that they were HR representatives who were, as she put it, supporters and not decision-makers. She further explained that the Respondent's witnesses were the Matron who dealt with the Claimant's capability issues, the dismissing officer and the appeal officer. Having considered this, I indicated to the parties that we were not prepared to grant the Claimant's request.

Issues

8. At the case management discussion I conducted, the list of issues was agreed between the parties and appears at pages 56 to 62 of the bundle. However, the Respondent has provided a revised list of issues headed "Draft Issues" in a separate paper document.

9. Mr Alukpe explained that this had only been provided to him belatedly on 26 January 2023. Ms McLorinan responded that they had attempted to agree the document but the Claimant's side refused to engage. She explained the various revisions: deletion of a potential complaint of automatic unfair dismissal, which the Claimant did not pursue; direct discrimination was limited to dismissal only; and the allegations set out within the Claimant's further and better particulars had been added to the complaints of discrimination arising from disability.

10. In order to move the matter forward, I suggested that the representatives consider the matter further during our reading adjournment and let us know whether the document was agreed or not on return.

11. On commencement of the hearing in the afternoon, the parties indicated that the Draft Issues were agreed. This was with the proviso from Mr Alukpe that paragraph 34 of the document combines paragraphs 27 and 28 of the Agreed List of Issues at page 60 of the bundle. With this in mind, I indicated that these were the issues that the Tribunal will determine and we will not depart from them unless there are exceptional circumstances.

12. It was agreed that we would deal with liability only given that the various monetary claims are still unquantifiable

Evidence

13. We were provided with the following electronic documents: an agreed bundle consisting of 499 pages (we will refer to this as "B" followed by the relevant page number where necessary); a separate bundle containing the witness statements of both parties, a cast list, chronology and list of key documents. In addition, we were provided with paper copies of the Claimant's impact statement dated 22 April 2022 and the Draft Issues referred to above.

14. We heard evidence from the Claimant and from Paul Randall, Vinodh Kumar and Tammy Stracey, on behalf of the Respondent, by way of written statements and in oral testimony.

Conduct of the hearing

15. Whilst the hearing was listed for 5 days, we only had 4 days to hear it in. The parties were confident this would be a sufficient amount of time.

16. The hearing was intended to be in person and was on the first day. However, given the impending rail strikes on 2 days of that week we converted it to a Cloud Video Platform ("CVP") hearing for the remainder of the hearing days.

17. On the morning of the first day we dealt with preliminary matters and then adjourned to read the witness statements and referenced documents. In the afternoon we heard the Claimant's evidence. On the second day we heard evidence from Ms Stracey and Mr Randall. On the third day we heard evidence from Mr Kumar.

18. We finished hearing evidence at 12.20 pm on the third day and adjourned until 2 pm to hear submissions. Ms McLorinan said she would be producing written submissions and would send these to the Tribunal and to Mr Alukpe over the lunch break.

19. Unfortunately, on resuming the hearing in the afternoon, Mr Alukpe advised that he had been in pain, had taken medication and had not been able to rest because he was in his office rather than at home. Consequently he had not been able to consider the Respondent's submissions or prepare his own. In the circumstances, we adjourned the hearing and indicated that we would deal with submissions the following day. Mr Alukpe said that he would not look at the Respondent's submissions until he got to his office the following morning.

20. On the fourth day, we heard submissions from both parties, Ms McLorinan speaking to her written submissions. We adjourned late morning and indicated that we would meet in Chambers to deliberate and had some time available the following day but would reserve our Judgment and reasons. In the event, we were unable to complete our deliberations and reach a decision in the time available and arranged to meet again in Chambers on 13 February 2023.

21. I must apologise sincerely to the parties for the length of time that it has taken to perfect and send out our Judgment and reasons. This has been due to pressure of work and my part-time pattern of working.

Findings of fact

22. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

23. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

24. The Claimant was employed by the Respondent from 25 June 2000 onwards as a Senior Staff Nurse (Band 6) working in the Cardiothoracic Intensive Care Unit ("CTICU") at St George's Hospital. His duties included providing nursing care for critically ill patients. He worked permanent nights on Mondays and Wednesdays.

25. The Respondent is a National Health Service Foundation Trust providing acute and community healthcare services to the local population of South West London and specialist services on a national basis.

26. We were referred to the Respondent's Sickness Absence Management Policy and Procedure at B249-284.

27. On 14 August 2019, the Claimant was injured at work whilst working and assigned to provide nursing care for a patient who was recovering from a heart attack. He had not previously provided nursing care for that patient. Whilst emptying the patient's catheter bag, the patient became agitated and kicked the Claimant on the left side of his head in the temporomandibular region, the force of which caused him to hit his hip area against the bedside table. We were referred to a review of the incident contained in what is called a Datix report at B112-120.

28. The Claimant attended A&E within St George's Hospital and the following day he attended A&E at his local hospital and had a CT scan. He had a further scan two weeks later because he was experiencing distressing

symptoms including severe headaches, dizziness, vertigo, nausea, fatigue/tiredness, irritability, poor concentration and memory recall.

29. The Claimant was absent from work as a result of the incident from 14 August 2020 onwards. His doctor provided statements of fitness for work from 21 August 2019 to 30 September 2020 which stated variously that the Claimant was unfit to work because of "Concussion, Vertigo" and "Post-Concussion syndrome" (B299-304, 307, 310-312 and 317). These statements were for periods of a month or two months at a time.

30. The Claimant has provided a disability impact statement (this is in the separate document provided to us by Mr Alukpe).

31. We heard submissions that medical records have been disclosed to the Respondent but we have not seen them and they were not included within the bundle.

32. The Claimant relies upon two impairments, Post-Concussion Syndrome (which he states is also known as Traumatic Brain Syndrome) which he says, in terms of stress, commenced since 14 August 2019 and in terms of anxiety and depression, became apparent from January/February 2020); and stress, anxiety and depression which he states was caused by the first impairment. We have not seen any direct evidence relating to a diagnosis of the second condition.

33. In summary, the Claimant describes the following effects on his ability to carry out day to day activities: flash-backs to the incident which can be sparked by scenes of violence on television, as a result of which he now hardly watches; panic attacks although not so recent; nausea and associated reduced appetite and aversion to certain foods that he previously enjoyed; limited ability to walk daily distances; dizziness/vertigo; weekly headaches; reduced concentration and increased forgetfulness and fatigue; feeling depleted due to constant stress; difficulty sleeping; ongoing thoughts and worries including ruminations over what happened to him, when he might be able to return to work before the termination of his employment; whether he might be able to secure alternative paid employment since losing his job to reduce his financial difficulties; worrying that he may have to live with his conditions for the rest of his life with no estimated time frame for a full recovery; a phobia of the hospital environment as he continues to re-live what happened to him; avoidance strategies so as not to re-live the incident, including apprehensiveness and unintended procrastination before engaging with his representatives.

34. During his evidence, we did observe that the Claimant found it difficult to remember details of various events relevant to his claim and could not elaborate on matters set out in his witness statement. He became distressed on a number of occasions during his own and the Respondent's evidence

and he was most concerned that because of what happened he had lost his registration as a nurse.

35. At the end of our hearing, Mr Alukpe advised us that the Claimant has commenced personal injury proceedings against the Respondent which, from what he told us, appear to have got as far as a defence being served but has not as yet gone to trial.

36. The Respondent accepts that the Claimant was disabled at the material times for the purposes of the Equality Act 2010. The Respondent does not concede some of the effects of the disability that the Claimant asserts and relies upon. However, there was very little to no cross examination of the Claimant on the issue of disability.

37. We were referred to a summary of correspondence between the Claimant and Ms Tammy Stracey at B143 which sets out dates and content of various WhatsApp text messages between the two of them. Ms Stracey is the Matron at the CTICU. The Claimant's messages attach each fitness for work statement as and when he got them. Ms Stracey's messages ask him to contact her to discuss his sickness and welfare or to remind him if a certificate had expired or to seek an update from him. Ms Stracey explained in evidence that this was so that she could know his progress, to update the staff rota and inform the nurses in charge. It was not intended to place him under any pressure or to cause him any stress, as the Claimant alleged. We accepted her evidence in this regard.

