



# EMPLOYMENT TRIBUNALS

**SITTING AT:** LONDON SOUTH  
**BEFORE:** EMPLOYMENT JUDGE FRANCES SPENCER  
**MEMEBRS** MS A SADLER  
MR N SHANKS

**BETWEEN:** MR. T SHIFERAW CLAIMANT  
AND  
GUYS AND ST THOMAS NHS FOUNDATION TRUST RESPONDENT

**ON:** 13-17 MARCH 2017

## **Appearances**

**For the Claimant:** Mr D Williams, friend  
**For the Respondent:** Ms D Masters, counsel

## **RESERVED JUDGMENT**

The Judgment of the Tribunal is that:

- (i) The Claimant's claim under part 2 of the Employment Rights Act 1996 (unpaid wages) is not well founded and is dismissed.
- (ii) The Claimant's complaints of disability discrimination (section 13, 15, 20 and 21 of the Equality Act) and harassment related to his disability (section 26 of that Act) are not well founded and are dismissed.

## **REASONS**

1. In this case the Claimant, Mr T Shiferaw, claims unpaid wages and disability discrimination. At the time he presented his claim form he was

still employed by the Respondent Trust. We understand that he has recently been dismissed, though that was not a matter before us.

Background and Issues

2. In his claim form, presented on 27<sup>th</sup> September 2015, the broad headings which the Claimant identified were “loss of income and suffering of my family when the management deliberately prevented me from returning to my full-time contractual hours” and “loss of income and suffering of family when I was laid off work (without pay) for 8 months” . At box 8 of the claim the Claimant identifies that his claims are unfair dismissal, disability discrimination and “other payments”, though plainly at that time he was still employed and could not claim unfair dismissal.
3. At a Preliminary Hearing on 2<sup>nd</sup> December 2015 EJ Balogun identified the issues in wages claim. However as the disability discrimination complaint had been insufficiently pleaded she ordered further and better particulars. In respect of his disabilities, the Claimant clarified that he relied on (i) a back injury incurred on 19<sup>th</sup> October 2007, from which he had fully recovered in May 2012 and (ii) depression and anxiety – which he says started in April 2013 and was ongoing. The Respondent accepts that the Claimant was disabled in relation to his back but does not accept that he was disabled at the relevant time in relation to depression, and that issue remained live before us.
4. The Claimant provided his further and better particulars in January 2016. (54). At the risk of oversimplification the Claimant’s claims broadly related to (i) an alleged refusal to allow him to work full-time from May 2012 (relied on as harassment, discrimination arising from a past disability and direct disability discrimination –all referable to his back injury as a past disability) and (ii) failures to make adjustments. Essentially the Claimant was saying that the Respondent should have postponed any competency assessments and any capability process as a reasonable adjustment for his depression and anxiety and that it would also have been a reasonable adjustment for the Respondent to move the Claimant permanently away from work in Guys Dispensary.
5. At a further case management preliminary hearing on 14<sup>th</sup> June the issues (as they emerged from the claim and the further and better particulars) were set out in a list of issues drafted by the Respondent and agreed to by the Claimant. Although the Respondent has overlaid the legal tests, the factual matters complained of are taken from the claim and the further and better particulars. Time limits are in issue, as is disability in relation to depression. These are the issues in this case and they are set out in the Schedule to this Judgment for ease of reference.
6. Subsequently the Claimant sought to argue that he had been unwell at the 2<sup>nd</sup> Preliminary Hearing and not fit to agree the issues. His applications for a review of the issues made on 28<sup>th</sup> July (and repeated in January 2015) were refused. The Claimant’s appeal to the EAT against the refusal of the review was rejected on the sift.

7. Applications made in the weeks before the hearing to postpone this hearing pending the outcome of the sift and (once that had been received) pending the Rule 3(10) hearing before the EAT were refused. A further application for a postponement was made on the first day of the hearing on the basis that (i) the Respondent had refused to include documents in the bundle and (ii) the Tribunal should wait for the outcome of the Rule 3(10) hearing. We refused that application. In respect of the issue at (i) the Tribunal allowed the Claimant bring any additional documents which he wished to provide to the Tribunal in a separate bundle for the start of the oral evidence on the 2<sup>nd</sup> day of the hearing. In respect of (ii) the Claimant was unable to articulate in what respect the list of issues did not reflect the pleaded issues. In his letter to the parties following the sift, HHJ Shanks stated that the notice of appeal had no merit and the hearing should go ahead as planned on 13<sup>th</sup> March 2017.

### Evidence

8. The Tribunal had 4 significant lever arch files of documents (plus the Claimant's additional smaller bundle). We heard evidence from the Claimant. For the Respondent we heard evidence from the following
1. Ms Karen Haynes, who managed the Claimant until the summer of 2015.
  2. Ms Jennifer Hunt the manager of Guys Dispensary service
  3. Ms A Scott-Clark, Associate Chief Pharmacist
  4. Ms Tess Fenn, Pharmacy NVQ and Technical Staff Development Manager
  5. Ms J Ost, who heard the Claimant's grievance appeal.
- In addition we were asked to take into account the statement of Ms Mould, who was not available to give evidence but who investigated the Claimant's grievance. In any event, her witness statement largely relates matters that are set out in and supported by the documents in the bundle and the Claimant did not identify whether he disputed the factual matters set out in her witness statement.

### Relevant law

#### Wages

9. Section 23 of the Employment Rights Act 1996 (the ERA) provides that:-
- An employer shall not make a deduction from wages of a worker employed by him unless—
- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
  - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Wages are defined in section 27 of the ERA as "any sums payable to the worker in connection with his employment."

10. Section 23(2) of the Employment Rights Act 1996 provides that an employment tribunal shall not consider a complaint of unlawful deduction of

wages unless it is presented within three months of the date of payment of the wages from which the deduction is made or the payment was received. Subsection (3) provides that "where a complaint is brought under this section in respect of a series of deductions .... the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

11. Section 23(4) provides that a limited exception to the 3 months' time limit "where a Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months". In that case the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable." The reasonably practicable exception "is to be narrowly construed and sparingly invoked". (*Gisda Cyf v Barratt* 2010 ICR 1475).

