



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Robinson

**Respondent:** Mitchells of Lancaster (Brewers) Limited

**HELD AT:** Manchester

**ON:** 16-18 August 2017  
29 September and  
2 October 2017  
(in Chambers)

**BEFORE:** Employment Judge Sherratt  
Ms M T Dowling  
Ms E Cadbury

## REPRESENTATION:

**Claimant:** Mrs F Almazedi, Solicitor

**Respondent:** Mr T Collyer, Consultant

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims succeed in respect of his allegations numbered 1, 4, 6 and 9.
2. The claimant's claims fail in respect of his allegations numbered 2, 3, 5, 7, 8, 10 and 11.

# REASONS

## Introduction

1. The claimant commenced his employment with the respondent on 4 August 2015 managing the respondent's licensed premises known as The Wilton Arms in Bolton. The claimant has qualifications in Catering and Hospitality and has been in the catering trade all of his working life.

2. The respondent operates a chain of managed and tenanted public houses throughout North West England and Yorkshire employing around 170 people.

3. According to a medical report dated 29 March 2016 from Mr N T Gurusinghe, Consultant Neurosurgeon, the claimant who was born on 9 March 1971, suffered a subarachnoid haemorrhage due to a ruptured cerebral aneurysm on 20 November 2015. He suffered a generalised convulsion in the Emergency Department at the Royal Lancaster Hospital. The CT brain scan revealed subarachnoid haemorrhage and hydrocephalus (increased fluid within the brain). Investigations demonstrated a cerebral aneurysm as a cause of the bleed. The ruptured aneurysm was treated with endovascular coiling on 22 November 2015. He developed infarction of the left cerebellar hemisphere as a complication of the endovascular treatment. On 6 December 2015 he underwent an emergency operation to deal with the cerebellar infarction by removing the bone and reducing the pressure on the brain. He recovered from this procedure satisfactorily. On 20 January 2016 he underwent an operation (ventricular-peritoneal shunt) to deal with the accumulating fluid inside the brain. Prior to this he displayed some cognitive difficulties and unsteady gait. Following the operation he was clinically improving and was able to walk with the help of a frame. He was broadly orientated in time and place.

4. The claimant returned to work on Monday 6 June 2016 and his employment ended on 16 October 2016 following his resignation given in writing on 16 September 2016.

### **The Claims**

5. The claimant's claim form was received on 10 January 2017 with Ms Almazedi shown as his representative. The claimant claims that he was discriminated against on the grounds of disability. The details of complaint were set out over 3.25 pages.

6. The response was set out over 4.25 pages.

7. The matter came before Employment Judge Holmes at a preliminary hearing on 13 April 2017 by telephone conference call. The Employment Judge noted that the particulars set out in the claim form whilst complete in a narrative sense did not adequately, in his view, set out the precise claims that the claimant was seeking to advance, and he made provision for a Scott Schedule which would have the benefit of linking the alleged acts and omissions relied upon to the types of claim the claimant wished to advance. The respondent was afforded the opportunity to amend its response in the light of the Scott Schedule.

8. The question of disability was in dispute at the preliminary hearing. The respondent in due course accepted that the claimant was at the material time a person with a disability for the purposes of section 6 of the Equality Act 2010 having considered the information provided by the claimant including his medical records.

9. The Scott Schedule was provided to the respondent and then to the Tribunal, and the respondent's response was provided on 6 July 2016. The response, which includes a summary of the claims, is appended to this Judgment.

10. It is apparent from the schedule that the claimant brings claims of direct discrimination under section 13 of the Equality Act 2010, discrimination arising from disability under section 15 and he alleges that the respondent failed to comply with the duty to make reasonable adjustments set out at section 21. Some allegations are pleaded in the alternative.

### **The Evidence**

11. The claimant gave evidence on his own behalf and called no other witness. Julia Hodge, the respondent's Human Resource Director, gave evidence on behalf of the respondent.

12. There was an agreed bundle of documents containing in excess of 600 pages.

### **Findings of Fact**

13. The claimant was offered employment in a letter dated 17 July 2015. He was provided with a contract of employment stating the terms on which he was employed. Although there were rostered hours, the hours could be varied when required to meet the needs of the business with the claimant having to work the hours necessary to suit the needs of the business without payment of overtime. He was required to sign an "opt out" from the maximum 48 hour working week.

14. The claimant was provided with a company handbook which made reference to flexible working, including moving to alternative locations to meet business needs and the requirement to account for goods received and supplied.

15. Section 10 of the handbook deals with sickness/injury absence, payments and conditions. Under the heading "Medical Report" it states:

"We may seek access to a written medical report supplied by your doctor or specialist where necessary. This provides us with details of your health and fitness to return to undertake normal/alternative duties. We will seek your written consent on every occasion."

16. Section 15 deals with capability and under the heading "Medical Evidence" it states:

"Where we wish to contact your doctor, we will indicate this in writing. We will secure your written consent. You have the right to withhold consent but we always prefer to take account of your doctor's medical opinion. Otherwise, we must rely solely on the information currently available to us and/or an Occupational Health advisor's view. In those circumstances we may conclude we have no alternative other than dismissal. We will provide you with a copy of the letter to your doctor. We will give you a copy of any medical report subsequently supplied. You may ask your doctor for sight of the report before it is supplied to us. It is your responsibility to contact your doctor urgently to view the report..."

17. The respondent has an internal stock taker who visits their premises regularly. The stock taker, Tim Mawson, reported a wet stock deficit for The Wilton of £1,072.31 on 5 November 2015 which resulted in a letter dated 9 November 2015 being sent to the claimant by Jane Ramsay, Head of Retail Operations. The company considered it unacceptable and the claimant was asked to implement four measures with immediate effect. There was to be a further stock take within the next three weeks and should there still be a deficit the claimant would be invited to attend an investigatory meeting to provide an explanation.

18. Events were overtaken by the claimant's aneurysm on 20 November 2015 after which he was unable to work for some months.

19. When the claimant was not at work his wife, Susan, kept the respondent informed of his progress and made enquiries as to what payments were due to him.

20. On 2 February 2016 Julia Hodge sent an email to Susan Robinson referring to their conversation and asking if she could get the claimant to sign and return "the attached" complete with the identity of his consultant in order for them to obtain a medical report. If she needed further information Mrs Robinson should contact Mrs Hodge.

21. "The attached" was a request for medical information under the Access to Medical Reports (sic) Act 1988. There was space for the claimant to insert the name and address of the doctor and to sign to say that he gave his permission for Julia Hodge to obtain a full medical report on the present state of his health on the basis that :

"I have been informed of and understand my rights under the Access to Medical Records Act 1988."

There is then a space for the claimant to sign and date the document, which he did on 2 February 2016 in a signature which was somewhat different from his previous signature.

22. Mrs Hodge was asked how the claimant was informed of his rights under the relevant legislation and she told us that she believed she had sent a different letter to Mr Robinson and she subsequently produced a copy of it to the Tribunal. It is a completely different letter setting out the claimant's legal rights and with the attachment addressed to the doctor indicating whether the claimant did or did not give permission for the company to contact the doctor, and stating whether or not he wished to receive a copy of the report before it was sent or when it was sent.

23. The Tribunal is satisfied that this later produced document was not sent to Mr Robinson.

24. On 11 February 2016 Julia Hodge sent a letter to the claimant's consultant, Mr Gurusinghe, which resulted in the medical report referred to above. We are satisfied that Mr Robinson was not provided with either a copy of the letter requesting it or of the report itself.

25. Mr Gurusinghe was asked to deal with the following questions:

- (1) What is the exact nature of the medical condition?
- (2) Is Mr Robinson still receiving hospital treatment and if so, how long will this last?
- (3) From their duties described above, how long do you anticipate the illness will affect his work?
- (4) Do you feel Mr Robinson will be able to return to work as a pub manager?
- (5) If you feel Mr Robinson will be able to return to work, are there any duties that should be avoided upon returning to work? If so, would this be on a short-term or long-term basis?
- (6) When do you anticipate a return to work?
- (7) Is Mr Robinson taking any medication for his condition? If so, could this have an effect on his ability to return to full duties?

26. On 12 February 2016 the claimant's GP deemed him unfit for work for four weeks due to haemorrhagic stroke.

27. A further note was issued for four weeks on 11 March 2016 for the same reason.

28. On 14 March 2016 it was reported to Julia Hodge that Sue Robinson had called and advised that the claimant's occupational therapist would like to meet with her in Lancaster together with the claimant and his wife to discuss him coming back to work.

29. A meeting took place on 29 March 2016 attended by Julia Hodge and Jane Ramsay for the respondent and the claimant, his wife and Ann-Marie Clarke, a clinical specialist occupational therapist working with the Community Neuro Team, Central Lancashire, with the subject being the claimant's return to work following sickness absence. The meeting was recorded by the respondent and transcribed.

30. Mr Gurusinghe's medical report was not available for this meeting. As to the claimant returning to work, in the absence of the medical report Ann-Marie Clarke is recorded as saying, "Leave it with us – unless there was a medical reason, which there isn't... as to why you can't come back to work. It's more sort of up to us, really, with what happens". The claimant agreed with this statement.

31. The claimant reported that he could walk again. Fatigue was the biggest problem but he could walk. It was balance and "stuff like that". He had not been out of bed for 11 weeks. He slept for such a long time. 14 or 15 hours a day.

32. Ms Clarke said from their point of view it was more about things from a company point of view in terms of "phased terms" which the Tribunal thinks should

be a reference to a phased return. She asked what's the sort of procedure on phased return and how long could it be over and how could it work in terms of hours?

33. Ms Hodge said they could look at things and see what suited the needs of the business, but she thought it would be easier if they could let the company know what would suit the claimant and then they could look at the needs of the business and reasonable adjustments to facilitate his return to work.

34. The occupational therapist said she knew "some companies have it set over a four week period or whatever. As long as you end up coming back on the hours you are working, if that's sort of fairly flexible. I think it's just sort of around things like that".

35. The claimant's concerns were on the fatigue side and on the financial side because they were under pressure with the mortgage "and things like that". He had every intention of coming back and making the place what it should be. He would do what he could do as quickly as possible but within the restraints of the expert saying what he could do.

36. Jane Ramsay thought what they were trying to ascertain was what was reasonable for the company to expect from him and what he should expect from the company. The company had never had a phased return with a manager.

37. The occupational therapist said:

"Depending on how long that phased return can be done over will depend on when you can come back. If it's a longer period then you can obviously go back sooner than if you had to get it all done and finished in four weeks. Because obviously from your point of view there's going to be the fatigue element which is going to [be] the big contributing factor to how much you can do really, isn't it?"

The claimant agreed and said that he could not drive until the end of July. The occupational therapist thought it was more about the hours he would be doing than the driving:

JFH: Where are we now? Have you got any recommendations that you think we need to be aware of? Obviously we need some information that we can look at and see how we can facilitate it.

AC: Yes.

JFH: Is it weeks away when he's looking to return to work or is it sooner?

AC: I would say probably a few weeks. I wouldn't say it was like a month off. If we are looking at...what I mean is in terms of time, if we could do a phased return sort of potentially over two or three months, you could be looking at starting to go back to work in the next few weeks. If we are looking at it that you have to be back at work full-time in the next sort of four weeks after you start or whatever then I will saying that you

need to be much better than what you are. It will depend on how many hours you will be expected to do over what time period to get you back to full-time. You know what you're like from a fatigue point of view.

.....

AC: I would anticipate that if we can stage it quite well over however many weeks we need to do it, you won't have a problem with it. It is that pacing.

PR: Totally. Each day I'm building up stamina and building up everything but to rush back in is not productive for anyone. Providing it's a staged return that everyone is in agreement with then I don't feel there is a lack of capacity from a brain point of view. I haven't lost anything. There are certain things I need training in.

AC: I think it's going to be the higher level of attention stuff.

PR: Yes.

AC: Being able to concentrate on more than one thing at once and block out that background noise. All that sort of stuff is stuff you're going to have to practise, which is fine. Then we've got the other aspect that you're going to be moving around a lot more from a balance point of view. You're going to have to be a lot more focussed on your balance at work than what you currently are.

JFH: You've got cellar work and things like that.

AC: From that point of view, physically, that should be ok....It's going to be more about Peter doing what he's told, really, and not trying to do things what he shouldn't be doing until that point.

JFH: So, if things progress like they do in the next couple of weeks if Peter is in a position to work what are you looking at as a starting point for Peter to be in work and on what hours?

AC: The way we would normally do it, if we were working over six weeks, which I'm not quite sure whether he would manage at the minute, it would be three half days, three mornings a week, and then seeing how that goes, probably for a couple of weeks and then increase the hours on those three days so he has a day off in between. From a fatigue point of view you've got a day in work and a day off to sit and do nothing, then a day at work then a day off. And gradually increase the hours on the other two days after that. But that would be monitored from a fatigue point of view and how it affects your balance and all of that side of things. That's the bit we've got to think about.

JFH: In our business, when you say three mornings, the pubs don't open till 11.00am. Could he do three afternoons? Though four hour shifts?

AC: Yes.

JFH: Right. There four hour shifts.

AC: Yes.

JFH: Is there a preference of more afternoons than evenings because of the fatigue problem?

AC: Probably, afternoons would be better for you than evenings wouldn't it?

PR: Yes. Mornings or afternoons are better.

JFH: So mornings and afternoons.

...

SR: Yes, he wouldn't be able to go to a table and clear plates...It's all about retraining isn't it?

AC: Yes.

JFH: In your phased return to work your initial period when you come back to work, what sort of duties will Peter will able to do?

AC: You said about computer work and all that side of things, he should be ok with that. Actually walking around in the pub you would probably be alright with that and in terms of managing people.

PR: I'm probably the wrong person because I'll just say "yes".

SR: You'll say that you're alright.

...

JFH: What about S4? So all the computer work, you think you'll be able to manage?

PR: I probably need to be re shown some of that...whilst I know that it has two rotas, I know there are things we had to do. I am unsure about what the forms are like or how I find them on the computer...I'm not saying that I can't...I'll just have to write it all down.

JFH: The WSR – does that mean anything to you at all...the big weekly sales return sheet?

PR: I've heard of it. I couldn't tell you what was on it. I understand things like working to a wage budget so if I had a figure...

JR: So, the broader concept is there, it's just the details.

PR: Yes and where it is on the system.



...

JFH: In a few weeks' time you will have more of an idea of how Peter is to come back to work, but your initial thoughts are three, four hour shifts throughout the week with a day off in between for a couple of weeks See how it goes.

AC: Yes.

JFH: And then look to increase on the same day.

AC: Increase on those days.

JFH: The same days?

AC: So you've still got that day off in between just to get over any fatigue.

JFH: Yes.

AC: We would normally do that over a couple of weeks and then increase the hours on other days to sort of manage around it.

JFH: If there wasn't a time element on it from our perspective, from your perspective how long would you think it would be before he could be back full-time?

AC: I think if we start in a few weeks I'd like to think that over eight weeks we could possibly get you back to a point where, as long as you're working sensible shifts and not like you were doing before where you were rocking home at silly o'clock in the morning and those sort of things, as long as you're doing your contracted hours.

PR: I'm always sensible.

JFH: It's the hours to suit the needs of the business. It isn't contracted hours.

AC: Yes. I'm just thinking initially. You finishing at whatever time and you agree to do that and you're not stepping back and saying "Oh I could do this" or "I could just do that" for a few weeks...If you do it in the wrong way you're just going to be off sick again...and that's the last thing we want...I think if we structure it right and we do try and stick as close as we can to that, like you have done for the last four weeks with all the other stuff we've been doing, that you will see quite a big change.

...

JFH: Can I just ask? Going back to the initial duties, we've got computer work once we've found it all and we have re-established process. There obviously isn't 12 hours of computer work a week, what other things will Peter be doing?

AC: I think in terms of getting about, like I say, you're not unsafe, even if it's things like being behind the bar and all that sort of stuff. That stuff will be ok. It will be more about things where you challenge your balance a bit more by carrying things or if you suddenly change from bending down to standing up and turning. There might be other people about or you have to negotiate different things which is going to be more difficult.

PR: Before I would probably have cleared a table of eight by myself.

JFH: Yes, you can't do that.

...

JR: Will you still be working with Peter?