38. On 2 January 2020, Ms Stracey sent a message to the Claimant requesting him to attend a meeting (at B143). On 3 January 2020, she sent a further message advising him that an Occupational Health ("OH") appointment had been made for 29 January and she would arrange their meeting following that appointment. The Respondent's OH Service is in-house.

39. We were referred to Ms Stracey's OH referral form dated 2 January 2020 at B305-306.

40. On 6 January 2020, Ms Stracey wrote to the Claimant inviting him to attend a first long-term sickness absence meeting to be held on 29 January 2020 (at B121-122). The letter states that the purpose of the meeting will be to consider the impact of his sickness absence on the department and to ensure that as much support as possible is available to him. The letter refers to the Respondent's Sickness Absence Management Policy and Procedure and enclosed a copy.

41. The Claimant attended an appointment with OH on 29 January 2020. He saw Dr Thayalan, Consultant in Occupational Medicine and Head of Occupational Health Services at St George's Hospital. Dr Thayalan sent his report to the Claimant later that day, copied to Ms Stracey. This is at B308-309.

42. Dr Thayalan's report sets out a summary of the Claimant's health, his fitness to work and recommendations. In essence, he states that the Claimant is currently unfit for work and he is not able to give a timescale for recovery but the Claimant is likely to be off work for several weeks. Dr Thayalan suggests that the Claimant may need to look into injury benefits if his sickness extends beyond mid-February. Dr Thayalan also states that he will review the Claimant on 21 April 2020.

43. On 29 January 2020, the Claimant attended the first sickness review meeting with Ms Stracey. This took place in person and was timed to begin after the first OH report had been submitted by Dr Thayalan. There are no minutes of that meeting, it being the Respondent's policy to summarise the discussion within a subsequently written outcome letter.

44. We were referred to the outcome letter sent by Ms Stracey to the Claimant dated 29 January 2020 at B127. In essence, this sets out the following: there was a discussion of the reasons for the Claimant's absence and what he was experiencing; the OH report indicated he was currently unfit to work and Dr Thayalan had requested a follow-up appointment with him on 21 April 2020; Ms Stracey explained that the purpose of the meeting was to try to support the Claimant as much as possible and that it was important that they kept in contact; they spoke about the options currently available to the Claimant and that he would be going onto half pay from February 2020; the Claimant said he was not worried about his pay and only wanted to feel better; there was a discussion about the Claimant making an application for Injury Allowance and he was provided with a guide to this; and there was a discussion about the possibility of the Claimant retiring as he was approaching retirement age and the Claimant felt that this may be something he would consider.

45. Also on 29 January 2020, Ms Stracey sent a further letter to the Claimant inviting him to attend a second sickness review meeting to take place on 27 February 2020 (at B123). We would make the following observations. Ms Stracey had only just seen the Claimant, his current sick note did not expire until 13 February 2020 (at B307) and there was further OH appointment scheduled for 21 April 2020. For these reasons, her actions seemed a bit premature and we could understand why the Claimant thought this.

46. On 19 February 2020, the Claimant sent an email to Ms Stracey, which appears to be in response to the above letter given the reference in the first line (at B129). In summary, he said as follows: he thanked her for her letter inviting him to another meeting just one month after their first one; as he said at the last meeting, the meeting is putting him under unnecessary stress at the moment; he is trying to get better and does not need to do anything to put too much pressure on him; therefore he will not attend the meeting and is not fit enough to travel alone and although his sister assisted him last time she is not available on that date; he will let Ms Stracey know when he is fit enough to attend an appointment; any further meetings should not be held in the CTICU meeting room.

47. Later that day, Ms Stracey reply to the Claimant (at B130) (precis) expressing her regret that the process was putting him under unnecessary stress and explained that the meetings are held in order to support him. She also expressed the importance of having regular meetings and that while she appreciated that is difficult for to attend, she would expect to have regular communication even if it is by telephone. She said that she expected to speak to him on 27 February at 2 pm as planned and asked him to confirm he would be available. She also stated that she would relocate any of their meetings to another area of CTICU in the future. She attached forms which the Claimant said had not been previously sent to him.

48. Any event, the meeting planned for 27 February 2020 did not go ahead and was cancelled because of the onset of Covid-19. Indeed, the first lockdown commenced on about 23 March 2020 and had a dramatic effect on the ability of people to meet together and to conduct meetings in person, as well as a huge impact on the ability of the Respondent to provide health services to patients.

49. On 23 June 2020, Dr Thayalan sent an email to Ms Stracey containing a further OH report in respect of the Claimant (at B313). This was as a result of a telephone-based consultation he had with the Claimant the previous day. The email summarised the Claimant's relevant health issues, stated that he was currently unfit for work and it was not possible to give a timescale for recovery but it was likely to be for several weeks. By way of recommendations, Dr Thayalan asked Ms Stracey to consider the Claimant's eligibility for injury benefits and as and when the Claimant makes progress and is ready for work, he will require a phased return to work. Dr Thayalan ended by stating that he had arranged a further telephone review the Claimant on 22 July 2020 or sooner if he makes good progress.

50. From this report it appears to us that the Claimant has only seen his GP so far and this is 10 months after the injury at work. Dr Thayalan states that the Claimant has been referred for treatment by local secondary care for people suffering from head injury symptoms but not had any contact from the special service.

51. By letter dated 23 June 2020 (at B131), Ms Stracey wrote to the Claimant rescheduling the second sickness meeting for 3 July 2020. The letter set out the Claimant's history of ill-health absences going back to April 2018.

52. The meeting took place on 3 July and Ms Stracey sent the Claimant an outcome letter on 27 July 2020 in which she summarised what had taken place (at B133-134). In essence, the letter set out the following: the Claimant is still struggling and experiencing the same symptoms; he has seen a Neuro Specialist the previous Tuesday and has a further consultation in 3 months time; he has been prescribed new medication but as yet has not started taking it; he has been absent from work due to ill-health since 15 August 2019 and his most recent medical certificate is for the period to 30 August 2020;

this level of absences not sustainable; she asked if the Claimant had the opportunity to explore the options discussed at their last meeting regarding redeployment possible early retirement; the Claimant confirmed that he was not looking other options but just wish to get better was focusing his efforts on that; he stressed that the reason he had been off sick for a year was due to an injury sustained at work; she confirmed that she was aware of that and from a management perspective was trying to support him in the hope of facilitating his return to work within a reasonable timescale; she added however that given the level of absence she would have to move his sickness absence management to a final review meeting and would be writing a management report and will provide a copy to him and an invite letter to the final meeting.

53. On 3 August 2020, Dr Thayalan sent an email to Ms Stracey containing a further OH report (at B315-316). His report essentially states that he conducted a telephone consultation with the Claimant on 22 July, there is no overall change in the Claimant's condition, he is currently unfit for work, it is not possible to predict a return to work, he will be starting neuro physiotherapy (and CBT - which we assume means Cognitive Behavioural Therapy) and Dr Thayalan has made a further appointment for 10 September or sooner to review the effect of the treatment.

54. The Claimant provided a further medical certificate for the period 27 August to 30 September 2020 indicating that he was unfit for work due to post-concussion syndrome (at B317).

55. On 10 September 2020, Dr Thayalan sent a further email to Ms Stracey containing a further OH report (at B318). This followed a further telephone consultation with the Claimant that day. The report provided an update as to the Claimant's symptoms, indicated that he was currently unfit for work, that it was not possible to predict a return to work date or timescale for his absence and that he would conduct a further review in one month' s time.

56. We were referred to Ms Stracey's Long Term Sickness Absence Report in respect of the Claimant, dated September 2020 at B135-142. This is an extensive document that sets out the background as to the Claimant's absence from work, the various meetings he has attended and the OH advice. It is clear from the list of appendices that a substantial amount of documents were considered in compiling the report. The report's conclusions are at B142 and are set out below:

"Since 15th August 2019, Olutayo Osadugba has been off sick continuously. This has been a period of over a year.

