Case Number: 3325280/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C MacDougal	**v**	**Minet Junior School**

Heard at: Watford **On**: 6-8,11,13 & (in chambers) 14 December 2017

Before: Employment Judge R Lewis
Members: Mrs P Breslin
Mr P Miller

Appearances

For the Claimant: Ms S Robertson, Counsel
For the Respondent: Mr R Clement, Counsel

RESERVED JUDGMENT

1. The claimant was, with effect from 1 July 2015 at the latest, a person with disability within the meaning of s.6 Equality Act 2010.

2. The following claims are dismissed on withdrawal: all claims of indirect race discrimination relating to experience outside the UK; all claims of victimisation by Ms Bootes.

3. The respondent discriminated against the claimant contrary to sections 15 and 19 of the Equality Act when read with sections 39(2)(b) and/or (2)(d), by failing in autumn 2015 and / or autumn 2016 to provide him with annual performance appraisal or pay review in respect of the school year 2014/ 2015.

4. The respondent discriminated against the claimant by failing to provide reasonable adjustment on 31 March 2017, in relation to the time permissible to supply additional evidence to support assessment.

5. Save as stated above, all the claimant's claims fail and are dismissed.

ORDER

1. There will be a remedy hearing at the Watford Employment Tribunal on **Monday and Tuesday 26 and 27 March 2018** starting at 10am on the first day.

2. No later than **16 February 2018** the claimant is to send to the respondent any witness statement about remedy from any person, including the claimant, proposed to be relied on at the remedy hearing.

3. The claimant's witness statement about remedy may not exceed 6,000 words and the statement of any other witness may not exceed 4,000 words.

4. The claimant may annexe to his witness statement a schedule or table of sums claimed, the content of which is not included in the above word count.

5. No later than **16 February 2018** the claimant is to send to the respondent a core bundle of documents of no more than 50 pages to be relied upon at the remedy hearing.

6. If the core bundle includes documents which were in the main bundle at this hearing, they should not be re-numbered, but should replicate the numbering in the main bundle.

7. The claimant is responsible for providing for the tribunal sufficient copies of the core bundle. Each party is to bring at least five copies of any witnesses statements which it relies on at the remedy hearing.

8. If the respondent proposes to call evidence at the remedy hearing, copies of any witness statements are to be sent to the claimant no later than **2 March 2018.**

9. The respondent may serve one witness statement of no more than 6,000 words; any other statements may not exceed 4,000 words. The respondent may annexe to one witness statement a counter-schedule or table, the content of which is not included in the above word count.

10. The parties are reminded of their continuing disclosure obligations, relevant only to the issues to be adjudicated at the remedy hearing.

11. The parties are reminded further that it is open to them to apply to the tribunal in writing for a telephone case management hearing in the event of any dispute relating to preparation for the remedy hearing. Any such application must state why the matter cannot be resolved directly between the parties, and should be marked for the urgent attention of the present Judge.

REASONS

Procedural history

12. By a claim presented on 7 July 2017 against the above respondent and the London Borough of Hillingdon, the claimant, who was and remains employed as a teacher at the respondent school, brought claims of race discrimination and disability discrimination. On service, the tribunal in accordance with the usual practice listed a preliminary hearing. It was to be on 18 September.

13. By letter from the solicitors who represented him then and remained on record, the claimant on 18 September applied for the case to be fast tracked, stating that this course was "imperative" in light of the claimant's ill health, and the uncertainties as to his immigration position. By letter dated 30 September, Regional Employment Judge Byrne directed expedition.

14. The respondent submitted its lengthy response on 21 September; on 6 October the claimant withdrew his claims against the then second respondent.

15. Matters were expedited to a preliminary hearing at Bury St Edmunds on 16 October (Employment Judge Laidler), whose order was sent on 31 October. Judge Laidler listed the case for ten days to start on 4 December at Bury St Edmunds.

16. Further correspondence involved the Regional Judge who confirmed the listing; directed that the case be heard at Watford; and stated that the issue of disability should be decided at the start of the hearing. The Regional Judge agreed to the claimant's applications for issue and service of three witness orders.

Procedural matters at this hearing

17. At the start of the hearing, the tribunal addressed a number of matters. The hearing proceeded entirely as a public hearing, and rule 44 applied to the witness statements which were produced. The tribunal directed that no pupil of the school was to be referred to by name or actual initials, or otherwise rendered identifiable (it is recorded that the parties had themselves facilitated this). The parties accepted the tribunal's suggestion that this stage of hearing deal with liability only. The tribunal asked the parties to agree a working timetable, and we record our gratitude to Ms Robertson and Mr Clement for doing so, and for adhering to the timetable.

18. The first day of the hearing was spent addressing the issue of whether the claimant met the s.6 definition of disability. No oral evidence was given, and the hearing proceeded entirely on the basis of written statements, documents and submission. The tribunal gave its judgment on the same afternoon. At the end of the full hearing, when judgment was reserved, Ms Robertson on behalf of the claimant asked for written reasons. It was

conceded that the material date of respondent's knowledge was 1 July 2015.

19. From early on the first morning, the claimant was visibly distressed. At a number of stages throughout the hearing, the tribunal asked Ms Robertson and the claimant for guidance on what could be done to assist the claimant to participate fully in the hearing, while maintaining the tribunal's even handedness between the parties. The claimant elected not to give evidence on the first day on disability, but to rely on his witness statement only. When he gave oral evidence, there were a number of interruptions and breaks, and when the claimant became acutely distressed and unwell, the tribunal indicated to Ms Robertson that he had the right to decline to give further oral evidence, and to rely on written evidence only. The claimant chose to continue with oral evidence. The tribunal released the claimant from oath during breaks, so far as it was able to do so. We declined to intervene when Ms Robertson indicated that the claimant was upset by what he considered to be the body language and engagement of Ms Birch (Head Teacher and the main witness for the respondent) who was sitting behind her representatives. Ms Birch was in the tribunal's line of vision, and we saw nothing which required our intervention.

20. The claimant's evident distress throughout this case understandably inhibited Mr Clement from what might otherwise have been a rigorous cross-examination. There were many questions which could have been put to the claimant, and some cross-examiners would have put them robustly (subject to guidance from the tribunal). The claimant's distress also rightly required the tribunal to manage the parties' use of time. We have decided the case which was put to us, but without a detailed testing of all the claimant's allegations, or of all his turns of phrase.

21. The tribunal had a bundle of some 1800 pages, presented thematically. At the end of the hearing, Mr Clement indicated that the bundle had been prepared on behalf of the claimant and received by the respondent about two weeks before the hearing. The material was disproportionate in volume and unwieldy in arrangement. When we asked to be referred to essential documents to read before the start of evidence, counsel indicated no more than 50 or so pages. Our estimate is that by the end of the hearing, we had been referred to about 150 pages.

22. The claimant gave evidence, with breaks and interruptions, for about six hours. The other witnesses were, on behalf of the claimant:

    - Ms Claudia Aviles, who has taught at the school since September 2015. Her evidence was given in under ten minutes;
    - Ms Linda Deverson, who has taught at the school since September 2012, and has been the claimant's house mate since around Easter 2012. She gave evidence for about 30 minutes;
    - Ms Karen Calveley, a teacher at the school for some 28 years, and currently off sick. She gave evidence for just under an hour.

23. A witness statement was read from Mr James Adutt, a friend of the claimant who is legally qualified, and who has assisted him in preparing this case. Mr Adutt was present throughout the hearing to support the claimant, but did not give oral evidence.

24. The respondent's witnesses were:

    - Ms Sonia Birch, Head Teacher of the respondent since January 2017, gave evidence for about three hours;
    - Mrs Julie Field, Officer Manager and employed at the respondent since June 2004 gave brief evidence;
    - Mr Jonathan Lafafian, Assistant Head since 2016, who has taught at the school for over ten years, gave evidence for about an hour;
    - Ms Kelly Gubbin, Assistant Head since 2016, gave evidence for about an hour;
    - Ms Fiona Bootes, Head of Year 5, who has taught at the school for 11 years, gave evidence for just over an hour.

25. Counsel provided written closing submissions, to which they spoke briefly. Before conclusion of this hearing, provisional dates for a remedy hearing were set by consent which are now confirmed above. All other case management orders above are made of the tribunal's own initiative.

Executive summary

26. It may render these reasons easier to follow if we summarise the position briefly. The claimant, who was aged 37 at the time of this hearing, is an Australian citizen who graduated in that country and was a teacher for a number of years there before coming to the UK in 2009. He has worked at Minet since 2010. The claimant has formed a strong wish to remain in the UK. His understanding of his immigration rights is that he will be entitled to indefinite leave to remain in the UK if by late January 2018 he is able to demonstrate that he is employed at a basic salary of £35,000.00 pa. The school had, at the material time, a system of performance-related pay. The claimant's pay remains below £35,000.

27. The claimant has an anxiety condition, which produces panic attacks. The tribunal has found that as a result, he met the statutory definition of a person with a disability. He has over the years become increasingly anxious about a range of issues which have become intertwined: his wish to remain in the UK; accordingly, his immigration status; therefore, his level of pay, which is performance-related; and in consequence the process and procedures for assessment of his performance.

28. The claimant worked for the school year 2014/15 until being taken ill on 1 July 2015; in the school year 2015/16, he did not work until March 2016, when he worked for ten weeks of phased return. In 2015/16 therefore he worked for about four months of the school year in all, of which the majority was in phased conditions.

29. In much of the period with which we were concerned there was a turnover of Head Teachers, and the school's Governing Body had been replaced by an Interim Executive Board (IEB).

30. The list of issues (133-139, appended) is regrettably diffuse**.** Taking it as four broad areas of complaint, we have rejected the complaint that in 2014 the claimant's pay was reduced to take account of the costs associated with employing an overseas teacher; we uphold the complaint that the claimant was discriminated against in autumn 2015 and again in autumn 2016 by being denied a performance review for 2014/15; in the third category, we place a list of 18 events of which the claimant complained as acts of discrimination, all of which we reject; and finally, we accept one strand of his complaint of discrimination by failure to make reasonable adjustment, and that relates to a single specific event on the afternoon on 31 March 2017, when he was given a deadline for the production of work.

The List

31. The bundle contained at pages 133-139 a document called Claimant's Revised Draft list of issues. Although it was described as the draft, it was the working document for these proceedings. It forms an appendix for cross-reference to these reasons. We refer to it as "RDL" in these reasons, and so for example where we refer to RDL 4.16, we refer to item 4.16 (136) commencing "Was the claimant subjected….."

32. RDL was amended in the course of these proceedings in three material respects. RDL 2.5 to 2.8 inclusive were withdrawn. Claims of victimisation against Ms Bootes at issues 5.1.5 to 5.1.18 inclusive were also withdrawn; her evidence that she had not known of the protected act was not challenged. RDL 5.1.14 was amended in closing, so that the words 'Mrs Birch through ..' were added before Mr Lafafian's name.

Disability

33. The claimant asserted that by virtue of depression and anxiety he was at the material time a person with a disability, such as to meet the definition set out in section 6 Equality Act 2010.