AC: Yes...On a day-to-day basis we are sort of there telling you how to adapt things, we can do that. Even when you're back at work we can do that from arms' length. It's like you don't know what you're doing from a rehab point of view...The main thing is I'm going to be keeping an eye and making sure that you're doing what you should be doing or are you overstepping the mark a little bit, and making sure your fatigue doesn't become too much of an issue.

SR: Will you actually go into his place of work then?

AC: Yes. If when you sit down on the computer, if you do need to write things down and need prompt sheets and things putting in place I can help you with all of that if that's what you need. I would anticipate, given the fact of the difficulties you've had with your cognition, it's all high level attention stuff. I would anticipate that once you've gone through it that you will be ok. I'd be very surprised if not. If you do have a problem with it then that's fine. That's what I'm there for – to come in and set all these processes up for you. It's just more about jogging your memory really as to where things are and like you say, passwords. When I went through with you all of the stuff about budgeting and all that side of things you didn't have a problem with it...It was all there. It just needed teasing back out of you.

...

JR: Ideally, from your point of view, what would you suggest?

AC: I would probably be saying eight weeks.

JR: Over eight weeks?

AC: Yes. But if it's going to be reduced...a lot of companies say four weeks. I would be anticipating you need a bit more rehab before you did that four weeks because you would have to be back full-time after four weeks. Your phased return would have to be quicker.

JFH: If we said eight weeks and come back to work in a couple of weeks' time, phased over eight weeks, then hopefully back almost to where he was at.

JR: During a phased eight weeks, is that two days a week or three half days?

AC: Three half days increasing then. The week before you were due back full-time you would be managing however many days per week is when it's split up.

PR: So it would be a normal shift?

JFH: So, ten weeks really from now?

AC: Yes.

JFH: He could be back. If we are saying that we want you back in four weeks, then you wouldn't start your phased return yet, maybe another month or so.

AC: Yes because we would have to do a little bit more work on your balance. We would have to "up the ante" quite quickly. So from a fatigue point of view we'd have to make sure that you weren't going to drop back. Whereas if we do it over a longer time period we've got in effect four more weeks to gradually increase the hours and you will get used to that. You will be tired. I get people ringing me up and saying "I feel as though I've run into a brick wall". It's just that mental fatigue more, which is what you were experiencing quite a lot of. It's that and other stuff and not the physical stuff.

38. The meeting concluded with a discussion concerning financial matters. Mrs Robinson asked if pay would be based on an hourly rate and Mrs Hodge said that she will pro-rata it out without stating how the pay would be calculated.

39. On 12 April the claimant's GP assessed him as not fit for work for another period of four weeks to 6 May 2016 because of "Haemorrhagic stroke".

40. In the absence of the anticipated medical report Julia Hodge asked questions of Ann-Marie Clarke as to the claimant's ability to do his job. In an email sent on 13 April Ann-Marie Clarke said that his abilities would be no different from those discussed in the return to work meeting. She said the claimant was currently having some high level balance issues that he was having rehabilitation for and would affect his ability to multitask and carry lots of heavy objects whilst mobilising. She wrote that:

"There have not been any significant issues with his cognition, language or comprehension which will have an impact on his ability to carry out his duties at work. He may need to re-learn procedures and accessing IT information as discussed but once this has been done there should be carry over of this information and it should be returned from the long term. Peter was initially

experiencing high levels of fatigue but with the use of grading etc. this is now being effectively managed and should not pose an issue in the long term.”

41. By 13 April 2016 Julia Hodge had received the medical report from Mr Gurusinghe. The medical information is set out above at paragraph 3. In respect of his answers to the other questions:

“The recovery from this major brain condition is difficult to predict. He will require a period of stroke rehabilitation which will include assessment of cognitive function, mobility and independence regarding normal day-to-day activities. This recovery period will be at least three months but is more likely to be up to six months. It is possible that he may not recover back to his normal intellectual capabilities...

It is possible that he may be able to return to his duties as a pub manager. The judgment regarding this is best deferred until at least July/August 2016. On making a good recovery there are no specific duties from which he needs to be excluded. A phased return to work is recommended. As mentioned above, it is difficult to predict a date of return to work. He may not recover adequately to return to work. A review of the cognitive, intellectual and physical capabilities will need to be made as indicated above.”

42. On 15 April 2016 Julia Hodge wrote to the claimant concerning his phased return to work following the recent meeting with himself and Ann-Marie Clarke. Having received the medical report she felt they were now in a position to agree a plan for the phased return over a four week period which would be as follows:

Week 1

Wednesday 27 April 12.00pm-4.00pm Head Office Retraining

Thursday 28 April – off

Friday 29 April 6.00pm-10.00pm Water Witch working alongside manager

Week 2

Monday 2 May 10.00am-2.00pm Water Witch

Wednesday 4 May 10.00-2.00pm Water Witch

Friday 6 May 8.00pm-12midnight Water Witch

Week 3

Monday 9 May 9.00am-1.00pm Water Witch

Wednesday 11 May 2.00pm-56.00pm Water Witch

Friday 13 May	7.00pm-11.00pm	Water Witch
Week 4		
Monday 16 May	9.00am-1.00pm	Water Witch
Wednesday 18 May	2.00pm-6.00pm	Water Witch
Friday 20 May	8.00pm-12midnight	Water Witch

43. The letter went on to say that if the claimant felt he could work longer hours as the phased return to work progressed then he should let them know and they could amend the rota. It noted that Ann-Marie Clarke at the meeting confirmed he would be able to complete all company paperwork and computer work following the retraining as well as work on the bar:

“As you will not be carrying out full managerial duties during your phased return to work we will amend your salary accordingly and therefore you will be paid an hourly rate based on a pro rata’d salary of £20,000.

During your phased return to work we can assess your progress and should you be able to return to the position of manager at The Wilton Arms at the end of the four week phased return to work then your salary will revert to normal.

Please confirm your acceptance of this plan and I look forward to seeing you on Wednesday 27 April 2016 at 12 noon to commence retraining on all company procedures and paperwork.”

44. The Water Witch is another of the respondent’s licensed premises situated on the Lancaster canal, “a five minute stroll from the historic city centre of Lancaster”. Although it is the respondent’s pub with the type of trade most similar to that carried out at The Wilton it was not convenient to the claimant in terms of its situation. Undertaking a phased return at The Water Witch was not mentioned to the claimant before it appeared in the letter.

45. The claimant discussed this with Ann-Marie Clarke who emailed Julia Hodge on 21 April with the claimant’s concerns:

- (1) Being at The Water Witch would make his journey difficult as he is unable to drive and the last train from Lancaster is around 10-10.30 so he could not get home after this time.
- (2) He feels he knows the staff at The Wilton and he would feel supported there rather than in a place he is not that familiar with.
- (3) He is concerned about the drop in salary. Given that he feels he will be taking on some managerial responsibility he is wondering why this is being considered.

- (4) He was also asking that his hours be gradually increased over the four weeks so when he returns to work after the four weeks there is not a big jump in hours from 12-48 etc.

46. She also sent a letter to Julia Hodge with the claimant being potentially happy to return but feeling it would be more appropriate to spend only two weeks in Lancaster, with reference to the added travel/increase in the length of the day which may impact on his fatigue. If this could not be accommodated it may be that he has to delay his return to work until he is able to return to full-time hours in his substantive post at The Wilton. She thought it also worth bearing in mind the anticipation that the claimant would be able to return to work at The Wilton as manager as from the letter it sounded like there may be some doubt about this:

“The plan for his phased return was initially, we thought, that he would be returning to his substantive post, as this is not meant as an assessment of his capabilities to take up his previous role, but as a phased return into his previous post, as there is no impairment from what we have assessed that would prevent him from returning to this job as discussed at the meeting. I feel this is where some confusion may have come from Peter’s perspective as it reads more like he is being assessed as to whether he will be able to return to his role, not that he will be doing so. I hope this issue can be agreed upon so this does not delay his return, but the current offer in place is unmanageable at this time.”

47. Ann-Marie Clarke sent a further letter on the claimant’s behalf. The issue of pay was still a concern. An Occupational Health assessment could be a consideration if they required further advice on the return to work. The claimant was happy to remain off sick if required until he could return to The Wilton in his full capacity but may still need managing so a phased return would still be advised given the nature of his diagnosis. It may be worth considering whether he could complete a day at The Wilton with a colleague there to re-familiarise himself with the systems and processes. The respondent in reply to the various issues raised by the claimant explained that they felt it was better for the claimant to carry out the phased return at The Water Witch because he would be supported by a very experienced manager. Shift times could be amended to allow him to catch the train home and the company would meet any extra travel costs. The salary, they said, fairly reflected the role during the phased return. It would revert to normal should he return to managing The Wilton.

48. On 6 May 2016 the claimant was certified as not fit for work for a further four weeks again because of haemorrhagic stroke. It did not suggest that the claimant may be fit to work with adjustments. The doctor’s note goes on to say:

“I will not need to assess your fitness for work again at the end of this period.”

49. Julia Hodge invited the same parties to a further meeting on Friday 6 May which was rescheduled to 18 May and then to 1 June 2016. The meeting was recorded and a transcript has been provided.

50. Julia Hodge noted that it was seven weeks since they last met with a plan that the claimant would get back to work doing a four week phased return, which by the time of the meeting he would have been through and would hopefully have been back full-time. The meeting then discussed the question of the claimant's return:

AC: From Peter's point of view he's not going to be able to go from not working at all since last year to going back to 40 hours or however many hours you do, in one go.

JFH: So you're saying week one would be three half days?

AC: Yes, and then five half days.

JFH: Five half days in week two?

PR: Yes.

AC: And then increasing that to...

PR: Three half days and two full days.

JFH: And then three half days and two full days.

PR: And then by week four, we are there.

JFH: So on week four you would be full-time? So its three weeks' phased return you're asking for?

AC: Yes, just to manage the fatigue side of things. At least on that first week, you know you've got a day where you can have a bit of a rest.

PR: When I come back I want to come back to stay. I don't want to be in a position where in a month's time I've come back too quickly and done too many hours and go off ill. My body will just shut down. I don't want to be in that position. It's going to have to be phased whichever way we do it and over the minimum time possible. I really want to get back to the team at The Wilton and progress things.

JFH: When are you looking to start week one?

AC: From our point of view, whenever.

JFH: Your fit note runs out on Friday. Are we saying Saturday?

JR: What we are trying to do is ascertain when you are well enough.

PR: Absolutely.

JR: And secondly, how we run the business in the short term. Obviously I need to make sure the site is covered. That's secondary to what's

happening with you. It's quite clear that you could go and get another sick note. That's all we are trying to ascertain.

AC: It's about everybody's wellbeing. You've got a business to run and we understand that. We are totally on board with that. Peter, on the phased return, are you looking at starting back at The Wilton where you worked before?

PR: It's all down to Jane and Julia. In my mind, yes.

JR: There are some things in my mind and I've got to be honest with you...I need to know whether that's a safe environment for you at The Wilton. I know you know the staff and they'll obviously look after you, but I wouldn't think that would have been any different at The Water Witch to be honest with you.

PR: Yes.

JFH: Where are we up to with all the computer work and everything like that? When we saw you seven weeks ago you didn't know about S4 or the returns.

AC: It's more about logistics of where things are rather than that he doesn't understand.

PR: Yes.

JFH: So if we put S4 in front of you could you do the rota or not?

PR: Yes I can do the rota.

JFH: On S4?

JR: This was the whole point of putting you into The Water Witch...

PR: I'm not saying whether I know or not. Until I look at something...can I write a rota? Yes I can.

JFH: Not write a rota, it's on the system. When we arranged the first phased return to work we arranged a full training programme. You were quite open, which was fine. You said you had no recollection of any of our systems so we therefore set up training for you in order that you could familiarise yourself with it. The point of you being at the Water Witch was so that you could do the Monday returns and have a manager there to support you...

PR: The thing is I'm not sure if I need a total re-learn. It could be a case of me looking over someone's shoulder and then they can see whether I've done it the first time and then there we go.



JFH: So you've no recollection of it now as we sit here, but once it's put in front of you...

AC: He'd probably be ok.

SR: Until he actually does it we don't know do we?

...

JFH: So with the phased return to work this is at The Wilton?

PR: Yes.

JFH: When can you come back to work?

AC: From my point of view it's if you're ready, Peter...

JR: Why don't we start the phased return on Wednesday 8 June?

JFH: So week one will be three half days, so taking this into account you could return to work on Saturday?

AC: And his first shift would be Wednesday, is that right?

JFH: No, it would be Saturday. And then we could have Wednesday, so Peter has a few days off, perhaps.

PR: Next Wednesday and Friday?

...

JFH: Lauren, the assistant manager, leaves on 12 June. She's running it and she's the main line of support. We are recruiting but there will be even less support, that's what we are saying...

AC: I think he'll be ok. I don't have any concerns about him coming back to work apart from the fatigue which we are managing through a phased return.

...

JFH: What's your version of a half day?

AC: We normally say four hours. Most people do 9.00am to 5.00pm.

JFH: Not a pub manager. So you're working on four hours for half a day?

AC: Yes. Four hours. Like I say, I would anticipate it because Peter is active now and coping quite a lot on a day-to-day basis. I can't see it impacting on you that much now.

JFH: When we get to week two, five half days, Peter gets two days off per week anyway. How do you want to do it? Two days together, a day off, two days then a day off?

AC: Whatever. That's what you would normally have a look at as that's what you've got to get back into by week four. It doesn't really matter because 9.00am to 5.00pm they would be doing three half days, maybe Monday, Wednesday and Friday then five half days together if he had weekends off.

JR: I know it's all about Peter's rehabilitation and getting better, I'm looking at it from a business point of view, are we saying from week four Peter takes back the business?

AC: I don't have a problem with Peter taking it back.

PR: I feel comfortable on the basis of dealing with staffing issues, the rotas and walking around the car park to make sure it's clean. In the role of a manager I would expect to go in there and do that from day one.

JR: I'm concerned about the cash and the stock. It's a legal obligation.

PR: The stock, yes that's ok.

JR: It's just there are legal obligations in doing that as a licensee.

...

JFH: So the half days, are you wanting a mix of lunchtime, teatime, a lock up? Do you want a mix?

AC: Yes. He needs to be doing what he was doing before. There's a bit of a downscale in a way and then build him back up to full-time hours on week four. Hopefully the driving issue will be sorted in July, won't it?

...

PR: So Monday, Wednesday and Friday next week. They're my half days. That's next week sorted.

JFH: Hopefully, it will depend on the rota that is already in place. And then we're on five half days the following week?

PR: Yes, and then three half days and two full days.

JR: Do you want the days to be together or split? On the second week it's five half days isn't it?

JFH: Yes.

AC: Most people do a five day block.

JFH: So five half days together and then you get two days off then you start the third week and it's three half days and two full days. After that you're back on full-time hours.

SR: That will be good.

AC: That's then what we'll do, towards the end of that week, second week or the beginning of the third week I'll come and check in to make sure nothing has cropped up...but he doesn't have to go down to the cellar for the first month, does he? Just until he gets used to it.

JFH: What about line cleaning and putting deliveries away? He will need to go in the cellar.

SR: What I'm saying is that he doesn't have to be down there everyday all day.

PR: I'm not rushing down there for anything. If I'm doing a line clean that's over two or three hours.

51. The meeting concluded with the company and the claimant accepting that they needed to find a new assistant manager in respect of which an advert had gone into the trade press and internally.

52. Julia Hodge wrote to the claimant on 1 June 2016 concerning the phased return to work confirming what was agreed:

"You feel you are now ready to return to The Wilton as manager on a 3 week phased return to work. Below I have detailed the rota that has been inputted onto S4.

- Week 1

Monday 6 June	9.00am-1.00pm
Friday 10 June	2.00pm-6.00pm
Sunday 12 June	12.00pm-4.00pm

- Week 2

Monday 13 June	9.00am-1.00pm
Thursday 16 June	7.00pm-11.00pm – lock up
Friday 17 June	7.00pm-11.00pm – lock up
Saturday 18 June	12.00pm-4.00pm
Sunday 19 June	12.00pm-4.00pm

- Week 3

Monday 20 June	9.00am-1.00pm
Thursday 23 June	7.00pm-11.00pm – lock up
Friday 24 June	12.00pm-4.00pm
Saturday 25 June	3.00pm-11.00pm – lock up
Sunday 26 June	12.00pm-8.00pm

- Week 4

Full-time hours, Peter Robinson to complete rotas.