Olutayo's level of sickness absence from work is putting pressure on the service and his colleagues. Absences are often not able to be filled by bank or agency and therefore staff on the unit have an increased workload to accommodate for this. Shortages in staff on the unit can result in staff not having breaks and in some extreme instances may also result in beds being closed.

The outcome of the last Occupational Health Report, dated 10th September 2020, was that Olutayo remains unfit to return to work and that the timescale for his return cannot be predicted.

Management's concern is that Olutayo has been off work for a period of over 12 months. The Trust is not in a financial position to continue to employ bank/agency staff to cover in Olutayo's absence.

We are no longer able to manage Olutayo's sickness absence and recommend this case be taken to a Sickness Hearing for further management."

57. On 29 September 2020, Mr Paul Randall, Head of Nursing, sent a letter to the Claimant inviting him to attend a Final Review Meeting (at B145-146). This is also known as a Stage 3 Sickness Absence Meeting (under the Respondent's Sickness Absence Management Policy and Procedure).

58. The letter advised that the meeting would take place on 8 October 2020 in the A & E Seminar Room, that Mr Randall would be conducting the meeting and Ms Stracey would be presenting the Management case.

59. The letter attached a copy of Ms Stracey's Report and identified that the purpose of the meeting was to consider the effect of the Claimant's "short term absences" from his continued employment with the Trust taking into account the advice from the OH Department, his own opinion of his health and the impact of his absences on the work of the Cardiology Department.

60. The letter set out the following options for discussion: whether or not it is appropriate to allow a further time for recovery; whether or not it is appropriate to redeploy the Claimant to another post in the Trust; ill-health retirement; and the termination of the Claimant's contract of employment.

61. The letter advised the Claimant of his right of accompaniment and also stated that if he failed to attend, without good reason, the hearing may proceed in his absence and a decision made.

62. On 8 October 2020, the Stage 3 Sickness Absence Meeting took place by Microsoft Teams, the Claimant having indicated that he was too unwell to come to the hospital. The Claimant was unaccompanied but indicated that he was willing to continue on his own. However his son appeared on the screen in the same room as the Claimant during the hearing.

63. We were referred to the notes of the meeting at B147-150. At the meeting, Ms Stracey presented the Management case by summarising her Report. Mr Randall asked the Claimant if he had any questions in relation to the Management case and he said no. Ms Stracey went through the various meetings that had taken place with the Claimant and the contact that she had had with him via WhatsApp.

64. Mr Randall said in his written evidence that despite having full opportunity to present his case and ask questions, the Claimant was not very engaged in the Stage 3 hearing. He did not provide full answers to the questions he was asked and, if he did provide an answer, it was frequently a one-word

response. Throughout the hearing he repeated the response that he just wanted to concentrate on getting better and that was his priority.

65. Mr Randall's further evidence is that he believed that the Claimant understood the Stage 3 process, especially as he had gone through it previously in May 2016.

66. Mr Randall's evidence continued that he attempted to discuss the options identified within the invite letter. However, when he did ask the Claimant questions and try to discuss those issues, he just repeated the same answer, that he wanted to concentrate on getting better and to return to work.

67. Mr Randall asked the Claimant specific questions around when he might be in a position to return to work so as to assess whether or not it was appropriate to allow him a further period of time for recovery. The Claimant responded that his return to work was "up to his GP". When Mr Randall asked whether this was likely to be within weeks or months, the Claimant stated that he was not able to return to work at the moment and that when he is okay he will return.

68. In addition, in response to questions, the Claimant was not sure whether his CBT had been completed or not and denied that his long-term absence was putting pressure on the service from a staffing and cost pressure perspective. Mr Randall also discussed the option of retirement and ill-health retirement but again the Claimant said he wanted to concentrate on getting better and returning to work and would not engage in any discussions about these alternatives.

69. Towards the end of the meeting, Mr Randall's evidence is that the Claimant stated that he was suffering from a headache and so they agreed to reconvene the hearing at a time when he was feeling better.

70. Mr Randall's evidence is essentially supported by the notes of the meeting. Whilst the Claimant said in evidence that these notes were not accurate he was unable to identify any inaccuracies. On balance of probability, we accept Mr Randall's evidence and the contemporaneous notes of the meeting.

71. On 12 October 2020, the Stage 3 meeting was reconvened again by Microsoft Teams. At that meeting Mr Randall advised the Claimant that he was dismissed. In his written evidence, Mr Randall goes into some detail as to the decision to dismiss and the rationale behind it at paragraph 23 of his witness statement. His evidence is that at the resumed meeting he told the Claimant that he had decided to terminate his employment on grounds of capability due to ill-health. He told him that his continued sickness absence could no longer be supported by the service and that there was no information from OH to indicate that he would be able to return to work in a reasonable period or any further medical information from the Claimant to indicate that he might be able to return to work.

72. The Claimant has asserted in evidence that the Respondent should have obtained further medical evidence, such as, from his GP. Mr Randall's evidence is that he does not recall the Claimant suggesting at the meeting that further medical evidence would be required or made any attempt to ask questions, even when prompted, only responding "I just want to concentrate on getting better".

73. In response to being notified of his dismissal, Mr Randall's evidence is that the Claimant stated only "okay".

74. Mr Randall's further evidence is that the Claimant was not dismissed because of his Post-Concussion Syndrome. He was dismissed because of his long term sickness absence, his inability to return to work because of ill-health and the need to ensure adequate staffing levels and service delivery.

75. The Claimant asserts that at the meetings held on 8 and 12 October 2020 he was threatened and/or intimidated. Mr Randall's evidence is that this was not the case and that everyone present was supportive and provided him with ample time to respond to questions and to present his case, no one raised their voices towards him and he was given full opportunity to say what he wished to say without any pressure being put upon him.

76. On 20 October 2020, Dr Thayalan sent an email to Ms Stracey containing a further OH Report (at B151), following a further telephone consultation with the Claimant earlier that day. In essence, he advised that the Claimant's symptoms had not changed, that he was still experiencing headaches which affected his concentration, he was currently unfit for work and it was not possible to give a return to work date. In addition, the Claimant had told him that his employment was being terminated and so he had not arranged a routine review but was happy to do so in a months time if Ms Stracey felt it appropriate.

77. On 26 October 2020, Mr Randall wrote to the Claimant confirming the outcome of the Stage 3 Sickness Absence Hearing (at B158-160). The letter sets out the reasons for dismissal and advises that it is effective from 12 October 2020 and that he will be paid for a period of 12 weeks and that "thereafter your employment with the Trust will end". The letter advised the Claimant of his right of appeal.

78. However, the letter is headed "Re: Outcome of Disciplinary Hearing" and makes reference to the Respondent's Disciplinary Procedure. We also observe the wording does take on the tone of a disciplinary outcome letter. However, it is clear on a reading of the whole letter that it relates to a capacity dismissal.

79. Mr Randall said in evidence that at this time he was busy at the height of the Covid-19 pandemic. He did not write the letter and did not see it before it

went out. It was written by an HR Partner, who was anxious to get the letter out.

80. We would observe the following. To us it appears that the HR Partner has taken a previous disciplinary letter and used it as a precedent to write the letter to the Claimant and that the tone of the letter is geared more to dealing with a disciplinary outcome. However, on balance of probability, we do not accept the Claimant's assertion that it was indicative that he was dismissed under the disciplinary procedure. It is just an unfortunate and bad error.

81. On 16 November 2020, the Claimant sent an appeal against his dismissal (at B161-162). In his letter, he stated that he intends to provide full grounds of appeal and supporting evidence but is constrained from doing so because he does not understand the alleged grounds of capability on which he has been dismissed. His letter indicates that perhaps he does not understand what this word means. He requests that Mr Randall and the Trust provide him with full written reasons for dismissal because the letter dated 26 October does not contain any written reasons that all. He also contends that the alleged dismissal is not effective from 12 October but can only be effective from 27 October 2020 when he received the letter.

82. On 18 November 2020, the Claimant sent a further letter (at B166) by way of correction to one of the paragraphs in his earlier appeal letter.

