EMPLOYMENT TRIBUNALS

Claimant: Doctor Nicholas Evans

Respondent: Loughborough University

Heard at: Leicester ET

On: 16-20/1/2017, 1/3/2017, 13/3/2017, 19-20/10/2017, 23-24/10/2017, 6-7/11/2017

Before: **Employment Judge Solomons**
Members: Mr G Kingswood
Mr P Martindale

Representatives
Claimant: Mr D Northall, Counsel
Respondent: Mr P Gilroy, Q.C.

RESERVED JUDGMENT

1. The Claimant was a disabled person within the meaning of Section 6 Equality Act 2010 by virtue of:
   a) a mixed anxiety and depressive disorder between October 2011 and 31 July 2016.
   b) a knee impairment between 1 January 2011 and 31 July 2016.

2. The claim of being subjected to a detriment by reason of having made protected disclosures contrary to Section 47b Employment Rights Act 1996 fails.

3. The claim of unfair constructive dismissal contrary to Sections 94, 95 and 98 Employment Rights Act 1996 fails.

4. The claim of automatically unfair constructive dismissal by reason of having made protected disclosures contrary to section 103a Employment Rights Act 1996 fails.

5. The claim of automatic unfair constructive dismissal contrary to Section 100 (1) Employment Rights Act 1996 fails.

6. The claim of disability discrimination in the form of failure to make reasonable adjustments contrary to Section 20 & 21 Equality Act 2010 fails.

7. The claim of disability discrimination by way of harassment contrary to Section 26 Equality Act 2010 fails.

REASONS

1. The claimant was employed by the respondent University as a senior lecturer in the Radio Chemistry Section of the Chemistry Department from the 1st July 2003. He resigned giving notice on 26 April 2016 and the effective date of termination of employment was the 31 July 2016. He has brought before the Tribunal a number of claims:

    1) Being subjected to a detriment by reason of having made protected disclosures contrary to Section 47b Employment Rights Act 1996.

    2) Constructive unfair dismissal within the meaning of Section 94 & 95 Employment Rights Act 1996.

    3) Automatically unfair constructive dismissal by reason of having made protected disclosures contrary to Section 103a Employment Rights Act 1996.

    4) Automatically unfair constructive dismissal contrary to Section 101 Employment Rights Act 1996.

    5) Disability discrimination in the form of failure to make reasonable adjustments contrary to Sections 20 & 21 Equality Act 2010.

    6) Disability discrimination by harassment contrary to Section 26 Equality Act 2010.

2. The parties provided to the Tribunal a number of helpful documents at the commencement of the hearing which were updated during the hearing. In particular:

    1) An updated list of issues of fact and law, which sets out the suggested issues to be determined by the Tribunal by virtue of the hearing;

    2) A two-page document in the form of particulars of qualifying disclosures, which was provided on behalf of the claimant by virtue of an Order made by the Tribunal, setting out the disclosures relied upon by the claimant for the purposes of the detriment and unfair dismissal (PID disclosures) claim.

    3) A respondent's chronology covering the period of the claimant's employment with the respondent, which was not agreed on behalf of the claimant, but was a helpful short exposition of most of the major events taking place during the claimant's employment, in so far as they were relevant to the claims.

    4) Lengthy written closing submissions on behalf of the claimant and the respondent, together with bundles of authorities relied upon. Due to a shortage of hearing time at the end of the hearing, the written submissions are substantially the submissions of the parties, and the Tribunal heard orally on behalf of the parties, only briefly.

3. The claimant gave evidence, and also called Professor David Reed, who was Professor of Radio Chemistry at the respondent between 1 November 2010 and 1 April 2016.

4. The respondent called five witnesses:

   - Professor Paul Thomas, Head of Chemistry Department between October 2009 and 31 July 2015;
   - Professor Mark Briggs, Dean of Science since 18 August 2014;
   - Robert Alan, Director of Human Resources since 2008;
   - Julie Turner, Radiation Biological Radiological & Chemical Protection & Safety Officer; and
   - Richard Taylor, Chief Operating Officer since 16 September 2013.

5. The Tribunal read the lengthy typed witness statements of the witnesses, including, two on behalf of the claimant, the second one being a disability impact statement. It also heard cross examination and re-examination of the witnesses, together with some evidence given in response to questions by the Tribunal.

6. In relation to the disability issue the Tribunal also read the medical reports of two consultant psychiatrists' – Doctor Holden on behalf of the claimant, and Doctor Rogerson on behalf of the respondent. Neither psychiatrist was called to give evidence, and in relation to the disability issue the Tribunal has only been able to take into account the evidence of the claimant himself, in the form of his witness statements and oral evidence, and the written reports of the two psychiatrists'.

7. Due to the substantial period-of-time over which this case was heard, including substantial adjournments which were unfortunate but unavoidable, the Tribunal carried out a considerable amount of pre-reading before the case commenced, and, also re-reading before the last hearing dates, and during the course of our deliberations. In the light of all the evidence before us, and the submissions we received, the Tribunal arrived at its' necessary and relevant findings of fact as set out hereafter, and made its' necessary determinations in relation to the issues in the case, as set out in the Judgement and Reasons which follow. In so far as our findings are concerned, we have arrived at them unanimously and on the balance of probabilities.