During your phased return to work we will pro rata your salary for the hours worked. I know everyone at The Wilton is looking forward to your return and Lauren is looking forward to meeting you on Monday 6 June 2016.”

53. The claimant started his phased return and on 13 June 2016 Jane Ramsay emailed him saying his labour costs looked high for the coming week in comparison with the previous week. She would do the second interviews of suitable candidates for the position of assistant manager.

54. On 20 June 2016 the claimant emailed Jane Ramsay when one member of his team was away which meant they had no cover for locking up on two days a week for two weeks, his days off, unless they were happy for him to train someone up and pay them accordingly or there was a relief manager. Then on 28 June 2016 the claimant emailed Jane Ramsay again to explain why there would be a lack of management cover over two weekends. The people who would be able to lock up were on annual leave apart from one so they were extremely short staffed. The claimant was having to work all week to cover absences and therefore had booked off the weekend.

55. On 24 June 2016 Jane Ramsay sent a letter to the claimant concerning a dry stock deficit of £2,159.38 found at a stock take carried out on 17 June for the period from 13 May to 16 June “which the company considers totally unacceptable”. The company recognised that the claimant was not in situ for the full stock period when the deficit occurred but he was asked to implement six measures with immediate effect. The company stock taker would attend within three weeks and should the deficit stand then there would be an investigation by the company. This letter is along the lines of the one sent to the claimant on 9 November 2015 concerning a “wet stock deficit”.

56. On 27 June, at the start of the fourth week, Jane Ramsay sent an email to the claimant. She asked for certain information. She told the claimant she had contacted the manager at the Water Witch to assist him in line cleaning. She had noted from his schedule that he was absent from the pub on Sunday. Could he please adjust his rota to ensure he was present a peak trading times? Peak trading times were later

confirmed to be Friday, Saturday and Sunday and there was a need to be there on Monday for completion of the week ended trading information.

57. On 12 July 2016 Lisa Gracey, Operations Secretary of the respondent, sent a confidential email with high importance to Jane Ramsay and copied it to Julia Hodge on the subject of "P Robinson". They were to find areas of concern. She had a log of emails detailing various issues. The first was the dry stock deficit to 16 June in respect of which the claimant had been asked to implement controls. As to assistance with line cleaning, the claimant had sent an email on 24 June saying he was not sure when a line clean was last done but it needed doing. Simon was called for clarity on the system installed at The Wilton. Whilst the claimant was happy to attend it would be useful if someone could clarify as to the method to be used to avoid confusion. Simon Morrissey would be asked to assist in line cleaning. The claimant had asked for holiday in August which was against company policy but Jane Ramsay had agreed to make an exception for two days.

58. As to management cover, the claimant had been absent on a Sunday. The claimant said he would be taking Sunday as a rest day and Jane Ramsay had responded saying it was essential he was there at key trading times. He was asked to check costings for a new menu as it appeared expensive. He had asked to be excused from managers' meetings due to a transport issue then to staff cover. As to weekly paperwork, the email highlighted various different errors each week from 13 June to 12 July.

59. On 13 July at 15:49 Jane Ramsay sent an email to Lisa Gracey setting out her concerns over the claimant's performance. On 7 July 2016 she had attended the Wilton and the claimant was there. She asked for some information which had not been prepared and the claimant could not find it in the office. He asked for five days off in August which was not in line with company policy. She told him of his responsibility to ensure the smooth running of the site and she had spoken to him regarding the requirements on two previous occasions where he had not planned to be on site at peak trading times and he had said he required his days off. He became agitated and left the table after she requested he lowered his tone and calm down. He did not return. She approached him and asked to continue the conversation. He was, she wrote, very distressed and unsteady. She stayed with him until he was calm. A Marketing Consultant attended the site at noon and the claimant told her he wanted a 9-5, Monday-Friday job.

60. With reference to 11 July 2016 she had the scheduled telephone call with the claimant. She went through the submitted business information and asked that it be re-sent with corrections. She asked that he be in the business at peak trading times. He had had the last few Fridays off. She reiterated the need for him to be in the business then. She was concerned that the needs of the business were not being considered appropriately.

61. On 4 July 2016 at the scheduled business call she asked for business information again to be resubmitted when corrected and for the claimant to ensure he was on site at peak business times. He became very agitated when she said he needed to be there on Sunday. The claimant had subsequently informed her that

after the call he had gone home for 4 hours and sobbed and that he had been unable to control it.

62. On 15 July 2016 Lisa Gracey emailed the claimant following a visit the previous day. She asked if he would list the areas of Monday reporting he was finding difficult to complete so that she could ensure additional training was completed. She expressed concern that the claimant was working from 9.00am to 11.00pm. In view of his fatigue levels she would suggest working split shifts would be more beneficial allowing him to rest during quieter periods particularly during Friday, Saturday and Sunday peak trading.

63. In cross examination the claimant stated that this was not practical, particularly as there was nowhere on the premises suitable for him to rest.

64. On 15 July 2016 Tim Mawson, the stock taker, reported a wet stock deficit at The Wilton of £118.93 but the dry stock was ok. He had given the claimant some retraining on how to enter delivery notes.

65. On 18 July 2016 Simon Morrissey, manager of the Water Witch, provided some training to the claimant at The Wilton.

66. This came about because the claimant emailed Jane Ramsay on 17 July 2016 explaining that he had had a memory loss in respect of the things needing completing on a Monday. He felt he would benefit from a further handover and clarification as to the requirements to avoid misinformation. For example he required assistance with locating the discount sheet required and clarification on gross and net figures, and period ends. He went on to say that fatigue would continue to be a major symptom of the stroke that he would need to control. He had been taking off Tuesday to attend a limb clinic as part of rehabilitation and Friday to try to avoid too long a stretch before rest, but he would look to change it to another day.

67. Jane Ramsay contacted the claimant on 18 July to say that she had arranged for Simon Morrissey to give assistance once his stock take at the Water Witch had concluded and at 21:51 on 18 July Simon Morrissey sent an email to Jane Ramsay confirming he had returned from The Wilton and gave some feedback as to what he had clarified. He pointed out some things the claimant had got right and some that he had got wrong and how they should be rectified.

68. On 28 July 2016 Julia Hodge wrote to the claimant, further to her letter dated 1 June confirming he had returned to work on 6 June on a three week phased return basis following a period of illness, to say that they would now like to review his progress in his role as manager at The Wilton having returned to full-time duties. He was invited to a welfare meeting on Wednesday 3 August 2016 in Lancaster with Julia Hodge and Jane Ramsay.

69. The claimant responded by email asking if an agenda could be forwarded and for confirmation as to whether or not he needed a representative present – if so he would speak to his occupational therapist. Lisa Gracey replied to the email confirming to the claimant that he did not need to be accompanied. There was no set

agenda. The purpose of the meeting was to discuss how he was settling back into work and whether he was experiencing any difficulties and if so, what.

70. The meeting took place on 3 August at the respondent's Head Office. The claimant met with Julia Hodge and Jane Ramsay. The claimant was not accompanied. The meeting was recorded and transcribed and appears over 23 pages in the bundle. Whilst anyone reading the transcript will get a feeling for the meeting as a whole, there are two specific allegations concerning this meeting at allegation 6, ignoring the claimant's visible distress and requests that he was unable to cope with his workload and hours, and allegation 7 as to the question of tiredness, and so it seems appropriate to record the particular exchanges relied upon by the claimant as outlined by his solicitor in her submissions.

71. The question of tiredness at allegation 7 is dealt with in the following exchange:

PR: When I couldn't walk, all of the muscles in my legs had to learn to walk. My balance is really bad so I can't stand on one leg or if I get tired my gait gets a lot wider. So I do an hour a week where I've got to put one foot in front of the other or stand on one leg. Just strengthening it really. I go on the bike, I go to the gym. I have to have a cortisone injection and a scan on that because of my shoulder and everything else.

JR: That must leave you tired on a Wednesday.

PR: Yes, I'm really tired on a Wednesday. I just sleep. I went to bed about 5.30pm. I had to get up at 7.00am this morning so 12 hours sleep or 14 hours if possible.

JFH: Really, do you actually sleep for that period of time?

PR: Yes, I don't have a telly on. I go to bed and just sleep, yes.

JR: Is that your normal pattern or is it just on a Tuesday?

PR: Most days, when I finish work, I'll generally be in bed within an hour of being at home and I'll sleep until whenever I get up. It gets easier. It does get easier. You've got to do it. The latest I've been to bed, if I'm on a late shift and then on an early shift, I'll do it but at the end of the early and I'll be in bed by 4.00 or 5.00pm.

JR: So the 8 or 9 hours sleep isn't sufficient?

PR: Not at the moment. It's getting better. When I first came out of hospital I was sleeping for 18 or 19 hours. It's getting better each time as to get stronger. Fatigue is major. If it gets to 11.00pm, my gait gets a lot wider so therefore I could only probably carry half a tray for safety more than anything rather than carry a full tray. I'd make two trips as opposed to one which defeats the object really because you walk twice as far. I

would be careful not to go down the stairs without holding on after sort of 8.00pm or something because my balance may just go.

72. With regard to allegation 6 we were referred to the matters set out above concerning tiredness and the comment of JR that that must leave him tired on a Wednesday. The claimant then goes on to say that fatigue is major when dealing with the amount of sleep. In his witness statement the claimant said that:

“The minutes of the meeting record that sleep was mentioned. However the way that I was spoken to made me feel that I had to justify to them why I was so tired and the tone of voice towards me when I said that I need 12 or 14 hours of sleep made me feel self conscious and I felt that what I was saying was not believed. This made me feel upset and frustrated especially in the light of the number of occasions that I had told the respondent about my condition and the fatigue problem.”

73. The claimant refers to using handrails when going down to the cellar.

74. Again as to fatigue:

JR: Is the fatigue the issue at the moment?

PR: Fatigue is the major one.

JFH: The purpose of today is you have been back at work for nine weeks. You were doing a phased return and have now been back full-time for six weeks. It's an opportunity for us to sit down and to ask how you feel you are doing and discuss what sort of issues you may still have or any areas we might have.

PR: I think the big one for me is that I enjoy the job, I enjoy all of that and that's all great stuff and it's brilliant. There are areas that yes, because of what's happened, with struggle with to try and overcome it as much as possible. The main thing is retention so if Jane asks for four or five things to be done I won't physically remember. I will ask for it to be written down. I'm not meaning to be rude with her.

75. The next exchange referred to:

JR: I think what we're trying to get a clearer picture of today, Peter, is where or how you feel you are back in the workplace and what you feel needs to be the areas that we need to be concentrating on going forward and what is your role in those.

PR: Ok, I will be honest with you, I haven't given that much though, because Lisa didn't mention that, but the key roles are obviously to increase the revenue in the place, increase the standard of company offering to a point where we are doing table service and offering a better service to customers, in line with changing the menu and streamlining the costs we've currently got in there. We are looking for an assistant manager as we are aware, and we have had the



conversation and I've been interviewing this week, I've got more today to do. As regards my illness and everything it is something that may or may not get better or improve, hopefully it will improve. I am exercising my brain regularly with new information and things like that but there is only so much that my brain can absorb in one go because what I don't want to happen is for it to just shut down again. So I am very conscious about everything that happened and how I've got to be sensible in what we do and how we deliver things.

JR: Sorry, what do you mean by that?

PR: Well I can't probably go back, and it's not been asked of me, but to do 70 or 80 hours a week because my brain will just shut down at that point...

JFH: I was just saying that you wouldn't be asked to work 70-80 hours a week.

PR: But my brain, Julia, is trying to absorb a lot more than it has done for nine months, from a learning perspective, from a customer service, from an activity point of view, so I have got to be very careful on how I manage that.

JR: So managing your fatigue, managing your energy levels?

PR: Because the last thing I want is to have any form of relapse back to where I was.

76. In connection with ignoring the claimant's visible distress towards the start of the meeting:

JR: When we had our meeting you were really upset.

PR: Yes, I was really upset. I don't know why, people perceiving that people don't care or if I've done something wrong I take it very personally...

*PR falters and he becomes upset*

JR: You're obviously getting upset now.

PR: I'm trying not to.

JR: Shall I get you a brew?

JFH: Would you like some water

PR: No, I'm fine (*voice falters*). Honestly, I'm fine.

JFH: I'll talk for a little bit. Obviously it's great that you've come back to work and you need to be very proud of how you are. I think that's what people don't notice because you physically appear fine to them...

77. About halfway through the meeting:

PR: I can't, well, at the end of the day, 8/9, well 9 weeks ago I struggled to get up each day to do anything, so now I feel confident about going into a restaurant, speaking to customers, pointing out where things have been done wrong, topping up salts and peppers and filling vinegars and working in the kitchen in regards of GP, or their stock or changing a barrel. So a lot of things which probably sound small things but to me... *(becomes a bit overwhelmed)*.

JR: Are quite large things?

PR: Ahem.

JR: Ok, time for a brew? Do you want to take quick five minutes and have a cup of coffee?

PR: No I'm fine.

JR: Are you sure?

PR: Yes, sorry.

78. As to a lack of support:

JFH: And we will recap where we are. When you stated your phased return initially, and again today you mentioned certain things that you have a vague recollection of or none at all. We talked about our procedures and paperwork which obviously didn't mean anything to you at the time.

PR: Yes.

JFH: You were quite happy if someone showed you it, and were confident it would come back. You didn't know how to email but when someone showed you it came back to you.

PR: Yes.

JFH: Obviously we've got a lot of procedures and paperwork, I was wondering how, you have had quite a lot of support with that now because you've had a handover with Lauren for a couple of weeks, then Simon from the Water Witch has been to see you.

PR: Once I had Simon for an hour.

JFH: I think he's been to The Wilton more than that.

PR: No.

JR: Are you saying that he hasn't shown you what you need to be shown?

PR: I'm not saying that, all I'm saying is...the question was that Simon's been over a lot. He hasn't, he's been over once.

JFH: You have only had one meeting with Simon?

JR: Have you spoken to Simon on the telephone?

PR: I've spoken to him once which was about line cleaning and then he went straight to Julia and said that I didn't know how to do line cleaning. I just got on and did it myself.

79. As to assistance:

JFH: Simon's feedback from that meeting was very positive.

PR: It helped. It did help. That's the only time I've met him.

JR: I think it is quite difficult for us to ascertain what you do and don't know.

PR: Yes I don't know.

JR: When you're sending stuff through, it's not the same stuff that is wrong. Does that make sense, Peter?

PR: Right, ok.

JR: The reason I asked Simon was because I wasn't sure and you said yourself it's quite random, we weren't quite sure what you required more attention on. I know Simon spoke to you and said that everything need to be net with the exception of the weekly sales return which kind of assisted you because there were some issues with gross and net. Is that correct?

PR: Yes.

JR: Are there other areas that you wish Simon to spend time with you on?

PR: I don't think so. I'm quite comfortable with everything that needs [to be] done on a Monday unless it's being done incorrectly in which case let me know and I'll try and put it right. I can look at a figure now and understand the gross and net and I understand what wage percentage to have. I understand all that but if there are figures I'm inputting incorrectly just say and I'll put it right. If I can't I'll say "I keep looking at it, I keep trying to change it but I'm going to need some assistance".

JFH: If it's a techy issue?

PR: That's fine.

80. With regard to the seventh allegation on the schedule and making the claimant feel humiliated by comments that if he could not do his job as before then

he was incapable of doing the job altogether, we were referred specifically to the beginning of the meeting where the claimant got upset referred to above:

JR: I think it is quite difficult for us to ascertain what you do and don't know.

PR: Yes I don't know.

JR: When you're sending stuff through, it's not the same stuff that is wrong. Does that make sense, Peter?

81. Turning to paperwork:

JFH: On the Monday paperwork isn't there always some issues with it? Have you got that sorted now? Each week it comes back to you to be amended.

PR: What, every week? It has come back a few weeks with a figure that's been wrong.

JFH: It's every week.

PR: I don't think there was anything wrong this week.

JR: I'd have to check that. I think most other weeks where I've had to send something back.

PR: Ok. Right.

JFH: The WSR wasn't calculating on Monday...We're just asking if you need continued support. That's what we are trying to get to.