34. Section 6 provides so far as material that a person has a disability if he "has a ….. mental impairment, and the impairment has a substantial and long term adverse effect on his ability to carry out normal and day to day activities." Further guidance on interpretation is available in schedule 1 of the Act and in Guidance which has been issued by the EHRC.

35. The parties invited the tribunal to determine this question without oral evidence, relying on the claimant's impact statement (35 pages); and on portions of the witness statements of Ms Deverson and Mr Adutt, describing their observations of the claimant over years of friendship. As most of this material described events outside work, Mr Clement could not realistically challenge it. The bundle contained a large section of medical information

(1467 – 1732) of which we were asked in particular to read Occupational Health Reports of July 2015 and February 2016, and limited sections of the claimant's GP records. A single professional summary of this material from a qualified person would have been of assistance. We were also referred to an email written by Mrs Field on 1 July 2015 (1091) about an event at work that day.

36. The tribunal noted the following:-

36.1 The claimant gave evidence of having experienced what he now identified as symptoms of anxiety, and panic attacks, for many years. There was no challenge to the description given at WS49-58 of their impact;

36.2 We accept the claimant's account of an episode when Mr Foot was Head teacher (ie before July 2014), when Mr Foot was called to assist him, as he had collapsed and was sobbing in the school toilet;

36.3 Mrs Field's email of 1 July 2015 should be read in full; in short, it describes a similar episode having taken place that day. We accept it as wholly accurate. Mrs Field wrote as follows so far as material:

"It has been identified recently that Craig has had serious issues with anxiety and emotional distress that seemed to have affected his performance at work. Over the past couple of days his emotional status has become a real concern to the SLT and a question has arisen as to whether he is fit in class. Today at lunchtime he had a complete 'meltdown'".

It was explained to us in evidence that the term "meltdown" meant that the claimant was in such tearful distress that for a time he was unable to function in any normal way. Evidence of the claimant experiencing "meltdown" was given from a number of sources on both sides.

36.4 At WS76, and in a memo to himself on 17 July 2015 (1791), both of which we accept as broadly accurate, the claimant described the impact of the 1 July event on his ability to function in a number of social and daily respects;

36.5 We noted that the Occupational Health referral completed by Mrs Field on that day stated that the claimant "is suffering from severe emotional instability" (and we noted that his sickness absence record for the previous two years was 19 days, 1468);

36.6 The resulting report (1471) advised a period of absence followed by a phased return, and recorded that the claimant "has recently experienced some distressing health symptoms, including disturbed sleep, worry, poor appetite, tearfulness and low mood" (1472);

36.7 The outcome of a second OH consultation on 22 January 2016 advised that "the claimant has felt increasingly stressed since 2013. Since his assessment by my colleague….. he was diagnosed with "stress, anxiety and depression relating to work." ….. significant symptoms, poor sleep, feelings of panic and difficulty functioning day to day." He had begun CBT and the diagnosis was of "mild/moderate symptoms of anxiety and depression overall."

37. Ms Robertson submitted that from at least 1 July 2015 the claimant met the section 6 definition through the impairment of anxiety, including panic attacks, going beyond the normal experience of a spectrum embracing concern, uncertainty, worry or stress. She submitted further that panic attacks are an instance of a different level of anxiety, relying on Mrs Field's words "complete meltdown". She submitted that the claimant had given evidence that anxiety affected the normal activity of sleep, for which the claimant had been prescribed medication; which led to fatigue, affecting concentration, and accordingly the time taken to undertake everyday tasks, ease of self-expression, and self-care. These were all matters attested in the claimant's witness statements. She submitted further that there was evidence from the claimant and Mr Adutt of the negative impact of the claimant's condition on social engagement and his interaction with colleagues.

38. Mr Clement made two broad points in reply. The first was that on his reading of the medical evidence the claimant's poor sleeping pattern and panic attacks preceded any diagnosis of depression/anxiety, and accordingly he submitted cannot have been caused by it. He submitted that the claimant's written evidence was unclear as to cause and effect of panic attacks in a number of respects, noting that Ms Deverson's evidence for example described what she identified as panic attacks before any such diagnosis had been made. He submitted secondly that to the extent that all that the claimant was experiencing was personal reaction to the stresses experienced by many teachers, that which the claimant experienced was stress, and however distressing to him, no more than that.

39. The tribunal adjourned for an hour to deliberate before giving judgment. We first found that the claimant had a mental impairment. In the absence of more detailed medical guidance we could say no more by way of categorisation than that the impairment was depression/anxiety, of which panic attacks were a significant part.

40. We accept the claimant's general assertion that he has suffered from intermittent panic attacks since early in life. We accepted as significant evidence of long term mental impairment the evidence at WS49-58, and in particular (WS52) the specific collapse before 2014, and the 'meltdown' in July 2015, and its consequences. We find that the effects and symptoms described by the claimant pre-date 1 July 2015 by some time.

41. We do not think Mr Clement's point that the symptoms pre-date the diagnosis is a good one. Our own experience of disability discrimination has been of many cases where late diagnosis is found by members of the public to cast light on effects experienced before diagnosis; dyslexia and Aspergers are examples which we have encountered in other cases.

42. When we consider effect on day to day activities, we accept broadly that the claimant has experienced three substantial adverse effects. We accept first that he has suffered from disturbed sleep, which in turn has led to fatigue, poor concentration, and other symptoms associated with tiredness. We accept secondly that the claimant's social activities have been affected, notably recreational activities such as his enjoyment of physical recreation or computer use (impact statement, paragraphs 66-69), and interpersonal relationships and friendships. We noted in particular paragraphs 61-65 of the claimant's impact statement, and paragraphs 38 and 39 of the statement of Mr Adutt.

43. In the third category, we accept that there has been an intermittent substantial adverse effect on the management of routine tasks, including personal care and hygiene; organising a routine day; and planning, organising and completing every day domestic tasks to a satisfactory standard within a proportionate and reasonable time. In that context we noted in particular Ms Deverson's account of the claimant's travel preparation.

44. Mr Clement in reply had submitted that there are tasks and events that everyone finds challenging but no evidence that the claimant's difficulties were due to disability. We do not accept that that is a good point for two broad reasons; first the recurrent theme of the disproportionality of the claimant's reactions to the individual challenge (eg Ms Deverson's description of the claimant packing his suitcase); and secondly by application of sheer common sense, that the effects which we have described operate cumulatively, and cannot be neatly cut and dried.

45. Our above findings do not include any finding about the claimant's work life, other than the two specific events of the collapse and the 'meltdown'.

46. We have found that the claimant met the section 6 definition by, at the latest, the date submitted by Ms Robertson, which was 1 July 2015. Mr Clement accepted, in light in particular of 1091, that the respondent accepted that by the date it had constructive knowledge of the claimant's disability.

Limitation

47. Our broad general approach is the following. We accept that the sequence of events set out in RDL 4.1 to 4.23 inclusive, and continuing with the claimant's pay appeal (not concluded until April 2017, and not a matter before us) was a continuing act for the purposes of the Equality Act, and that those matters are all in time.

48. We find that the decision about the claimant's pay in March 2014 (RDL 2.1 to 2.4 inclusive) was a single act at that time of which the claimant had full knowledge at the time, and that time on the face of it ran from March 2014. We find that it has not been shown that it was just and equitable to extend time. We also find that that event constituted relevant background, and that having heard the evidence it is in the interest of justice that we give our adjudication on the merits. In doing so, we stress that our over-arching finding is that the tribunal does not have jurisdiction to decide the point.

49. Not without misgivings, we find that the matters set out at 5.1.1 to 5.1.18 constitute the continuing act of the claimant's management during the period after his return from extended sick leave, and are within time. We have decided them on their merits.

The legal framework

50. This claim was brought exclusively under the provisions of the Equality Act 2010. Although the protected characteristics under which this claim proceeded were race and disability, and although the claim was pleaded under multiple provisions, it was at heart a claim brought under sections 15 and 19 in relation to disability.

51. Section 13 of the Act defines direct discrimination as occurring where "A discriminates against B if because of a protected characteristic, A treats B less favourably than A treats or would treat others". In this case, we must take care to distinguish allegations brought under s.13 from those under s.15. Section 15 provides that "A discriminates against B if A treats B unfavourably because of something arising in consequence of B's disability". (The provision is disapplied "If A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".) The defence of justification is open to the respondent. In the present case, the reality of the claimant's evidence was that he relied heavily on his disability-related absence as the operative reason for the treatment complained of; we have dealt separately with the issue of impaired performance, which was mentioned in RDL.

52. Section 23 provides that "On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case." That is particularly important in the instances of direct discrimination complained of.

53. Section 19 deals with indirect discrimination, and states that "A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's" … (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that

disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

54. From the body of authority we note in particular the need to define the PCP, and to analyse its impact on the protected group in question. When we consider the defence of justification, whether under section 15 or 19, there must be proven to us separately the aim, its legitimacy, and proportionality, in the sense that its discriminatory impact must be no more than necessary to achieve the legitimate aim.

55. The duty to make reasonable adjustments arises and is set out under sections 20, 21 and 22 and Schedule 8 of the Act, and it would be disproportionate to set out those lengthy provisions here. It is material to note again the requirement to prove the impact complained of, as well as that the adjustment must be shown to 'be reasonable to have to take to avoid the disadvantage.'

56. Section 27 provides that "A victimises B if A subjects B to a detriment because (a) B does a protected act".

57. Section 123 provides that the time limit is "The period of 3 months starting with the date of the act to which the complaint relates, or … such other period as the employment tribunal thinks just and equitable". Day A was 25 May 2017, and Day B was 25 June; the claim form was presented on 7 July. On the face of it therefore, all acts occurring on or before 26 February 2017 were matters which the tribunal did not have jurisdiction to consider, unless we found it just and equitable to extend time. However if we were to find a continuing state of affairs or series of events, spreading across that date, we would be entitled to accept jurisdiction to consider that sequence of events. Even if we were not to accept jurisdiction in relation to events occurring on or before 26 February, we would be entitled to have regard to their evidential weight as forming part of the relevant background to the matters which we do have to consider.

58. Section 136 sets out the burden of proof provisions. Section 136(2) provides: "If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred." That provision "does not apply if A shows that A did not contravene the provision .."

The structure of this decision

59. We first set out our general observations and findings of fact, and those which set the scene. We then turn to RDL, which we approach following the structure of RDL itself, and setting out our conclusions as we proceed. We have departed from strict chronology in the interests of clarity.

General observations

60. We preface our findings with general observations. In this case, as in much of our work, we heard evidence about a wide range of matters, some of them in depth. Where we make no finding about a matter of which we heard, or do not do so to the depth to which the parties went, that should not be taken as oversight or omission. It is a reflection rather of the extent to which the matter was truly of assistance to us. Our approach also reflects our understanding of proportionality.

61. We make limited general observations about the witnesses. The stress and distress of the proceedings for the claimant was self-evident throughout. It was clear to us also that stress was felt by a number of the witnesses for the respondent. When considering the claimant's evidence, we make the general observation that his evidence focused on his own perceptions, which sometimes led him not to appreciate the bigger picture of managing the school, and the perspective of others. In so saying, we seek to make every allowance for the artificiality of the litigation process. That observation reflects also a second unhelpful aspect of the claimant's case, which was its binarism. The claimant presented his experience repeatedly in black and white terms. We in general do not find that that reflects our experience of work place reality. As a final comment, we hope that we do not exceed our responsibilities in paying tribute to the loyalty and support shown to the claimant by his friends throughout these events, notably by Ms Deverson and Mr Adutt.