83. Having considered the evidence before us we formed the view that the reason for the Claimant's dismissal was clear from the letter although perhaps using the word "capability" (which is a form of legal jargon) without explaining what was meant or the context made it confusing to the Claimant who after all was unwell.

84. On 26 November 2020, the Claimant sent an email to Ms Ekendu, Senior HR Practitioner (at B168) in which he states that he does not understand why he has been dismissed and in view of his ongoing ill-health and the seriousness of the impact on dismissal on his livelihood, he asked to be allowed legal representation at his appeal. He adds that he is not a member of a Trade Union and that there is no former colleague could assist him.

85. In response the same day (at B167), Ms Ekendu advises the Claimant that she has asked for a new outcome letter to be produced with all relevant clarification, including the reason for his dismissal and that he would have the right of appeal within 21 days of the date of that new letter. She also advises the Claimant that by way of exception of Trust policy he could be accompanied at the appeal hearing by a friend or family member to provide moral support but not representation.

86. On 27 November 2020 (at B169), the Claimant sent a further email to Ms Ekendu repeating his request to be allowed legal representation noting that her email was silent on his specific request for this.

87. On 27 November 2020, Mr Randall sent a revised outcome letter to the Claimant (at B172-175). We note that this letter is much softer in tone than the previous outcome letter and includes an introduction. It also removes references to the Disciplinary Procedure. Although there are seven points within the second letter, Mr Randall said in evidence that this was by way of further information and these are sub-divisions of the three points contained in the first letter. Whilst the Claimant asserted that these were additional grounds for his dismissal, we accept Mr Randall's evidence. Overall we find that the letter is more detailed. However, it contains nothing that changes the outcome. Further, there is nothing untoward in the contents despite the Claimant's belief that there is.

88. Mr Randall did accept when questioned by Ms Mitchell that with hindsight that he should have formally apologised to the Claimant for the first letter and he then did apologise to the Claimant at our hearing.

89. On 14 December 2020, the Claimant sent an email to Ms Ekendu (at B178-179) requesting that he be sent copies of various documents. Ms Ekendu provided some of these within emails dated 15 & 16 December (at B177-178). The Claimant sent a further email to Ms Ekendu on 16 December 2020 requesting contemporaneous and official notes of all his sickness absence meetings. By way of response later that day, Ms Ekendu sent an email to the Claimant advising him that under the Trust's Sickness Absence Policy the requirement was to provide staff with outcome letters of their sickness absence meetings and not meeting notes. She added that the purpose of notes taken during the meetings was to support with the drafting the outcome letters. This correspondence is at B180-181.

90. By a letter dated 17 December 2020 (at B184-190), the Claimant set out his grounds of appeal. This is obviously a very considered and a detailed letter. Whilst it is in the Claimant's name, it is clear to us that by this point the Claimant must have been receiving some assistance as it is markedly different to what he had sent before. We only raise this given the submission by the Respondent that it was indicative of his ability to deal with his appeal unrepresented.

91. On 29 December 2020, Mr Vin Kumar, the Chief Pharmacist, sent a letter to the Claimant notifying him that he would be conducting his appeal hearing and invited him to the hearing to take place on 15 January 2021 (at B191-192).

92. On 5 January 2021, the Claimant wrote to Mr Kumar by email (at B197-198). In his email he stated that he would not be properly able to present his appeal because of illness and disability arising from his injury at work, that he would not be able to constructively present his appeal due to this and he asked for legal representation. He also asked Mr Kumar to consider that his livelihood

was at stake due to his dismissal and that he did not bring the injury he suffered at work and consequent long-term illness and disability upon himself.

93. On 6 January 2021, Mr Kumar responded by email to the Claimant (at B197). His email stated that he was more than happy to arrange the hearing using Microsoft Teams so that the Claimant did not have to physically attend. In addition he repeated what Ms Ekendu had already told him as to the unacceptability of being legally represented under the Trust Policy. The email also repeated that by exception he would be allowed to be accompanied by a friend or family member providing the moral support only and not representation, although he was of course entitled to ask for adjournments so as to confer with his companion.

94. On 12 January 2021, the Claimant emailed Mr Kumar (at B199-200). He expressed his sadness and disappointment that he had declined his request for legal representation and added that he was not a member of any Trade Union, had no former colleague companion and no family friend to assist or accompany him. He repeated the impact that the lack of legal representation would have on his ability to present his appeal due to his disability. In view of this, he requested that the appeal be dealt with in writing. In closing, his email states that after he has been provided with all the documents management intends rely upon or at the same time as being provided those documents, Mr Kumar may put his questions in writing to him to enable him to respond before any hearing date. His email indicates that by separate email he has requested a postponement of the hearing scheduled for 15 January because Mr Kumar's failed to provide him with the documents that management intends to rely upon.

95. It became apparent in evidence that the Claimant believed there was a further document setting out the Management response to his appeal. However, in Mr Kumar's evidence was that there was no such document and that Mr Randall made an oral presentation at the appeal hearing. We accept the Respondent's evidence in this regard.

96. On 13 January 2021 (at B199), Mr Kumar replied to the Claimant's email stating that the Management side have confirmed that all of the documents that would be relied upon at the hearing had been sent to him, that he will consider the option of the meeting going ahead in his absence and providing him with a written outcome. He then set out the documents he would take into account, any information presented to him at the hearing and if he required any clarification from the Claimant or if the Claimant had any questions following the hearing, he will write to him to seek such clarification of response to the questions to ensure that all available information has been duly considered. In closing, he asked the Claimant to let him know if there is any other reasonable adjustment that he would like him to consider.

97. The email made it clear that provision had been made for the Claimant to be supported in the meeting but not by a legal representative and that the hearing would proceed as scheduled.

98. On 15 January 2021, the appeal hearing took place. We were referred to the notes of the hearing at B201-202. Mr Kumar hoped that the Claimant attend and waited some time before starting. However, he did not attend.

99. On 25 January 2021 (at B203), Shaida Sadozai, Strategic HR Business Partner, sent an email to the Claimant advising him that the hearing had gone ahead but before reaching a decision they wanted to seek a point of clarification from him. In essence, she stated that although the Claimant has asked for the decision to dismiss him to be set aside and requested reinstatement, he had not provided details of his current state of health. She therefore asked him to confirm whether he would be fit to return to work with immediate effect if he was reinstated and if so to provide a GP's fit note to confirm this. She asked him to respond by 27 January 2021. Ms Sadozai also telephoned the Claimant in the absence of a response.

100. On 27 January 2021 (at B205-206), the Claimant sent an email to Ms Sadozai in reply, accusing her of harassment by telephoning him without any written notice or his consent to do so. He stated that all communications relating to his dismissal appeal should be put in writing. In addition, he stated that he believed that the reason she telephoned him with an unknown number was an attempt to entrap him and not allow him the opportunity to seek legal advice before responding to verbal questions. He also set out a transcript of their telephone conversation within his email.

101. Also on 27 January 2021 (at B208-209), the Claimant sent an email to Mr Kumar responding to Ms Sadozai's email. In essence, he stated the following: that at the time of his dismissal he had an unexpired medical certificate; that with regard to the request for a GP's fit note, the Trust had the opportunity to obtain a medical report direct from his GP before he was dismissed and before his appeal hearing but failed to do so; he believes the latest email is an attempt to cover up *"your failure and that of the Trust".* He added that he was under no contractual obligation to provide any such information to the Trust having been dismissed. His email urged Mr Kumar *"to stop playing a cover-up game and to stop causing me more stress and anxiety"*.

102. The email closed with the following paragraph:

> *"In all the circumstances, I feel that the employment relationship between me and the Trust has broken down irreparably because of the manner of my treatment by the Trust and its management as I no longer have any confidence and trust in the Trust."*

103. We would make the following observations. Whilst we understand why the Claimant found a telephone call upsetting (particularly following the email) we appreciate that the Respondent simply wanted to determine whether there

was any change to the Claimant's health position before the appeal decision was finalised and communicated. The Claimant's first email does border on the intemperate but his second email is more measured. However, if there had been any change in his health then it would have been better to have communicated it.