### Disability

12. The definition of a disabled person is set out in section 6 of the Equality Act 2010 which provides that "a person (P) has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities". This definition is supplemented by the provisions of Schedule 1 and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by in April 2011 (the Guidance).
13. The time at which to assess whether a person has a disability is the date of the alleged discriminatory act.
14. Paragraph 2 of Schedule 1 provides that
  - (1) The effect of an impairment is long-term if—
    - (a) it has lasted at least 12 months;
    - (b) the period for which it lasts is likely to be at least 12 months; or
    - (c) it is likely to last for the rest of the life of the person affected.
  - (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."
15. In considering whether an effect is likely to recur for the purpose of paragraph 2(2) the House of Lords has determined that likely means "could well happen" rather than "more likely than not" *SCA Packaging Ltd v Boyle* [2009] IRLR 746.
16. The word 'substantial' has been defined in the Guidance has been "more than minor or trivial" reflecting "the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."
17. Paragraph 6 of Schedule 1 provides that in considering whether or not an impairment had a substantial adverse effect on the ability of a person to carry out normal day to day activities, the effects of medical treatment

should be ignored, and it is necessary to consider the normal day to day activities which the individual will not be able to undertake without the medical treatment.

18. The Claimant complains that the Respondent has unlawfully discriminated against him contrary to sections 13, 15 and 20 of the Equality Act and has harassed him contrary to section Section26.
19. Section 13 of the Equality Act provides that “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Disability is a protected characteristic.
20. Section 15 of the Equality Act 2010 provides that

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

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

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

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

This section requires two steps. “There are two links in the chain, which are causal, though the causative relationship is differently expressed in respect of them. The tribunal has first to focus the words “because of something”, therefore have to identify something – and second upon the fact that something must be open to something arising in consequence of B’s disability, which constitutes the second causative consequential link.” (Basildon and Thurrock Foundation Trust v Weerasingh EAT0397/14)

21. It is now well known that an employer has a duty to make reasonable adjustments for disabled employees. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than others in recognition of their special needs.
22. The Code of Practice on Employment 2011 (chapter 6) gives guidance in determining whether it is reasonable for employers to have to take a particular step to *comply with a duty to make adjustments*.
23. *In Environment Agency v Rowan 2008 ICR 218 and General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4 the EAT gave general*

guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must identify:

- 23.1 the PCP applied by or on behalf of the employer, or the physical feature of premises occupied by the employer
- 23.2 the identity of non-disabled comparators (where appropriate), and
- 23.3 the nature and extent of the substantial disadvantage suffered by the claimant.

Once these matters were identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

24 Section 40 prohibits an employer from harassing its employees. Section 26 defines harassment as follows

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

Although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so.

25 In *Richmond Pharmacology v Dhaliwal* (2009 ICR 724) the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment

- Did the employer engage in unwanted conduct
- Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her
- Was that conduct on the grounds of the employee's protected characteristic.

- 26 As to time limits Section 123 of the Equality Act 2010 provides that complaints of discrimination should be presented within three months of the act complained of. Conduct extending over a period is treated as done at the end of that period although this should be distinguished from a single act with continuing consequences. The concept of an act extending over a period was considered by the Court of Appeal in *Lyfar v Brighton and Sussex University Hospitals Trust* 2006 and given a wide interpretation. If an application is out of time the Tribunal may still consider the claim if, in all the circumstances of the case, it considers it would be just and equitable to allow the claim to proceed out of time.
27. As to the burden of proof section 136 of the Equality Act 2010 provides that:-
- “(1) This section applies to any proceedings relating to a contravention of this Act.
  - (2) If there are facts from which a court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that contravention occurred.
  - (3) But section 2 does not apply if A shows that A did not contravene the provision.”

Findings of relevant fact

28. The Claimant began his employment with the Respondent Trust as a band 2 student Pharmacy Technician in August 2005. Once he had completed his qualification he accepted a post as a band 4 Rotational Pharmacy Technician in 2007. On 19<sup>th</sup> October 2007 he sustained a back injury at work and was absent as a result of this injury until 10<sup>th</sup> August 2008.
29. The role of a Rotational Pharmacy Technician involves rotating through a number of different areas within Pharmacy. There are about 10 different area of work as identified in Ms Haynes witness statement including dispensing. The Claimant’s job description appears at page 213. In each rotation a Pharmacy Technician is expected to complete the required training plan to ensure that they meet the competencies required to work in the area. This involves reading the Standard Operating Practices (SOP’s) for the relevant area and undertaking assessments to ensure safe practice. In each area accuracy is very important and The General Pharmaceutical Council requires the maintenance of competency standards. In particular, when working in Dispensing, a Pharmacy Technician would be required to complete 200 error free dispenses in order to meet the relevant competency standard.
30. When he returned to work in 2008 after his back injury, and following Occupational Health, advice, the Claimant began a phased return, initially

working for 2 hours a day and on 22<sup>nd</sup> September 2008 increasing to 4 hours a day. OH advice in September was that the Claimant should continue to work 4 hours a day until further review. On 28<sup>th</sup> October the Respondent wrote to the Claimant documenting that the Claimant would continue to work for 4 hours a day until advice was received from OH that his hours should be increased. The Claimant agreed to a reduction in his salary to reflect his hours commencing on 20<sup>th</sup> October 2008 (486).