The Factual Background

8. The factual background, together with relevant page references, is set out in the respondent's chronology provided to the Tribunal at the commencement of the hearing. Although not an agreed document, we conclude that the facts as set out in that document accord with the evidence which we heard. That chronology sets out bare facts by reference to undisputed events and documents, and is sufficient to set out the chronology relating to this case, and the factual background. To the extent that other findings of fact are necessary in order for us to arrive at our judgement on the issues in the case, they are referred to in the sections dealing with each of the issues separately as herein, after set-out.

The Disability Issue

9. The claimant relies upon two impairments; that first one, a physical impairment in the form of a disintegrating left knee joint which led to a knee replacement in 2011; and secondly, a mental impairment in the form an anxiety/depressive disorder, of which hypertension was a symptom. Although originally a separate physical impairment of hypertension was being relied upon, during the course of final submissions it was accepted on behalf of the claimant that the hypertension added nothing, and could be considered as part of the anxiety/depressive disorder. So far as the physical impairment is concerned to the left knee, the respondent concedes that there is a physical impairment of a long-term nature, but does not accept that the impairment has a substantial adverse effects upon the claimant's ability to carry out normal day to day activities. So far as the mental impairment is concerned, the respondent accepts that the mental impairment gives rise to disability between September 2014 and October 2015, so admits disability between those dates, but does not accept that the claimant by virtue of the mental impairment was disabled prior to September 2014, or after October 2015.

The Knee

10. The only evidence which the Tribunal has, in relation to the physical impairment to the left knee, is that of the claimant himself. In particular, in his second witness statement and in the course of cross examination and questions asked by the Tribunal. No medical reports have been produced in relation to the knee condition, although there are some references in the claimants' GP medical records to symptoms relating to the knee. The evidence in the witness statement, and indeed in cross examination, concentrated upon the condition of the knee and its' effects after the claimant's knee replacement operation in 2011. However in the course of answering questions posed to him by the Tribunal, at the end of his evidence the claimant explained that the knee had been damaged when he was a child, had always left him with a problem, that he had cartilage operations in the 1980's and 1990's, both through keyhole and open surgery, and that prior to his knee replacement, the joint was disintegrating through attrition, and that by that stage he had crippling arthritis, with terrible pain and loss of control in the left leg. Prior to the knee replacement he also would fall over on occasions due to loss of control caused by intense pain, and the instability of the knee. In addition, there would be regular aching from the knee, which would cause swelling and which greatly restricted his activities and made it difficult for him to run or jog, or even to kneel. In his witness statement, and in the course of cross examination, the claimant described the condition of his knee, post the replacement operation in 2011, as being a great improvement, but despite that, he does not have full mobility in the joint, and he has regularly to flex his leg during journeys in order to avoid pain build up. Indeed, due to that, the University in due course agreed that he could continue to travel first class when travelling by train, so that he had additional leg room. At a time when he had to teach double lectures (two 50-minute lectures with a ten-minute break between the two), he had to take a large amount of paracetamol and codeine tablets, in order to cope with the additional pain caused. Even now his own mobility is affected due to not having full flex angle in his knee. So far as physical co-ordination is concerned, there is a lack of full movement in the knee and ankle, and that means he is more prone to falling as his balance is not ideal on his left-hand side, and partly for that reason carrying heavy objects is severely restricted. Going downstairs remains painful.

11. Section 6 Equality Act 2010 requires that the claimant should have a physical impairment which has a substantial adverse effect on his ability to carry out normal day to day activities on a long-term basis. As we have recorded, the respondent concedes that the knee condition amounts to a physical impairment, which has an adverse effect on a long-term basis, but it is denied that that effect is substantial.

12. The Act defines 'substantial' in the context of Section 6 as "more than minor or trivial". Furthermore paragraph 5.1 of Schedule 1 to the Act provides that an impairment shall be taken as having a substantial adverse effect, if it would have that effect, but for the claimant's receipt of measures, taken to treat or correct it. In other words, the Tribunal is to disregard the effects of such treatment, be it medical or otherwise. In those circumstances it is important to look at the condition of the claimant's knee, and visualise what it would be, and its' effects if it had not been for the replacement of his knee joint with a prosthetic knee. In those circumstances as we have described above, the impact would have been very substantial indeed.

13. It is difficult in those circumstances to understand therefore the basis upon which the respondent can contend that by virtue of the physical impairment to his left knee, prior to the knee replacement operation, the respondent could contend that the claimant does not by virtue of that condition, suffer from a disability. Even with his prosthetic knee, the effects of the condition described at paragraph 6 of the Impact Statement, are sufficiently disabling to have a substantial adverse effect on normal day to day activities, but those effects are even more substantial if one visualises the condition that the claimant would be in, if he had not had a prosthetic knee fitted. Perhaps in some indication of realism on the part of the respondent, the respondent's counsel, when asked, in the course of final submissions, what the respondent's case was on disability in relation to the knee, simply retorted that the burden of proof was, of course as it is, on the claimant to establish that he is disabled by virtue of the knee condition, and put forward no further arguments in support of the contention that the knee does not give rise to a disability. In those circumstances the Tribunal is entirely satisfied that by virtue of the physical impairment in the form of a seriously arthritic knee, which required knee replacement, the claimant has been under a disability within the Act between the 1st January 2011 and 31st July 2016.