82. A further exchange referred to:

JR: Because certainly when I write back to you or speak to you things are happening as a result of the conversation or the feedback from email, whichever method of communication, so my concern was why was that? Why were these things just not happening in the first place?

PR: Well they were happening.

JR: But just not when I visited site?

PR: Absolutely. There had been flowers out up until the day you came but I had already arranged for fresh flowers to be picked up by Vicky for the next day which was the Friday. Why they took the flowers away on the Thursday I have no explanation.

JR: But do you understand my concern?

PR: Yeah.

83. As to performing the role:

JR: What do you mean, the demands? What I think you're trying to say, and do correct me if I'm wrong, is that demands of the job may be more even within the confines of time that you are there? Are you saying that, Peter? Is that a concern?

PR: Yes. Maybe.

JR: Is that a concern, because obviously you genuinely are concerned about where you were?

PR: Yes.

JR: And with what happened to you?

PR: Well yeah, I can't remember but yeah.

JR: So you are concerned that if you are having to take on more, even within the confines of that timeframe, that may be too much?

PR: It may or may not be too much, yeah.

JR: It could be.

84. Talking about the Christmas menu:

JR: Do you think, Peter, that when you sent that in that that menu is appropriate for your business?

PR: Well, is was I, I suppose, I had a conversation with John (chef) prior to that on my opinion on it, and my opinion was very similar to yours on that I was not Northcote or somewhere, but if that's what you as a chef want to do, it was John's menu then I'll send it in.

JR: But surely that should be led by you as manager.

PR: Well he has been but I think in the first instance it was his menu, the Christmas menu was his menu.

JR: Yes but it is your call, he is part of your management team and therefore...

PR: No absolutely.

JR: Do you see where I am going with this?

PR: Yeah, totally, but I'm just saying that in the first instance I think he has got to have an input as to what he wants. The second one you will clearly see that there is much more of a dumbing down, a much more simplistic approach to what the dish actually is, it doesn't need fancy words.

85. As to stocks:

JFH: Obviously we have to, as I'm sure you understand, look at it as a business as a whole and what we need to do is review where we are with The Wilton. Initially when we had our first conversations in March/April it was a case of showing you processes and paperwork again and you said "I'll remember it, move on and I'll be able to do that". I think we have some concerns that that isn't actually the case because there are ongoing issues, specifically with the paperwork on Monday, stocks, standards.

PR: Sorry, with the stocks?

JFH: There were some stock deficits.

JR: There's a food stock deficit and I think there's a small wet stock deficit.

PR: There was a £1,600 food stock when I took over; it was on the day I started. It was sorted out last month. Anyway if you've got concerns that's fine.

JFH: I think what we'll do is we will review everything and then we can meet again.

86. Almost at the end of the meeting:

JR: I think the main part of today was to find out how you are actually feeling about it, Peter, and how you are coping with it. The Wilton is out on a limb from the rest of the sites. Certainly initially when we spoke, and I understand the transport issue, we would have preferred you to be at the Water Witch to learn.

PR: At the time I wouldn't have coped with the travel.

JFH: Yes.

PR: With the travel and the fatigue and everything. Again it wasn't me saying no to be awkward.

JFH: No I understand that.

JR: No, I'm not suggesting that. I just thought it might, it might have helped in one way, maybe not the other way.

PR: I wouldn't have coped with that. I think the handover I had with Lauren, in fairness, it happened.

JFH: But she was still employed up to 23 June. Did she not work with you for a few shifts and do the paperwork with you on Mondays?

PR: Yes. It wasn't as extensive as it could have been. Certainly on the paperwork side it was a bit woolly.

JFH: We had arranged for you to come to Head Office for training but you wanted to be at The Wilton.

PR: I didn't choose for it to be at The Wilton. My fatigue is to do with my occupational therapist which determined that that would be more practical. *(is agitated)*

JFH: Yes, you thought you'd feel more comfortable because it was with people you knew and you'd feel more supported. Is that not true?

PR: That's one of the reasons, yes.

JFH: Yes, so that you'd feel supported.

JR: Why are you being like this, Peter? *(very agitated, defensive)*

PR: Why am I being...?

JR: Why are you being like this?

PR: Because it's a play on words. I'm not dissing anyone. I'm not saying people haven't helped but the reason that I didn't want to go to the Water Witch wasn't anything to do with the Water Witch or Mitchells. At the time the fatigue of everything that had happened would have been too much if anything and had set me back. That's all.

JFH: Yes, no-one is doubting that.

PR: It wasn't a case of me not wanting to learn.

JFH: No I'm not suggesting that. I don't think that.

PR: That's fine.

87. The meeting ended with no formal conclusion or agreement as to what might follow.

88. At 18:58 on 3 August 2016 the claimant sent an email to Julia Hodge asking for some advice about completing a business plan and the appraisal of his head chef and having been off with a brain injury for the majority of the appraisal year was he the best person to carry it out? They spoke on the telephone on 5 August 2016 after which Julia Hodge sent a template for a business plan and said that the appraisal of the head chef could be done later in the year.

89. Without the knowledge or consent of the claimant Julia Hodge wrote to Mr Gurusinghe, the claimant's consultant, on 5 August 2016. She referred to his 29 March letter and his statement that judgment regarding the ability of the claimant to return was best deferred until at least July/August and then continued:

“Mr Robinson returned to work on a phased basis on 6 June 2016. We have constantly been reviewing his performance and providing support and assistance to try and help him in his role as pub manager. I was wondering as it was not (presumably should be “now”) July/August if you could now provide further information:

- How far has his mental capacity improved?
- How much more do you feel his mental capacity will improve?

The reason behind this question is that we are very concerned regarding Mr Robinson’s mental abilities as a pub manager and you stated in your medical report that *‘he may not recover adequately to return to work. A review of the cognitive, intellectual and physical capabilities will need to be made as indicated above’*.

When we held a review meeting with him on 3 August 2016, there didn’t appear to be any significant improvement in his mental capacity and it was very clear that he is still struggling with:

- Fatigue, which then affects his gait and ability to do his job.
- Answering questions clearly.
- Weekly paperwork. Constant different errors on a weekly basis.
- Forward thinking – he seems to manage with instruction when it is given in writing and he has a tick list to address, but is unable to have a wider view of the business, produce future strategies, use his own initiative or develop the business which of course is a major part of his role and a concern to the business.
- He cannot process verbal instructions, he said he found it difficult to write down instructions given whilst on the phone, and when he looked at what he had written he had no idea what he was meant to do.
- He is also very emotional and becomes tearful and fairly agitated quite quickly, which is also concerning when you take into account he has to deal with customers and a very busy kitchen on a daily basis.

I would like to thank you in anticipation for any information you provide and would like to assure that the information will be treated in the strictest confidence. Please could your response be treated as a priority?”

90. Tim Mawson took stock at The Wilton on 5 August 2016 and found a wet stock deficit of £799.98 and a dry stock deficit of £345.83.

91. On 11 August 2016 an administration assistant with the respondent sent an email to Lisa Gracey, Jane Ramsay and Julia Hodge concerning “Wilton Arms – Cellar Issues – Peter Robinson”. According to the email on 8 August 2016 the



claimant had asked for authorisation to call out a cellar service engineer as the bitter and lager cask pumps were frothing. The claimant was asked if his cellar was running at the correct temperature and he said it was fine. The cellar service engineers attended and told the claimant that the cellar coolers were not working properly and thus the cellar was not at the correct temperature causing the issue with frothing of the beer. Engineers were being called to attend to repair the cellar cooler but the respondent will incur a call out charge from the cellar service engineers due to the claimant not properly checking the cellar temperature.

92. It would appear that around the middle of August a new Assistant Manager was appointed at The Wilton.

93. Towards the end of August it was apparent that there were some new starters at The Wilton with the claimant not sending all of the required information to Head Office. New starter forms were not fully completed in respect of two starters. One of the main concerns related to their identification.

94. On 25 August 2016 a letter dated 24 August 2016 was emailed to the claimant inviting him to attend an investigatory hearing on Wednesday 31 August 2016 at Head Office to be chaired by Jane Ramsay:

“The purpose of the hearing is to allow you the opportunity to provide an explanation for the following matters of concern:

- Non compliance with company procedures regarding completion of new starter paperwork as detailed in emails from Sarah Jones, administration assistant, on 17 and 24 August 2016.
- A wet stock deficit of £799.98 which occurred following a stock take by Tim Mawson, company stock taker, at The Wilton Arms, on 5 August 2016.
- A dry stock deficit of £345.83 which occurred following a stock take by Tim Mawson, company stock taker, at The Wilton Arms, on 5 August 2016.

I would stress that this is not a disciplinary hearing and the statutory rights to be accompanied do not apply. However, the company will allow you to be accompanied by a fellow employee and should you wish to avail yourself of this right then it is your responsibility to make the necessary arrangements...It is important that you attend this meeting but if you do not do so without good reason I have to inform you that a failure to attend will be treated as a breach of a reasonable management instruction, and that this failure may be added to the matters of concern already under consideration and could lead to disciplinary action being taken against you.”

95. The claimant attended on Wednesday 31 August 2016 accompanied by John Howcroft. Jane Ramsay had Sarah Jones with her. The notes of the meeting, which was recorded, are set out over 11½ pages.

96. The claimant was told that the purpose of the hearing was to give him the opportunity to provide an explanation for matters of concern which were non compliance with company procedure regarding completion of new starter paperwork together with the wet stock deficit of £799.98 and the dry stock deficit of £345.83 both on 5 August 2016. The claimant was asked to give reasons for these matters and to state what actions had been taken.

97. As to the new starter paperwork the claimant confirmed the two new starters were UK born and bred with their passports confirming this. When he did the paperwork on the Monday he mistakenly sent them over when they were incomplete but when they were sent over the two people had not been given any shifts. The claimant put these papers in with his Monday paperwork in error when it was not complete. When it was pointed to him he asked for the papers to be sent back so he could complete them correctly. The claimant confirmed he was aware of the paperwork that needed to be completed and that if not completed the company might get fined. It was put to him that the company had responsibilities placed upon them by the Home Office and without the paperwork staff did not get paid. He believed that prior to them doing any shifts everything was complete and sent to Head Office.

98. Turning to the stock deficits the claimant started by saying there was a very large food deficit when he took over. He and the Head Chef put in place certain measures which he described which appeared to reduce the problem almost instantaneously, after which they relaxed the rules. The claimant was asked why he relaxed the procedures following one positive stock take, and he said it was because the deficits had been turned around and the procedures, whilst they were an inconvenience to the kitchen team because the fridge was being locked the whole time, it would appear that they had rectified what the problem was. The claimant accepted he made that decision based on one stock take and when the next stock take was not good the procedures were immediately reinstated. In hindsight the claimant accepted it was probably the wrong decision to make because they went from deficit to surplus and to deficit. He would not relax it again. He would keep it in place. The main procedure relaxed was counting of all the stock key lines everyday. The procedures took an hour a day.

99. During the discussion the claimant said the only procedures relaxed were signing in and out key items. The fridges were locked except during service when they were allowed to be open. The claimant could not explain the reason for the deficit but things had been put in place to try and resolve the issue. He was working together with the Head Chef:

JR: I would just like to ask a question. We've had a situation where we have had a very poor stock take, we then have another stock take which is about four weeks later when that had been reversed. We then take out the main procedures which is actually controlling the key lines, your expensive key lines in your kitchen. Is that correct?

PR: Ok.

JR: Then that results in a loss for the company.

PR: A deficit.

JR: A deficit to the company.

PR: Hence why it is now back in place.

JR: What do you consider that has been the reason for it as manager of the site?

PR: As manager I'm surmising it could well be theft, it could well be lack of care and attention of the goods that are coming in. Have they gone past their sell by date, is the wastage book being controlled properly, are they utilising recipe cards for ingredients?

JR: These are checks that you will do as a General Manager aren't they, and you are responsible for?

PR: These are the checks that are in place.

100. As to wet stocks the claimant said there had been a number of issues in the wet stock primarily with lagers and bitters, the coolers in the cellars not working and the claimant did not know for how long they had not been working, hence the temperature in the cellar being extremely hot. The service engineers came out and did some work. The claimant was asked he if had completed weekly line checks on draft products and he said he had not because he did not know how to do a weekly line check. He checked his orders coming in. He could print off the till what had been sold but he did not know how to do a line check in respect of remaining stocks. He had introduced a wastage book. There had been some staff training with relation to deliveries. They had been retrained in completing the wastage book and how to measure out wine. Although some staff were giving more wine than was bought the claimant believed the major thing was the coolers not working in the cellar.

101. The claimant was told he was required to do a weekly line check in respect of the main products. The stock taker would go through that with him.

102. As to the future the claimant hoped the coolers being mended and the way they were dealing with the beer would sort it out.

103. The claimant accepted it was the responsibility of the manager to control stock on site. He was told he should be completing line checks and a full weekly wet stock take. The stock taker would discuss matters with him and there would need to be a full stock take each week until the problem was sorted:

JR: I am concerned if I'm being honest that you withdrew stock control methods after a four week period. I am concerned at that because that has resulted in a loss to the company which, if you had maintained those checks, then it would not have occurred.

PR: We were hoping not to, yes we have. We have no way of knowing and we are hoping that and certainly that is something that we will continue to keep in place if that's what it takes to get a good stock result.

- JR: No, you understand what I am saying. We had one result that was positive and then we discarded what is effectively the majority of the control system.
- PR: Yes, but you had a £2,000 deficit prior.
- JR: No, Peter, I'm aware of that and I appreciate the fact that you had one stock take result which was positive.
- PR: Yes.
- JR: But to withdraw stock control systems...
- PR: So quickly..
- JR: So quickly is a bit of a concern because you basically reversed what was a surplus to a deficit within 22 days effectively.
- PR: Ok.
- JR: Is that correct?
- PR: It's an opinion isn't it? It went from deficit to surplus to deficit.
- JR: Because what you're saying is that you consider the methods you put in controlled it, you then withdrew it and effectively it's no longer controlled.
- PR: It wasn't controlled.
- JR: Yes, then you have had to reintroduce then again.
- PR: Absolutely and I will put more in place if I need to.
- JR: No, I understand that, but within that timeframe we actually reversed it and then we have a deficit within a four week period.
- PR: Yes.
- JR: Ok, is there anything else you would like to add?
- PR: No thank you.

104. There was no communication to the claimant by way of an outcome letter following the investigation meeting. In her witness statement Julia Hodge notes that in his resignation letter set out below the claimant had taken issue with there being no outcome to this investigation meeting. This was to her understandable because he had commenced sick leave shortly after the meeting. They were not intending to take any action following the investigation meeting other than providing additional support, but "of course Mr Robinson resigned very shortly after this. Had he continued in his employment, we would have provided him with a written outcome,

but it is likely that we would have waited until receipt of the updated medial report first”.

105. The claimant returned to work at The Wilton Arms and on 5 September 2016, there was a stock take with a deficit of £1,016.22 on food. The claimant sent an email to Jane Ramsay, Tim Mawson and Julia Hodge setting out the action he would be taking to include an investigatory meeting with the Head Chef regarding his concerns about running and leadership in the kitchen and stock control. He was aiming to be reactive to the situation and if there were other measures management wished him to put in place they should please advise.

106. On 6 September 2016 the claimant went to see his GP and because of “stress, work related”, the GP advised on a Med 3 form that the claimant was not fit for work for one month. We have not been taken to any response following the submission of this note.

107. On 16 September 2016 the claimant wrote to Jane Robinson as follows:

“I am writing to you as per my contract to submit one month’s notice for my resignation from the position of General Manager of Wilton Arms as of 16 September 2016. My last official day with the company will be 16 October 2016.

Since my return in June following my illness I have felt a lack of support from the company, despite the agreements that were made around my phased return to work in conjunction with the Community Neurological Team. Within my three month return there were conditions placed on my position, which I feel to be unreasonable, such as not being able to have any Fridays off, and being asked to attend Lancaster four hours before my shift for welfare meeting, when I was not rostered on that day. A call to an investigatory meeting about bad food stock following an isolated issue, when it is apparent no actions as to previous poor food stock results from January until June were tackled with the relevant member of staff at the time, that have occurred during my absence. No outcome or minutes of actions have been received or communicated to me following this meeting.

These are just a few points that have led to a further period of time off this time due to stress.