31. Documents in the bundle record (and the Claimant accepts) that between October 2008 and April 2010 he agreed that he should continue working 4 hours a day and that this accorded with OH advice. In 2010 the Claimant applied to take a career break in order to pursue alternative therapy for his back injury. That career break was approved and the Claimant was away from the Trust from April 2010 until 30<sup>th</sup> April 2012.
32. The Claimant returned to work on 1<sup>st</sup> May 2012 working four hours a day (20 hours a week) as he had done prior to his career break. An appointment with OH was made for the Claimant on 22<sup>nd</sup> May 2012. In his Further and Better Particulars the Claimant complained that the Respondent refused to refer him to OH in 2012 and that they ignored this request "for more than 3 years". Plainly that cannot be correct as we have a copy of the appointment made for him on 22<sup>nd</sup> May and OH notes record (1580) that this appointment was "postponed by client". In cross examination the Claimant acknowledged this but said that he had been advised by his alternative therapist to wait a month after his return before increasing his hours and that he was waiting to be re-referred.
33. It is also the Claimant's case that from his return to work on 1<sup>st</sup> May 2012 he repeatedly asked to increase his hours and that he told Ms Haynes that he had completely recovered from his injury and could work full-time after one month. He complains that she did not refer him to OH in June. Ms Haynes on the other hand says that the Claimant did not request to increase his hours during 2012.
34. The Claimant has produced his handwritten note of a meeting with Ms Haynes (606) said to have taken place on 10<sup>th</sup> May 2012. In that note the Claimant documents that he asked for a referral to OH "after one month" to assess his ability to work full-time. Ms Haynes does not recall a meeting with the Claimant on this date and says her diary does not refer to a meeting with the Claimant on that date. The note records that the Claimant told Ms Haynes that he was "as healthy now as I was before my injury. I can walk, sit and do normal manual works without any problem". In any event the Claimant had already been referred to OH but did not attend.
35. We do not accept the note at page 606 is accurate. The Claimant did raise the issue of increasing his hours in an email sent in April 2013 (648) nearly a year later. In that email the Claimant says "*However as I told you last time my condition has been improving very well hence my doctor has asked me to increase my working hours gradually.*" There is no reference to a meeting in May 2012 or to what he now says were his repeated



requests to be referred to OHS with a view to working full-time. Despite his evidence that this note was produced contemporaneously with the 2012 meeting, the Claimant did not produce it during his subsequent grievance process. Given that the subject of the grievance was that his return to full-time work after a career break had been blocked, it seems unlikely that he would not have produced this note if it had existed at the time. (The Claimant's explanation that he did not think he would be allowed to present it to the grievance investigation is not credible).

36. It is common ground that the Claimant was not referred to OH again until July 2013.
37. When the Claimant returned to work in 2012 he was based at St Thomas's Dispensary, undertaking the duties of a band 3 Pharmacy Assistant sorting out medication returned from the wards (but remaining on a band 4 salary) in order to allow him time to re-familiarise himself with the pharmacy processes. In consequence the Claimant was not undertaking the required competency assessments. The Claimant denied this in cross examination and said that he was allowed to do dispensing without undertaking any competency assessments but we reject this. It seems unlikely that the Claimant would be allowed to dispense drugs without having undertaken his competency assessments. It is also inconsistent with the Claimant's own evidence (para 136) that on his return he was "deprived of the right to benefit from the CD rota", was not put on the CD rota until he was transferred to Guys dispensary in April 2013 and had been demoted.
38. The Claimant produced a note (616) purportedly taken by him during and after a meeting with Ms Haynes on 29<sup>th</sup> November 2012 in which he claims that before the meeting he overheard Ms Haynes telling another unnamed employee that she proposed to victimise him for bringing a successful personal injury claim against the Trust, that because of this he had been placed into a band 3 role and that she was looking to for him to make "a single error to formalise the demotion" and that he was "a very bad person". The note documents that during the meeting Ms Haynes told him that he had excellent feedback from dispensing management and that his controlled drug dispensing skill "was phenomenal". Ms Haynes denies that she made such statements and says that she had been unaware of the outcome of his personal injury claim against the Trust. We do not accept that the document at 616 is a true account of what the Claimant overheard, or of what Ms Haynes said in the meeting.
39. The Claimant met with Ms Haynes on 14<sup>th</sup> March 2013 to discuss moving to Guys Dispensary to put in place a plan for assessing his competencies so that he could revert to working in his substantive band 4 role. The Respondent considered that Guys was a better working environment for the Claimant to undertake his competencies. It was their view that the Dispensary Manager at Guys was more experienced and better placed to support the Claimant than the Dispensary Manager at St. Thomas'. St Thomas' was a much busier department (as the acute site for the Trust) with less time to dedicate to training. In addition it was a period at

uncertainty at St Thomas' as outpatient dispensing was being TUPE transferred to Sainsbury's causing high staff turnover. There was a staff shortage at St. Thomas' which meant that there would be less capacity to support the Claimant in his retraining. Building works were being carried out at St Thomas and the Pharmacy robot at St Thomas' kept failing, whereas Guys had a working robot. The Claimant agreed to the move to Guys and to working 10-2 each day.

40. On 26<sup>th</sup> April 2013 the Claimant sent an email to Ms Haynes as follows *"Thank you for giving me time to decide about my working hours. I agree to the hours you suggested (10 till 1) which makes up the 20 hours per week shift"* (In fact what had been agreed was 10-2). He continued *"However, as I told you last time, my condition has been improving very well, hence my doctor has advised me to increase my working hours gradually. Therefore I hereby asking you to refer me to occupational doctor to discuss about the possibilities I can go back to my full contractual hours (37.5 hours per week)."* Ms Haynes responded that they would trial the working hours suggested by her for the next 4 weeks and that they would review it after 4 weeks.
41. It subsequently transpired that the Claimant had in fact only been working 3 hours a day both at St Thomas's (647) and later also at Guys. It was the Claimant's case that he had understood that in a 4 hour shift he was entitled to take an hour's break and work for 3 hours. Following a meeting about this on 11<sup>th</sup> May the Respondent accepted his explanation but made it clear that for the future he should work his full 4 hours with a 15 minute break (660).
42. The Claimant moved to Guys in April 2013. Initially he was happy with his working conditions (651).
43. Once working at Guys the Respondent began to assess the Claimant's competencies in Dispensing. Each member of staff is allowed 3 attempts to pass their competencies and in April and May the Claimant failed two attempts to pass his competencies. In June (656) the Claimant told his manager that pain in his leg and back stopped him from sleeping and this was causing a lack of focus.
44. As he was failing his competencies, Ms Haynes wrote to the Claimant inviting him to an informal Capability Meeting on 25<sup>th</sup> July 2013 to discuss the required standard of working within his role. At that meeting the Claimant said that he experienced night pain and that the medication he took for that (diazepam) was affecting his concentration. Ms Haynes said that she would put the informal capability process on hold until she had received information and guidance from OH. Referral to OH was made and an appointment booked for 19<sup>th</sup> August (which the Claimant did not attend). The Claimant attended the subsequent appointment on 20<sup>th</sup> September.