104. On 15 February 2021 (at B210-221), Mr Kumar wrote to the Claimant advising him of the appeal outcome. This letter is detailed and deals with each of the grounds of appeal comprehensively.

105. Essentially, Mr Kumar did not uphold any of the Claimant's grounds for appeal save for ground 2 relating to the first outcome letter dated 26th of October 2020. For this, Mr Kumar apologised that the letter caused the Claimant shock and alarm due to the incorrect information it contained. He assured the Claimant there was no intention to cause any distress and that this was an unfortunate administrative error which made reference to the disciplinary policy instead of the sickness absence management policy. However, he added that the content provided full details of the arrangements of the hearing and clearly showed that it was held in adherence to the Trust's sickness absence management policy and procedure. He also stated that he had been reassured that there was no malice or intentional abuse of the Trust's policies. He emphasised that it was unfortunate administrative error and actions had been taken to ensure that this does not happen in the future.

106. In dealing with the ground of appeal seeking that the dismissal be set aside and the Claimant reinstated, Mr Kumar set out the history of the Claimant's ill-health absence and stated as follows:

"It is now over 16 months since your sickness absence commenced. The Trust has sought to support you by trying to facilitate a return to work and by Occupational Health referrals but, unfortunately, these attempts have not been successful and you remain unable to work. The Trust requires regular and sustained attendance at work in order to be able to provide a safe and effective service, particularly in these very difficult times.

I note also that you feel that the employment relationship between yourself and the Trust has broken down irreparably and that you no longer have any confidence and trust in the Trust. Given these sentiments and the lack of any evidence that you are fit to return to work, the only viable conclusion I can reach is to uphold the decision to terminate your employment. I do not take this decision lightly and it has been reached following careful consideration of all the facts."

107. We reached the following conclusions with regard to the Claimant's evidence and credibility. The Claimant said on several occasions that he could not remember anything that had happened in relation to the events we had to consider in any detail. He also stated that a number of the items of contemporaneous correspondence and notes of meetings were not accurate without being able to identify in what way and with no evidence in support. We formed the view that where there was any dispute of evidence, then on balance of probability we had to accept what was set out in contemporaneous documents or put forward in evidence by the Respondent's witnesses.

108. We would note that there were references to the Claimant's earlier periods of ill-health absences going back to 2016 in some of the sickness absence meeting outcome letters from Ms Stracey and also within her Report.

109. In evidence, Ms Stracey explained that these earlier absences were not relevant because they had occurred over a year before commencement of the sickness absence review relating to the August 2019 absence. She further explained that she had simply included them by way of completeness.

110. It had been unclear to us why these previous incidents of ill-health going back to 2016 were noted in documents and in evidence. However, we are satisfied by the evidence we heard that these absences were not taken into account in terms of the decision making.

Submissions

111. We had written submissions from Ms McLorinan which she amplified orally. We had oral submissions from Mr Alukpe. We do not propose to set these out within our decision although we would assure the parties and representatives that they were fully considered and taken into account. We have only referred to specific submissions where it is appropriate to do so.

Essential law

112. Section 13 of the Equality Act 2010:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

113. Sections 20 of the Equality Act 2010:

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"*

114. Section 15 Equality Act 2010:

> *'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.'*

115. Section 21 Equality Act 2010:

> *"1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *15 (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that*

116. Section 26 Equality Act 2010:

"(1) A person (A) harasses another (B) if—
a.A engages in unwanted conduct related to a relevant protected characteristic, and
b.the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

117. Section 95 & 98 of the Employment Rights Act 1996:

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

b.the reason (or, if more than one, the principal reason) for the dismissal, and
c.that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…

(4) [In any other case 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."

Conclusions

Time limits

118. At B56-57 of the Agreed List of Issues which were agreed at the case management discussion I conducted, the first matter that the Tribunal was required to deal with is the issue of time limits. As noted there, given the date on which the claim form was presented and the dates of early conciliation, any complaint about something that happened before 1 October 2020 may not have been brought in time.

119. We would note that whilst there is a dispute as to when the Claimant's employment ended, in other words the Effective Date of Termination ("EDT") this does not change the date on which the earliest act or omission could be in time.

120. Time limits impact upon the complaints brought under the Equality Act 2010. We formed the view that we would focus on the substance of the complaints and come back to time limits if appropriate.

Burden of Proof

121. Under section 136of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

122. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be "something more". There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

123. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

124. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so

Disability discrimination

Disability

125. The Respondent admits disability but not knowledge at the requisite times or certain effects of the disability. We find that it must have become apparent to the Respondent from the diagnosis of Post-Concussion Syndrome and the ongoing fit notes, which were issued for longer and longer periods, that by at least the 25 June 2020 fit note (at B312, which was for 2 months) that the Claimant's condition was capable of lasting at least 12 months. Indeed it did last for more than 12 months.

126. We were unclear whether the Respondent conceded disability in respect of stress, anxiety and depression.

127. We had limited evidence of this impairment. The OH report dated 3 August 2020 which was based on a telephone consultation with the Claimant on 22 July 2020, at B315, mentions that he "get(s) anxious in relation to work matters and meetings" and later on "they are looking at arranging CBT". We are unsure who "they" are. In the report dated 10 September 2020 based on a telephone consultation that day, at B318, there is a reference to the Claimant having CBT. CBT in itself is not indicative of stress, anxiety or depression or as to the degree, if that is the reason for CBT.

128. The only other references to this impairment are the Claimant's own emails referring to stress and anxiety and his impact statement. The latter refers to stress arising from the date of the incident, 14 August 2019 and anxiety and depression from January/February 2020, to various symptoms of the impairment he relies upon and a reference to referral to a CBT therapist and attending six CBT sessions.

129. We did have some difficulty with this because we were not provided with anything more than the OH reports which we have referenced above. Whilst the Respondent did not challenge this evidence, we simply could not determine that this impairment amounted to a disability because of course such an impairment is a question of degree.

130. At paragraph 4 of the document labelled Draft Issues, the Respondent states that it is not admitted that the Claimant's disability prevented him from being able to participate in his appeal hearing without legal representation.

Direct discrimination

131. Under section 13 of the Equality Act 2010 ("EQA"), it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

132. The Claimant's case is set out at paragraphs 5 and 6 of the Draft Issues. In essence the Claimant states that his dismissal was less favourable treatment and that he was dismissed because he was disabled.

133. We accept that the Claimant was dismissed because he was absent from work for 14 months with no prospect of return. Whilst this may have arisen from his disability, there was no evidence that the Respondent would have treated a hypothetical comparator any differently in any event – that is someone in the same circumstances as the Claimant but not disabled. It was hard to think of a comparative situation beyond this.

134. We therefore conclude that this complaint is not well-founded and is dismissed.

Discrimination arising from disability

135. A complaint of discrimination arising from a disability is essentially where a Claimant is alleging that he has been treated unfavourably as a result of something arising from his disability.

136. The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

137. It is a defence to such a complaint if the employer can prove the unfavourable treatment was a proportionate means of achieving a legitimate aim.

138. The Claimant's case is set out at paragraphs 7 to 26 of the Draft Issues.

Knowledge

139. Paragraph 7 of the Draft Issues asked us to determine did the Respondent know, or could it have reasonably been expected to know, that the Claimant was disabled?

140. We make the following points. The Respondent's managers are health care professionals. Essentially, the Claimant was kicked in the head by a patient and injured his hip. The Respondent was aware of the nature of the Claimant's symptoms. The Claimant was absent from work due to Post-Concussion Syndrome for well over a year. The Respondent noted the Claimant's demeanour and behaviour at various meetings. The Respondent had access to an in-house OH Department and the Claimant was seen/telephoned by a senior OH consultant. Frankly, we are astounded that the Respondent did not ask OH the question whether the Claimant was disabled for the purposes of the Equality Act 2010. However, whilst we reach the conclusion that perhaps the Respondent did not know that the Claimant was disabled under the Act, it ought reasonably to have known that he was, certainly by the date of dismissal and at least 12 months after he sustained the injury at work.