The Mental Impairment

14. As we have already recorded, the respondent concedes that the claimant was by virtue of this condition, disabled between September 2014 and October 2015. The evidence which we have considered is that of the claimant himself in his witness statement and in oral evidence, and the reports from the two psychiatrists, one for the claimant and one for the respondent, who were not called or subjected to cross examination. We have to consider, whether or not by virtue of the mixed anxiety and depressive condition, the claimant was also disabled between October 2011 and September 2014, and between October 2015 and 31 July 2016.

15. In his witness statement the claimant describes in paragraphs 7 through to 13, the nature of his mixed anxiety and depressive condition, the visits to his GP and the medication which he has been receiving from October 2011 onwards. A large number of symptoms are described at paragraph 9 in the witness statement, and the GP medical records refer to those being reported.

As a result of the claimant's condition, he has been in receipt of several types of medication over a number of years, which have assisted with his condition, but as we have recorded above, must be ignored for the purposes of determining whether or not there was a disability, and we must look at what the position would be if he were not taking that medication. It goes without saying that his condition would be far worse if that medication were not being used. Dr Holden's consultant psychiatrist report on behalf of the claimant is particularly compelling. It sets out in a good deal of detail the symptoms which the claimant has been occasioned over recent years, and the medical treatment which he has received. At page 1798 Dr Holden professes the opinion that the claimant has been suffering from a mixed anxiety and depressive disorder (ICD-10;F41.2) since October 2011. Although the current definition of disability does not require a mental impairment to be a well-recognised psychiatric condition, unlike the old definition of disability based on a mental disorder, it is quite clear that the claimant has been suffering from such a disorder for some years.

16. Dr Rogerson in his report on behalf of the respondent, concedes that there have been periods of time when the claimant has suffered from a well-recognised mental condition, and that such amounts to a major depressive disorder, and the same amounted to a disability for a period of time in that it was present from September 2014 until October 2015. He confirms that, at paragraph 6.1.9, and also says, it is possible that it may have been present longer. But based upon the fact that he concludes that the condition remains in partial remission, he does not consider that the claimant would qualify as a disabled person outside of those dates. However, at paragraph 6.3.4, Dr Rogerson appears to conclude that after the claimant became disabled within the meaning of the Act, thereafter, although there was an improvement and remission of his symptoms, were it not for the continued antidepressant treatment, it would have been likely that his condition/impairment would have continued.

17. Of course, neither Dr Rogerson nor Dr Holden were called to give evidence and we have nothing more from them that what is set out in the reports, but that paragraph appears to indicate an opinion on the part of Dr Rogerson, that after disability was established for the period conceded by the respondent, although there was an improvement and remission of the claimant's symptoms, that appears to be because of the continued use of antidepressant medication. Of course, the Tribunal must look at the position on the assumption that the medical treatment is not being given, in which case it would appear to be the position even on Dr Rogerson's view, that the claimant symptoms would have continued to be as bad as they were during the period of admitted disability. That is a significant factor in the Tribunal's view.

18. The symptoms suffered by the claimant by virtue of the mental impairment, as described by Dr Holden in his report, are set out in summary form at paragraph 66 of the claimant's closing submissions. That information from Dr Holden, combined with the claimant's description of his symptoms and their effects, from paragraph 7 onwards of his impact statement, is, in our judgement, more than sufficient evidence to show that the claimant was disabled by reason of anxiety and depression from at the latest October 2011, up until the time of the termination of his employment with the respondent. If one discounts the effect of the fluoxetine prescribed in September 2012, as we must do, to determine the deduced effect, the effects of these impairments

are likely to be even more severe, and certainly sufficient, in our view, to amount to substantial adverse effects upon the claimant's ability to carry out day-to-day activities. Even if it could be said, that there were periods when the symptoms improved, there was, as Dr Holden records, a significant risk of recurrence throughout the entire period, and that being the case, that is an important-factor which must be considered in determining whether, or not, the claimant was disabled. We conclude in all the circumstances that, by virtue of the mental impairment, the claimant was disabled, throughout the whole of the period from October 2011 until 31 July 2016. Accordingly, both the physical and mental impairments give rise to disability for the whole of the material period that the Tribunal is concerned with, namely from 1st January 2011 until 31st July 2016.

The Qualifying and Protected Disclosure Point

19. The claimant has bought complaints of both detriment and unfair dismissal for having made protective disclosures. The first issue the Tribunal has too determine, which affects both of those claims, is whether-or-not the claimant made qualifying and protected disclosures. The communications which the claimant relies upon to establish the relevant disclosures are as set out in the document entitled 'Particulars of Qualifying Disclosures' provided by the claimant early on in the hearing, as a result of the Order of the Tribunal, are:

    A) Discussions taking place between the claimant and Richard Taylor and Robert Alan on 29th January 2016, and

    B) The claimant's written grievance of 9th February 2016 (page 1640).