62. A recurrent theme at this hearing was that the claimant strongly disagreed with any critical comments made by others about his professional work. His responses were, broadly, that criticism was unfounded; that it failed to take account of his views; that the professional assessment had not been properly carried out; or that it was plain wrong, and that he was in a better position to assess his own work with the pupils who knew him and whom he knew best. We repeat what we said at the start of the hearing. This tribunal has no power or capacity to assess the professional competence of a teacher. We have the duty to assess the fairness and integrity of the respondent's process.

63. A caution in considering the claimant's case was his tendency to re-interpret an event in light of a later event. A striking example related to Ms Holmes. The consistent evidence before us was that between the claimant's return in March 2016 and Ms Holmes' departure in December 2016, she, with the support of Ms Gubbin and Ms Calveley, sought to support the claimant in achieving a level of performance which would warrant payment at MPS6, ie at £35,000.00. The consistent evidence was that the claimant sought to engage in this process. However, as matters went on, and Ms Holmes did not assess the claimant's performance either as he saw it, or in a way which would deliver the pay increase, he came to form the view that she had changed; that her professions of support for him were insincere, and that she had sought to mislead him. There seemed to be no part of the claimant's analysis which understood that however much Ms Holmes wanted to support him, her support had to be subject to her own

professional judgment, which in the event was that he had not achieved the appropriate standard.

64. The bundle included lengthy transcripts of covert recordings made by the claimant. We mean by this that there were a number of occasions during 2016 when the claimant recorded conversations or meetings, which he later transcribed, without the other participant in the conversation being aware of the recording. It is not a rare practice, and we agree with the comments in particular of Ms Bootes that it is distasteful. We make no wider finding against the claimant because of it. We do however approach the transcripts in the bundle with caution. Our first caution is that a conversation which only one participant knows is being recorded is capable of manipulation. The second is that the transcripts were self-evidently not complete, and contained editorial comments by the claimant. The third is that as we were not invited to listen to any recording, we were conscious that conversation contains tone, inflection and body language which cannot be captured on paper. All of those factors must be borne in mind when noting Ms Robertson's observation that the accuracy of the transcripts was not challenged and that the recordings had been disclosed.

65. At the end of the hearing, after closing submissions, the tribunal asked counsel for their observations on how the tribunal should deal with allegations made by the claimant to which there was no direct evidence in reply. In particular, the respondent had not called the evidence of two former Head Teachers, Mr Foot and Ms Holmes, against whom serious allegations were made. Counsel agreed that we must take the evidence as it is, and decide the case on the evidence before us, not on the evidence not before us. Ms Robertson submitted that the correct approach must be to uphold the claimant's allegations if we find that there was no answer to them other than discrimination. Mr Clement observed that we should draw no adverse inference from the absence of witnesses, and referred to the practical difficulties of preparation of this case within an abridged time frame. We have endeavoured to decide the case on the basis of the evidence before us, to which we bring in particular the experience of the non-legal members and our experience of tribunal litigation.

66. Ms Birch was present as an observer throughout the proceedings, and gave evidence for half a day. She struck us as a measured, sensitive professional, who in 2017 accepted appointment to solve a large number of problems made by others. She was conspicuously a witness of truth, and she may regard herself as vindicated in the eyes of this tribunal of the allegations of discrimination levelled against her personally.

Setting the scene

67. The claimant was born in 1980. He was born in Australia and is a citizen of Australia. He is not a joint national of the UK. He graduated in Australia and was a teacher there for a number of years.

68. He came to the UK in 2009, and joined the staff of the school in 2010 working through an agency called Sanza. The bundle contained a reminder which he had written to himself at some point (1059); "Sanza said that I should be started on band B at £27,992. Once I get QTS it should go up to about £35,000." With effect from 25 January 2012 he was appointed by the respondent (1051) as an overseas trained teacher on a full-time temporary basis to be paid on the unqualified pay scale. On about 4 March 2014 he gained qualified teacher status (QTS) (1063) and his pay was adjusted (1067).

69. The previous paragraph entwines separate strands. Before March 2014 the claimant was paid on the scale available to teachers who were not formally recognised as qualified in the UK (as his experience had been gained overseas). From September 2012 until March 2014 he was paid unqualified salary equivalent to point 3 on the main teacher scale. On gaining QTS his appointment was confirmed at MPS4 (point 4 on the qualified teacher scale), at which point he has remained ever since. The lowest point on the scale at which the claimant could or can achieve his goal of £35,000.00 pa is MPS 6.

70. The claimant's immigration status was briefly summarised. He entered the UK in December 2009 on a two year scheme known as Youth Mobility. In January 2012, following sponsorship obtained and paid for by the respondent, he was granted a Tier 2 visa to run until February 2015. That visa was extended for a further three years in March 2015.

71. We repeat paragraph 17 of the claimant's witness statement, which summarises the issue which underpinned these events:

    "On 1 March 2015 my leave to remain was extended to the full six years legally allowed to 22 January 2018. In January 2017, I completed five years in the UK as a Tier 2 visa holder and became eligible to apply for indefinite leave to remain provided I do so before my leave to remain expires on 22 January 2018, but I have been unable to do so because my salary remained on M4 and therefore below the £35,000."

72. It was common ground at this hearing that the relevant advice from the Home Office was consistent with the above (1219), using the phrase: "You can apply for ILR if…your job pays £35,000 or more."

73. The position summarised in the above two paragraphs has been unchanged since March 2014, a matter known throughout to the claimant, and not disputed by the respondent.

74. Our background findings about the respondent are that it is a junior school with about 480 pupils and 66 staff including non-teachers. Its long term Head Teacher, Mr Foot, left in the summer of 2014. In the school year 2014/15 it had three Head Teachers. Ms Holmes became Head Teacher in September 2015 and remained in post until December 2016. Ms Birch has been Head Teacher since January 2017. At time of giving evidence, she had nearly 30 years service as a teacher, about half of it as a Head teacher.

75. An OFSTED inspection in September 2013 found that the school required improvement, a finding which also applied to almost all teachers as individuals, including the claimant. Between November 2014 and November 2017 its Governors were replaced by an IEB.

76. In autumn 2013 following the OFSTED inspection, "No teachers received pay progression in 2013. This was discussed with Unions, and the school stood by its decision….no teacher appealed this decision, as they were entitled to do." (Ms Birch, WS8).

77. In autumn 2014 and for the first time the school implemented performance related pay in accordance with an announcement made to staff in July 2013 (369).

78. It was explained to us that the system introduced in autumn 2014 was that individual performance was reviewed in September and October, the review relating to the previous school year, and any pay rise then awarded was payable in the year of the review and backdated to 1 September of that year. To illustrate: in September and October 2018 teachers' performance in the school year 2017/18 will be reviewed. The results of the individual reviews will be the basis of any pay increases awarded in the course of autumn 2018. Any pay increases will be backdated to 1 September 2018.

79. When this system was first applied, in October 2014, (1079) the outcome was that all teachers received a 1% pay rise, but there was no individual pay progression. The application of the procedure in autumn 2015 and autumn 2016 formed part of the dispute before us. Although the October 2014 recommendations stated (1080) that there would be a further review of pay in February (presumably 2015) there was no evidence that that was done, or changed the position.

80. We accept that the school is a demanding environment in which to work, and that those who work there understand the burdens of their profession. We accept that the demands and challenges at the school were, in the period after September 2013, increased by the OFSTED report and by its findings about the teachers; by the subsequent introduction of performance related pay; and by the turnover in school leadership. In that context, the claimant was recognised as stressed, but not identified as disabled.

81. We heard little evidence about the role of equal opportunities in the school, but what we heard was striking. We noted that teaching staff received disability training in their educational role in relation to children; that Ms Calveley as Special Educational Needs Co-ordinator was automatically a member of the school's SLT; and Ms Bootes gave evidence that training is given to colleagues in how to assist and support the teachers (of whom three were known to Ms Bootes including herself) who are known to be disabled: she gave the example of diabetes. Taken together those three matters indicate to us an environment where issues of equality and disability are understood and serious steps are taken to address them.

Claim about MPS pay (Issues 2.1 to 2.4 inclusive)

82. As stated, it was common ground that in early 2012 the claimant obtained a tier 2 visa through the sponsorship of the respondent. The respondent supported the claimant in the application, and in consequence incurred three fees. We understood them to be a one-off fee to be licensed as a sponsor; an annual fee for a certificate issued to the claimant as an individual; and the legal costs of the claimant's advisors, Messrs Kingsley Napley, whose fees, Mrs Field told us, were a multiple of the Home Office fees. Despite the volume of material before us, the respondent had given no disclosure of any document indicating how much the fees were, or when exactly they were paid.

83. The Tier 2 visa was obtained early in 2012, from which we infer that the costs were incurred in the school year 2011/2012. The claimant was then on the equivalent of MPS2. In September 2012, the claimant's pay was increased to the equivalent of MPS3. In March 2014, after he had obtained QTS, the claimant was placed on the main pay scale for the first time as a qualified teacher, on MPS4.

84. The claimant asserted that Mr Foot appointed him in 2014 to a scale salary which, Mr Foot said, "would have to be lower to off-set the costs which the school would have for my sponsorship." The claimant pursued a claim of indirect race discrimination on this basis. In support of this proposition, the claimant referred to the experience of Ms Deverson, a joint British Australian national, who had shorter teaching experience in Australia, and who did not need sponsorship, who had also been placed upon MPS4 on achieving QTS. His point was that as a result of his longer experience in Australia, he should have been appointed in 2014 at a higher MPS point than Ms Deverson. He argued that the fact that he had not was evidence that his MPS scale had been lowered.

85. The tribunal was shown no note or record relating to why the claimant was placed on MPS4, or any note or record made by Mr Foot of what may have been many conversations in which the claimant asked to be placed on MPS5 or 6.

86. Ms Birch had been a Head teacher for many years before her appointment to Minet. Her witness statement contained the following, which we accept to be truthfully and accurately stated, based on her general knowledge and experience: "At the time of the claimant's appointment, overseas teachers from Canada, Australia, New Zealand and USA were categorised as unqualified teachers because they were inexperienced in the English system until they acquired QTS. The normal expectation of a teacher acquiring QTS would be to be paid at MPS1. The claimant was paid at MPS4 to take account of his previous non-UK teaching experience."

87. The claimant abandoned the argument that discounting overseas experience was indirectly discriminatory (RDL 2.5 to 2.8 inclusive). RDL 2.1 asked us to answer the question whether the claimant's pay in March 2014 "took account of costs it incurred in connection with taking on the claimant as a new employee (in his case, costs of arranging sponsorship and obtaining immigration advice)."

88. We ask ourselves has the claimant shown that in March 2014 he had an entitlement to be paid at MPS5 or 6. That question can easily be answered. He did not, as he agreed in his pay appeal (719). Although this is a claim of indirect discrimination, we approach it by next asking if the claimant has proved the fact that if were not an employee on whose behalf sponsorship costs were incurred he would, on balance of probabilities, have been placed on MPS5 or 6 in March 2014, and we answer the question in the negative. We ask whether it has been shown that the claimant's pay was set by taking account of sponsorship costs incurred in employing him, and we find that it has not.