45. During this period his competencies were not being assessed and the informal capability process was halted for a period. The Claimant continued to complete practice assessments which were checked by a pharmacist and used as a training aid but he was not being formally assessed. Ms Haynes met with the Claimant to discuss these 3 times during August 2013. On 22<sup>nd</sup> August the Claimant reported that he was feeling happier and more confident with his performance.
46. OH reported on 23<sup>rd</sup> September that the Claimant was asymptomatic from lower back pain during the day. However, medication taken at night before sleep might affect his alertness in the morning and for the time being he should refrain from carrying out accuracy logs (i.e. assessing his competencies). No recommendation was made that the Claimant's hours should be increased. OH advised that the Claimant had an underlying health problem of lower back pain that might be impacting upon his work capability and that the Equality Act was likely to apply in relation to that condition. A risk assessment of tasks to be carried out was recommended. This was carried out at both sites (Guys and St Thomas') on 26<sup>th</sup> November and no risks were identified. The Claimant has produced a note of a discussion had with Ms Haynes during that assessment which is denied by Ms Haynes (692) and we do not accept it reflects a true account of what was said at that time.
47. In November the Respondent decided to restart the capability process as the Claimant's process had now been on hold for 6 months and on 27<sup>th</sup> November he was asked to attend a meeting on 13<sup>th</sup> December 2013 in line with the informal stage of the Trust's capability procedure. The Claimant sent a letter (697) to Ms Haynes on 10<sup>th</sup> December, the content of which is not wholly clear but which inter alia, asks for a change of rotation and fresh accuracy trials.
48. The Claimant attended the meeting on 13<sup>th</sup> December. (694). At the meeting the Claimant said that he had changed medication from diazepam to amitriptyline, so that there should be less of an effect on his work. He also asked to be moved to St Thomas' for his assessments. Ms Haynes said that this was not possible and explained why Guys was more suitable. The meeting was summarised in a letter sent to the Claimant on 7<sup>th</sup> January (725). The Tribunal does not accept that notes of that meeting produced by the Claimant (and denied as accurate by Ms Haynes) are a true account.
49. A couple of days later, on 16<sup>th</sup> December 2013 the Claimant began a period of sickness absence. The fit note records the reason for absence as insomnia.
50. On 7<sup>th</sup> January Ms Haynes wrote to the Claimant to say that the Claimant could not move to St Thomas' for his assessment and explained why. An informal 2 month period of monitoring would commence from the date of the letter until 6<sup>th</sup> March.

51. In the event the Claimant remained off work for 6 months. Subsequent fit notes record the reason for absence as “depressive episode”. He returned to work on 26 June 2014.
52. The Claimant attended OH on 17<sup>th</sup> June 2014. OH reported that the Claimant was now functioning normally “no longer depressed but still a bit anxious, especially about coming back to work.” OH also reported that the Claimant had been working 22 hours a week (clearly an error or a misunderstanding) and had expressed a desire to return to full-time work (although he also appears to have told the OH that he would be returning initially to an area of work where professional assessment was not required which was not the case). OH suggested that the Claimant should come back to work for the first two weeks working from 10 a.m. till 4 p.m. Monday, Wednesday and Friday (i.e. 18 hours) and that after the first 2 weeks there should be a discussion how the hours should be increased, initially to 22 hours with further discussions “as to whether he can start to resume full-time work”.
53. However by 3<sup>rd</sup> July the Claimant had requested a formal change to his working hours “from full-time to part-time 11 till 3 Monday to Friday”.
54. Ms Scott-Clark was away on holiday when the Claimant returned and as an interim measure the Claimant was allowed to work at St Thomas’. The Claimant was told that it was as a temporary arrangement. However on her return from leave Ms Scott Clark told the Claimant that he had to move to Guys on 3<sup>rd</sup> July to continue his assessment. On 3<sup>rd</sup> July the Claimant emailed Ms Scott-Clark saying he did not wish to work at Guys. He said there were “health and other issues that prevent me going to Guys dispensary at this time”, although no details were given. He said that he would stay at home to await her decision but was ready to go to St Thomas’. (786)
55. The Claimant did not attend for work on 4<sup>th</sup> July. (In evidence before the Tribunal the Claimant said he was not ill during this period but was unable to work at Guys and his doctor gave him a certificate to help him get an adjustment.) The Claimant met Ms Scott-Clark and Ms Haynes on 7<sup>th</sup> July and Ms Scott-Clark explained why he was required to work at Guys. The Claimant said he was not happy to work at Guys and would go back off sick. He was advised that if he was to remain off work after 11<sup>th</sup> July he would need a medical certificate.
56. After the meeting the Claimant sent an email to say that Claimant said that he had been bullied at Guys in 2013 which had caused depression and severe anxiety disorder. (794)
57. The Claimant attended a further OH appointment on 16<sup>th</sup> July. OH advised that the Claimant was “no longer depressed but anxious about work related matters”. He reported that the Claimant had said that he did not want to return to Guys Hospital because of his negative feelings about

what had happened in the past and that he had become “quite phobic about returning there.”