20. The document provided by the claimant contends that, in the course of those communications the claimant disclosed information relating to:

    1) The existence of written health and safety concerns within a radiological environment;

    2) The respondent's failure to give details of those concerns upon reasonable request to a senior member of staff and UCU accredited health & safety representative; and

    3) The claimant's proposal to contact the Environment Agency and other relevant regulators so that there might be certainty over the safety of the workplace.

21. The claimant contends that evidence of those disclosures may be found in:

    (1) Paragraph 61 of the claimant's main witness statement

    (2) The claimant's written account in an email to a union officer of 1st February 2016 (pages 1623-4)

    (3) The written grievance at page 1640

22. The claimant contends that, in his reasonable belief, those disclosures tended to show one or more matters contained in section 43B(1) (b) (d) (e) & (f) Employment Rights Acts 1996. The Tribunal must first determine what it was,

that was communicated by the claimant to the respondent in the course of those communications. This is a factual matter.

[A] The meeting of 29 January 2016

23. The background to this meeting was that on Friday 29th January, as a result of an earlier letter from Professor Reed dated 22nd January 2016 regarding health & safety issues, the Vice Chancellor ordered that an emergency inspection be conducted of the radio chemistry laboratory. That inspection was undertaken by the respondent's Radiological Protection Officer and the respondent's External Radiological Protection Advisor from Leicester University. In due course it turned out that the result of the inspection was that the External Radiological Protection Advisor was satisfied that the lab was safe. Indeed, an email from him on the afternoon of 29th January to Julie Turner, the respondent's Radiological & Safety Officer, confirmed that that was the position. In due course a written report was provided by the External Advisor, Mr Scott. Miss Turner wrote a report to the respondent's Health & Safety Committee, attaching Mr Scott's report, and the report was provided to the Environment Agency during a routine inspection on 10th March 2016.

24. The claimant discovered through Professor Reed, that the inspection was taking place, and he sought to see the Vice Chancellor. The Vice Chancellor was unavailable, and whilst the claimant was waiting for him, he was invited into a meeting with Mr Taylor, the respondent's Chief Operating Officer, and Mr Alan the HR Director. In that meeting the claimant requested details of the complaint made, and asked to see a copy of the letter. He was told by Mr Taylor and Mr Alan that those matters would not be disclosed to him, but was assured that, as a result of the inspection, the laboratory was safe. The Tribunal is satisfied that the claimant was told that the External Advisor had deemed the laboratory to be safe. It is clear that the claimant was physically agitated during the course of this meeting, so much so that he was pacing about the room. Mr Taylor, we are satisfied, took the view that the letter from Professor Reed should be treated as a whistle blowing issue and that therefore the author of the letter should remain anonymous. He was also concerned about a reference in Professor Reed's letter to "staff with serious mental health problems", and was concerned that that might in fact be a reference to the claimant, to whom he did not wish to cause any further distress. Mr Turner informed the claimant that he would report the issues to the Environment Agency, and there was no need for him to do that, as the External Radiological Safety Advisor had already been involved, and had advised that there were no environmental health & safety issues of concern.

25. Accordingly, we are satisfied preferring the evidence of Mr Turner and Mr Alan upon this point to that of the claimant, that the claimant was not given, as he suggests, a management instruction not to report the matter to the Environment Agency, although it is clear that the claimant indicated, during the course of the meeting, that he felt that he should so report it. The claimant's suggestion that he was rebuked by Mr Taylor and Mr Alan during the course of this meeting, is not accepted.

26. Section 43B(1) Employment Rights Act 1996 provides that a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one of the matters set out between A and F. Accordingly, it is for the claimant to establish that during the course of this meeting, he disclosed

information tending to show one or more of the matters set out within section 43B(1). It is the claimant's case, as set out in the Particulars of Qualifying Disclosures document, that in the course of this meeting, the claimant disclosed information relating to:

1) The existence of written health & safety concerns within a radiological environment

2) The respondent's failure to give details of those concerns upon reasonable request to a senior member of staff and UCU accredited health & safety representative (namely the claimant).

3) The claimant's proposal to contact the Environment Agency and other relevant regulators.

27. The claimant relies upon sub paragraphs at B, D, E & F of Section 43B(1). The question for the Tribunal is, whether-or-not at this meeting, the claimant disclosed any information which tends to show:

- B: That a person has failed, its failing or is likely to fail to comply with any legal obligation to which he is subject; or

- D: That the health or safety of any individual has been, is being, or is likely to be endangered; or

- E: That the environment has been, is being, or is likely to be damaged; or

- F: That information tending to show any matter forming within any one of the proceeding paragraphs, has been, or is likely to be, deliberately concealed.

28. Whilst it is certainly the case, that there had been a notification by Professor Reed to the respondent about health & safety concerns, and that the respondent had refused to give details of the letter, or its author, and that the claimant had indicated that he wished to report matters to the Environment Agency or other regulators, the Tribunal cannot accept that any of that amounts to a disclosure of information on the part of the claimant, of any of the matters set out in paragraphs B, D E & F. The claimant was simply not disclosing information about any of those matters to the respondent; what he was seeking to do was to get the respondent to give information to him about the content of, and author of the letter raising the health & safety concerns, and proposing that he would contact the Environment Agency. He was not disclosing information tending to show the existence of written health & safety concerns.