89. We find that the underlying factual allegation is not made out for the following reasons:-

    89.1 We do not accept that the claimant's recollection (WS4-15) of his conversations with Mr Foot was inherently plausible.

    89.2 The claimant's salary was set at MPS4 six months after he, in common with all his teaching colleagues, had been assessed as requiring improvement, and all teachers' pay had been frozen;

    89.3 We have insufficient evidence to find Ms Deverson a true comparator on a like with like basis, and the attempted comparison meets the logical problem that the claimant was treated identically to her, but claims that he should have been treated more favourably. If the claimant seeks to rely on a hypothetical comparator, that argument is refuted by Ms Birch's evidence of the usual practice.

    89.4 The chronology is at odds with the claimant's account. If the school wanted to claw back costs by underpaying him, there would have been no reason to delay for two years before starting to do so, and no reason to give him a pay rise in September 2012.

    89.5 We had no reason to believe that Mr Foot, or the school, would adopt a course which could in practice turn out to be manifestly unjust. The mechanism of underpayment did not limit the respondent to a claw back of the actual sponsorship costs; depending on the length of the claimant's service at MPS4 it could in time potentially claw back a great deal more.

    89.6 We accept the logic of Ms Birch's evidence, and the wider knowledge from which it arose, about unqualified teachers quoted above.

89.7 The claimant knew throughout how important he felt his pay scale to be. On his own account he was confident of discussing his position with Mr Foot. In our view he was capable of articulating grievances. He was working in a sector which recognises the legitimacy of employees voicing their issues and concerns. He made no complaint about potential injustice at the obvious time, namely when he was appointed in March 2014.

89.8 Having seen the claimant give evidence, and read material written by him, we do not accept that his reason for not articulating the issue was, as he said in evidence, that he was or felt unable to articulate grievances because of a sense of job insecurity.

90. We analyse the alleged act of discrimination as a single event, namely that of placing the claimant on MPS4 in or about March 2014. We find that the issue is in any event out of time, and that it has not been shown to us that it forms part of a continuing act, or that it is just and equitable to extend time.

91. We would dismiss issues RDL 2.1 to 2.4 inclusive in their entirety because the factual basis for them has not been made out.

Claims about performance appraisals (RDL 4.1 to 4.23 inclusive)

92. We now turn to and take together RDL 4.1 to 4.23 inclusive, which deal with the system of performance appraisals and pay reviews between October 2014 and December 2016.

93. Between September 2013 and 30 June 2015 (i.e. for almost two complete school years) the claimant's total absence was 19 days. A cursory reading of the claimant's medical notes suggests that the absences were for a variety of medical reasons unrelated to disability.

94. On 1 July 2015, the claimant had the "meltdown" event and was sent home. He did not return to work that term. If the claimant advances any criticism of the decision to send him home, we reject it. The view that he was not fit to work was, in our view, reasonably open to the school leadership in light of Mrs Field's email (1091).

95. We recall that the Occupational Health Report of 7 July recommended a period of absence and adjustment.

96. The claimant returned to school on the first day of term in September 2015. It was Ms Holmes' first day in post as Head. She asked the claimant to return home. On 7 September the claimant was signed off for a month, the sick note stating stress at work, and there followed a succession of subsequent notes.

97. The claimant was at this hearing manifestly angry to have been sent home on 1 September 2015. He claimed that he had not been off sick until 7 September. We accept that Ms Holmes was entitled, and advised, to require adherence to the Occupational Health advice of July before the claimant

returned to his duties. Sending the claimant home was a decision which was reasonably open to her. We do not criticise her decision.

98. The performance review for 2014/15 was conducted in September 2015. Ms Birch's evidence stated broadly (WS11): "The claimant was absent from the school from 1 July 2015 until 15 March 2016 as a result of long term sickness. He was therefore absent when the next round of Performance Reviews were undertaken in the Autumn term 2015." Ms Calveley, with near lifetime experience of the school went further (WS 16): "My experience over the years at Minet has been that if a teacher is absent on the dates of performance management meetings (usually held in October) then if they are just away for a week or so the meeting will be rearranged. However, if a teacher is absent for a long period they will not be given any performance management or pay review at that time." She went on to describe the exception for maternity absentees. That evidence indicates that in certain circumstances the respondent understood that its procedure had to be modified.

99. We accept that the performance review for all other teachers was conducted in the claimant's absence. The procedure which was followed was set out in a lengthy document for teachers' appraisal (649–665 at 659-660) which envisages a bilateral process during which the appraisee submits evidence of achievement, including material of his or her choice. The procedure requires a review meeting attended by both appraiser and appraisee.

100. There was no evidence of the school having considered any form of flexibility in this procedure, or any form of modification to it. We understand the cautions in dealing with an employee whose sick note states that he is absent due to "stress at work;" but there was no evidence of the respondent having considered, formulated, or offered the claimant a bilateral procedure for the review of his 2014/15 performance. We find that he lost the opportunity for performance review, and therefore for pay review, as a result of his absence. His absence was disability-related.

101. When we consider RDL 4.1 to 4.3 inclusive, we find that the respondent applied to the claimant the PCP of its annual performance review, which required that appraisees be present at the school to take part in the review. It failed to provide a review to the claimant for the school year 2014-15 because he was not present to take part. We reject below Mr Clement's submission that this was made good in autumn 2016. We find that the PCP puts teachers with the claimant's disability at a particular disadvantage for the obvious reason of their unavailability to take part. The claimant was put to that disadvantage. The respondent produced no evidence to make good any defence of justification, and these claims therefore succeed. RDL 4.4 to 4.7 succeed for the same reasons. We find that the claimant suffered the unfavourable treatment of not having a performance review (and therefore consideration for a pay increase) because of his long term absence, which was something arising out of his disability. The respondent produced no evidence to make good any defence of justification, and these claims therefore succeed.

102. On 14 March 2016, the claimant attended a meeting with an NUT representative, Ms Calveley as his mentor, and Ms Holmes. It was a preliminary to his return to work the next morning. The note of the meeting (1099) sets out a ten week phased return (Occupational Health having suggested six weeks, but the claimant preferring ten), with the support of Ms Calveley as mentor, and an agency teacher to work full time with the claimant to provide support. We find that the tone of the meeting was set by the opening "A discussion took place about the most effective way to reintegrate Craig into the classroom". We note also that the final sentence reads: "Ms Holmes said that it was important that Craig felt happy with the plan and the ten week schedule proposed by Craig was agreed by all parties present." (1099).

103. The final paragraph of the note is also significant: "Craig talked about an issue with his Visa, where he needed to be earning at least £35,000 to be able to remain in the country. This would mean you would need to move from M4 to M6 on the pay scale. Ms Holmes explained that pay is related to performance and that at the end of the next academic year his performance would be reviewed." (1100). We regard that note as significant because the meeting proceeded on the shared understanding that the claimant had simply missed out on the autumn 2015 review (of a year for most of which he had been present), and that he would next be reviewed the following autumn (at the end of a year, most of which he had missed). Nothing was said about remedying the omission.

104. A series of review meetings took place (1100-1112). The notes record discussions about reintegration of the claimant and about his professional work. They also record the claimant having raised his concern about pay on 14 March, 4 May, 8 June, 5 July, 20 September, and 10 and 21 November. It was clear that the claimant was not reticent in expressing his need for a pay rise, and in making clear to the respondent that it was not just a matter of wanting more money, the request for a pay rise was linked to his long term wish to remain in the UK.

105. It appears that on 15 July 2016 there was an agreement that the claimant would in autumn 2016 receive a bespoke appraisal, based on that term's performance: we base this finding on the first words of Ms Holmes' letter to the claimant of 14 December (1246). While we find that that was a reasonable adjustment, made in good faith, to support the claimant in achieving MPS6, it did not remedy the failure to conduct an appraisal of performance in the school year 2014/15. It also denied the claimant the potential opportunity to be considered, in autumn 2016, as a teacher on MPS5, seeking to advance to MPS6, and left him as a teacher on MPS4, seeking to advance by two grades at once. We do not accept Mr Clement's submission that the bespoke procedure made good the absence of the 2014/15 review, because that year's performance was never assessed for the purposes of pay review.

106. On 12 September 2016 Ms Holmes emailed all staff to remind them that performance review would take place the following month, and of the procedure to be followed (1153). The claimant was present in school and

entitled to a review. Issues 4.8 to 4.15 in RDL are in essence a complaint that there was no pay review in autumn 2016 and RDL 4.16 to 4.23 were that it was a compressed or inadequate performance review. Considered like that and taken together, they illustrate a recurrent difficulty, namely the employer who faces Hobsons choice. Clearly the respondent had to meet the claimant's entitlement to performance review; equally clearly it had a difficulty in reviewing his performance in the circumstances. It could not pretend that the claimant had been at work throughout 2015/16, when evidence of performance in that school year was required.

107. Ms Holmes had a meeting with the claimant on 20 September. Ms Calveley was present as mentor. We note that Ms Holmes stated that she wanted "CM situation to be resolved before she leaves. She also explained that the IEB are happy to waiver (*sic*) the normal one year's progress in data. It is no longer a pass or fail climate." The final note of the meeting reads "a further meeting to discuss what else Craig needs to do in order to qualify for M6 was then set for 31 October"; this was postponed to 10 November.

108. We accept that in the intervening period the claimant worked as normal, his work was observed, and he was given professional feedback. At the next meeting, on 10 November, attended by Ms Gubbin, Ms Calveley and the claimant (not Ms Holmes) there was discussion of what needed to be done by the claimant "to ensure he achieved M6 and was clear about what he still had to do to achieve it." We accept that Ms Gubbin had been tasked by Ms Holmes with explaining to the claimant how he could formulate evidence which would be accepted as evidence that he had achieved MPS6 level and could be paid at that level. As Ms Gubbin briefly put it in evidence, "I was asked to go through the pay scale and support the claimant." That was also the role of Ms Calveley.

109. We accept that in the knowledge that there would be performance review in December 2016, and partly in the knowledge that she wished to support the claimant by avoiding a breach in continuity with an incoming Head Teacher, Ms Holmes made reasonable arrangements to enable the claimant, with support, to produce objective evidence which would warrant a pay increase, which could in principle be to MPS6. She requested and obtained the involvement and support of Ms Calveley and Ms Gubbin. The claimant was advised of the outcome of observation and what still needed to be done (e.g. 1168 and 1169). He was advised to focus on an action plan which was the joint work of Ms Gubbin and Ms Holmes (1194).

110. On 21 November, the claimant met Ms Calveley and Ms Holmes. The first three lines of Ms Holmes' note were significant: "Purpose of this support meeting. SH asked what more could the school do to support CM in reaching M6? CM could not think of anything." (1107). In the course of that meeting Ms Holmes is recorded as having advised "That she is considering offering M5 with recruitment and retention allowance which will take him above the £35,000 he requires." The claimant replied that that would not meet the visa requirement, which was for £35,000 basic pay, with no add ons. The next day, Ms Field, on Ms Holmes' instructions, checked with the Home Office, and was told that that was right (1219 – 1220).