Allegation 1

141. Ms McLorinan has defined this at paragraph 36 of her written submissions as "the holding of regular LTSAMs in January/February 2020". However the Claimant in his further and better particulars has put this more narrowly and refers to their being "too frequent sickness absence meetings".

142. The meetings were on 29 January, 3 July, 8 & 12 October 2020. There was a meeting scheduled for 27 February but it did not go ahead. Giving the Claimant the benefit of the doubt that he had not adopted the Respondent's Draft Issues in this respect, these are hardly too frequent meetings given their spacing and that they fall within the Respondent's sickness absence policy.

The Claimant has a stage 1, stage 2 and a stage 3 meeting over 9 months. In any event, the other meetings do not form part of the pleaded case and the Claimant did not apply for leave to amend his case.

143. At paragraph 10 of the Draft Issues, the Claimant relies upon his sickness absence as something arising from his disability. This is clearly the case.

144. At paragraph 11 of the Draft Issues, we are asked to determine whether the Respondent treated the Claimant unfavourably by inviting him to too frequent sickness absence meetings. We do not accept that there were too frequent meetings. Whilst the February one was a month after the January one, it did not go ahead. He was not invited to too frequent sickness absence meetings.

145. The complaint is therefore not well-founded failing at this point and so there is no need for us to deal with the remaining issues at paragraphs 12 and 13.

Allegation 2

146. This is identified in the Draft Issues as being the reference to the disciplinary policy in the dismissal confirmation letter. The original allegation set out within the particulars of claim at B31 at paragraph 6 e) does not make any sense. Within the Claimant's further and better particulars at paragraph 2.1 (B72) this is extended to subjecting the Claimant to a "disciplinary procedure" and/or falsely alleging that it had carried out a "disciplinary procedure "without complying with its own Disciplinary Procedure and/or Procedure. The Claimant has made no application for leave to amend to include this extended allegation.

147. In any event, it is clear that the references to the disciplinary policy within the first outcome letter of 26 October 2020 were included by mistake. It was a drafting error. It may have been false as the Claimant alleges at paragraph 16 of the Draft Issues but it was a mistake. The Respondent did not carry out disciplinary proceedings against the Claimant. As a matter of fact we do not find that the allegation occurred.

148. Even if we accept the unfavourable treatment was the false allegation, this treatment was not because of the something arising from the disability, ie his absence from work. It was an unfortunate error.

149. We therefore find this complaint not well-founded and is dismissed.

Allegation 3

150. This is identified in the Draft Issues as not providing the Claimant with the investigation report and all documents at the appeal. In his particulars of claim at paragraph 6 d) (at B31) and within his further and better particulars at paragraph 3 (at B73) this is expanded upon by reference to his email to Mr Kumar dated 14 January 2021. What this boils down to was that the Claimant alleges that he was not provided with the Management statement of case.

151. There was no evidence to indicate that the Claimant was not provided with all the documents he asked for that were before the appeal haring. There was no written document setting out the Management case as the Claimant appears to have believed. We think the Claimant has possibly misconstrued Mr Kumar's reference in his email at point 3 (at B199). Mr Kumar said that Mr Randall presented the management case orally. The only investigation report was the one prepared previously by Ms Streacy and the Claimant had that. However, he did not have the minutes of the Stage 3 meeting.

152. In any event, where the complaint flounders is that the Claimant has not identified the something arising from his disability.

153. We therefore find this complaint not well-founded and it is dismissed.

Allegation 4

154. This is identified in the Draft Issues as not permitting the Claimant to have legal representation at the appeal hearing. It is also referenced in the second paragraph d) (at B31) and in his further and better particulars (at B75).

155. At paragraph 23 of the Draft issues the something arising from his disability appears to be his inability to represent himself. However, there was no evidence to support this beyond the Claimant asserting that he needed representation.

156. Dealing with paragraphs 24 and 25 of the Draft Issues, namely did the Respondent treat the Claimant unfavourably and was that treatment because of the something arising?

157. Denying the Claimant what he wanted does amount to unfavourable treatment although this is always tempered with the proviso as to whether it is reasonable to view that as unfavourable treatment. However, the Claimant was not refused legal representation because of his disability but because the presence of a legal representative was not allowed by the Respondent's sickness absence policy. We would observe that as a matter of general industrial relations practice it is not appropriate for legal representatives to participate in internal hearings particularly under a sickness management procedure unless specifically allowed for under the employee's contract of employment.

158. But in any event, dealing with the defence at paragraph 26 of the Draft Issues, we accept Ms McLorinan's submissions at paragraph 57 of her written submissions. The legitimate aim of the policy of not allowing legal representation at internal meetings is self-evidently to have a manageable, workable and efficient capability procedure. Excluding legal representatives from what is not a legal process is a proportionate means of achieving a legitimate aim bearing in mind that employees could bring work colleagues

and union representatives to meetings under the Respondent's policy at paragraph 6.13.2 (at B264). This much is permitted by statute at disciplinary and grievance procedures but even then with limited rights of audience (section 10 of the Employment Relations Act 1999). Indeed, the policy also states:

"Employees with a disability may require additional or alternative support at meetings, and all reasonable requests will be accommodated."

159. Moreover, the Respondent made an exception to its policy by offering the Claimant the option of bringing a family member or friend to offer moral support although not to actually represent him. However, it did add that the Claimant could ask for adjournments in which to seek assistance from that person outwith the meeting (see the Respondent's email B197).

160. We therefore find this complaint not-well founded and it is dismissed.

Failure to make reasonable adjustments

161. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

162. The adjustment has to be reasonable. In considering whether an employer has met the duty to make reasonable adjustments, the Tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

163. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

164. The PCP that the Claimant relies upon is set out at paragraph 27 of the Draft Issues. Namely, the policy that an employee can only be accompanied to an appeal hearing against dismissal by a trade union representative or a work colleague. It is admitted that this was the Respondents PCP, although noting that an exception was made for the Claimant in that he was told that he could bring a friend of family member along.

165. At paragraph 28 of the Draft Issues, we are invited to consider whether the PCP put the Claimant at a substantial disadvantage compared to non-disabled persons? The Claimant sets out the basis for this by reliance on the OH report dated 29 January 2020 (at B308) and the reference to severe headaches, dizziness, vertigo, nausea, fatigue/tiredness, irritability, poor concentration and memory recall.

166. However, we note that the appeal hearing took place prior to this report, on 15 January 2020. For the sake of completeness we note the following. The previous OH report is dated 20 October 2020 (at B151) and refers to his symptoms as not having changed since the previous report on 10 September 2020. This report is at B318 and has an update on the Claimant's symptoms referring to his headache being troublesome but there is an improvement and being given exercises for his dizziness but he did not respond to these. The previous OH report is dated 22 July 2020 (at B315) and refers to his headaches as troublesome, dizziness and infrequent vertigo, the latter two symptoms coming at any time with no apparent trigger.

167. We accept that there was no supporting medical evidence to support the Claimant's presentation of symptoms at the OH assessments. The GP's fit notes are not any more forthcoming than stating Post-Concussion Syndrome". But we also accept that the Claimant, whilst he attended all of the previous meetings unsupported, did not adequately represent himself at the stage 3 meeting.

168. However, he was not denied the right of representation outright he was told he could have a colleague or TU representative under the policy and was also given the opportunity to bring a friend or family member and reminded that he could seek adjournments to confer with that person (the policy actually allowing for additional support).

169. Not being legally represented is not a disadvantage confined to a disabled person (it puts everyone at a disadvantage when one considers the advantages of being legally represented) and we accept the reasons put forward by the Respondent as to why it was not appropriate at an internal hearing. Further, we were not presented with evidence that the disadvantage to the Claimant was substantial.

170. At paragraph 29 we are invited to determine whether the Respondent knew, or ought to have reasonably been expected to know at the relevant time, that the Claimant had a disability was likely to be placed at a substantial disadvantage?

171. We have already dealt with the issue of knowledge of disability and determined that the Respondent had imputed knowledge by the time that it was clear that the impairment lasted 12 months. However, as to knowledge of the substantial disadvantage, whilst the Respondent may have known of the symptoms to a degree (taking into account the content of the OH reports

provided prior to the appeal hearing), there was insufficient evidence that the Claimant was at any more of a disadvantage than anyone else who was not legally represented at an appeal hearing.