[B] The written grievance of 9 February 2016 page 1640

29. This document is a letter written by the claimant's solicitors, Actons, to the Vice Chancellor and others. The letter makes it clear that the claimant wishes to raise a grievance concerning events arising out of the meeting of 29th January 2016, which allegedly caused the claimant distress, thereby exacerbating his existing health conditions. The letter rehearses the events of 29th January in terms of there being a letter sent to the Vice Chancellor containing concerns about health & safety, the existence of an inspection taking place, and the claimant's visit to the University and his meeting with Mr

Taylor and Mr Alan, and what was said at that meeting, including the claimant's suggestion that he should inform the Environment Agency. It goes on to complain that the claimant, who is a Health & Safety Representative, was being kept in the dark, and thereby was having his position undermined by the respondent, and suggested that thereby the respondent was in breach of the implied term of trust and confidence in the contract of employment, as a result of which, the claimant was invoking the University's grievance procedure. The letter went on to ask that, as the claimant was off sick with stress and anxiety, the respondent should direct all future correspondence to Actons, his solicitors. That simple recitation of facts, which the respondent was aware of, and had been subject of discussion on the 29th January, cannot in the Tribunal's view, amount to a disclosure of information, tending to show any of the matters set out in sub paragraph B, D, E or F of Section 43B(1). There being that no disclosures of information, which could give rise to there being a qualifying disclosure, it follows that the claims of being subjected to detriment by reason of having made protected disclosures, and also of automatically unfair dismissal contrary to Section 103A Employment Rights Act, that must fail on that ground alone.

30. As to the alleged detriments imposed for having made protected disclosures, the first alleged detriment is the suggested management instruction not to make disclosures to external regulators during-the-course of the meeting on 29th January 2016. As the Tribunal has found, as is set out above, there was no such management instruction, simply an indication given to the claimant that there was no need for him to notify the regulators, because that was going to be done in any event by the respondent. Such a complaint could not reasonably be regarded as a management instruction, and certainly no such words such as 'instruction' or 'management direction' were used by either Mr Taylor or Mr Alan at the meeting.

31. The other alleged detriment is the restriction of the claimant's access to the respondent's buildings and his emails, following the respondent's letter of 14th April 2016. Following the meeting of 29th January, the claimant was signed off work sick and never returned to work before his resignation and the effective date of termination at his employment. According to the claimant himself, he was signed off work as unfit, against a background of what he regarded as series mental well-being issues.

32. Correspondence had taken place between the University and the claimant's solicitors 'Actons', after the grievance letter of 9th February 2016, at the request of the solicitors due-to-the-fact that the claimant was off work with stress and anxiety. Despite that fact the claimant did in fact attend the University on at least two occasions, and this was reported to Ms Turner. On 14th April 2016 Mr Alan wrote to Actons, (1690) and during the course of that letter, indicated that the University was surprised that the claimant had attended the University in the previous week, in the light of his current ill health, which he believed is work related. There was in fact no need for the claimant to attend the University at the time and, as Mr Alan indicated, the University did not believe it was conducive for him to do so, pending further occupational health advice, until he was well enough to return to his normal duties. In those circumstances Mr Alan indicated that to avoid the potential for the claimant becoming concerned about matters in the workplace while signed off sick, the University, as a precautionary measure, was proposing to remove his access to the buildings and department until he was well enough

to return to work, and also considering his access to University emails, which it was likely to restrict access too.

33. So far as the emails are concerned, the claimant's access was not actually restricted, and the Tribunal is satisfied that an indication that the University was considering the same, cannot sensibly be regarded as a detriment. Furthermore, we are satisfied that neither the removal of the claimant's access to the site, nor the consideration of restriction to emails, both was in any way causatively connected to the grievance which the claimant had issued, or anything said by him at the meeting on 29th January. The respondent's decision to send the letter of 14th April 2016 was motivated entirely by its concerns about the claimant's visits to the respondent's premises, in particular the Chemistry Department, in April 2016, and the potential for incidents which might further affect the claimant's health. It follows that even if the Tribunal were satisfied that the claimant had made qualifying and protected disclosures as alleged, we are satisfied that the respondent did not impose any detriment upon the claimant by reason of those alleged disclosures.

The Reasonable Adjustments Claim Related to Disability

34. That Section 20 Equality Act provides that where a provision, criterion on practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison to persons not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage. There are two alleged PCP's in this case:

    1) A PCP requiring the claimant to work in accordance with an excessive workload comprising teaching, research, grant application, project management and associated administration.

    2) A PCP requiring the claimant to provide teaching in two-hour blocks from the start of the academic year September 2014.