111. That seems to us significant evidence for this reason. Ms Holmes on 21 November gave the claimant a clear signal that on the material before her she could justify MPS5, not MPS6. Ms Holmes knew that that would need to be supplemented to get the claimant to £35,000. The claimant knew that that would not work. Ms Holmes obviously took her own suggestion seriously, because she had the position verified straightaway. It is a striking indication of the extent to which Ms Holmes sought to balance subjective support for the claimant (getting him to the best level) with objective standards (her professional view of how far he should be promoted).

112. In the event, Ms Holmes reported on the claimant's pay to an IEB meeting in December 2016. On 14 December, the claimant was told (1246) that there was insufficient evidence to justify promotion to MPS6. Ms Holmes' letter opens: "As agreed on 15 July your salary has been reviewed outside of the usual appraisal period which runs for 12 months from 1 September to 31 August. Evidence has been considered from the autumn term monitoring of teaching and learning and in relation to the short-term performance objectives that were specified on your support plan for the autumn term 2016."

113. The claimant's pay therefore remained just over £31,000, which as both parties knew was well below the Home Office level. The claimant later exercised his right to appeal, and in doing so made an allegation of discrimination, which at this hearing was acknowledged to be a protected disclosure. There were no issues about the appeal before this tribunal.

114. When we consider this sequence and RDL, we find as follows:-

114.1 We repeat that there was no consideration of conducting the missed 2014/15 review in autumn 2016;

114.2 The respondent modified its procedures, with consent, so that a performance appraisal could take place in autumn 2016, which had a prospect of giving the claimant a pay increase.

114.3 In doing so, the respondent modified its procedures with a flexible and open minded approach which was lacking in autumn 2015.

114.4 In doing so, it of necessity exposed itself to Hobsons choice criticism: whichever choice it made (unless it led to an increase to MPS6) it was open to criticism.

114.5 It did so, with consent of the claimant and his union, in good faith and with a genuine intent to support the claimant to reach MPS6.

114.6 In modifying its procedures, the respondent did not relax the objective professional standards which were expected of the claimant.

115. Issues 4.8 to 4.15 fail because we do not accept that the factual matrix pleaded at 4.8 is made out. We find that there was a modified form of performance review, amended by consent in good faith and with intent to support, and showing open mindedness and flexibility.

116. When we consider issues 4.16 to 4.23 we accept that the appraisal conducted in autumn 2016 was done in modified and flexible form in a reduced period of time. The pleading refers to "a compressed period." If the point is that the appraisal related to a short working period rather than a long one, that stands to reason. If it is suggested that the respondent sought to elicit from the claimant a year's performance in a much shorter period of time, that suggestion fails on the facts.

117. To the extent however that RDL 4.16(b) includes, in the last three words, a claim that there was a failure in autumn 2016 to conduct a performance review for 2014/15, that claim succeeds under both sections 15 and 19, for reasons set out above in relation to the same failure in autumn 2015.

118. Accepting that the procedure adopted by Ms Holmes in autumn 2016 constitutes a PCP, we are not convinced that it has been shown to have an adverse impact on teachers with disability. It seems to us in any event that subject to our above findings, the test of justification at RDL 4.11, 4.14 and 4.22 is met. The legitimate aims were those of balancing the need to maintain the school's standards and financial controls with the need to support a returning disabled employee who had a legitimate expectation of a fair opportunity to have his performance reviewed and his pay increased. We do not for the purposes of 4.20 consider that this was unfavourable treatment; if anything it was a form of reasonable adjustment.

Claims about 18 factual matters: RDL 5.1.1 to 5.1.18

119. At RDL 5 the claimant set out 18 factual complaints. All of the events occurred in the period between 4 May 2016 and 23 May 2017. All were pleaded under sections 13 and 15 of the Equality Act. At RDL 5.3 the "something arising" was defined as the claimant's "previous long term sickness absence and phased return or alternatively disability impaired performance (if to any extent, the tribunal finds that the claimant's performance was impaired)."

120. RDL 5.1.11 to 5.1.14 were also pleaded as victimisation claims (issue 5.1.14 was amended in closing by Ms Robertson) and while RLD 5.1.15 to 5.1.18 had initially been pleaded as victimisation claims, such claims were withdrawn when the claimant could not prove that Ms Bootes had knowledge of the protected act relied on.

121. There were two problems about this part of the case. One was that the unfocused pleading put the tribunal potentially in the position of reaching fifty or so adjudications, a figure which reflects something of the lack of self-discipline in the approach this case. The other arose from the words in brackets quoted above: the tribunal was in no position to assess the claimant's performance, and the claimant's passionate denials of

professional criticism left us uncertain as to whether he really asked us to find as fact that his performance had been impaired.

122. We have not found it useful to approach this part by a detailed chronology of all the events at the time. We approach each pleaded issue separately, finding the facts, and where necessary analysing our finding through the different legal heads of claim. In doing so, we pay tribute to Mr Clement's closing submission, which in its analyses of this part of the claim was a model of conciseness and clarity.

RDL 5.1.1

123. We set the scene by reminding ourselves that at the claimant's return to work meeting on 14 March 2016 Ms Holmes, with the active support of the claimant, the NUT representative and Ms Calveley expressed support for the claimant's reintegration; provided the support of a full time agency teacher for the remainder of the school year, and set out a phased programme, immediately accepting the claimant's request that the period be extended from the six weeks recommended by Occupational Health to the ten weeks requested by the claimant (1099).

124. We find that a meeting took place on 4 May 2016 attended by the claimant, Ms Holmes and Ms Calveley. We accept the broad accuracy of Ms Holmes' note at 1100. The relevant section should be read in full: "CM asked for a pay rise to M6… SH explained that pay is relating to performance [and] suggested that he focuses on his class and teaching rather than the issue with his visa. CM expressed concern that he would deteriorate going forward because of the "visa situation", he said he felt "the school had made money out of him." SH reminded CM that the school have had to pay additional teaching staff for nearly a year while he has been absent. While this isn't a problem, as we want to do the best for CM it does mean that the school cannot have made money out him."

125. We interpret the claimant's reference to the school making money out of him as referring to the allegation that it clawed back more by his alleged under grading than was spent on sponsorship.

126. We find that Ms Holmes made the remark set out at RDL 5.1.1, or said words to their effect. Her remark must be read and interpreted in context, from which one sees that it is in reply to a loose phrase used by the claimant, and is followed by the words "this isn't a problem." It is also in the context of Ms Holmes earlier in the meeting having confirmed retention of the agency teacher for the rest of the school year. We accept that the remark was made because of something arising out of the claimant's disability, namely his absence and the respondent's need to provide cover during his absence and phased recovery.

127. We do not accept that the remark constitutes a detriment for the purposes of a claim under section 13 or unfavourable treatment for the purposes of the claim under section 15. It was a professional minuted dialogue between

colleagues in which Ms Holmes on our reading, taken as a whole in context, gave a well said reply to an emotive assertion by the claimant.

RDL 5.1.2

128. On 23 June 2016 Ms Holmes wrote to Mr Durham of the NUT. In a letter of a page and a half she stated "We are also clear, by referring to Performance Management records, that there were issues with Craig's performance during the year 2014/2015." We agree that that was an accurate statement of fact. Concerns were recorded by Mr Lafafian in an observation on 14 October 2014 (1075), and in an action plan of 15 September 2014 (1800).

129. The claim fails because the factual basis, namely that the allegations were incorrect, is not made out. Ms Holmes made an accurate statement of fact about the material before her. In so saying we attach no weight at this stage to the claimant's assertion that both sets of comment and observation were unfair or inaccurate, or that Mr Lafafian was on 14 October 2014 not carrying out an observation. We make no finding on the unquoted remainder of the above sentence in Ms Holmes' letter, which may be a matter for the remedy hearing.

RDL 5.1.3

130. The factual basis of this complaint is found at paragraph 48 of Ms Deverson's statement. She records that there was a staff meeting at which the claimant expressed views, and then "after the meeting another member of staff….came up to me to ask if Craig was alright as she had seen the way Ms Holmes reacted when Craig expressed his opinion. The member of staff explained to me that Ms Holmes had rolled her eyes, looked down towards the floor and shook her head. I had not seen this myself because I was sitting facing the other way, with my back to Ms Holmes." (WS48). The claimant's evidence was that "I saw Ms Holmes look down towards the floor, and shake her head." (WS99). The claimant's evidence was that when told by Ms Deverson that she had been told by somebody else that the other person had seen Ms Holmes roll her eyes, the claimant felt belittled.

131. At the time, and in oral evidence but not in pleading, the claimant explained that "he was advised by his therapists that it was really important to speak out" (1106) and that therefore his need to express his opinion was something arising from disability. We have disregarded that point: it was not a pleaded issue, there was no professional independent evidence to support the view that a need to speak out was something arising from disability, and the tribunal did not accept the claimant's general assertion that he was unable to speak for himself at work.

132. We find the evidence on what Ms Holmes did unsatisfactory. We are not on this evidence prepared to find that Ms Holmes rolled her eyes or that if so it was because of the claimant's disability or a reason related to it. Accepting the claimant's evidence that Ms Holmes looked at the floor and shook her head, we find that Ms Holmes showed concern about something in the

claimant's contribution to the meeting. It may have been the content or the manner, or both. We note in context that Ms Gubbin, in a meeting with the claimant and Ms Calveley shortly afterwards, "explained that CM needs to choose when he expresses negativity as he has come across in some meetings as negative…she still wants him to speak out but try to contribute more positively in meetings and share things that have gone well and not just negatives." (1106).

133. This claim fails because it has not been made out that Ms Holmes either looked at the floor and/or shook her head and/or rolled her eyes because of the claimant's disability of something arising from it.

RDL 5.1.4

134. We accept on balance of probabilities that in many discussions about the claimant's wish for a pay rise from MPS4 to MPS6, Ms Holmes referred to the need to sustain the performance required at that level. There is an oblique reference in the notes of their meeting of 21 November 2016: "CM said he was worried about the use of maintaining in all SH comments." (1107). In oral evidence, the claimant made a curious point. The judge's note reads: "I have never heard of anyone basing salary on the future. She was saying I could not cope. She had evidence I could achieve M6. It was the way she said it. It was very derogatory. All of a sudden I had this extra criteria. I can't achieve the future."

135. We find that Ms Holmes made a remark to the effect quoted. We see nothing wrong with the remark or the principle underpinning it. The non-legal members in particular have experience that any enhancement in pay or status often involves dialogue about the individual's ability to attain and sustain the performance levels appropriate to the proposed new grade or salary.

136. We do not agree that the claimant has made out that the words were made on grounds of disability or of his absence. We find that they were a legitimate part of a prolonged discussion about a two grade promotion with a colleague whose performance was under some scrutiny.

RDL 5.1.5

137. At WS102 the claimant quoted the remark pleaded and wrote: "She then reclined back in her chair with her hands behind her head, pretending that she was going to put her feet up on the desk."

138. Mr Clement made the point that although at the meeting on 21 November (1107) the claimant was noted to have taken objection to the "maintained" remark, he was not noted to have raised this allegation. We agree that that point is well made, in particular because we regard this allegation as the apparently more serious of the two.