I feel that I am now unable to return to the position due to the above due to the stresses it has caused so I am writing to you as per my contract to submit one month’s notice for my resignation from the position of General Manager of Wilton Arms as of 16 September 2016. My last official day with the company will be 16 October 2016. Could you please email me with my annual leave entitlement to date?”

108. Julia Hodge responded in a letter also dated 16 September 2016 acknowledging receipt of his resignation letter and confirming the official date of leaving as 15 October 2016. Any monies due would be paid in the normal way. Details of holiday entitlement were given. The letter went on to state:

“Although your resignation has been acknowledged the company has recognised that you have raised issues of concern. We would like the opportunity to discuss these issues using the company’s grievance procedure. Subsequently I have arranged a grievance meeting to take place on Thursday 22 September 2016 at 10.00am (in Lancaster) to discuss these issues.”

109. The claimant could bring a work colleague or trade union representative and if the date and time of the meeting were not suitable then he should contact Ms Hodge with a convenient date and time.

110. The claimant responded on 20 September 2016 by email thanking Ms Hodge for the invitation to discuss his concerns mentioned in his resignation letter but:

“At present I am unable to attend, but I do hope we have the opportunity to discuss when I am well.”

111. Ms Hodge acknowledged this letter, noting the claimant's comments and she looked forward to hearing from him in due course. It would appear that neither party contacted the other thereafter.

112. The claimant went to see his GP on 4 October 2016 and again because of stress at work he was considered unfit to attend from 4-17 October 2016 which took the claimant beyond his official date of leaving as notified to him by the respondent on 16 September.

113. On 23 October 2016 the now Professor Gurusinghe wrote to Julia Hodge concerning the claimant. According to the professor his report should be read in conjunction with his previous report dated 29 March. It had been prepared by perusal of clinical information available at the Lancashire Teaching Hospital NHS Trust and “the patient has provided written consent for disclosure of medical information previously”. The bullet-pointed matters in Ms Hodge’s letter of 5 August were summarised and the report continued as follows:

“He was reviewed in the Neurovascular Outpatient Clinic on 15 April 2016. The clinic letter indicated that he was living at home and managing very well. He was independent regarding activities of daily living. He was going out for walks on his own. He had intermittent mild headaches which settled quickly. He had not suffered any blackouts. Examination revealed that he was alert and orientated. The shunt valve was functioning well. He would walk independently and looked quite steady. Coordination was normal in the upper limbs. Clinically, there was no cause for concern except a rash on the abdomen which was not indicative of any neurological problem. He was reviewed by a consultant neurosurgeon regarding the shunt on 2 June 2016. A CT brain scan performed on the day of the clinic indicated that the shunt was functioning satisfactorily. The consultant discharged him from the clinic in view of satisfactory progress.

He underwent a magnetic resonance brain scan and angiogram on 17 May 2016. The investigation demonstrates the previously known infarction of the left cerebellum and that the shunt is working satisfactorily. The aneurysm is

also healing well but there is a very small area of neck residue which does not require active treatment. The plan is to perform another MR angiogram in November 2016. This patient will also be reviewed in the Neurovascular Clinic.

### Opinion

Mr Peter Robinson is continuing to recover from the brain haemorrhage due to a ruptured aneurysm in November 2015. He appears to have made a satisfactory physical recovery being able to walk independently despite the complication of a stroke involving the balance mechanism of the brain. I would expect him to continue with further recovery of physical and neurological function.

Fatigue is a common phenomenon following brain haemorrhage particularly with other complications and usually recovers gradually with time.

The main area of concern regarding recovery relates to cognitive function as noticed at the workplace and documented above arising from the meeting on 3 August 2016. Cognitive disturbances are due to the brain haemorrhage as well as the hydrocephalus which has been treated with a CSF shunt which is working satisfactorily according to the brain scans. Again, continuing improvement of cognitive function can be expected over the next few months, but the extent of recovery cannot be predicted. Considering the observations made at the workplace it appears that he does not have the cognitive capabilities which are necessary for fulfilling all the responsibilities of a pub manager. Cognitive function is best assessed by performing a neuropsychological assessment.

Arising from the above, my conclusion is that Mr Peter Robinson is continuing to make a recovery but has not made a recovery to the extent which makes him capable of functioning at a satisfactory level as a pub manager. Further recovery can be expected even up to two years from the time of the haemorrhage i.e. November 2017. I recommend that a further assessment of the work capability is made in six months from now i.e. April 2017."

## **Submissions**

### Claimant's Submissions

114. The claimant's representative made an oral submission. The respondent's representative provided a short written submission and supplemented it orally.

115. The claimant's representative reminded us that the claimant had suffered a devastating event on 20 November 2015 and after a long rehabilitation period he had some residual issues concerning cognitive function and balance. After the event the claimant was uncertain as to whether or not he would make a full or partial recovery. It was the claimant who made the first move on the question of returning to work which involved negotiations with the respondent, in particular Mrs Hodge, in connection with his return.

116. With regard to the first allegation concerning cutting short the claimant's phased return when this was contrary to medical advice and the claimant's wishes, she said that Ms Hodge had accepted the advice of Ann-Marie Clarke, she relied on her opinion when it might have been reasonable for the company to have taken advice from their own Occupational Health physician. The PCP was insisting on a short phased return contrary to the wishes of the claimant as expressed at the meeting on 29 March and in subsequent correspondence. Anne-Marie Clarke was asked if there was a time element, how long did she think it would be before the claimant would be back full-time, and she responded:

“I think, if we start in a few weeks, I'd like to think that over eight weeks, we could possibly get you back to a point where, as long as you are working sensible shifts...as long as you are doing your contracted hours...”

117. Various concerns were raised. The claimant did not want to end up back where he was with illness. It would be dangerous if he was forced “to run before he could walk”. It was clear that it was reasonable and sensible for the claimant to have a longer phased return than the respondent was pushing for. In the event they settled on a four week phased return but after week three he would be right in at the deep end. The letter from Mr Gurusinghe was not available during their discussions but was available to Ms Hodge afterwards. He gave extremely important advice which she appeared to have disregarded. The claimant required a period of stroke rehabilitation, he said. The recovery period will be at least three months but is more likely to be up to six months. Any decision to cut short or impose a phased return in the absence of reports following the claimant being assessed could subject the claimant to substantial disadvantage.

118. The PCP was insisting on a short phased return. The comparator, it was submitted, would be someone without the claimant's disability returning to work after a period of absence from, for instance, a broken leg.

119. In her submission the company was taking a stab in the dark without an Occupational Health report. They were hoping for the best. They were cutting short his return contrary to medical advice which was a failure to make necessary reasonable adjustments.

120. As to the second allegation involving failure to excuse the claimant from the need to perform certain duties and/or to reallocate duties to other employees at the claimant's usual place of work when considering his return to work, she commenced by submitting that if an Occupational Health report had been available these matters may never have arisen. As to certain duties, it was the Monday paperwork and the use of the computer. In her submission the respondent had anticipated the things the claimant would require training on when looking to start his phased return to work on 27 April with an afternoon in Head Office going over various paperwork issues.

121. She made reference to the welfare review meeting on 3 August when there was a discussion about the claimant sending through stuff that was wrong. The claimant was asked if there were other areas he wanted Simon to spend time with him on but he did not think so. If he could not understand he would say that he needed some assistance.



122. He was concerned about the weekly stock take and deliveries.

123. At the welfare meeting there was a discussion of cellar work with the claimant saying if he went down to the cellar he would always hold on to the rail and he just got on with it.

124. It was apparent from the letter sent to Mr Gurusinghe by the respondent on 5 August 2016 that the respondent had concerns about various things including the weekly paperwork where he made constant different errors on a weekly basis. These were the sort of things that could have been given to someone else or excused from the duties of the claimant. Ms Almazedi went back to the reference on page 484 to the claimant saying "I'm going to need assistance". The quotation has been put into context above.

125. The claimant entering figures onto the respondent's stock system, the technical side of things, paperwork and figures were causing him issues. They could or would have been looked at had an Occupational Health report identified it.

126. There were staff shortages. There was no assistant manager from week three onwards. The company might have considered making an adjustment by retaining an agency assistant manager following the claimant's return and allocated part of the role to that person. This would have included the Monday paperwork and the banking. These were the issues apparent at the welfare meeting on 3 August, and the fact that they were still apparent supported the claimant's contention that the duties should have been allocated to someone else.

127. The comparator would be a non disabled employee expected to complete a period of training.

128. In her submission the comparator would be an employee at The Wilton able to perform all duties.

129. In respect of the third allegation of direct discrimination, this relates to delaying the claimant's return to work by insisting he return to a different pub miles away leaving him further to travel and in a role that was in lower salary or remain on the sick when the claimant wanted to return to work earlier at his usual place of work. This is also pleaded as a failure to make a reasonable adjustment. In the claimant's submission the respondent made an assumption that the claimant was not going to be able to perform his usual contractual duties. There would be a phased return but if he did not fit the criteria could he do his job? Asking him to go to the Water Witch showed a discriminatory attitude. The claimant could not go and so had to remain on sick. He would be too tired to have any meaningful training on a phased return given the amount of travelling time that he would have needed to get to and from the Water Witch. The training would be to see if he could come back to The Wilton. A non discriminatory attitude would have involved the claimant returning to his role as manager at The Wilton building up to full-time duties. The respondent's letter of 15 April had him working at the Water Witch following four hours of training at Head Office and the reduction in salary to an hourly rate based on half his annual salary. The claimant clearly explained in writing why such a phased return would not be suitable, causing the respondent to put it to him that if he did not wish to partake in

their proposed phased return he could remain on sick leave until he was fully fit. The claimant was depressed, worried, and anxious to be faced with these matters and also given the reduction in pay he did not feel valued.

130. As to direct discrimination, the hypothetical comparator would be someone returning to work without a disability following a long absence, for instance following a broken leg, who was expected to go to a different location to retrain. That person would not be paid the lower wage or be expected to do only bar work.

131. The reasonable adjustment would be to pay the claimant at the contractual rate and provide equivalent managerial duties not lesser duties. It would be the same comparator.

132. The letters written by Ms Hodge showed her mindset, which was discriminatory towards the claimant.

133. With regard to the fourth allegation concerning the expectation that the claimant should perform his full previous duties, including working in excess of 50 hours a week and filling in for a colleague after his four week phased return despite the fact he was in a period of long-term rehabilitation and suffering from life-changing disabilities, which was pleaded as a failure to make reasonable adjustments, the submission started with reference to the lack of an Occupational Health report with the employer not clarifying what might be needed to re-adjust the claimant back into work. In the absence of such a report discrimination would be more likely to occur. There was no excuse for not having an Occupational Health report. There was need in the case of the claimant for patience, for him to undergo his rehabilitation and the situation should have been kept under review for the period recommended by the doctor and the occupational therapist.

134. As to the respondent's expectations, the letter of 24 June in her submission picked up on a minor issue of a stock deficit. The company expected all managers to get the stock right. The claimant was picked up for something that he was not wholly responsible for. He had to fill in to cover colleagues when short-staffed. He was expected to do full-time work after week three, which included completing and returning the paperwork, filling in for colleagues when understaffed, interview and provide induction for new employees: these requirements meaning he was doing overtime. The PCP was the expectation that he would do normal contractual duties and overtime. It was directly discriminatory to expect him to perform full duties when he could not do so. The comparator would be hypothetical. Someone in a similar situation not in a period of rehabilitation or suffering from the disabilities that the claimant had.

135. As to the fifth allegation "subjecting the claimant to unreasonable investigations on his return to work and an expectation that the claimant perform to an impossibly high standard". The unreasonable investigations related to the matters discussed at the investigatory meeting on Wednesday 31 August – non compliance with company procedures and the wet and dry stock deficits. The claimant was required to work to an unreasonably high standard not making minor mistakes, e.g. failing to send one photograph. As to the wet stock deficit the respondent knew the coolers were not working. In the submission of the claimant they were expecting

more from him than they were from other managers. They made no allowance for his condition. The comparator would be someone returning to work without the claimant's disability and not in a period of rehabilitation if expected to perform to an impossibly high standard. They made no allowance for his condition.

136. As to a section 15 claim the "something" was memory loss, fatigue and cognitive difficulties. It was less favourable to the claimant to expect such an impossible standard from him.

137. It was less favourable treatment to subject the claimant to the investigation, including the way in which the meeting was conducted.

138. Allegation six concerns the welfare meeting, ignoring the claimant's visible distress and requests that he was unable to cope with his workload and hours. It is alleged that this amounted to a failure to make reasonable adjustments with the PCP being the expectation of performance of full contractual duties to an impossibly high standard and/or under section 15 unfavourable treatment as a consequence of something arising out of his disability, the "something" being the inability of the claimant to perform to the highest standard because of fatigue and memory loss.

139. Taking us to the notes of the welfare review meeting held on 3 August Ms Almazedi referred us to references on page 476 to the claimant being tired and the amount of sleep that he had, then to page 477 where the claimant said "fatigue was major". He referred to going down to the cellar always holding onto the rail. On page 478 the claimant told them that there were areas where he might have had issues but he struggled with them to try to overcome it as much as possible. The main thing being retention of things in his memory such that if he was asked to do four or five things he would not remember them. He would ask for it to be written down.

140. On page 488 he referred to looking for an assistant manager and carrying out interviews. He was exercising his brain regularly with new information but there was only so much it could absorb in one go. What he did not want to happen is for it just to shut down again. He was conscious that he had to be sensible in what he did and how he delivered things. To do 70 or 80 hours a week would not be suitable because his brain would just shut down.

141. On page 489 the claimant, having been told he would not be asked to work 70-80 hours a week, said that his brain was trying to absorb a lot more than it had done for nine months from a learning perspective, from a customer service perspective, from an activity point of view, so he had to be very careful how he managed things because the last thing he wanted was a relapse.

142. On page 490 we were taken to the reference to the claimant becoming a bit overwhelmed and it was put that the exchange after this showed the respondent being dismissive of the claimant's emotional state.

143. We were then taken back to page 482 where the respondent said that the claimant had had quite a lot of support involving a handover from Lauren for a couple of weeks then a visit from Simon from the Water Witch. The claimant said Simon had been for one hour. Whilst the claimant was not saying Simon had not shown him

what he needed to be shown, the claimant was certain that Simon had been over once and they had had one telephone discussion. On page 484 they referred to the claimant saying he was going to need some assistance with the full sentence being recorded as:

“If I can’t. I’ll say ‘I keep looking at it, I keep trying to change it but I’m going to need some assistance’.”

144. On page 489 the claimant saying he was trying to absorb a lot more information was an indication that he was under pressure. He referred to the demands of the role, saying he did not want to get into a position in that the demands of the role demanded him to do more or that he had got to manage his brain and what he was doing in a sensible fashion.

145. On page 490 the claimant said there were a number of staffing issues but he would manage them.

146. All these were signs of distress with the claimant being unable to cope. Occupational Health may well have helped him not to get into this position. It was submitted that Ms Hodge had no intention of listening to the claimant's requests and ignored them when it was not reasonable to do so.

147. As to the PCP of performing duties to an impossibly high standard, the claimant was disabled with fatigue, memory loss and was treated less favourably.

148. Allegation 7 again related to the meeting of 3 August, making the claimant feel humiliated by comments that if he could not do his job as before then he was incapable of doing the job altogether, and making the claimant feel uncomfortable about the amount of sleep that he needed by asking if this was “normal”, humiliating the claimant and violating his dignity.

149. Ms Almazedi referred to page 476 with the conversation about the claimant's sleeping habits set out in full above. She referred to the letter to the consultant which mirrored many of the issues that arose in the welfare meeting. She submitted that the respondent's failure to provide the claimant with a copy of the letter and obtaining his consent was not, as the respondent said, an oversight but was a purposeful and devious act.

150. As to the meeting itself, there was no agenda provided. The claimant was told that there was no need to bring either his wife or his occupational therapist with him. It was asserted on behalf of the claimant that they were not wanted as they would have been concerned for the interests of the claimant.

151. She referred to page 481 where the claimant faltered and became upset. The claimant was intimidated. This was a matter mirrored in the subsequent letter to the doctor.

152. On page 484 Jane Ramsay told the claimant that when he was sending stuff through it was not the same stuff that was wrong, and did that make sense? Ms Hodge then confirmed that it was every week. The claimant did not think there was

anything wrong. The respondent would have to check it but thought most other weeks they had had to send something back.