172. Turning then to paragraph 30, as to whether the duty to make reasonable adjustments arose and did the Respondent take reasonable steps to avoid the disadvantage.

173. The Claimant's contention is that a reasonable adjustment would have been to allow him legal representation at the appeal hearing . The Respondent's position is that it made reasonable adjustments to mitigate the effects of the disadvantage that it was aware of. Namely, it made an exception to the policy so as to allow him to be accompanied by a friend or family member. It further asserts that the adjustment suggested by the Claimant was not reasonable because the appeal hearing was in internal process and not in the course of legal proceedings.

174. Our conclusions are as follows taking into account the factors set out at paragraph 162 above. The adjustment sought by the Claimant was not reasonable. It was not reasonable or appropriate to be allowed legal representation at an internal hearing. The Respondent offered a number of alternatives in correspondence and the right of accompaniment under its policy to exceptionally extend to a friend or family member and also to an ex-colleague and to attend by telephone and to provide written submissions.

Harassment

175. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

176. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

177. We note in particular the caution by the Employment Appeal Tribunal ("EAT") (albeit dealing with race related harassment) at paragraph 22 of their Judgment:

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

178. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

179. The alleged acts of harassment are set out at paragraph 31 of the Draft Issues.

180. The first of these is the failure to obtain medical evidence from the Claimant's GP and to fail to properly inform the decision to determine the Claimant's employment on grounds of capability. We struggled to see how this reasonably fell within the definition of harassment within section 26. There was no evidence to suggest that it was done with the purpose of harassing the Claimant. In terms of whether it had this affect taking into account the perception of the Claimant, the wider circumstances and whether it is reasonable for the conduct to have that effect we find the answer to be no. We also heed the caution expressed by the EAT in Dhaliwal and in the ECHR Code as set out above.

181. Whilst we can be critical of the Respondent for not seeking medical evidence, the Claimant does not raise this issue until the appeal hearing and when the Respondent actually asks for further medical evidence he refuses to provide it.

182. The second of the allegations of harassment at paragraph 31 b. of the Draft Issues is the delay in providing the first dismissal confirmation letter from 12

October to 26 October 2020 without any reasonable explanation or any explanation at all.

183. Again, there is no evidence to suggest that this was done with the purpose of harassing the Claimant and in terms of whether it had that effect is simply not reasonable to form the view that it had it did. We again take into account the caution expressed by the EAT in Dhaliwal and in the ECHR Code as set out above.

184. The Claimant knew he was dismissed on the day of the meeting. Whilst he denies this, we have made our observations of his evidence and credibility in our findings and we have no reason not to accept the Respondent's evidence. Given that they reconvened the meeting it does seem likely that this did not include giving him the outcome). In the circumstances, it is not reasonable to see the delay or lack of explanation for a delay of 14 days as harassment. Moreover, there is no evidence that it is related to disability.

185. The third alleged act of harassment at paragraph 31 c. is the delay in providing the second dismissal confirmation letter from 12 October to 27 November 2020 without any reasonable explanation or any explanation at all.

186. Our conclusions with regard to this essentially the same as with the second allegation of harassment although the delay is longer. We accepted Mr Randall's evidence as to what happened with the drafting of the first letter. Mr Alukpe said in submissions that the second letter was "doctored". But there was no evidence to support this.

187. However, we are critical as to the delay, the framing of the original letter, and we do acknowledge the impact this had on Claimant at the time. But the delay complained of does not amount to harassment. It is no more than a series of unfortunate circumstances arising in the midst of the Covid-19 pandemic.

188. The next allegation of harassment at paragraph 31 d. is the failure to provide or explain to the Claimant the reason(s) for his dismissal between 27 October and 27 November 2020. We would again refer to our findings that the Claimant was told at the meeting that he was dismissed and despite the failings of the first letter it did explain why he was dismissed. In any event taking into account the perception of the Claimant and the wider circumstances it is not reasonable to view this conduct as amounting to harassment and in any event it's not related to the Claimant's disability. We again heed the caution expressed by the EAT in Dhaliwal and in the ECHR Code as set out above.

189. The next alleged act of harassment at paragraph 31 e. is that the Respondent failed to allow the Claimant to be legally represented at the appeal hearing on 15 January 2021. Again taking into account the relevant test of

harassment this is not conduct that can reasonably amount to harassment within the definition.

190. The final allegation of harassment at paragraph 31 f. is that the Respondent behaved in a high-handed, malicious, insulting and aggressive manner when dismissing the Claimant. We heard no evidence of this from the Claimant beyond a general assertion and we saw no evidence from what the Respondent did and said to indicate any element of this. The Respondent was simply applying a sickness absence procedure which unfortunately resulted in the Claimant's dismissal.

191. It does appear that the Claimant placed great stead on the fact that the injury had been sustained at work and that it was not his fault that he was ill and that he should simply be allowed to get better and return to work then.

192. Whilst Mr Alukpe submitted that it was harassment to dismiss the Claimant because it was humiliating, dismissal in itself was not part of the complaint. However, we do acknowledge that dismissal is humiliating but it is not in itself reasonable in the circumstances for it to amount to harassment within the definition.

193. We therefore find the complaint of harassment to be not well-founded and it is dismissed.

Unfair dismissal

194. Section 98 of the Employment Rights Act 1996 sets out how an Employment Tribunal should decide whether a dismissal is unfair.

195. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

196. We first had to determine whether the Respondent had a potentially fair reason to dismiss the Claimant within sections 98(2) and (3) of the 1996 Act. The Respondent alleges that this was by reason of capability.

197. It is clear that incapability can stem from sickness, what is necessary is that the sickness or ill-health impacts upon the Claimant's capability to do his job which can arise from resultant lack of attendance at work or inability to return to work.

198. The Claimant was absent from work for over 14 months, the OH reports and GP certificates referred to ongoing ill-health and the Claimant could not provide any indication of when or whether he would be able to return to work.

We accept that the Respondent has shown that the potentially fair reason for dismissal was capability. As we have already said we found that there was no disability discrimination.

199. We then turned to consider whether the Claimant's dismissal satisfied the test of reasonableness under section 98(4) of the 1996 Act.

200. The basic question in determining whether the test of reasonableness has been met in a case of dismissal arising from a single period of prolonged absence is whether in all the circumstances the employer could be expected to wait any longer and, if so, how much longer? Each case must be considered on its own facts and an employer cannot hold rigidly to a predetermined period of sickness after which any employee may be dismissed.

201. We would expect the employer to have found out the true medical position and to have consulted with the employee before making a decision. A medical report on the implications and likely length of illness should generally be obtained from the employee's GP or an OH adviser or company doctor or independent consultant. Where the employer obtains a report from an OH adviser or a company doctor, the employer should also be willing to consider a report from the employee's own GP or specialist. Whereas the former may be more familiar with working conditions, the latter may be better placed to judge the employee's health.

202. The Respondent did not ask the Claimant for a GP or specialist report. They relied solely on the evidence of the OH assessment by its in-house OH service. Whilst the OH consultant, Dr Thayalan may have had underlying medical evidence this is unclear from his reports. We acknowledge that the Claimant did not provide a GP or specialist report or even suggest it prior to his dismissal and appeal (assuming Dr Thayalan did not have such). However, we believe the onus to suggest this lies with the employer. More so, if the employer is an NHS Foundation Trust and the managers are practitioners. There was no evidence the Claimant was asked for and refused to allow or provide a medical report. In evidence, it was clarified by the Respondent that the Claimant had been open about his medical condition throughout (this said to as justification for the absence of underlying medical evidence from his GP or specialists).

203. We are surprised by the Respondent's reliance on GP fit notes and the OH reports alone without any underlying medical evidence. There did not appear be any liaison between the decision makers and OH beyond the initial referral made by Ms Streacy. OH carried out a series of review assessments (by telephone) following the initial in-person assessment. The Respondent did not even ask the question of the consultant whether the Claimant was disabled for the purposes of the Equality Act 2010.