139. Although we have not heard from Ms Holmes, we reject the allegation for two reasons. While we accept Mr Clement's point about 1107 as well made, we attach more weight to the fact that Ms Holmes' words and body language as alleged would have been at odds with a consistent record showing that over some 16 months in post as Head teacher she endeavoured to manage the claimant professionally, express herself to him and others in professional language, and support his progress to MPS6, so far as she could. The allegation is not made out.

RDL 5.1.6

140. The claimant here takes issue with Ms Holmes' assessment and feedback of the claimant's work on 13 September 2016 and 6 December 2016 (769 and 1228, WS130 and 131). We agree that both documents indicate room for development on the part of the claimant. The allegation is that her assessment was tainted by the protected matters.

141. We are unable to make any such finding. Both documents read as objective professional assessments. Both record positive as well as less positive aspects. They are balanced. We do not accept that Ms Holmes was under a duty to engage in dialogue about the matter. Her duty, as the senior teacher in the school, was to record honestly her objective professional opinion. We saw no evidence of her having done otherwise.

RDL 5.1.7

142. As indicated above, the mechanism by which the claimant could achieve a pay rise before Ms Holmes' departure at Christmas 2016, was if she reported to the IEB that he merited a pay rise and the IEB accepted her guidance. Her report of 7 November 2016 about the claimant stated in full the following: "He was asking to be paid at M6 otherwise he will have to leave the country. We do not have the evidence to say where he is working at the moment as he had been off sick for a year. He is paid at M4 but would like to go on to M6. There is a possibility of paying at M5 and being given a recruitment and retention point but the evidence is not there. The Union has been involved. He was reintegrated in the summer term but is not demonstrating the attributes required for M6. No decision was made today and this will be reviewed again in January when hopefully more evidence can be produced." (768).

143. This allegation fails because the factual basis is not made out. As the task of the IEB in autumn 2016 was to assess performance in the school year 2015-16; and as in that school year the claimant had worked at full capacity for only four to five weeks, the comment about absence of evidence was well made. Existence of evidence from 2014-15 was another matter. What the quotation indicates is that Ms Holmes sought to be open minded and flexible, and reserved the position to enable the claimant to produce the evidence by performance, so that the matter could be dealt with in January 2017, not the following autumn. We do not accept that her remarks were incorrect nor do we accept that they were less favourable treatment or

unfavourable treatment. They were on the contrary an appeal to open minded flexibility and evidence-based analysis.

RDL 5.1.8 and 5.1.9

144. These issues relate to the evidence presented by Ms Holmes to the IEB on 12 December 2016. To the extent that they repeat allegation 5.1.7 we repeat the above findings.

145. We accept that in addressing the IEB, Ms Holmes must also have relied on the observation of 6 December 2016 (1228) which, as stated, we find to be balanced.

146. The claimant was told of the decision of the IEB on 14 December 2016 (1243) and the outcome was confirmed in writing the same day (1246 above). On both occasions Ms Holmes expressed herself professionally with reference to objective evidence based standards. In doing so, she expressed herself consistently with what had been stated to the claimant in meetings in the course of the term, and recorded in professional observations. She was required to give an honest professional objective assessment. Her duty was not to agree with the claimant, or to say what he wanted to hear. The claims fail because the factual basis has not been made out.

RDL 5.1.10

147. This is an undocumented remark alleged against Ms Holmes on which we have no contrary evidence. It has not been made out. We repeat the reasons given above in relation to RDL 5.1.5. If said with sarcasm or intention to hurt, it was utterly out of kilter with everything which we have seen and read of Ms Holmes' management of the claimant. If said as an attempt at levity or good humour, it may have been a poor choice of words, and the claimant may well have had a justified sense of grievance. In either event the claim fails because we do not accept that such a remark if made was made because of disability or something arising from it.

148. Ms Birch became Head Teacher in January 2017. She was an external appointment with substantial experience as a Head Teacher outside Minet. In the course of December 2016, she came to the school a number of times to meet Ms Holmes, discuss handover, and make herself ready to take up her new appointment.

149. On 7 January 2017, the claimant appealed against the IEB's pay assessment. He did not do himself justice by writing a 50 page letter, to which he subsequently added nearly 150 pages of appendix. It was agreed that in the course of the letter he made allegations of disability discrimination and accordingly that there was a protected act for the purposes of section 27 of the Equality Act. Ms Birch confirmed that she had read the letter after its receipt, and was aware of the discrimination allegations. Ms Robertson was unable to challenge the denials of other

witnesses that they were unaware of the contents of the appeal letter, and therefore unaware of the protected act.

RDL 5.1.11 to 5.1.14

150. These issues dealt with a number of related events in the last few days of the spring term of 2017. The last working day before the Easter closure was 31 March.

151. Putting the matter shortly, each pupil had at least three books (e.g. for maths or literacy) which the pupil worked on throughout the school year. Books represented a mechanism for assessment of progress towards meeting national standards. The books were available to the school's leadership for scrutiny or moderation. Ms Birch explained the difference: in scrutiny, she would look at the level of achievement of the children; in moderation she would look at how teachers assessed the children. We accept that marking the books was a burden on all teachers, and that making time for marking was a challenge to all teachers. Ms Birch gave telling evidence, which we accept, that in general, she would expect a teacher to be no more than two weeks behind with marking.

152. On 20 March 2017 Ms Birch asked that books be brought to her for scrutiny/moderation. There was an immediate misunderstanding. Ms Birch's evidence was that in all other schools where she had worked, including where she had been Head, this process meant all books of all children would be looked at. That would mean consideration of over 1,000 items. The practice in Minet until then had been that only three books per class were looked at, which would be about 50 items. The Minet practice was that the teacher made the selection of three. When Ms Birch asked for books, she assumed that everyone would understand that she was asking for everything; her Minet colleagues thought that she was asking just for the selection.

153. Teachers were asked to produce their books on 20 March 2017. Shortly before 6pm that day the claimant emailed Mr Lafafian and Ms Gubbin to say that he would be out at a medical appointment for all of the following day but that "all of my books are at home." Believing that only three had been asked for he wrote that he could ask Ms Deverson (his house mate, as well as a colleague) to bring in "a few" the next day.

154. The following morning Mr Lafafian replied "Sonia has asked me to request all books be brought into school today for moderation." Mr Lafafian had been informed that the claimant was to be absent for all of 21 March for a medical appointment. The school sent the claimant a text at about the same time saying, "Sonia would like you to bring all pupils' books back to school. She suggests that you get a taxi and the school will refund you." (1356). The claimant did not return to work on 21 March, and none of his books were brought to school that day.

155. The claimant returned to work on 22 March. He did not bring any books with him. At the SLT meeting first thing that morning, Ms Birch realised for the first time that the school's practice had been to scrutinise/moderate a few books, and therefore sent clarification that all books were required, and made arrangements for all books to be collected in. This applied equally to all teachers. (It would have been good practice for the SLT to tell all teachers that there had been a misunderstanding and that Ms Birch had introduced with immediate effect a new procedure of looking at all books; if that happened, we were not given evidence of it). If the claimant sought to advance the allegation that Ms Birch and / or the SLT changed their decision or practice, and required all teachers to produce all books so as to create a form of dishonest cover for a practice targeted at him as an individual, we regard that suggestion as far-fetched, and unsupported by evidence, and we reject it.

156. When the claimant was told that all books were required, he made the mistaken assumption that this requirement applied only to him, and was in some way targeted at him. He asked why and went to see Ms Birch, who in evidence described his manner as rude, repeatedly asking the questions "why" and "what's all this about."

157. When it became evident that the claimant had no books at school, he was instructed to take a taxi to his home at the school's arrangement and expense to collect them. We do not accept the claimant's allegation that Ms Birch yelled instructions at Mrs Field to the effect that the claimant was to return home in a taxi. We note that when the claimant's books were scrutinised/moderated after 22 March it was found that his marking was in arrears to the previous October, something which he, but not the SLT or Ms Birch, must have known on 22 March, and which (although the point was not put to him in terms) may have underlain his reaction to a request for all books.

158. While we accept that there may have been a communication issue in this episode, we can see no basis at all for it having arisen on grounds of disability or disability related absence. We find that broadly the pleaded setting is factually accurate. We have to consider whether the claimant has proved facts which require an explanation. We find that the claimant has not shown any such matter for the purposes of a section 13 claim. We find that all teachers were required to produce all books. There was no other member of staff all of whose books were off site, and therefore no comparison can be made. We do not accept that the claimant was sent to collect books because of his absence or poor performance; he was sent to collect books because the books were off site, and were required on site for professional work to be done by members of the SLT.

159. We do not accept (in the absence of evidence) that the books were kept at the claimant's home because of his disability or anything arising from it. It was not the claimant's case to the tribunal that his performance had as a result of disability deteriorated to the extent that he was many months behind with marking, and that that was why the books were at his home,

and we make no such finding. We do not accept that objectively the claimant suffered detriment or unfavourable treatment, no matter how he felt about it. In so saying we attach weight to the undeniable reality that what Ms Birch was embarking upon was in the best educational interest of the pupils. We reject the victimisation claims: there was no evidence to suggest that this episode had anything to do with the claimant's pay appeal.

RDL 5.1.12

160. This issue repeats previous points. The duty of the members of the SLT assessing the claimant's work was to give an objective professional assessment of what they saw before them, and to do so consistently. We find that they did so, without regard to any protected matter or characteristic. We accept that Mr Lafafian and Ms Gubbin had no knowledge of the contents of the claimant's pay appeal and therefore of the protected act. There was no basis on which either might have victimised the claimant.

RDL 5.1.13

161. Issue 5.1.13 is slightly curious. It is a complaint that Ms Birch refused dialogue with the claimant on the grounds that it might be quoted back. It was quoted accurately to this tribunal because it was one of the conversations that was secretly recorded. We accept the accuracy of page 1370, but stress the importance of reading the page in its entirety. It was a dialogue in which Ms Birch told the claimant a number of things which he did not want to hear. She spoke to him frankly, respected senior professional to colleague. Our paraphrase is that the claimant asked Ms Birch to identify priorities and she declined to do so, because he had to remedy a number of failings and shortcomings which she described as the basics of teacher standards. In that context she said that everything was a priority, and that she declined to identify one priority ahead of others, for fear of a dialogue in future in which, if challenged about other demands, the claimant might assert that he was following the priorities set for him by the Head Teacher.

162. As pleaded the allegation is incomplete, because it is a selective quotation from a wider context. We find that Ms Birch's remarks, taken as a whole in context, were well made, and represented her honest professional judgment. We can see no basis for relating them to any protected characteristic or protected act.

RDL 5.1.14

163. As we understand it, the books which had been returned on 22 March normally contained "tick sheets" in which teachers were to record marks.

164. During the course of moderation between 23 and 29 March members of SLT noticed that the tick sheets were absent from the claimant's books. We accept that members of SLT thought that they were in the claimant's classroom.

165. At 12.50 on 31 March Mr Lafafian on behalf of Ms Gubbin and himself emailed the claimant to ask for "any extra evidence of the progress the children had made that he would like us to take into consideration for our moderation." He set a deadline of 3.05pm, as school was to close for Easter at 1.30pm (1376).