58. In any event the Claimant remained at home. A further review meeting took place on 5<sup>th</sup> September. The Claimant said he had been bullied at Guys but could not give concrete examples or articulate what the issues were. He said he did not wish to return to the dispensary at Guys but would return to any other area at Guys or St Thomas'. He also complained that he had previously asked to increase hours to full-time and that Ms Haynes had prevented him from doing this. The Respondent made it clear that the only option was for the Claimant to work at Guys dispensary. The meeting was summarised by Ms Haynes in a letter to the Claimant (856).
59. The Claimant provided a 2 month sick certificates for his absence until 22<sup>nd</sup> September 2014. Thereafter he remained absent without sick certificates but he continued to be paid in full until 3<sup>rd</sup> March 2015. After 3<sup>rd</sup> March he remained at home on an unpaid basis until 19<sup>th</sup> May 2015 when he returned to work under the redeployment process (see below).
60. The Claimant submitted a grievance on 19<sup>th</sup> September 2014. He complained that
  - a. he was not listened to when he asked to be moved away from Guys dispensary,
  - b. that his return to full-time work had been blocked,
  - c. that he was subjected to professional assessments when he was suffering from a sleep problem and that Ms Haynes had taken no steps to prevent his mistreatment,
  - d. that he was bullied by the pharmacist at Guys' (Anya) on one occasion when she had shouted at him and treated him disrespectfully, and
  - e. an error which was not his fault had triggered the launch of the 2<sup>nd</sup> capability procedure.
61. The Claimant's grievance was referred to Ms Mould to be investigated. She obtained statements from Anya and Ms Haynes and she met with the Claimant (accompanied by Mr Williams) on 2 occasions. She also spoke to Leo who the Claimant said had witnessed the altercation with Anya. She wrote to the Claimant on 29<sup>th</sup> December rejecting his complaint. Subsequent, fuller, investigation reports were sent to the Claimant in January (dealing with the bullying and harassment complaint into Ms Haynes and Anya) and on 6<sup>th</sup> March 2015 (988) (dealing with the issue of the Claimant's hours). In relation to the hours Ms Mould concluded that “as the additional evidence identifies numerous cases where you agreed to work 20 hours a week and Karen Haynes did start looking into increasing these hours but due to you being off sick and then in June 2014 stating that you no longer want to work full-time this was not progressed.”
62. In the meantime the Claimant attended a meeting with Ms Scott-Clark on 20<sup>th</sup> January, accompanied by Mr Williams. Ms Scott-Clark suggested that

the Claimant could return to work in the pharmacy department at the Evelina Children's Hospital on the St Thomas' site. He would be managed by and work with individuals he had not met before so there would be no history. We accept Ms Scott-Clark's evidence that the Claimant did not seem interested in this proposal, but could not explain why he did not think this was a solution. The Claimant said he wanted to work in the production unit at Guys, where he had not worked since before his injury in 2007. Mr Williams said that the Claimant was concerned that the "environments would be the same" but beyond that the Claimant could not explain why the Evelina was not suitable.

63. Ms Scott-Clark wrote to the Claimant on 29<sup>th</sup> January saying that the Claimant should return to the Evelina when his annual leave ran out. She told him that a work based risk assessment for the Production Unit, where he had asked to work, would be arranged once he had returned to the Evelina. The Claimant did not respond to this letter or to subsequent chasing emails sent on 5<sup>th</sup>, 10<sup>th</sup> and 12<sup>th</sup> February, remained off work and did not provide medical certificates.
64. On 3<sup>rd</sup> February 2015 the Claimant appealed the investigation outcome (948) saying that Ms Mould had "relied on false information supplied to her by management." Further grounds of appeal were submitted on 19<sup>th</sup> March 2015 (999).
65. On 27<sup>th</sup> February 2015 the Claimant emailed Ms Scott-Clark to say that he would not go back to anywhere in the Pharmacy department "where I have been mistreated in the past". He said that redeployment was the best option but wanted to wait for the outcome of the appeal.
66. The Claimant attended an appeal hearing on 8<sup>th</sup> May 2015 with his representative Mr Williams and the grievance appeal was heard by Ms Ost.
67. At the appeal the Claimant provided a further OH report dated 18<sup>th</sup> March 2015 (1002). This stated that:
  - i. The Claimant was fit to work "both from the mental and physical point of view (his back has given him no problems for quite a while now)."
  - ii. He had not worked since the middle of last year but that this was not supported with any sick certificate and he had been mentally well throughout the period.
  - iii. He could return to work straightaway in some capacity
  - iv. He would not accept work in any area managed by Pharmacy. His feelings of anxiety had extended to all the Pharmacy operations on all 3 sites. He could not contemplate working in any of those places, neither in dispensary nor production.
  - v. There had been an underlying mental health problem which had largely resolved and the disability provisions of the

Equality Act were unlikely to apply “because his condition (phobic anxiety state) is actually only limited to his working in any department run by the Pharmacy in the Trust. Outside these limits, he remains perfectly psychologically well.

68. At the grievance appeal the Claimant said that he wanted to be considered for redeployment. He considered that the redeployment period should be open-ended rather than limited to 12 weeks as per trust policy. However the meeting was to deal with his grievance appeal. As Ms Ost pointed out issues about redeployment under the sickness procedure was not a matter for her. The Claimant said he wanted to be paid for the period when he was off work without sick certificates as he believed that the Trust’s failure to arrange a proper placement for him was to blame.
69. By letter dated 27<sup>th</sup> May 2015 the appeal was rejected.
70. The Claimant remained off work during this period but was required to attend meetings under the formal sickness absence procedure, (notwithstanding the fact that he had not provided sick certificates). At a meeting with Ms Scott-Clark on 27<sup>th</sup> April 2015 the Claimant said that he could not return to any Pharmacy department and that he wanted to be redeployed. Ms Scott-Clark explained the redeployment policy to the Claimant, specifically that he would need to complete the Redeployment Registration, after which he would receive his full pay and support to find another job within the Trust for 12 weeks. If, after that period, he had not found another job, a meeting would be arranged to consider dismissal. The Claimant wanted the period of redeployment to be indefinite in his case. He was told that that was not possible. Redeployment was agreed in principle and the Claimant was told that redeployment would start with effect from 1<sup>st</sup> May for 12 weeks
71. Despite his clear position at the sickness absence hearing on 28<sup>th</sup> April 2015 the Claimant emailed Ms Scott-Clark the following day to say that he had reconsidered and wanted to be placed at Evelina Children’s Hospital “for some time before deciding to go on the redeployment process”.
72. As a result of this change of heart there was a further meeting with the Claimant on 29<sup>th</sup> April 2015. Ms Scott-Clark said that if the Claimant wished to return to work in the Evelina Pharmacy department he should return to OH for a further assessment given the previous advice that he was “phobic” about returning to Pharmacy.
73. By email dated 5<sup>th</sup> May the Claimant said he did not “think it is important to see the occupational health doctor”. Beyond that it is not at all clear what the Claimant is saying, save only that he wanted the redeployment process to be extended indefinitely. On 6<sup>th</sup> May the Trust reiterated its position that if the Claimant wished to return to Evelina he would need to obtain the agreement of OH.