204. Having apprised itself of the medical position, the employer's decision to dismissal ought to be based on the following factors:

    a. the nature and likely duration of the illness;

    b. the need for the employee to do the job for which he was employed and the difficulty of covering his absence. The more skilful and specialist the employee, the more vulnerable he is to being fairly dismissed after a relatively short absence;

    c. the possibility of varying the employee's contractual duties. An employer will not be expected to create an alternative position that does not already exist nor to go to great lengths to accommodate the employee. However, a large employer may be expected to offer any available vacancy which would suit the employee. What is reasonable very much depends on the facts;

    d. whether or not contractual sick pay has run out is just one factor either way;

    e. the nature and length of the employee's service may suggest the employee is the type of person who is likely to return to work as soon as he can, but length of service would not necessarily be relevant in any other way.

205. It is important for the employer to have discussions with the employee and for the employee to know when his/her job might be at risk.

206. Dealing then with the point a. above. The Claimant had been off work for 14 months and there was no indication of when or whether he could return to work. Whilst the Respondent did not obtain medical reports the Claimant's own evidence at the time of dismissal and at our hearing was that he was not in a position to return to work and there was no date put on when he could.

207. Dealing with point b. above. The Claimant was employed in the CTICU which Ms Streacy investigation report describes as follows (at B135-144, taken from paragraph 14 k. of the Respondent's written submissions):

    i. "The intensive care unit covers sickness absence currently in the short term using bank and agency staff. Also, at short notice, coverage is often not always possible leaving the unit short staffed which can impact on patient safety and care as well as staff health, well-being and morale."

    ii. "CTICU is a busy intensive care unit with critically ill patients who are normally staffed at a ratio of 1:1 nurse to patient. At times CTICU can be a stressful environment and involves a degree of manual handling The fast pace of this unit demonstrates the need for all staff to be reliable in their attendance."

    iii. Olutayo's level of sickness absence from work is putting pressure on the service and his colleagues.

    iv. "Absences are often not able to be filled by bank or agency and therefore staff on the unit have an increased workload to accommodate for this Shortages in staff on the unit can result in staff not having breaks and in some extreme instances may also result in beds being closed."

    v. "The Trust is not in a financial position to continue to employ bank/agency staff to cover in Olutayo's absence."

208. We accept this evidence. Whilst the Claimant asserted that it was cheaper to employ bank/agency staff there was no evidence to support this. We acknowledge that the Claimant was receiving sick pay for a period of time when the Respondent was also paying for bank/agency staff to cover for him and that by the time of his dismissal he had exhausted his sick pay. However, we acknowledge that the Claimant was a Senior Staff Nurse and so more difficult to arrange cover for. We heard evidence that the work required skilled and experienced staff and that the Respondent had a waiting list of those applying to join CTICU who they could not employ whilst they had no vacancies. We accept this evidence.

209. c. the Claimant would not consider any variation his duties. His focus was on recovering and coming back to his job as he said repeatedly in evidence.

210. d. whilst this is a factor we viewed it in the light of the above (under b.)

211. e. the Claimant had not been off work for this length of time because of one single period of ill-health and so it is not a relevant factor. Whilst the Claimant had been employed for over 20 years this in itself would not render his dismissal unfair.

212. Picking up on a point raised by the Claimant in evidence and also raised in submissions. If the employee is unable to do the job because of injury or ill-health originally caused by the employer, this does not necessarily mean the dismissal is unfair. A Tribunal can take it into account when considering whether it is reasonable to dismiss in the circumstances, but it is unlikely to be a big factor - McAdie v Royal Bank of Scotland [2007] IRLR 895, CA. Again whilst the Claimant viewed this as a reason not to dismiss him, it is not unreasonable to dismiss a person who has been injured at work when taking into account the other factors.

213. We do not find the process that the Respondent followed was unreasonable. The Respondent followed its sickness absence procedure. It held three formal review meetings, advised the Claimant in advance of the nature of the meetings and the potential outcomes, he was sent outcome letters. He was advised of the possibility of dismissal at the stage 3 meetings. He was offered and availed himself of the right appeal. The Respondent advised of the right of accompaniment and extended this when the Claimant requested legal representation. Whilst there was some delay in sending outcome letters and the unfortunately wording of the first outcome letter and the sending of a second one, this was not sufficient to render the procedure unfair. We simply did not accept the assertion that the second dismissal outcome letter was doctored to cover up alleged deficiencies in the process.

214. Whilst the Respondent may not have followed best practice in proceeding in the absence of GP or specialist report we do not find it unreasonable of the Respondent not to do so in these circumstances. The Claimant was open about his medical condition throughout, his GP provided ongoing fit notes

indicating no timeline for a return to work, the OH reports supported this view, and the Claimant support this view. There was no time scale for recovery. We were troubled by the final OH report that indicated that a further report should be sought. However, the Respondent did attempt find out whether the Claimant was fit to return, in the context of his request for re-instatement, before issuing the appeal outcome letter but the Claimant refused to comply. We do not find it unreasonable of the Respondent to proceed to dismiss at that time and to confirm his dismissal on appeal. The Claimant alleges that he was prejudiced at his appeal by the lack of all the documentation. However, apart from generally requested documents at our hearing it became apparent that he was seeking a specific document that did not exist. We did not accept that he was prejudiced or that the Respondent acted unreasonably in failing to provide a document that did not exist.

215. In any event dismissal fell within the band of reasonable responses open to a reasonable employer in these circumstances. It is not possible to conclude that no reasonable employer would have dismissed in these circumstances.

216. If we are wrong we also considered whether it was appropriate to make a "Polkey reduction".

217. In Polkey v A E Dayton Services Ltd [1987] IRLR 503, the House of Lords (as the Supreme Court was then known) held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal.

218. Of course a dismissal may be unfair for procedural reasons only, even though the actual reason for dismissal is fair. In such cases, the compensatory award may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if fair procedures had been followed. A percentage reduction can be as high as 100 per cent, although a Tribunal might still award loss of earnings for the time it would have taken to go through proper procedures.

219. It is often difficult to decide whether unfairness is procedural or a matter of substance. Either way, the Tribunal must consider the question of whether and when the employee would have been dismissed if the employer had acted fairly.

220. It is arguable that Polkey applies to this case. We conclude given what was known about the Claimant's prospect of returning to work at the time of dismissal and what happened after the event that this is a rare case where it is inevitable that had the Respondent obtained further medical evidence it would not have changed the outcome. In any event, given that the Claimant had exhausted his sick pay by the time of dismissal he had no loss of earnings. (NB should he not get his basic award?)

221. However, we have found that the Claimant was fairly dismissed, the complaint is not well-founded and is dismissed.

Breach of contract / unauthorised deductions from wages

222. Under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1995 the Employment Tribunal has jurisdiction to deal with claims in respect of damages for breach of contract arising or outstanding on termination of employment.

223. The Claimant appears to be seeking damages in respect of his entitlement to statutory notice of 12 weeks on the basis that his effective date of termination was either 26 October or 27 November 2020.

224. We have found that the Claimant was paid for his notice pay period and his employment ended on 4 January 2021. Therefore his complaint of damages for breach of contract in respect of entitlement to be paid for his notice pay period fails. It fails even if we had found the effective date of termination to be as alleged by the Claimant.

225. The Claimant's case appeared to be that in any event he may have accrued additional holiday entitlement during the notice period. The Respondent's case is that he was paid his full entitlement.

226. Whilst Mr Alukpe has pleaded entitlement to holiday as damages for breach of contract, we were unclear whether he was seeking contractual holiday entitlement or the statutory entitlement (the latter of which is not a contractual right and so could only be an unauthorised deductions for wages complaint).

227. The Respondent's position is that the Claimant received all of his accrued holiday pay on termination of employment. The burden of proof is on the Claimant and he presented no evidence as to what he alleged he was owed.

228. We therefore find the complaint fails.

229. Thus all the Claimant's complaints are unfounded and the claim is dismissed.

Employment Judge Tsamados
25 May 2023