166. The claimant replied at 3.14pm, and stated "I can give you my progress tick sheet assessments but those are at home for safe keeping and for regular updating in the evenings. I am therefore physically not able to provide them until next term. They are all completed and up to date. Please can I bring these on the first day of term? That will also let me think if there is anything else I should provide. Have other staff been asked to provide this kind of information over the last week? It would be unfair if I lost out on the chance to discuss the moderation properly just because I was on sick leave – surely that would be discrimination against me on grounds of disability." (1376).

167. Mr Lafafian on behalf of Ms Gubbin and himself replied 14 minutes later: "SLT were led to believe you had tick sheets available. This tick sheet is usually handed in at the back of everybody's books and was not available in your case. We are giving you the opportunity to provide this information so we can take it into consideration when making our final judgments today. We were not aware this information was not available at school. As you were away for the scrutiny and all the books were at home, SLT had no choice but to scrutinise the books that were available to us."

168. Mr Lafafian's evidence was that he did no work during the Easter holiday, so as to return refreshed at the start of the summer term. Ms Gubbin's evidence was that she did work at home on scrutiny and moderation during the Easter holidays, because it was comfortable to do so, and there were no interruptions. When asked whether the information could have been provided on the morning when school re-opened after Easter, she stated that the data needed to be captured at the end of term, and prepared for the meeting of IEB which would take place in the week of the school re-opening.

169. The allegation as formulated factually is partially correct. It is correct to say that Ms Birch allowed the claimant two hours, if one disregards the fact that the moderation process had begun on 22 March. We accept and find that the respondent imposed a deadline on 31 March, in terms which indicated that it was a final guillotine. We see no evidence that this related to any protected characteristic or protected act and the claim fails under sections 13 and 15.

RDL 5.1.15 to 5.1.18

170. The final section of this part of the case related to four interactions between the claimant and Ms Bootes. Ms Bootes was the claimant's Head of Year. She was not a formal line manager, but she managed the Year 5 teachers of whom the claimant was one. Although these were originally pleaded as

allegations of victimisation, those allegations were withdrawn. We deal with them briefly, adopting in full Mr Clement's submissions.

171. On 2 May 2017 Ms Bootes wanted to have a meeting with the claimant to discuss routine professional issues. She did not engage in any formality about advance notification or a formal agenda. There was no entitlement to representation. There was no circumstance protected by the Equality Act which rendered the claimant entitled to representation in relation to a routine everyday operational conversation. We can see nothing in this everyday event which relates to any protected characteristic.

172. On 12 May Ms Bootes wrote a document about the claimant which was painful reading for him, because it summarised her concerns about his professional work. It showed a history of concerns and of deadlines not met, and, given that it was intended as a summary of concerns, it did not balance them with positives.

173. In relation to the allegation that it was inaccurate, we repeat what we have stated above about our inability to second guess professional assessment. However, the sting of the issue was that Ms Bootes left a copy on the office copier for others to see. It was alleged that this was done deliberately. Ms Bootes denied having done so and denied any need to photocopy the document, which she prepared off site electronically. We accept her evidence, and find that the allegation has not been made out on its factual basis.

RDL 5.1.17

174. The factual basis is correctly stated. On the day in question Ms Bootes required to collect books for scrutiny. She told us that the claimant was in the next classroom to her and that about 20 minutes before the end of the school day, when he had still not as requested delivered books to her, she went to collect them. Another Year 5 teacher had also not delivered books by that stage; Ms Bootes did not go and collect her books because that member of staff worked in a different building, and it was inconvenient to do so. As Mr Clement said, this was simply "a normal everyday act by a senior member of staff in the school." We agree and can see no evidence which related this everyday event to a protected characteristic or matter.

RDL 5.1.18

175. As it emerged in evidence the allegation was that the teaching assistant working the claimant went away to copy a lesson plan which the claimant had prepared; while at the copier the teaching assistant met Ms Bootes, who expressed an interest and asked for a copy of the document. While there may be professional issues which we have not understood in depth, we accept Ms Bootes' evidence that lesson planning was the task of all Year 5 teachers collectively not individually, and that as Head of Year she was entitled to see the lesson plan which the claimant had prepared, and

from which he was working. We can see nothing that links this allegation to any protected characteristic.

RDL 6

176. The claimant made claims of reasonable adjustment. It was common ground that the respondent's knowledge of disability dated from 1 July 2015. It seems to us a matter of practical common sense that the duty to make reasonable adjustments arose in preparation for the claimant's return to work and upon his return on 15 March 2016. We take the allegations out of the order given in RDL for ease of reference.

RDL 6.1.2

177. We accept that the school's management practice was not to send out advance notifications warning of what it was going to do next, but to do the next thing. A moment's reflection will indicate that this is organisational common sense, and the sting of the complaint appears to be that any letter requiring response or action should be preceded by a letter stating that a letter was going to come. The adjustment of giving advance notice does not seem to us reasonable because it would require duplication of management actions. It also meets the plain logical objection that if the intention is to reduce stress, that is not done by sending everyone a letter warning that a letter of greater substance is to follow. It seems to us that that would have increased many people's workload and stresses and could not be a reasonable adjustment.

178. We accept that there was evidence before the tribunal that after his return in March 2016 the claimant informed the respondent that mornings were not a good time for him, and that events which might be difficult for him, such as meetings, should preferably not take place first thing in the morning. The evidence was that as soon as that was made known to management, it was acted upon. We are unable to make more specific findings. We add that we were not told of any occasion on which the claimant complained of actual disadvantage because of timing.

179. We accept that timing meetings around a teacher's working day (ie so as to avoid classroom time) constitutes a PCP. We do not accept that it places disabled people or the claimant at a disadvantage. We do accept that a reasonable adjustment was provided when it was requested. Issue 6.1.2 fails: the factual basis has not been made out.

RDL 6.1.3

180. We accept that on 31 March the claimant was subjected to a PCP which was to provide his tick sheets by 3.05pm without flexibility. We accept that the imposition of a short deadline in the workplace may put any person with disability, whose speed of response is in any way hindered, at a disadvantage, and the claimant was put at that disadvantage. In so saying

we make no finding as to whether the claimant had left his tick sheets at home because of his disability.

181. Was the PCP a proportionate means of achieving a legitimate aim? It seemed from Mr Lafafian's evidence that it was not, because he was not going to do anything with the tick sheets once they were received that afternoon. Ms Gubbin's evidence was that there was a legitimate aim, namely completing information, but we do not find that the data from the claimant had to be available that day. In so finding, we have particular regard to the requirement that the discriminatory impact of a PCP should be as narrow as possible as a matter of proportionality.

182. The reasonable adjustment was plain to see because it was requested by the claimant: receipt of the tick sheets at the start of the next working day after 31 March. We find that the failure to consider and balance the possibility of flexibility leads us to uphold the claim set out at 6.1.3 of a failure to make reasonable adjustment.

RDL 6.1.1

183. This was a complaint, framed in diffuse and general language, of failure to make reasonable adjustment to the claimant's working arrangements after his return from prolonged sick leave. One method of reducing workload and stress often requested in such cases – part time work or job share – was not an issue.

184. We accept that the work done by the claimant and colleagues was demanding. We accept that working with young children is emotionally demanding, and that wider societal or political issues may add to the demands. In this particular case the OFSTED inspection and its outcome added to staff stresses.

185. We note also that the school had an effective Trade Union presence, that a number of witnesses had long service at the school, and that other than in the role of Head Teacher, there was no evidence of untoward turnover of staff; we note that teachers work in part within the national framework over which they have no control; and that perhaps in recompense for the early closure of schools in the afternoon, the school maintained its premises open late one evening per week to enable to staff to catch up on non-contact activities.

186. We had no evidence, and little capacity, to assess whether there was an excessive workload for a teacher as pleaded, and we make no finding to that effect. We do find that in Ms Birch, the school had a Head Teacher who we are confident is well aware of the demands made upon staff, and is alive to the need to balance those demands with the educational mission of the school.

187. The claimant asserted that giving him cover duties rather than classroom teaching would have been a reasonable adjustment. Ms Birch explained

that her experience is that cover teaching is much more stressful, because the teacher comes to work each day not knowing what he is to do, which class he is to teach, at which level and in which subject, not knowing the children whom he is to teach and not knowing if lessons have been planned. It is therefore a role with inbuilt uncertainty and insecurity, and as Ms Birch commented as an aside, her opinion was that "Craig needs consistency." That seemed to us a reasonable assessment of the claimant, and logical evidence and in accordance with our general understanding of behaviour in the workplace. The claim fails because we find that redeployment of the claimant to cover duties would not have been a reasonable adjustment.

188. The remainder of this part of the claim related to reducing the claimant's responsibilities or providing support.

189. We find that on the claimant's return in March 2016 he worked with another teacher for the remainder of the school year. Ms Calveley who was a respected senior colleague, had a mentor role, later replaced by Ms Harrison. These were reasonable adjustments and we find that they were provided. (1099, 1412).

190. At paragraph 62 of his closing submissions, Mr Clement listed 12 bullet points which he stated were evidence of support given by the respondent to the claimant. In each case, he cross-referenced where available to the minute of the relevant meeting. We adopt much of what is said there. We accept that the claimant's return was supported not only by the additional full time teacher, Ms Calveley and Ms Harrison; by a number of the other matters referred to including support meetings, the presence of a teaching assistant, and time for marking (1333).

191. Ms Robertson put to Ms Birch that there was nothing recorded about emotional support for the claimant, and Ms Birch gave a telling answer: it is not recorded because it is taken for granted, without the need to say it. Her expectation is that all staff provide emotional support to each other when required. We accept that that phrase captures Ms Birch's understanding of her role. If there is a claim before the tribunal that the respondent failed to make the reasonable adjustment of affording the claimant emotional support, we reject it. It was not supported by evidence or adequately argued, and failed to address the balancing exercise which would inevitably have to follow, of balancing support for the claimant with professional obligations to children, parents, other teachers, and national standards.

192. It has not been shown objectively that the workload was excessive. We accept that the everyday demands and challenges of working at the respondent became difficult for the claimant, particularly when the entanglement of immigration status, pay grade, performance review, and historic senses of injustice (whether or not well-founded) came to occupy a disproportionate part of his thoughts and emotions. We do not accept that it has been shown that the proposed adjustments were reasonable adjustments, or that the workload placed people with disability at a disadvantage. Fundamentally however this part of the claim fails because

we accept that what was done by the respondent in the period in question was reasonable.

APPENDIX

Case No: 3325280/2017

IN THE WATFORD EMPLOYMENT TRIBUNAL
BETWEEN:

MR CRAIG MCDOUGAL	**Claimant**
and	
MINET JUNIOR SCHOOL	**Respondent**

CLAIMANT'S REVISED DRAFT LIST OF ISSUES

PRELIMINARY ISSUES

1. Time limits (s.123 Equality Act 2010)

1.1 For each act of discrimination and victimisation:

1.1.1 Did the Claimant present his claim out of time taking into account any extension to the limitation period by participation in ACAS early conciliation?

1.1.2 Was there conduct by the Respondent extending over a period of time, such that alleged acts occurring more than three months before the claim was brought (taking into account any extension to the limitation period) may still form the basis for the claim?