74. On 8<sup>th</sup> May Ms Scott-Clark wrote to the Claimant acknowledging his wish to be redeployed and to say that there was a temporary role available for a trial period in the Nuclear Medicine department carrying out administrative duties. She told the Claimant the redeployment period had started on 5<sup>th</sup> May and asked him to complete the relevant forms.
75. The Claimant began work in Nuclear Medicine on 19<sup>th</sup> May 2015. At the end of that four-week period he took on a temporary role in HR where he remained until the end of his 12 week redeployment period.
76. As the Claimant had not found an alternative permanent position at the end of the 12 weeks he attended a meeting with Ms Fenn on 24<sup>th</sup> August 2015 under the sickness absence management procedure. The Claimant told Ms Fenn that he was unable to return to the Pharmacy department. Ms Fenn told the Claimant she would progress matters to a formal review meeting to consider whether to terminate his employment. As a result she prepared a management case for a capability hearing (1114).
77. The Claimant presented his claim on 27<sup>th</sup> September 2015 and the Tribunal is not concerned with matters after that date. However we understand from Ms Fenn that at the dismissal hearing under the sickness absence review procedure the Claimant accepted that he could now work in Pharmacy and a vacancy was found for him in Pharmacy Manufacturing.

#### Submissions and conclusions

##### Unlawful deduction of wages. Issues 1-6

78. It is the Claimant's case that he was entitled to receive pay for the 17.5 hours a week not worked between May 2012 and June 2014. It is his case that he asked repeatedly from May 2012 for his hours to be increased to full-time and that he was ignored. It is also his case that the Respondent ignored him because they had, without consulting or notifying him, changed the basis of the reduction in his hours from temporary (which he had agreed) to permanent (which he had not).
79. It is the Respondent's case that this claim for unlawful deduction of wages is out of time. It is also their case that there was in any event no agreement to revert to full-time hours.
80. It is agreed by all parties that the Claimant requested, and the Respondent agreed to, a permanent reduction in hours to 20 in June 2014 (71). It follows therefore that if there had been an unlawful series of deductions from pay those deductions would have stopped at the end of June 2014. Since the Claim was not issued until September 2015 it is apparent that this claim is significantly out of time. The Claimant has not given us any reason why it was not reasonably practicable for him to have presented his wages claim within the relevant time limit.
81. In any event we do not accept the Claimant's evidence that he repeatedly asked for an increase in his hours in 2012. He did ask to be referred to



occupational health with a view to increasing his hours on 26 April 2013 and again in July 2013 but we do not accept that the Respondent ignored his requests. Initially Ms Haynes suggested that they wait for 4 weeks and the Claimant did not demur. In July when the Claimant asked again, far from ignoring his request Ms Haynes referred the Claimant to OH by return (669). In the subsequent occupational health report of 20<sup>th</sup> September 2013 there is no recommendation that his hours be increased. Instead it is apparent that the Claimant's focus at that time was on obtaining a recommendation that he need not be subjected to competency assessments. If the Claimant had been serious about his wish to increase his hours to full-time he would have pursued this matter with OH. On 18<sup>th</sup> June 2014 (775), when the Claimant did suggest that he might wish to increase his hours, OH did no more than suggest a gradual increase to 22 hours and then a "further discussion".

82. The agreement between the parties was that there should be a temporary reduction in hours until such time as OH assessed the Claimant as being fit to work longer hours. As OH never assessed the Claimant as fit to do so, the contractual position remained as agreed in 2008 namely that the Claimant should work 20 hours a week. There was no unlawful deduction in wages.
83. In evidence the Claimant said that as a result of the documents produced by management for the investigation he "discovered" that he had been "demoted" to a band 3 Pharmacy Assistant role in 2012 and that management had changed his contract permanently from full-time to part-time without his consent, and without notifying him, while he was absent on his career break. In particular he referred the Tribunal to a staff organisation details change form (229) which documents the change in the Claimant's hours to 20. However the document records that this is a temporary change "until further notice" and is entirely in accordance with the agreement made with the Claimant.
84. The Claimant also relies on 237 which is an internal "Change Form" dated 30<sup>th</sup> December 2011, while the Claimant was away from the Trust. This records that the Claimant's position has changed from full-time to part-time (20 hours a week). Ms Scott-Clark gave evidence that this was an internal form required for budgetary purposes. The forms had changed and no longer identified whether the change was temporary or permanent. However, it did not follow that this meant the Claimant's contractual position had been changed. If the Claimant had wanted to increase his hours following the go ahead from OH the Respondent would have taken budget from elsewhere. The Respondent had a large workforce, positions were constantly changing.
85. We accept that evidence. The Claimant is right that these internal change forms would not be contractually effective to change his contract. However they did not do so. The fact is that the Claimant had agreed to a reduction in his hours on advice from OH and that remained the position in 2011.

The form does not indicate that the Claimant would not be permitted to return to full-time work if he was well enough to do so.

Disability Discrimination related to the Claimant's back injury. Issues 9-23

86. Issues 9 to 23 of the list of issues all identify the same essential complaint. Although framed variously as direct discrimination, unfavourable treatment arising from disability and harassment, in each case the complaint is that the Respondent failed to increase the Claimant's hours from 20 hours a week to full-time. However, this complaint is unjustified on the facts.
87. We do not accept (as alleged in issue 9.1) that the Claimant's hours were reduced unilaterally, without consultation, and without receiving formal notification between October 2008 and May 2012. It is apparent that his hours were reduced with his consent and on OH advice. The reduction in hours was a reasonable adjustment made because of the Claimant's back condition.
88. We do not accept (as alleged in Issues 9.2, 9.3, 14.1 and 14.2) that the Claimant's requests to work full-time and his requests to be referred to OH were ignored. His first request in April 2013 was acknowledged, and the Claimant does not appear to have demurred from the suggestion that they should wait 4 weeks. His 2<sup>nd</sup> request in July 2013 was acted upon and he was referred to Occupational Health. By then the Claimant's principal concern was not so much his desire to return to full-time work but his desire that he be exempted from having to carry out the competency assessments. In short he did not pursue matters any further. It is telling that when the OH does suggest that there be further discussion about the matter the Claimant almost immediately asks for a permanent reduction to 20 hours.
89. We do not accept, as alleged at issue 20, that the Claimant was "made to work 20 hours a week". He had agreed to do so and understood the reasons why.
90. Since we do not accept the factual basis of the Claimant allegations his complaints of direct disability discrimination, unfavourable treatment arising from disability and harassment insofar as they relate to the reduction in his hours must fail. It is not therefore necessary to go on to consider the remaining legal tests.
91. In any event, since all of these complaints necessarily predate June 2014, they are out of time. The subsequent complaints are not well founded (see below). Further they relate to a different disability and to detriments of a wholly different nature and cannot be said to be conduct extending over a period or a continuing state of affairs where disabled people were discriminated against.