A. The Workload Issue

35. The Tribunal has found that the claimant was disabled by virtue of a mixed anxiety and depressive disorder between October 2011 and 31 July 2016. In October 2011 the claimant started a three-month period of sickness absence, due to stress. This is the beginning of the period in which it is necessary to consider whether-or-not the respondent applied a PCP, which gave rise to a duty to make reasonable adjustments, and, if so, whether the respondent complied with that duty. The claimant had returned to work on a phased return of two and a half days per week for a period of six weeks, which could be gradually increased by half a day per week, on the 7th December 2011. On 19th June 2012 the Head of Department Professor Thomas conducted the claimant's performance & development review (PDR) meeting, in which a number of objectives were agreed (485-487). It is clear that, from this time forward, the claimant's contractual obligations were being discussed with the Head of Department. The claimant in September 2012 informed Professor Thomas that he was suffering from depression, and Professor Thomas suggested to the claimant that he seek advice from Occupational Health. The claimant was seeking a reduction in his workload, in particular, in relation to work research obligations. The claimant's request was a constant theme until he went off on his final period of sickness leave in January 2016, and it is

clear that throughout the period until then, the respondent was requiring the claimant to carry out work. Equally it is clear that the respondent carried out various adjustments to the claimant's workload, and put in place various support mechanisms.

36. Clearly the requirement that the claimant carry out work, was a provision criteria in practice. The real issue in relation to this aspect of the claim, is whether-or-not what the respondent did was reasonable in all the circumstances in terms of adjustments to a lecturer's usual workload. The claimant's workload essentially involved (1) teaching; and (2) research duties, including supervision of research students, and administration associated therewith. He had removed from him departmental and school administrative duties, in order to ease his load. Examples of the steps taken by the respondents to adjust the claimant's workload are to be found in documents at pages 1103, 1145 and at 1335. It is clear from those documents that the respondent had carried out a series of actions in order to actively manage and reduce the claimant's workload. It is clear upon that evidence, contrary to the claimant's case, that, in particular during 2015, the respondent did a lot to manage and reduce the claimant's workload. In particular, there was the phased return from 7th December 2011, and Professor Thomas's suggestion that the claimant focus on aspects of the job that would yield the greatest value to him professionally (476).

37. In June 2012, the claimant again raised concerns about his workload with the Head of Department Professor Thomas. However, the record of the claimant's PDR in June (485-7) supports the evidence of Professor Thomas that he set out a number of actions to assist the claimant. After a flood in the Graham Oldman building in June 2012, where the claimant had been working, his office was moved into the main chemistry building and he never returned to the Graham Oldman building after that time; despite that the claimant continues to complain about the state of the Graham Oldman building. He complains about such matters in paragraph 18 of his Witness Statement. Yet despite that, at the claimant's PRP with Professor Thomas on 6th August 2012, as is recorded in the PRP interview record, the claimant wrote: "I agree with the above and I would like to acknowledge the support by the Head of Department during the last challenging couple of years". In January 2013 (see page 717) the claimant made a formal disclosure to the respondent via HR, in an attempt to reduce his research workload. However, during 2013, Professor Thomas sought to capture reliably the workload across the department in teaching and research data and feedback from colleagues, which the claimant was invited to contribute to, but declined to do so, and so estimates had to be used to assess the claimant's workload, and the resulting data placed him at about the median point of the loading in the department.

38. Discussions continued between the claimant and the University, and the Dean of Faculty set out the position so far as adjustments were concerned to Occupational Health in an email of 5th December 2014 (page 1103). The position was further set out in meeting notes arising from a meeting between the claimant and Professor Thomas and Professor Biggs on 16th March 2015 (1335-1337), which make it clear that the respondent had taken a series of steps to remove work from the claimant's obligations, thereby reducing his workload in an active way. The claimant's case is that the respondent did very little, if anything, during 2015 to manage or reduce his workload, but this documentation shows that that was not the case. In particular, when the

claimant went off as unfit to work in December 2014, when he returned in January 2015, it was on a phased return basis involving a 20-hour working week. There was a further two-month period of sick leave from mid-February until mid-April 2015, after which the claimant returned to work on a phased basis, initially involving a 10-hour working week, and also involving the assistance of a fully funded support worker for a period of six months. The phased return increased the working hours from 10 hours to 20 hours per week between 22nd May and 3rd August 2015. In August the working hours were increased to 30 hours per week. From 1st September 2015, after a further Med3, his hours were increased to 40 hours per week. Accordingly, it is clear that the claimant's phased return lasted in total from January to September 2015, during which time the claimant was given a good deal of time and support and measures were put in place following consultation and agreement with the claimant based on medical advice. That position continued until the claimant went off sick on 29th January 2016, after which he never returned to work. Accordingly, the Tribunal is satisfied that even if it could be said that there was a PCP to carry out a workload which put him as a disabled person at a disadvantage, it is clear to us that the respondent took reasonable steps in relation to workload, in order to comply with a duty to accommodate the claimant's disability in the form of his mental impairment.

B. <u>The 2-Hour Lecture Slot - Issue</u>

39. The complaint here is that the respondent imposed a PCP requiring the claimant to provide teaching in 2-hour blocks from the start of the academic year in September 2014. Indeed, that was in fact the case, as is agreed save that the 2-hour block included a 50-minute lecture followed by a 10-minute break, and then a further 50-minute lecture. Such sessions, upon the evidence, would clearly cause the claimant difficulty because of his artificial left knee and the associated problems arising from that, in particular pain etc, which required him to take substantial quantities of pain killers. It is absolutely clear that, by reason of that PCP, the claimant was put at a substantial disadvantage compared to an employee who did not have his knee condition, which amounts, we have found, to a disability. Apart from providing a stool for the claimant (page 1103) the respondent was unable to change the timetable for the rest of that academic year, and although one of the two-hour blocks was removed from the claimant's responsibilities after two months, there remained one 2-hour block for the rest of the academic year.