153. We were referred to the exchange on page 487, after Jane Ramsay had explained certain issues to the claimant she said, “do you understand my concern?”.

154. On page 489 the claimant did not want to get into a position that the demands of the role demanded him to do more or that he had to manage his brain for what he was doing in a sensible fashion. Jane Ramsay asked, what did he mean regarding the demands? Was he trying to say that the demands of the job may be more even within the confines of the time he was there? Was that a concern? The claimant said that maybe it was. Jane Ramsay asked him if he was concerned that if he was having to take on more, even within the confines of the timeframe, that it may be too much? The claimant said it may or may not be too much.

155. On page 493 talking about the menu for Christmas, the claimant said that the menu had been done by the chef, it was what he wanted, so he sent it in and Jane Ramsay responded “but surely that should be led by you as manager”. It was put to the claimant that it was his call and the chef was part of his management team. Did he see where they were going with this? Whilst the claimant did, Jane Ramsay said there were some issues for her that he probably needed to be addressing before the menu gets to her, and secondly the menu needed to be in line with the skill set of the kitchen and the menu was not, as they would have had difficulty producing it.

156. On page 496 Ms Hodge said that they did have some concerns with ongoing issues, specifically the paperwork on Monday, stocks and standards.

157. Ms Almazedi then moved forward to the end of page 497 with Jane Ramsay asking the claimant why he was being like this with the note, as set out above, stating that the claimant was being very agitated/defensive. It was submitted on behalf of the claimant that he was humiliated by these questions. The comments were made because of his disability with Ms Hodge demonstrating she had formed a view and was determined to push it through that the claimant was incapable and she had written him off.

158. The comments raised in the meeting followed through to the matters set out in the letter to the consultant which was sent by Ms Hodge shortly after the meeting. This showed her view of the claimant and his disability. She did not care about the claimant and his needs. She wanted a paper trail to get the green light from the doctor to sack the claimant on the basis of capability. It was a deliberate decision not to copy the letter to the doctor to the claimant.

159. As to direct discrimination this was a case for a hypothetical comparator. A person without disability at a review meeting with management raising performance issues.

160. Ms Almazedi confirmed that she was not seeking to pursue a claim of harassment in respect of this matter. She was relying upon direct discrimination.

161. Her submission in respect of item eight, which related to the 24 August meeting subjecting the claimant to unreasonable criticism, in particular being accused of a bad stock take and not following the recruitment procedure and calling an engineer out unnecessarily. The respondent failed to make any adjustment for his condition knowing he was suffering from exhaustion and memory loss. In her submission this was all covered in her earlier submissions.

162. The ninth allegation relates to 31 August, 6 September and 16 September 2016 allegedly ignoring the claimant's pleas for reasonable adjustments in the form of support and a reduction in hours when it was clear that the claimant was struggling on full-time plus hours; the respondent, it is alleged, being fully aware that the claimant was suffering from exhaustion and memory loss as a consequence of his disability.

163. In the claimant's submission the relevant matters here are the investigation meeting on 31 August, the claimant's sick note and then his resignation.

164. In the submission of the claimant it was clear an Occupational Health report was needed at the start of the claimant's attempt to return to work and thereafter to review his situation. This would have been the obvious thing to do, but if you want to manage the claimant out you do not want an Occupational Health report because it is going to say the claimant is capable as remaining as a manager. This explains the strange scenario where Ms Hodge as the HR Manager in quite a large business took advice; the claimant surmises that the advice would have been to commission an Occupational Health report, but this did not happen. The letter to the claimant's specialist was sent following the welfare meeting.

165. The sick note referred to stress. See also the resignation letter. The claimant was showing he needed adjustments. From beginning to end the claimant has had too much to do. He was struggling. He went off with stress after the investigation meeting. There was no response from the company to the sick note. There was no Occupational Health referral. There was no attempt to contact the claimant to see if he was struggling or needed help. All these actions would have been reasonable. Instead there was an expectation for the claimant to perform fully and the respondent was nitpicking in respect of his performance. They were aware of his exhaustion and memory loss. Any reasonable employer would not have ignored the sick note. This amounts to discrimination arising from his disability and a failure to make adjustments.

166. Item ten refers to 16 September 2016 with the respondent requesting the claimant to attend a grievance meeting in Lancaster on 22 September 2016 whilst he was absent from the workplace with stress. He was unable to attend the meeting as he was suffering from extreme tiredness, stress and anxiety brought about by the lack of support and the location of the meeting was too difficult for the claimant to get to. The allegation is a failure to make a reasonable adjustment with the PCP being the expectation of the claimant attending a meeting at a location far from his usual place of work.

167. The simple submission here is that the claimant should have been invited to a meeting at The Wilton which was close to his home rather than being invited to a meeting at the respondent's Lancaster premises.

168. The eleventh allegation is of letting the claimant leave employment without consideration of support measures that could have kept him in employment and an assumption that the claimant was unable to cope with the demands of the role because of his disability.

169. The claimant submits that the response to his resignation was a matter of fact acknowledgement followed by reference to financial matters and then an invitation to a meeting to discuss matters. A reasonable employer would not have sent this letter. They would have said they were upset, that the claimant's resignation was not wanted and they were going to sort things out to keep him in the business. In truth the claimant had done the job Ms Hodge wanted to do. He had resigned. To head off any challenge they invite him to a grievance meeting.

170. The claimant submits that the paperwork tells a different story. The conduct of the respondent illustrates what Ms Hodge was doing, why and for whom. In the meetings there were comments from management about the needs of the business. They were on a course of conduct with the ultimate effect of removing the claimant, an extremely vulnerable man who had suffered a life changing condition. He had lost his career. Ms Hodge would never give him a chance. She believed he was incapable of doing his job and all this explains why there was no attempt to resolve matters when he resigned. The onus, in the submission of the claimant, was more on the respondent. Ms Hodge should have made contact with the claimant.

171. The claimant's submissions ended without any reference to matters of law.

#### Respondent's Submissions

172. Mr Collyer for the respondent presented six pages of written submissions dealing with the 11 matters set out on the claimant's schedule.

173. As to cutting short the claimant's return to work contrary to medical advice and his wishes, the respondent's position is that the claimant wanted to get back to work as part of his recovery and for financial reasons because he was only receiving statutory sick pay. After the 29 March meeting and correspondence with Ann-Marie Clarke the claimant agreed to return to work in accordance with the 1 June plan leading to full-time in week four. The claimant confirmed in evidence he was happy with the phased approach and the respondent did not insist on a shorter period. The claimant did not at any point suggest the proposed four week period should be extended, neither did his occupational therapist. The respondent's position was that if the claimant was not considered fit to return to his previous role on a full-time basis at the end of the four week period then it was likely a further phased arrangement would have been required.

174. As to the second matter concerning failure to excuse the claimant from performing certain duties, the written submission was that other than not being able to use the cellar the claimant has failed to elaborate what duties he requested to be excused from. The claimant did not suggest to the respondent it should reallocate any of his duties to other staff.

175. As to allegation three, delaying the claimant's return to work, the respondent felt that the claimant would be best placed under the initial supervision of an experienced manager, which is why they preferred the claimant to return to work at the Water Witch managed by Mr Simon Morrissey rather than be subjected to limited supervision and support at The Wilton. This was to give the claimant the support of an experienced manager whilst he undertook the process of re-establishing/re-acquainting himself in the role. The respondent made it clear it would support the claimant by way of payment of travel expenses to the Water Witch but the claimant was not willing to start there on the basis of the travel required and so he remained off sick. In the submission of the respondent they cannot be blamed for any delay as it was clear the claimant was not ready to return. The respondent's concerns regarding supervision are somewhat vindicated by the issues that arose by the claimant insisting upon returning to The Wilton.

176. As to issue four, the expectation upon the claimant to perform to his previous full duties, Ann-Marie Clarke confirmed there was no physical or mental impairment to prevent the claimant from returning to his previous role. The claimant felt he could do it and if he was not ready or had indicated this to the respondent then he should have remained on sick leave and delayed his return.

177. As to the fifth allegation of subjecting the claimant to an unreasonable investigation, it is standard practice for the respondent to investigate issues of concern so that they may be resolved through additional training, support and implementation of procedures. It was necessary to investigate to try and prevent reoccurrence of stock shortages that had been ongoing since the claimant's return. In his submission reviewing the minutes of the meeting on 29 August:

“It would appear that the discussion was constructive. The claimant appeared happy with what had been discussed and he reassured Jane Ramsay that he would rectify matters. As a result of this meeting the claimant also obtained additional support from the stock taker.”

178. The claimant admitted in evidence that the investigation was not unreasonable and that the concerns raised with him were genuinely held concerns on the part of the respondent. The claimant submitted an action plan to resolve the issues on 5 September.

179. As to number six, ignoring the claimant's visible distress, there was no evidence to suggest the claimant's distress was ignored. It was difficult for the respondent to deal with it in a sensitive manner as issues at The Wilton were linked to his injury. The distress to the claimant suggested that he was not ready to return as manager. In evidence he confirmed he was not prepared to accept the role of an assistant manager:

“The claimant is clearly emotionally sensitive.”

180. As to allegation seven, the claimant being humiliated by a number of insensitive comments, the 3 August meeting was a welfare meeting. The claimant did not suggest his health condition was causing him to underperform or suggest other adjustments should be made to accommodate him. He acknowledged the



problems identified by the respondent and assured people he would address them. Although it was a difficult and sensitive situation the respondent was dealing with, any comment regarding his sleep could not reasonably be interpreted as insensitive. Upon a reasonable reading of the transcript of the meeting there was no comment implying that he was unable to do his job. The respondent was sympathetic to his condition and did what they could reasonably do to accommodate it. At the meeting the claimant confirmed he was taking things too personally and that the role was not the problem. The claimant had been asked to describe how what was said was insensitive. He suggested that some comments were pointed but could not describe how and why it was wrong. It was difficult for the respondent to raise these concerns in a sensitive way to obtain the information it sought, and also difficult for the claimant to respond with information that would assist the respondent.

181. As to item eight, subjecting the claimant to unreasonable criticism, there was no dispute that there had been a number of poor stock takes which the claimant could and did take action to resolve. The 24 June letter noted that the claimant had not been in post for the whole of the period when the shortage occurred, but it was an issue that the claimant would need to resolve. As a matter of fact the claimant agreed, took steps and the problem was resolved as the next stock take showed. The claimant agreed that he had not followed the employee recruitment procedure. In the investigation the claimant confirmed he understood the seriousness of the new starter paperwork and he explained he had made an error which was subsequently rectified.

182. As to allegation nine, failure to make reasonable adjustments as to support and a reduction in hours, the respondent denies refusing any requests for a reduction in the claimant's hours, saying that there were no requests made. Following the claimant's return his working hours were between 30 and 56.5 per week in the period from 6 June to 15 August. The respondent did not believe the claimant regularly worked more than 50 hours. Although there was no assistant manager, supervisors "acted up" as assistants to the claimant. The Head Chef had overall responsibility for the food which reduced a significant element of the managerial role that might otherwise fall on the claimant.

183. On 24 June 2016 in an email to Jane Ramsay the claimant expressed some concerns over management and supervisory resource. Jane Ramsay promptly addressed these matters and arrangements were made to provide cover to the claimant. In terms of assistance there was the suggestion of working split shifts that was not taken up by the claimant. Additional training was offered and provided by the stock taker. Mr Morrissey came to The Wilton to assist the claimant. Following the welfare meeting some further paperwork was provided to the claimant and he could delay appraising the Head Chef. Mr Mawson was happy to support the claimant to support the position on stock deficits. The claimant was genuinely grateful for the assistance provided, as set out by him in emails. In his resignation letter he suggested that there were unreasonable conditions placed on his return, such as a requirement to work on a Friday. The respondent's position was that there was no agreement to that effect in his phased return to work period and from the respondent's perspective working a Friday is essential for a manager as it is a peak business day.

184. As to allegation ten concerning the request to attend a grievance hearing in Lancaster, it is the respondent's submission that although the claimant would need to arrange transport he had already been to Head Office four times in 2016 so the respondent saw no issue with inviting him to a meeting in Lancaster. The claimant in his response did not suggest that the proposed location or other arrangements were unsuitable and he did not propose an alternative location. He would attend when he felt fit enough.

185. As to the eleventh and final matter, letting the claimant leave employment without consideration of support which would have kept him in the business, it is the respondent's case that they acknowledged the resignation and invited him to a grievance hearing given the nature of his letter. The claimant was not fit enough to attend but would advise the respondent when he was well enough. He never did, although there was nothing preventing him from doing so had he wished. If he had resolvable concerns then they might have been capable of resolution through the grievance procedure or possibly engaging an external Occupational Health expert to independently assess the claimant in the nature of the work environment.

186. The respondent denies the allegations against it but if the Tribunal finds the respondent did fail in its duty to make reasonable adjustments the respondent suggests that those adjustments may not have sufficiently alleviated the concerns of both parties in the short, medium or long term, bearing in mind the inherent pressures on a person fulfilling the role of managing premises such as The Wilton.

187. Mr Collyer made oral submissions.

188. At the initial meeting discussing the possibility of the claimant returning to work the respondent was guided by Ann-Marie Clarke. They would have considered eight weeks if she had suggested it. It was the desire of the claimant to get back to normal work and normal finances. This was why 3-4 weeks were agreed upon. In hindsight things might have been done differently but they were dealing with the situation as it was.

189. He did not accept that so many duties should have been reallocated. In the submission of the claimant almost all of the duties apart from pulling the pints should have been reallocated. That was not a reasonable adjustment for the role the claimant wanted to get back to and which the respondent wanted him to get back to.

190. At the end of the period of rehabilitation no issues were raised on either side.

191. The first stock take was the one where the claimant was largely not responsible. The letter acknowledged it. The claimant took the steps advised by the respondent and the next stock take was successful. This suggests the claimant was more than capable of dealing with such issues.

192. A number of issues cropped up during the phased return but for instance the beer lines were cleared. The claimant resolved the issue. The respondent acknowledged that the claimant would have some difficulties but they were resolved.

193. The respondent wanted the claimant to return to the Water Witch. They therefore put it forward. It might have been a better approach. The claimant would have been working with an experienced manager. This was a perfectly reasonable view which in hindsight should have been insisted upon. Any issues would have been flagged up and there would have been someone there to deal with issues.

194. An assistant managerial role might have been more suitable but the claimant was not interested. It was a delicate situation.

195. On the phased return the claimant agreed it. He wanted to get back to full duties. Occupational Health may have assisted both parties but this question should have been raised at the time of the phased return rather than in the Tribunal hearing. The respondent did not feel that there were any serious issues.

196. As to unreasonable investigation, it is only right for the respondent to investigate stock issues. As to employment documentation, this was a serious issue which might involve an employer being fined if correct documentation was not in place. This was not a minor issue but no action was taken. The claimant accepted the concerns were genuine and not fabricated by the respondent.

197. As to distress at the meetings, it was difficult to get the feel of the meetings from the transcripts but the meetings were generally cordial. Although the claimant was distressed at times the respondent did not ignore this.

198. As to hours, the claimant did work around 50 hours some weeks. The respondent was aware of this from the documents returned by the claimant showing the hours worked each week by all people in The Wilton. The respondent was not aware of a request from the claimant to reduce hours. If raised it would have been considered. The respondent had not seen matters as a cry for help. Supervisors acted up as assistant managers. The claimant did not say he needed to do fewer hours. He did not spell out his needs. Had the claimant referred to a need to reduce his hours then the request could have been considered.

199. It was denied that there was a lack of assistance. When the claimant requested help the requests were properly dealt with and help was provided.

200. The resignation happened. There was no intention to manage the claimant out. There was a lack of understanding as to what the respondent could do. The letter to the doctor showed the genuinely held concerns of Ms Hodge at the time.

201. Inviting the claimant to a grievance meeting in Lancaster was not something the respondent considered as an issue. The ball was in the claimant's court but he did not say a meeting in Lancaster was not suitable. He did not want to re-engage and the respondent did not want to push until the claimant was ready for a meeting.

202. There was no legal element to the respondent's submission.

### **The Relevant Law**

203. All of the claimant's claims are brought under the Equality Act 2010.

204. Section 13 dealing with direct discrimination provides that:

- (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.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
- (6) If the protected characteristic is sex –
  - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
  - (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
- (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
- (8) This section is subject to sections 17(6) and 18(7).