1.1.3 Is it just and equitable for the Employment Tribunal to extend time for submission of the claim under section 123(1)(b) of the Equality Act 2010?

1.2 For each alleged failure to make a reasonable adjustment:

1.2.1 What is the reasonable period of time within which each alleged reasonable adjustment should have been made?

1.2.2 Subject to any effects of ACAS early conciliation, was each complaint of a failure to make a reasonable adjustment brought within three months:

1.2.2.1 of a decision by the Respondent not to make the alleged reasonable adjustment; or

1.2.2.2 of an act by the Respondent inconsistent with the making of the alleged reasonable adjustment; or

1.2.2.3 where no decision or inconsistent act was made by the Respondent, of the end of the reasonable period of time within which the alleged reasonable adjustment should have been made?

1.2.3 If not, is it just and equitable to extend time?

RACE DISCRIMINATION

2. Indirect race discrimination (s.19)

(a) Costs of sponsorship and immigration advice

2.1 When deciding on what pay scale to place the Claimant in March 2014 (and in continuing to pay him at that rate ever since), did the Respondent take account of costs it had incurred in connection with taking on the Claimant as a new employee (in his case, costs of arranging sponsorship and obtaining immigration advice)?

2.2 If so, does taking account of costs incurred in connection with taking on a new employee, when deciding on what pay scale to place that employee (and in continuing to pay them at that rate subsequently), amount to a provision, criterion or practice (PCP)?

2.3 If so, does the PCP put teachers who (like the Claimant) are non-EEA nationals at a particular disadvantage when compared to UK or EEA nationals?

2.4 If so, has the Respondent shown that the PCP is a proportionate means of achieving a legitimate aim?

(b) Experience outside the UK

2.5 When deciding on what pay scale to place the Claimant in March 2014 (and in continuing to pay him at that rate ever since), did the Respondent attach less weight to teaching experience gained outside the UK than in the UK?

2.6 If so, does attaching less weight to teaching experience outside the UK, when deciding on what pay scale to place a new employee (and in continuing to pay them at that rate subsequently), amount to a PCP?

2.7 If so, does the PCP put teachers who (like the Claimant) are non-UK nationals at a particular disadvantage when compared UK nationals?

2.8 If so, has the Respondent shown that the PCP is a proportionate means of achieving a legitimate aim?

DISABLITY DISCRIMINATION

3. Disability (s.6 and Schedule 1)

3.1 Is the Claimant's depression and anxiety a mental impairment?

3.2 If so, does it have a substantial adverse effect on his ability to carry out normal day-to-day activities?

3.3 If so, is the effect long-term?

4. Indirect discrimination (s.19) / discrimination arising from disability (s.15)

(a) Lack of annual performance appraisal / pay review for 2014/15

4.1 The Respondent failed to provide the Claimant with an annual performance appraisal or pay review in respect of the academic year 2014/2015 due to sickness absence in

September/October 2015. Does not providing employees with an annual performance appraisal or pay review when they are off work due to sickness absence amount to a PCP?

4.2 If so, does the PCP put teachers with a disability (or a disability of the type and nature of the Claimant's) at a particular disadvantage compared to teachers without a disability?

4.3 If so, has the Respondent shown that the PCP is a proportionate means of achieving a legitimate aim?

4.4 Did failing to provide an annual performance appraisal or pay review for 2014/15 amount to unfavourable treatment?

4.5 If so, was the Claimant subjected to this treatment because of something arising in consequence of his disability, namely his sickness absence in September/October 2015?

4.6 If so, has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

4.7 If not, has the Respondent shown that they did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

(b) Lack of annual performance appraisal / pay review for 2015/16

4.8 Did the Respondent fail to provide the Claimant with an annual performance appraisal or pay review in September/October 2016, in respect of the academic year 2015/2016, because of his long-term sickness absence (and phased return) during that year?

4.9 If so, does not providing employees with an annual performance appraisal or pay review when they have been on long-term sickness absence and/or on a phased return for part of the year amount to a PCP?

4.10 If so, does the PCP put teachers with a disability (or a disability of the type and nature of the Claimant's) at a particular disadvantage compared to teachers without a disability?

4.11 If so, has the Respondent shown that the PCP is a proportionate means of achieving a legitimate aim?

4.12 Did failing to provide an annual performance appraisal or pay review in 2015/16 amount to unfavourable treatment?

4.13 If so, was the Claimant subjected to this treatment because of something arising in consequence of his disability, namely his long-term sickness absence (and phased return)?

4.14 If so, has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

4.15 If not, has the Respondent shown that they did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

(c) Performance appraisal / pay review process in autumn term 2016

4.16 Was the Claimant subjected to a performance appraisal in the autumn term 2016 which (a) was carried out in a compressed period, (b) took no (or no sufficient) account of his performance in 2015/16 (or any previous period), (c) required him to demonstrate any applicable objectives / standards in less than a single term, and/or (d) involved an increased number of observations, book scrutinies and learning walk-throughs?

4.17 If so, does taking this approach to performance appraisal in cases where a standard annual performance appraisal has not been fully completed in September/October amount to a PCP?

4.18 If so, does the PCP put teachers with a disability (or a disability of the type and nature of the Claimant's) at a particular disadvantage compared to teachers without a disability?

4.19 If so, has the Respondent shown that the PCP is a proportionate means of achieving a legitimate aim?

4.20 Did carrying out a performance appraisal as at paragraph 4.16 amount to unfavourable treatment?

4.21 If so, was the Claimant subjected to this treatment because of something arising in consequence of his disability, namely his previous long-term sickness absence (and phased return)?

4.22 If so, has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

4.23 If not, has the Respondent shown that they did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

5. Direct Disability discrimination (s.13) / discrimination arising from disability (s.15)

5.1 Was the Claimant subjected to any of the following treatment?

5.1.1 On 4 May 2016, Mrs Holmes told the Claimant that the school had had to pay additional teaching staff for nearly a year while he had been absent on sick leave;

5.1.2 On 23 June 2016, Mrs Holmes incorrectly told the Claimant's union representative that there were issues with the Claimant's performance during 2014/2015;

5.1.3 In a staff meeting on 1 November 2016, Mrs Holmes rolled her eyes, looked down at the floor and shook her head in response to something the Claimant said;

5.1.4 On 2 November 2016, Mrs Holmes told the Claimant that she needed to be "absolutely sure [he] could sustain the level" required for salary level M6;

5.1.5 On/around 2 November 2016, Mrs Holmes said to the Claimant, "How do I know that, if we give you your pay increase, you won't then just put your feet up and stop working?";

5.1.6 Mrs Holmes failed to take proper account of, or record fully, the Claimant's comments on her assessment of a learning walkthrough on 13 September 2016 and a lesson observation on 6 December 2016;

5.1.7 On 7 November 2016, Mrs Holmes incorrectly informed the Respondent's Interim Executive Board (IEB) that she did not have the evidence to say at what level the Claimant was performing because he had been on sickness absence for a year;

5.1.8 Mrs Holmes presented misleading evidence to the IEB on 12 December 2016;

5.1.9 On 12 December 2016, the IEB failed to moderate or challenge this misleading evidence, and therefore refused to increase the Claimant's pay from level M4;

5.1.10 On 14 December 2016, Mrs Holmes told the Claimant that writing his pay appeal would "give [him] something to do over the holidays";

5.1.11 On 22 March 2017, Mrs Birch required the Claimant to return home by taxi to collect all his books for moderation;

5.1.12 Between 23 and 29 March 2017, Mrs Birch, Mr Lafafian and Miss Gubbin moderated the Claimant's assessments of his children's performance levels without taking account of the professional teacher judgment of the Claimant or other staff who had previously moderated the levels with him;

5.1.13 In a meeting on 31 March 2017, Mrs Birch refused to answer a reasonable request from the Claimant for assistance in prioritising his workload because he "might quote this back at them later";

5.1.14 On 31 March 2017, Jonathan Lafafian allowed the Claimant only around 2 hours, mainly after the term ended at lunchtime, to supply additional evidence to support his assessment of the children in his class.

5.1.15 On 2 May 2017, Fiona Bootes required the Claimant to attend two meetings to discuss his performance, one with her and one with her and Mr Lafafian, with insufficient notice or the opportunity to obtain representation;

5.1.16 On 12 May 2017 Mrs Bootes produced a "summary of concerns" which contained inaccurate information about the Claimant, and left a copy visible to other staff;

5.1.17 On 17 May 2017, Mrs Bootes entered the Claimant's class while he was still teaching to collect books for scrutiny rather than allowing him to provide them by the end of the school day;

5.1.18 On 23 May 2017 Mrs Bootes took and copied the Claimant's lesson plan without his knowledge or agreement.

5.2 If so, did the Respondent treat the Claimant less favourably than it treats or would treat a non-disabled teacher, because of his disability?

5.3 If not, was the Claimant subjected to any of this treatment because of something arising in consequence of his disability, namely his previous long-term sickness absence (and phased return), or alternatively, disability-impaired performance (if to any extent the Tribunal finds that the Claimant's performance was impaired)?

5.4 If so, has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

5.5 If not, has the Respondent shown that they did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

6 Reasonable adjustments (ss. 20 and 21)

6.1 In addition to the PCPs at 4.1, 4.9 and 4.16 above, do any of the following amount to a PCP:

6.1.1 Placing on teachers an excessive workload including classroom teaching, marking, updating pupil progress on Target Tracker, subject leader responsibilities, attending PPA meetings, staff meetings and management meetings?

6.1.2 Collecting books, providing letters or other management documents, raising performance concerns, and arranging employee-specific meetings, with little or no warning, during (or just before the start of) the school day?

6.1.3 Requiring evidence to support a teacher's assessment of the children in their class before the end of the relevant term (for material purposes, 31 March 2017)?

6.2 If so, do any of the PCPs put teachers with a disability (or a disability of the type and nature of the Claimant's) at a particular disadvantage compared to teachers without a disability?

6.3 If so, would it have been reasonable for the Respondent to take any of the following steps to avoid the disadvantage suffered by the Claimant:

6.3.1 Reduce the Claimant's workload - for example by assigning him cover duties (rather than classroom teaching), providing additional resource or support to enable him to complete marking or assessment or subject leader responsibilities, or reducing the need for him to attend meetings?

6.3.2 Collect books, provide letters or other management documents, raise performance concerns, and arrange employee-specific meetings at the end of the school day and after giving advance notice?

6.3.3 Extend the deadline of 31 March 2017 for the Claimant to dispute the moderated scores arrived at between 23-29 March 2017?

6.3.4 Modify the appraisal and pay review process, for example by offering the Claimant the opportunity to provide written evidence about his performance, and/or, where absence in the relevant year limits available evidence, considering evidence from previous years?

7. Victimisation (s.27)

7.1 Did the Claimant's pay appeal letter of 6 January 2017 (paragraphs 67, 88, 164 and 167) amount to a protected act?

7.2 If so, did any of the treatment mentioned in paragraphs 5.1.11 to 5.1.18 above take place because of that protected act, or because the Respondent believed (in light of paragraphs 3, 49 and 167 of that letter) that he might do a protected act?

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Employment Judge R Lewis

Date: 19 January 2018………………….

Sent to the parties on: 19.01.18

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For the Tribunal Office