40. The real question in connection with this issue is that whether or not in the light of the claimant's physical disability, the respondent should have drawn up a time table which avoided time-tabling the claimant on 2-hour blocks, and was it a reasonable adjustment to avoid doing so? An email of 3rd November 2014 at page 1066 makes clear that if the respondent put in a request early enough before the timetable was established, it would not be a problem to avoid 2-hour slots for the claimant. The claimant gave evidence (Witness Statement Paragraph 26) which was not challenged on cross-examination, that it in the Spring of 2014, he raised the 2-hour slot problem with Professor Thomas, and made a request that the respondent reduces teaching slots back to 1-hour for the academic year 2014-15 on the grounds of his disability. The respondent did not act on that request for 1-hour slots until after September 2014, when the claimant complained and although they then took away one of the 2-hour slots, they left the claimant with another 2-hour slot for the rest of the academic year, and only took that away from September 2015.

41. It is also clear that the respondent was aware of the substantial disadvantage the claimant would be caused from having to deliver teaching over a 2-hour period, from the Spring of 2014 when he made his request to only have 1-hour teaching slots. It is also clear that the respondent acknowledged that if the request was made early enough, it would be possible to accommodate the claimant's request in the next academic year. In those circumstances it must follow as we find that it would have been a reasonable adjustment, prior to the 2014-15 academic year, to remove 2-hour teaching slots from the claimant, and the respondent failed to carry that adjustment out. The point made by the respondent, that the claimant accepted in December 2014, that it was not possible to alter the timetable further for that academic year to take away the remaining 2-hour slot, misses the point. The adjustment should have been made when the timetable was drawn up after Spring 2014, and as the document at page 1066 shows, if it had been, it would have been possible not to timetable the claimant for 2-hour slots. Accordingly, we find that there was a breach of the duty to make reasonable adjustments in respect of this particular PCP (the 2-hour slot issue), by virtue of which the claimant suffered a detriment. However, as we record hereafter, that claim does not succeed because of a time issue.

The Harassment claim

42. The claimant relies upon two alleged pieces of conduct by the respondent, which he contends amount to harassment under the provisions of the Equality Act for a reason related to his disability. For the claim to succeed it must be the case that the respondent engaged in unwanted conduct related to the claimant's disability which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant (Section 26).

43. The claimant that relies upon the two pieces of conduct:

1) An alleged threat on the 10th March 2016 not to pay the sick pay of the claimant. The document containing the alleged threat is an email on page 327 of 10th March 2016 from the Dean, Professor Biggs, to the claimant. The background to the email is that there had been a problem previously about medical certificates not reaching Professor Biggs possibly due to them being sent to the wrong person. Accordingly, in the email that Professor Biggs sent on 10 March he records: "Can I ask that you ensure the doctor's certificate for sick cover is sent to me in a timely manner, so as to ensure your pay is not stopped due to it not being passed on. This almost happened this time as it was sat with Sue Hughes in chemistry and I only got it by virtue of asking." The claimant characterises the email as a threat to stop his sick pay. The conduct is clearly related to the claimant's disability, in that his sick absence was due to his disability. However, even if it could be said that the sending of the email amounts to unwanted conduct, it is quite clear that it was not Professor Biggs' intention to create the proscribed environment and so the sending of the email did not have the purpose of so doing. The claimant can therefore only rely upon the effect provision and Section 26(4) makes clear, in deciding whether conduct has the effect referred to in sub-section 1b, the following should be taken into account:

A) The perception of the employee;
B) The other circumstances of the case; and
C) Whether it is reasonable for the conduct to have that effect.

But even assuming that the claimant's perception was, that he was being threatened, it is quite clear in all circumstances, that it is entirely unreasonable to perceive the communication in that light. It was clearly not a threat by Professor Biggs; he was simply pointing out to the claimant, that it was important that medical certificates should find their way to him in order to prevent the possibility that there might be an interruption in the claimant's sick pay due to a medical certificate not being received by the appropriate department at the respondent. So far as this particular allegation is concerned the Tribunal, although hesitating to use the words, concludes that the claimant's allegation of harassment arising out of this email communication, is complete nonsense. It cannot be said that it is in any way reasonable for that email to be seen as a threat to stop the claimant's sick pay and so this aspect of the claimant's harassment claim fails on that ground alone.