205. Section 15 dealing with discrimination arising from disability 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.

206. The duty to make adjustments is to be found in sections 20 and 21 which provide that:

Section 20

- (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.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –
  - (a) removing the physical feature in question,
  - (b) altering it, or
  - (c) providing a reasonable means of avoiding it.

- (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to –
- (a) a feature arising from the design or construction of a building,
  - (b) a feature of an approach to, exit from or access to a building,
  - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
  - (d) any other physical element or quality.
- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

<b>Part of this Act</b>	<b>Applicable Schedule</b>
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

### Section 21

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

207. The case of **Pnaiser v (1) NHS England and (2) Coventry City Council Appeal Number UKEAT/0137/15/LA** before The Honourable Mrs Justice Simler (President) gives guidance in connection with cases under section 15 of the Equality Act 2010 – discrimination arising from disability.

208. In paragraph 31 of the Judgment the President, having considered the relevant authorities, summarises the proper approach to a section 15 claim as follows:

- “(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
- (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. 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.
- (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises...
- (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is ‘something arising in consequence of B’s disability’. That expression ‘arising in consequence of’ could describe a range of causal links. Having regard to the legislative history of section 15 of the Act the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability will require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of a disability.
- (e) For example in **Land Registry v Houghton** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding

that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

- (f) This stage of the causation test involves an objection question and does not depend on the thought processes of the alleged discriminator.
- (g) Miss Jeram (counsel for the first respondent) argued that ‘a subjective approach infects the whole of section 15’ by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, ‘discriminatory motivation’ and the alleged discriminator must know that the ‘something’ that causes the treatment arises in consequence of disability. She relied on paragraphs 26-34 of **Weerasinghe** as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the ‘because of’ stage involving A’s explanation for the treatment (and conscious or unconscious reasons for it) and the ‘something arising in consequence’ stage involving consideration of whether (as a matter of fact rather than belief) the ‘something’ was a consequence of the disability.
- (h) Moreover, the statutory language of section 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the ‘something’ leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 13 would be substantially restricted on Miss Jeram’s construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.
- (i) As Langstaff P held in **Weerasinghe** it does not matter precisely in which order those questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was ‘because of something arising in consequence of the claimant’s disability’. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to ‘something’ that caused the unfavourable treatment.”

209. The Code of Practice on Employment (2011) issued by the Equality and Human Rights Commission makes reference in chapter 6 to the duty to make reasonable adjustments and asks “what disadvantage gives rise to the duty?”:

- “6.14 The duty to make adjustments arises where a provision, criterion or practice, any physical feature of work premises or the absence of an auxiliary aid puts a disabled person at a substantial disadvantage compared with people who are not disabled.



- 6.15 The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis.
- 6.16 The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

## Discussion and Conclusions

### Allegation 1

210. Looking at the schedule the first allegation of a failure to make a reasonable adjustment relates to 15 April 2016 and is described as cutting short the claimant's phased return when this was contrary to medical advice and the claimant's wishes.

211. The provision, criterion or practice ("PCP") is to be found in the terms of the phased return proposed by the respondent for the claimant by Julia Hodge as set out above at paragraphs 42 and 43.

212. . In summary it was to be over a four week period starting on Wednesday 27 April with four hours of retraining at Head Office followed by a day off then a day of work then in each of the following three weeks three days of work on different shifts at The Water Witch.

213. The reasonable adjustment pleaded would have been to schedule a phased return in accordance with the available medical advice and the claimant's wishes.

214. As to that advice we have referred above from paragraph 29 onwards to the meeting on 29 March involving Ann-Marie Clarke, a clinical specialist Occupational Therapist working with the Community Neuro Team. We have recorded her saying at the start of paragraph 37 that when the claimant returned would depend on how long the phased return could be done over. If it was to be over a longer period then he could obviously go back sooner than if he had to get it all done and finished in four weeks because of the fatigue element. In terms of time she thought if they could do a phased return potentially over two or three months then the claimant could look at starting going back to work in the next few weeks, but if they were looking at having to be back at work full-time in four weeks after he started then he needed to be much better than he was. She anticipated that if it could be staged quite well over however many weeks they needed then the claimant would not have a problem.

215. Later in the meeting Ann-Marie Clarke referred to "if we were working over six weeks, which I am not quite sure whether he would manage at the minute... "

216. Later on Ann-Marie Clarke said, "I think if we start in a few weeks I'd like to think that over eight weeks we could possibly get you back to a point where...".

217. Jane Ramsay asked Ann-Marie Clarke what she would suggest, and Anne-Marie Clarke "would probably be saying eight weeks", but if it was going to be reduced she would be anticipating the claimant needing a bit more rehabilitation before he did that four weeks because he would have to be back full-time after four weeks. There was then some discussion about eight weeks for the phased rehabilitation period which would take then ten weeks from the meeting.

218. Towards the end of the meeting Julia Hodge referred to if they were saying they wanted him back in four weeks then he would not start his phased return yet, maybe in another month or so, with Ann-Marie Clarke responding that they would have to do a little bit more work on the claimant's balance. They would have to "up the ante" quite quickly to make sure, from a fatigue point of view he was not going to drop back, whereas if they did the phased return over a longer time period they had in effect four more weeks to gradually increase the hours with the claimant getting used to it.

219. We have referred above at paragraph 41 to the medical report from Mr Gurusinghe received by Julia Hodge on 13 April and taken into account by her when she wrote the letter of 15 April. We have set out at paragraph 41 the requirement for the claimant to have a period of stroke rehabilitation to include assessment of cognitive function, mobility and independence regarding normal day-to-day activities. The recovery period will be at least three months but is more likely to be up to six months. It is possible that he may be able to return to his duties as a pub manager but the judgment regarding this is best deferred until at least July/August 2016.

220. Looking at the advice from Mr Gurusinghe, which was not precise, it might be questioned whether the claimant should have started a phased return on Wednesday 27 April given a reference to a recovery period of at least three but more likely up to six months, with a judgment on whether or not the claimant could return being best deferred until at least July/August 2016.

221. The advice of Ann-Marie Clarke was certainly to the extent that a period greater than four weeks would be needed for a phased return to suit the particular needs of the claimant.

222. We find that a phased return over four weeks starting on 27 April was contrary to the medical advice that we have just set out.

223. A person without a disability looking at a phased return to work following a period of sickness absence would not need the same length of phased return that this claimant would need to deal with his issues related to mobility, cognition and fatigue. The claimant's needs were much more complex than would be the case for instance for someone returning to work after a broken leg.

224. We therefore conclude that the terms of the proposed phased return set out in the letter from the respondent to the claimant dated 15 April 2016 were contrary to the medical advice provided to the respondent and that they put the claimant, a

disabled person, at a substantial disadvantage when compared with persons who were not disabled. It would have been reasonable on 15 April for the respondent to have scheduled the phased return starting on 27 April over a period longer than four weeks.

### Allegation 2

225. The second allegation refers to a time period from April 2016 until the claimant's resignation, although in the narrative it refers to a "failure to excuse the claimant from performing certain duties and/or to reallocate duties to other employees at his usual place of work when considering the claimant's return to work".

226. The allegation is of a failure to make a reasonable adjustment with the PCP being relocating the claimant as opposed to adjusting his role.

227. The respondent considered the claimant's return to work in March and April 2016 when it proposed a period at The Water Witch where he would not be carrying out full managerial duties but noting that Ann-Marie Clarke had confirmed that he would be able to complete all company paperwork and computer work following the retraining which was envisaged on the first afternoon. That return was not to the claimant's usual place of work. The subsequently proposed return to The Wilton is referred to above at paragraph 52 which was not preceded by any retraining at the company's Head Office. The claimant was scheduled to work each Monday, which was the day when the paperwork had to be completed and returned to Head Office.

228. We have set out above at paragraph 40 the information provided by Ann-Marie Clarke to the respondent saying that there had not been any significant issues with the claimant's cognition, language or comprehension which will have an impact on his ability to carry out his duties at work. Mr Gurusinghe did not make any suggestions in connection with particular duties that the claimant might or might not be able to do.

229. In our judgment, as a matter of fact, there was nothing coming from either the claimant or Ann-Marie Clarke or Mr Gurusinghe such that the respondent should have considered excusing the claimant from performing certain duties and/or for the respondent to reallocate duties to other employees at the claimant's usual place of work when they were considering the claimant's return to work whether at The Water Witch or at The Wilton.

### Allegation 3

230. The third allegation is said to relate to 15 and 26 April 2016 and can be separated into two parts. Firstly delaying the claimant's return to work by insisting that he returned to a different pub miles away, leaving him further to travel and secondly in a role that was at a lower salary or that he should remain on the sick when the claimant wanted to return to work earlier at his usual place of work. This allegation is put as direct discrimination and/or a failure to make reasonable adjustments.

231. The respondent's initial proposal for a phased return was dated 15 April. We are not aware of any event of significance to this allegation that happened on 26 April. The proposed return to work date was 27 April although the claimant had been assessed by his GP as not being fit to return to work until 7 May.

232. The respondent notes that the claimant had advised at the meeting that he could not remember certain company procedures and the respondent offered him an experienced manager to shadow but the claimant refused this offer. The letter does not make reference to shadowing but does state that the claimant will not be carrying out full managerial duties.

233. We have set out the claimant's submissions at 127-129 above in relation to allegation three. It was submitted that asking the claimant to go to The Water Witch displayed a discriminatory attitude and an assumption that the claimant was not going to be able to perform his usual contractual duties. The Tribunal notes that this is in contrast to the second allegation where the respondent should have relieved the claimant of certain duties.

234. In our judgment the respondent's suggestion of the claimant carrying out his phased return at The Water Witch was not a discriminatory suggestion. We find that it was a reasonable suggestion as it would have allowed the claimant to work with an experienced manager whereas had he returned to The Wilton as manager there would have been no-one at his level or above to support him if he needed any assistance. The fact that this could not be done due to time and travel problems was unfortunate but the respondent did offer to change the time of the proposed shifts and to pay any extra travel costs when the problems were pointed out to them..

235. We do not find that the respondent suggesting that the claimant's phased return should be at The Water Witch amounted to a failure to make reasonable adjustments or that it displayed a discriminatory attitude.

236. As to the proposed 50% reduction in the claimant's salary it was submitted on behalf of the claimant that the salary of a hypothetical comparator, a person returning to work after a long absence for a reason other than disability, would not have been reduced. Paying the claimant at a lower salary than his contractual entitlement would have amounted to less favourable treatment because of his disability.

237. We note that there had been no contractual change in respect of the claimant's role.

238. We agree with the claimant's submission in respect of the second part of the allegation and conclude that had the claimant been returning on a phased basis without a disability following a period of absence, for example in respect of a broken leg, then it would not have been proposed that he would return to work on a lower salary. We therefore find that this proposal had it been carried through would have amounted to direct discrimination. As it was not carried through we do not find that there was any actual act of discrimination.

239. In respect of the first three allegations we remind ourselves that the claimant was not stated by his GP to be fit to return to work until 4 June 2016.

#### Allegation 4

240. The fourth allegation, pleaded as failure to make a reasonable adjustment, relates to 6 June 2016 onwards and expectations that the claimant would perform his full previous duties including working in excess of 50 hours a week and filling in for a colleague after his four week phased return despite the fact that he was in a period of long-term rehabilitation and suffering from life changing disabilities.

241. Although the allegation refers to 6 June 2016 onwards the narrative relates to the period after his four week phased return.

242. It is apparent from the terms of the actual phased return that the claimant would work reduced, but increasing, hours in weeks 1-3 and then he would work full-time hours in week 4. Full-time hours were not defined in the contract of employment. The claimant was required to work such hours as were necessary.

243. The PCP put forward in submissions is the expectation that the claimant would carry out the normal contractual duties of the manager of The Wilton and overtime after the end of the four week period of phased return. The comparator would be someone in a similar situation to the claimant on a phased return who was not in a period of rehabilitation or suffering from the disabilities that the claimant had.

244. The claimant had explained in June 2016 to Jane Ramsay the problems he had covering staff absences as set above at paragraph 54.

245. In paragraphs 59-61 above we have referred to Jane Ramsay's email of 13 July 2016 setting out her concerns over the claimant's performance in relation to various aspects of it. This included the way he completed the weekly paperwork, him being off site at what the company considered to be peak trading times with the claimant having said he required his days off. He was very distressed and unsteady after a conversation in which this had been discussed. He had also sobbed uncontrollably for four hours after a discussion with her concerning business information and working on Sundays. Notwithstanding any statements made about the claimant's abilities before he started the phased return it must have been apparent to Jane Ramsay following his return that the claimant was not carrying out the normal managerial duties and that he was very much affected by the weight of the company's expectations and his failure to meet them.

246. In our judgment the way in which his work affected the claimant, a person with a disability, when he was unable to meet the requirements placed upon him by the respondent to carry out the full managerial duties put the claimant at a substantial disadvantage in comparison with a person who was not disabled and who was able to carry out the full managerial duties at the end of a period of phased return. This, in our judgment, placed upon the respondent an obligation to take such steps as it would have been reasonable to have taken to avoid the disadvantage, It must be recognised that some assistance was provided to the claimant as described above at 64, 65 and 67 but given the subsequent events culminating in the

claimant's resignation on 16 September we find that the respondent did not take such steps as would have been reasonable to avoid the claimant's substantial disadvantage.

#### Allegation 5

247. The fifth allegation relates to the period from July to September 2016 and is of subjecting the claimant to unreasonable investigations on his return to work and an expectation that the claimant perform to an impossibly high standard. It is pleaded as a failure to make adjustments or discrimination arising from disability.

248. There was one investigation meeting to which the claimant was invited following his return to work. This meeting was in respect of a failure fully to complete some paperwork regarding new employees and to consider the reasons for losses on both wet and dry stock. Having considered the transcript of the meeting we do not find that it amounted to an unreasonable investigation.

249. The respondent is in our judgment rightly concerned as to managers ensuring that there are no stock deficits. The claimant had been advised as to various steps to be taken to ensure there were no deficits following a stock take shortly after his return, for which he was not held fully responsible. The respondent's recommended procedures when introduced by the claimant had worked and then after a satisfactory stock take he relaxed them and there were further stock deficits. The claimant had proved himself capable of reaching the required standard. The Tribunal does not consider it an impossibly high standard to achieve, particularly when the claimant achieved it following his phased return.

250. As to paperwork concerning new starters, given the potential criminal liability on the respondent if all of the legislative requirements on taking on new employees were not complied with, then we do not think it unreasonable for the respondent to have expected the claimant to complete the paperwork properly. We do not therefore find that they expected an impossibly high standard from him.

251. In our judgment the claimant was not subjected to an unreasonable investigation neither was he expected to perform to an impossibly high standard. It follows that we do not find that the claimant was placed at a substantial disadvantage when compared with the respondent's other managers who were not disabled or that he was treated unfavourably in this regard.

#### Allegation 6

252. The sixth allegation refers to the welfare meeting of 3 August 2016 when it is alleged that the respondent ignored the claimant's visible distress and requests that he was unable to cope with his workload and hours. This is pleaded as a failure to make reasonable adjustments and or discrimination arising from disability.

253. We have set out above from paragraphs 71 to 86 various extracts from the transcript of the welfare meeting. References to the claimant's distress are set out at paragraphs 76 and 77. As a matter of fact, looking at these extracts, and taking the

meeting as a whole we do not find that the claimant's visible distress was ignored by either Julia Hodge or Jane Ramsay.

254. As to requests that he was unable to cope with his workload and hours, we have examined the transcript of the meeting and do not find any direct statement from the claimant that he was unable to cope with his workload and hours, but we have set out from paragraph 71 onwards exchanges related to his tiredness and then at paragraph 74 matters concerning fatigue, then at paragraph 75 the fact that his brain could only absorb so much in one go followed by references to the hours worked, although we do not find that the claimant was asked to work 70-80 hours a week. Paragraph 78 refers to the lack of support and the assistance given then at paragraph 81 problems concerning completion of the paperwork.

255. At paragraph 83 there is reference to performing the role with the respondent perceiving the claimant was concerned that he was having to take on more which may be too much.