Disability discrimination related to depression/anxiety

92. The Respondent does not accept that as at the relevant time the Claimant was a disabled person by reference to depression/anxiety. It is the Claimant's case that he was subjected to unlawful harassment related to his disability of depression from May 2013 and that the Respondent failed to make reasonable adjustments for his depression from March 2013 onwards. Since this spans a considerable period of time it is necessary to consider the position at the time of each alleged failure to make adjustments or act said to contribute towards harassment.

Accuracy competencies. Issues 7, 26.1 and 37-43

93. It is the Claimant's case that in or around March 2013 the Respondent required him to fulfil accuracy competencies (the PCP) and that they should have postponed the assessments as a reasonable adjustment for his depression. It is also his case that by requiring him to complete the competencies he was subjected to unlawful harassment related to his depression.
94. On the Claimant's return from a career break in May 2012 he was initially not required to undertake competency assessments as he was not undertaking his band 4 role (although he continued to be paid as band 4). In March 2013 the Claimant was told he would need to pass his competencies so that he could return to his substantive role. In March 2013 there is no evidence that the Claimant was clinically depressed.
95. After the Claimant had failed his competencies twice he raised an issue about lack of concentration telling Ms Bell that pain in his leg and back sometimes stopped him from sleeping which was causing a lack of focus. In fact the capability process was put on hold. At the informal capability hearing in July he said that he experienced night pain and that the medication he took for that (diazepam) was affecting his concentration. There is no evidence that he was depressed at that time. The OH report in September makes no reference to depression. There is no reference to depression in his GP medical notes before 30<sup>th</sup> December 2013.
96. It follows that the Claimant was not disabled by reference to depression/anxiety at the time that he first was required to undertake his competencies (March – June 2013) and the claims (Issues 26.1 and 30-36) that this amounted to harassment/ a failure to make reasonable adjustments must fail.
97. (There was evidence in September 2013 that the Equality Act might apply by reference to the Claimant's back condition (681) but that was not the Claimant's pleaded case and in any event it is inconsistent with his claim that when he returned to work in May 2012 he was 100% fit and for that reason had been seeking a return to full time work. (Claimant's ws paras 37 and 39)).

Capability procedure in December 2013. Issues 44-50

98. In November and December, the Claimant was informed that the accuracy logs would be restarted. The Claimant had been working at Guys but asked to be moved to St. Thomas'. The Claimant relies on this as part of a course of unwanted conduct relating to disability and as a failure to make reasonable adjustments.
99. The Tribunal has seen no medical evidence to suggest that the Claimant was medically depressed when he was informed that the informal capability process would start. He told Ms Haynes that the "hangover effect of diazepam had been reduced as he had now been prescribed Amythriptiline". He had not seen his GP for depression. His lengthy letter sent on 9<sup>th</sup> December does not refer to depression but to "recurrence of pain and sleep problem". The latter is said to relate to "night time back and leg pain. His position was that he was ready to undertake the assessment but only at St Thomas'. He was also asking for an increase in his hours (697).
100. We find that the Claimant was not a disabled person by reference to depression at that time so no duty to make reasonable adjustments had arisen. The requirement to go through a capability procedure does not relate to his disability. The claims at issues 44-50 must fail.
101. (We observe however that given the importance of accuracy in a Pharmacy Technician's work and the potential consequences of errors it might be hard to argue that it would be a reasonable adjustment to allow and individual to remain in this role indefinitely without completing his competencies.)

Change in location .Issues 26.2 and 51-57

102. The Claimant was then off work, initially for insomnia and then for depression. From 30<sup>th</sup> December – June 2014 sick notes record that he was absent because of "depressive symptoms; context of difficult environment work" or "depressive episode". The medical records indicate that he attended his GP surgery with a "depressive episode" and at some point (the evidence is not entirely clear on this point) he was prescribed citalopram.
103. It is the Claimant's case that the requirement to work at Guys on his return to work in June 2014 was a PCP that put him at a substantial disadvantage by reference to depression. It is accepted that the Claimant was required to work at Guys. It is also the Claimant's case that this requirement was unlawful harassment related to disability. (Although the issues record that this pcp was imposed between September 2014 and June 2015 this is factually incorrect.)
104. In June 2014 on the Claimant's return to work the Respondent told the Claimant he would have to work at Guys dispensary to complete his accuracy logs. The OH advice at that time was that the Claimant was no longer depressed "but still a bit anxious" and was "phobic" about returning to Guys. He had expressed a desire to return to full-time work.