256. We know that it was after this meeting that Julia Hodge wrote again to Mr Gurusinghe as described above at paragraph 88. It was very clear to her that the claimant was struggling with fatigue which affected his gait and his ability to do his job, answering questions clearly, making constant different errors with the weekly paperwork and not having a wider view of the business. He could not process verbal instructions. He was emotional and tearful and became agitated quite quickly.

257. On the basis of the matters set out in the transcript referred to above and the letter sent by Julia Hodge on 5 August 2016 to Mr Gurusinghe, we find that the respondent was aware by 5 August that the claimant was unable to cope with his workload and hours. At or indeed after the meeting no direct steps were taken to deal with these issues with the claimant. Ms Hodge did subsequently answer the claimant's separate queries and we have recorded above that a new assistant manager appeared to have been appointed in the middle of August.

258. We have noted at paragraph 87 that the welfare meeting ended with no formal conclusion or agreement as to what might follow.

259. As to a failure to make reasonable adjustments, Ms Almazedi referred to the PCP of performing full contractual duties to an impossibly high standard. We have concluded in relation to the fifth allegation that the claimant was not required to perform to an impossibly high standard.

260. As to the alternative claim under section 15, discrimination arising from disability, the unfavourable treatment was pleaded as ignoring the claimant's requests that he was unable to cope with his workload and hours and it was submitted that this was because of fatigue and memory loss both of which relate to his disability.

261. Having considered the evidence we find that the claimant (A) was unfavourably treated by the respondent (B) when it failed to do anything to assist him at or following the welfare meeting on 3 August 2016 when Julia Hodge was aware of the matters set out above at 257 as a result of the meeting.

262. What was the reason for this treatment which consisted of failing to assist the claimant? Julia Hodge a director of the respondent was the person responsible for the management and the treatment of the claimant. We are aware that she wrote the letter to Mr Gurusinghe, set out at 88 above, on 5 August. She asked about how far his mental capacity had improved and how much more was it likely to improve with the reason behind the question being that they were very concerned regarding the claimant's mental abilities as a pub manager.

263. We conclude that she wanted to get the answers to her medical questions before deciding on how she would deal with the claimant's issues that were apparent to her from the 3 August meeting.

264. Was the reason for this something arising in consequence of the claimant's disability? The letter to Mr Gurusinghe asking about the claimant's capability in our judgment arose in consequence of the claimant's disability. It questioned his mental capacity and other matters including fatigue which affected his gait. These issues were raised at the first meeting involving Mrs Hodge before the claimant's return to work as things arising in consequence of his disability.

265. We therefore find that the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability.

#### Allegation 7

266. The seventh allegation relates to the 3 August 2016 welfare meeting and it is in two parts. The first alleges that the claimant felt humiliated by comments that if he could not do his job as before then he was incapable of doing the job altogether. The second part alleges that the claimant was made to feel uncomfortable about the amount of sleep that he needed by asking him if it was normal thereby humiliating the claimant and violating his dignity. It is pleaded as direct discrimination.

267. We have read the transcript of the 3 August meeting and cannot find any comments that if the claimant could not do his job as before then he was incapable of doing the job altogether. The claimant has not proved any facts in relation to this allegation.

268. As to making the claimant feel uncomfortable about sleep, violating his dignity, we have set out the relevant exchange at paragraph 71.

269. Reminding ourselves of the content of the claimant's witness statement on this matter set out above at paragraph 72 which refers to upset and frustration we do not find that the claimant has provided evidence that he felt uncomfortable or that his dignity was violated.

270. The allegation here is of direct discrimination. A hypothetical comparator was put forward in the form of a person without a disability at a review meeting with management raising performance issues. We are not persuaded that the claimant was treated less favourably than the hypothetical comparator would have been treated.



Allegation 8

271. The eighth allegation relates to 24 August 2016, the date of the letter to the claimant inviting him to the investigation meeting on Wednesday 31 August, and it is of subjecting the claimant to unreasonable criticism, accusing him of having a bad stock take, of not following recruitment procedure for a new staff member and calling an engineer out unnecessarily. A failure to make adjustments for exhaustion and memory loss is alleged or in the alternative there was discrimination arising from disability.

272. The letter of 24 August 2016 is referred to above at paragraph 93.

273. The letter itself does not criticise the claimant. It invites him to come to explain the three matters of concern referred to therein. There is no reference to any investigation of him calling out an engineer unnecessarily.

274. It would have been open to the claimant to have raised exhaustion and memory loss at the meeting had he wanted to put these matters forward to explain why the matters of concern to the respondent had occurred. The transcript of the meeting does not contain any reference by the claimant to anything that might have arisen as a consequence of his disability when he was answering the questions put to him

275. We do not find as a matter of fact that the claimant was subjected to unreasonable criticism arising out of the issues raised by the respondent in the 24 August letter or that in the circumstances described there was a failure to make adjustments.

Allegation 9

276. The ninth allegation refers to three dates, being 31 August, 6 and 16 September 2016. 31 August 2016 was the date of the investigation meeting. 6 September 2016 was the date of the claimant's sick note and 16 September 2016 was the date of his resignation and its acceptance. The allegation is that the respondent ignored the claimant's pleas for reasonable adjustments in the form of support and a reduction in hours when it was clear that he was struggling on full-time plus hours. The respondent was aware the claimant suffered exhaustion and memory loss due to his disability. This is pleaded as a claim under section 15 and in the alternative a failure to make reasonable adjustments.

277. Looking at the transcript of the 31 August 2016 investigatory meeting, we do not find that there were any pleas from the claimant for adjustments in the form of support and a reduction in hours. The meeting was a business-like discussion between employer and employee with the claimant giving his explanation for the three matters of concern.

278. The sick note of 6 September 2016 was submitted by the claimant to the respondent. No evidence has been produced as to how, if at all, it was acknowledged by the respondent. It did, however, make it clear to the respondent that the claimant would be off work for one month with stress, work related. We take

the view that the sick note should be taken together with the 16 September 2016 resignation letter set out above at paragraph 107. The claimant does refer in his letter to a lack of support since his return in June following his illness, and although he does not ask for a reduction in hours he refers to not being able to have any Fridays off and being asked to attend a meeting in Lancaster four hours before his shift, which presumably extended his working day.

279. Also on 16 September 2016 Julia Hodge responded in writing to the claimant's resignation letter. She accepted the resignation and confirmed in the first sentence the official date of leaving. Her letter is set out above at paragraphs 108 and 109.

280. Looking at this as a section 15 claim we find that the unfavourable treatment is the immediate acceptance by Julia Hodge of the claimant's resignation without further enquiry and without taking any proactive steps to deal with the matters raised by the claimant in his resignation letter including that since his return following his illness he had felt a lack of support from the company -

281. As to the thought processes of Ms Hodge, we have the letter that she sent to Mr Gurusinghe following the welfare meeting in which she set out her concerns as to the claimant's abilities in relation to his disability and we also have her statement that they were awaiting the doctor's response to that letter before deciding on how they would respond to the claimant following the investigatory meeting on 31 August 2016. The company's receipt of the claimant's resignation meant that she did not have to wait for a reply from the doctor as the claimant's employment had ended without the need for further action by the respondent.

282. In our judgment this amounts to something arising in consequence of the claimant's disability because the effects of the claimant's disability on his ability to work lead to his resignation and the unfavourable treatment that followed.

283. The respondent has not sought to show that their treatment of the claimant was a proportionate means of achieving a legitimate aim.

284. Given the way that the claimant put this allegation in respect of a failure to make reasonable adjustments without reference to any PCP, the Tribunal does not make any findings in respect of the alternative allegation that this amounted to a failure to make reasonable adjustments.

#### Allegation 10

285. The tenth allegation refers to the invitation to the claimant in the letter responding to his resignation to attend a grievance meeting in Lancaster on Thursday 22 September 2016. The allegation is that the location was too far away and that this amounted to a failure to make a reasonable adjustment. The PCP was to expect the claimant to attend a meeting at a location far from his usual place of work.

286. The claimant indicated that he was unable to attend the proposed meeting but without reference to the venue. Had the claimant indicated a willingness to attend a

meeting but only if it could be held closer to his home and had the respondent refused to change the location of the meeting then we might have found a failure to make a reasonable adjustment, but in this case these things did not happen. In these circumstances we do not find a failure to make a reasonable adjustment in respect of this allegation.

#### Allegation 11

287. The eleventh and final allegation relates to 16 October 2016 and letting the claimant leave employment without consideration of support measures that could have kept the claimant in employment and an assumption that he was unable to cope with the demands of the role because of his disability. This is pleaded as a failure to make a reasonable adjustment or alternatively direct discrimination. In each case the schedule refers to a hypothetical comparator but without describing the characteristics of this comparator. There is no reference to any PCP in relation to the reasonable adjustments claim.

288. Given the way in which this allegation is put we do not see that it adds anything to the finding we have made in relation to the ninth allegation particularly given the absence of any further communication between the parties after 16 September 2016.

289. In conclusion the claimant has succeeded in relation to the allegations numbered 1, 4, 6 and 9. The claimant has not succeeded in relation to the allegations numbered 2, 3, 5, 7, 8, 10 and 11.

290. The parties are invited to reach an agreement on the question of remedy but if this cannot be done the claimant is to apply for a remedy hearing.

Employment Judge Sherratt

2 November 2017

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
9 November 2017

FOR THE TRIBUNAL OFFICE

## APPENDIX

## Respondent's Response to Scott Schedule

Robinson v Mitchells of Lancaster

Case No: 2401285/2017

Issue	Date	Description	Nature of Claim	Respondent Response
1	15.4.16	Cutting short the claimant's phased return when this was contrary to medical advice and claimant's wishes.	Failure to make reasonable adjustment S20 Equality Act 2010	Return to work was requested by claimant 29.3.16, abilities summarised 13.4.16. By letter 15.4.16 respondent proposed phased return to work commencing 27.4.16 for four weeks, working 4 hours daily, various shifts with retraining and shadowing an experienced manager. Claimant did not return to work at this time. Claimant raised concerns and 1.6.16 requested a 3 week phased return and hours to manage his fatigue resulting in his return to work 6.6.16 for a period of three weeks phased return, 4 hours daily confirmed by letter 1.6.16.
2	April 2016 until resignation	Failure to excuse the claimant from performing certain duties and/or to reallocate duties to other employees at the claimant's usual place of work when considering the claimant's return to work.	Failure to make reasonable adjustment S20 Equality Act 2010	Respondents deny failure to exclude certain duties and reallocation of duties from April 2016 as claimant only returned to work on 6.6.16. Claimant wished to remain at The Wilton pub where he felt more supported. Respondent advised by NHS 13.4.16 claimant was undergoing rehabilitation for balance issues, no significant issues with cognition, language, comprehension. For relearning IT and procedures – shadowing a manager was offered which claimant refused. Although claimant claimed fatigue no longer an issue, it was a significant issue throughout the phased return and afterwards, and hours had to be adjusted.
3	15.4.16 26.4.16	Delaying the claimant's return to work by insisting that the claimant return to a different pub miles away leaving him further to travel and in a role that was at lower salary or remain on the sick when the claimant wanted to return to work earlier at his usual place of work.	S13 & S20 Equality Act 2010	Claimant had advised he couldn't remember any procedures. Respondent offered an experienced manager to shadow – which was refused at different site. Claimant wished to remain at The Wilton believing he would have more support. Transport issue was discussed and hours to be arranged to meet train schedules – refused. Claimant remained on sick leave for further 5 weeks. Original request for welfare

				meeting was 14.3.16, arranged for 29.3.16, return to work arranged for 27.4.16 but claimant remained on sick leave from 26.4.16. Welfare meeting scheduled for 6.5.16 was rearranged by claimant to 18.5.16 which was then held 1.6.16.
4	6.6.16 onwards	Expectations that the claimant to perform his full previous duties including working in excess of 50 hours a week and filling in for a colleague after his 4 week phased return despite the fact that he was in a period of long-term rehabilitation and suffering from life changing disabilities.	Failure to make a reasonable adjustment.	Pub managers are expected to work at least 50 hours per week. Claimant was not expected to work in excess of 50 hours weekly. Claimant worked an average 50 hours per week prior to his sick leave, which increased occasionally when assistant manager on holiday. Claimant's hours worked between assistance manager resigning 27.5.16 (left 20.6.16) and new assistant manager commencing work 15.8.16, were between 30 hours and 56.5 hours but extra manager support was provided with assistance from two sites. Claimant was assisted also by emails to aid memory. Full duties were carried out when phased return expired in agreement with claimant. Hours, short shifts, days off accommodated as per Occupational Health. Claimant agreed on 3.8.16 that respondent has never asked him to work 70-80 hours.
5	July to September 2016	Subjecting the claimant to an unreasonable investigation on his return to work and an expectation that the claimant perform to an impossible high standard.	Failure to make reasonable adjustments S20 Equality Act 2010 or section 15 discrimination arising from disability.	Respondent denies unreasonable treatment and unreasonably investigating claimant on his return to work. Numerous adjustments had been made. After commencing full-time duties, stock deficits on 17.6.16 and 5.8.16 had to be investigated and claimant had been asked to implement measures to control stock.
6	3.8.16	At the welfare meeting, ignoring the claimant's visible distress and requests that he was unable to cope with his workload and hours.	Failure to make reasonable adjustments or S15 unfavourable treatment.	Claimant had been on full-time hours for 6 weeks. Random retention was an issue. Claimant became upset due to "taking things personally" he advised was caused by his injury. Claimant was asked if any areas needed revising. Claimant said "don't think so". Claimant refused split shifts to assist with fatigue. Claimant said the role is not the issue.
7	3.8.16	At the 3.8.16 meeting the claimant felt humiliated by comments that if he could not do his job as before, then he was incapable of doing the job altogether - S13 Equality Act 2010. Making claimant feel	Direct discrimination S13 Equality Act 2010 and/or harassment S26 Equality Act 2010.	Respondent denies all claims – no-one said claimant couldn't do his job in any way described. Respondents did not make claimant feel uncomfortable about sleep, the claimant described his sleep patterns, and no-one violated the claimant's dignity.

		uncomfortable about his sleep, violating his dignity.		
8	24.8.16	Subjecting the claimant to unreasonable criticism, accused of a bad stock take and not following recruitment procedure for a new staff member and calling an engineer out unnecessarily. Failure to make adjustments for exhaustion and memory loss.	Failure to make reasonable adjustments S20, alternative S15 Equality Act 2010	Respondents advised various sites/managers by email 24.3.16 of company procedures re documentation, starter/leaver paperwork, payroll. Issues were not unreasonable criticism, but issues to be resolved and corrected going forward. Claimant withdrew stock control methods which caused the respondents a loss.
9	31.8.16 6.9.16 16.9.16	Ignoring the claimant's pleas for reasonable adjustments in the form of support and a reduction in hours when it was clear that the claimant was struggling on full-time plus hours. Respondent was aware claimant suffered exhaustion and memory loss due to his disability.	S15 Equality Act 2010 memory loss and fatigue. Alternative fail to make reasonable adjustments S20 Equality Act 2010.	Respondents deny ignoring claimant's pleas for reasonable adjustments. Claimant refused options offered e.g. split shifts. Claimant never requested reduced hours after the phased return to work. Claimant was offered support and confirmed he had support from The Wilton pub.
10	16.9.16	The respondent requested the claimant attend a grievance meeting in Lancaster on 22.9.16 whilst absent from work with stress. Unable to attend due to extreme tiredness, stress and anxiety due to lack of support and location of meeting too difficult to attend.	Failure to make reasonable adjustment S20 Equality Act 2010. Location too far away.	Respondent invited claimant to grievance meeting by letter 16.9.16 advising claimant could advise of more suitable date and time if he wished. 20.8.16 claimant advised he was unable to attend but wished to meet when he was well enough. 21.9.16 respondent letter advised they looked forward to hearing from claimant, but no further correspondence was received.
11	16.10.16	Letting the claimant leave employment without consideration of support measures that could have kept the claimant in employment and an assumption that the claimant was unable to cope with the demands of the role because of his disability.	Failure to make reasonable adjustments S20 or alternatively direct discrimination S13 Equality Act 2010.	Respondents invited the claimant to a grievance meeting to discuss his issues with the intention of finding a way forward. Claimant failed to attend a grievance meeting. The respondents did not assume the claimant could not cope with his role due to a disability.