105. In his witness statement the Claimant says that in July 2014 when he started work again at St Thomas' dispensary his depressive symptoms were controlled with medication and his anxiousness was not resolved. However, somewhat inconsistently he also says "*I was settling in very well and was very happy and able to return to the job I love; in a suitable and supportive environment. I had no anxiety problem. I was doing non CD dispensing and there was no problem of accuracy and my speed of dispensing was great.*" He had told his GP that "depressive and anxiety symptoms have improved significantly". (Later at a GP appointment on 21<sup>st</sup> July he GP records "*very long discussion about his need for a cert. There appears to be some other issue here. Given cert -amended since only wanted depression as the reason*".) The Claimant told the Tribunal that he was not unwell in July but that his GP had agreed to give him a certificate in July "to help him get adjustments" but would not provide one beyond September. The medical notes are unclear as to whether the Claimant was still taking citalopram. The Claimant's evidence was that he took citalopram continuously from January 2014 to May 2016 but it does not appear in his medical notes as he was on a series of repeat prescriptions.
106. In June 2014 all the evidence suggests that he was no longer depressed. The Claimant told the Tribunal he was not ill. He also told us that he was still on Citalopram but we have not found the Claimant to be a wholly honest witness. He says that had he not been on medication, there would have been a continuing substantial adverse effect of his day to day activities. We bear in mind that as well as looking at the deduced effect we have to consider whether as at June the Claimant's depression was "likely to continue" for 12 months in the sense that it could well happen.
107. On balance we consider that the Claimant has not established that as at June 2014 and beyond he was a disabled person by reference to depression. He had had a depressive episode but that appeared to be over. The substantial adverse effect had not lasted and was not likely to last for 12 months. The claim therefore fails.
108. However, given the broadness of the legislation we acknowledge that there is room for doubt on this and, despite the lacuna in his medical notes at the OH report we are prepared to accept that he might have been continuing to take citalopram after June or July 2014. We have therefore also considered the substance of the claim on the basis that he was a disabled person at that point.
109. If he was disabled by reference to depression in June 2014 it is accepted that he was required to work at Guys in July. Was the Claimant at a substantial disadvantage by the requirement to work at Guys to complete his competencies? The Claimant gave no evidence as to why he would be at a disadvantage (by reference to his depression) by the requirement to work at Guys. The Respondent on the other hand gave convincing evidence about why the Guys environment would be a better and more supportive environment for the Claimant. At the time he told the

Respondent “there were health and other issues that would prevent him working at Guys” but gave no details. In an email of 7<sup>th</sup> July he said he had been bullied and mistreated, though this was not what he had told the Respondent at the meeting earlier that day. In his witness statement the Claimant says that this was because “of the bad feeling that has emanated from what has happened to me in the past”.

110. We do not accept that the Claimant was at a substantial disadvantage by reference to his depression when he was asked to return to work at Guys. (He was by then happy to undertake his competencies at St Thomas'). His allegations of bullying by Ms Haynes and Anya were not made in good faith. They appeared to be an afterthought and were rejected at the grievance. Ms Haynes had given the Claimant significant leeway in her dealings with him. Beyond that the Claimant did not explain why he would be at a substantial disadvantage if he had to work at Guys. On the other hand the Respondent has given many good reasons why working at Guys would be an advantage.
111. In any event the Respondent allowed the Claimant to remain at home and by January 2015 the Respondent had made the adjustment he had requested and the Claimant was offered work at the Evelina Children's Hospital.
112. When the Claimant was offered the chance to work away from Guys in a position where he had had no prior dealings with any relevant staff he changed his position and said he could not work anywhere in Pharmacy.
113. The Claimant's position was that he could return to work but not to Guy's— and later not to Pharmacy. If the Claimant had “a phobia” about these matters there was no evidence that this related to or was a symptom of his depression. Phobia is not a pleaded disability and there is no evidence that this was a mental impairment which had a substantial adverse effect on his day to day activities. He did not provide any fit notes during the period of his phobia. In 2015 the OH opinion was that the Equality Act did not apply to him “because his condition (phobic anxiety state) was limited only to working in any department run by Pharmacy in the Trust. Outside these limits he remains perfectly psychologically well.” It is noteworthy that once the Claimant was required to attend a meeting to discuss possible dismissal the Claimant said that he could work in Pharmacy after all.
114. Nor was the instruction to return to Guys unwanted conduct related to his disability which created an intimidating, hostile, degrading, humiliating or offensive environment for him. The instruction did not relate to his depression but to the need to provide support to an individual who had been failing his competencies. The Respondent explained the reasons why the Claimant should have his competency assessed at Guys and if the Claimant did perceive this instruction to be humiliating it was not a reasonable response.

Redeployment (Issues 58-61)

115. By March 2015 there was no longer any requirement that the Claimant work at Guys Dispensary as he had been offered the Evelina. Issue 58 fails on that ground alone. Even if the pcp is recast as a requirement to work in Pharmacy we do not accept that the Claimant was at a substantial disadvantage because of his depression by the requirement to work in Pharmacy so the issue of a reasonable adjustment does not arise. Further, despite this, by April the Respondent had agreed to put him on the redeployment register, where he remained at the time his claim was issued.
116. In the Tribunal's view the Trust was more than reasonable in its dealings with the Claimant by placing him on the redeployment register for so long. It would not be a reasonable adjustment (even if he were disabled and at a substantial disadvantage) to allow someone to remain permanently on the redeployment register on full pay irrespective of his capabilities and his usefulness to the Trust as the Claimant suggests.

Refusing to investigate the Claimant's grievance properly.

117. The Claimant complains (issue 26.3) that the Respondent refused to investigate the Claimant's grievance properly and then rejected it and that this amounted to unwanted conduct related to disability satisfying the definition of harassment.
118. In his Further and Better Particulars the Claimant suggests that HR dishonestly misled Ms Mould as to the maximum length of the redeployment period, and that the Respondent should not have investigated his complaint under the Bullying and Harassment policy.
119. However in oral evidence before the Tribunal the Claimant was wholly unclear as to why the Bullying and Harassment policy was not appropriate for his complaint – just saying that the Respondent should have devised an appropriate policy for his case. He should have been taken as a special case. In his witness statement (par 149) he says Ms Mould was protecting Anya (but not why he thinks that to be the case) and said there was a continued failure to investigate. He gave no examples of matters which had not been investigated and in answer to questions from the Tribunal said simply that his complaint was that she did not find in his favour and he also accepted that Ms Mould had in fact done a good job. (This was also his position at the appeal hearing.)
120. The Tribunal has heard no evidence which would suggest that his grievance was not properly investigated by Ms Mould and this complaint is not made out on the facts. The Claimant has not sought to explain why he alleges that the rejection of his grievance satisfied the legal test for harassment and we find that it does not.

Conclusion

121. It follows that the case must fail. The Claimant was not an easy person to manage. His position as to what he wanted and why was constantly shifting. In Tribunal we have witnessed much of the same tendency. As at the date of the claim the Claimant had not, on any reasonable measure, been unfairly treated by the Respondent and it is surprising that this has resulted in a significant and lengthy Tribunal hearing.

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Employment Judge Frances Spencer  
24th March 2017