2) <u>The Refrain From Access Letter 14 April 2016</u>

The claimant, through his solicitors in January 2016 when he went off sick never to return to work prior to the termination of his employment had sent a letter to the respondent of lodging a grievance in which the solicitors had requested that, in view of the claimant's state of health, the respondent should only communicate with him through the solicitors. On the 14th April 2016 (1690) the respondent wrote to the solicitors pointing out that it had not received any response to a request for an indication as to when the claimant was likely to return to work and asking for an update. The letter also said:

> "Given Dr Evans' current ill health, which we understand that he believes is work related, we were very surprised that Dr Evans attended the Chemistry Department last week, seemingly in response to an incident within the Department There was no request, expectation, or need for Dr Evans to attend the workplace in relation to such a matter, and pending further occupational health advice, we do not believe it is conducive for him to have done so, or, indeed to do so in the future, until he is well enough to return to his normal duties.
>
> In order to prevent such an occurrence, and to avoid the potential of Dr Evans becoming concerned about matters in the workplace whilst signed off sick, we are taking the precautionary measure of removing his access to the buildings/department, until he is well enough to return to work.
>
> We are also considering his access to University emails and are likely to restrict access to these too."

The claimant contends that the sending of that letter amounts to an act of harassment under the Equality Act. Again, there is a complete absence of evidence to show that the purpose of sending the letter was to harass the claimant. Furthermore, the claimant in his witness statement (paragraph 67), where it deals with the sending of this letter to his solicitors, makes no reference at all to its effect upon him. Neither does the claimant's resignation letter of 26th April at page 1692, although it refers to the sending of that letter, make any suggestion that the sending of the letter created the proscribed environment which is outlawed by Section 26(1)(b).

Furthermore, in particular taking into account the fact that the letter of 14th April is sent to the claimant's solicitors at the request of the solicitors so as to not trouble the claimant directly in view of his state of health, the Tribunal is entirely satisfied that the contents of that letter could not be said to have the effect of creating the proscribed environment. To hold otherwise would be entirely unreasonable in all the circumstances. No reasonable person would regard such a letter as having the effect of creating the prescribed environment. This aspect of the harassment claim must therefore fail for that reason.

The Time Issue Relating to the Disability Adjustments Claim

44. We have found that in relation to one aspect of the claimant's Reasonable Adjustments claim, there are grounds for finding against the respondent. However, in relation to that particular matter, namely the 2-hour teaching slots, it is clear and agreed upon the evidence, that that particular failure by the respondent ended at the end of the 2014/2015 academic year, and that from September of 2015, the claimant was not required to teach a double slot.

45. He did not complain of this particular matter until he launched his claim to the Tribunal, after his resignation on the 24th June 2016. Accordingly, the complaint in relation to this matter is made about 12 months after the end of the failure to make an adjustment. No evidence was called from the claimant to explain the delay in making that claim. The claimant seems to argue (closing submission paragraph 70 – 77) that the reasonable adjustment claim relating to the 2-hour teaching slot amounts to a failure to make reasonable adjustments extending over a period ending with the termination of the claimant's employment in the Summer of 2016, at which the claimant contends the limitation period only then begins to run, and so argues that the claim was presented in time.

46. However, that particular submission is, we find, fundamentally flawed because, upon the evidence, it is quite clear that the failure to make that adjustment ended at the end of the 2014/2015 academic year, and that from the commencement of the 2015/2016 academic year the claimant's request not to teach in 2-hour slots was accommodated. It cannot sensibly be argued in those circumstances, that that failure to make adjustments was an act extending over a period, which ran up until the termination of his employment. It was clearly a failure to make adjustments, which came to an end a year before the claim was made, and so, clearly outside the 3-month limitation period.

47. Alternatively, it is argued that it is just as equitable to extend time, in relation to that claim. The Tribunal is asked to so conclude in reliance upon a number of matters:

    1) The claimant's suffering from severe mental ill-health throughout the period;
    2) That he has established that administration tasks cause him significant anxiety, and that he had a heavy administration burden even after returning to work in the Spring of 2015; and
    3) That he was optimistic that his relationship with the respondent could continue until the events of 29th January 2016, and what followed.

48. However, it is significant that no evidence was adduced from the claimant to support the proposition that those matters in any way affected the time at which he brought his claim to the Tribunal. Indeed, there is a complete absence of evidence from the claimant concerning the delay in making the claim for adjustments and the reason for it. Furthermore, it is clear that, although the claimant had a mental impairment throughout the relevant period, he had solicitors who were acting for him, at least since January of 2016, but still no claim was presented until towards the end of June 2016. Secondly, he could not rely upon heavy administrative tasks from the time that he went off sick at the end of January 2016, when he never again returned to work.

49. In all the circumstances, we are entirely satisfied that it is not just and equitable to extend time to allow that aspect of the reasonable adjustments claim to proceed. We are conscious of the fact that in no way could it be said that the respondent is in some way responsible for the delay in the claimant making the claim, indeed the respondent had dealt with the claimant's complaint in that regard by, at the latest, September 2015. Accordingly, upon that ground the claim for a failure to make reasonable adjustments relating to the 2-hour teaching slots must fail.

50. The same can of course be said in relation to the harassment claim relating to the letter referring to medical certificates and possible interruption of sick pay, which was something that occurred in March 2015, a claim which the claimant accepts is made 'out of time'. Again, even if there were a foundation in fact for that harassment claim, which we have found there is not, there is no material upon which it could be said that it is just and inequitable to allow that claim to proceed.

The Dismissal Claims

51. There are three claims for unfair constructive dismissal:

    1) Under sections 94 and 95 of the Employment Rights Act

    2) Automatically unfair dismissal for having made protected disclosures under Section 103A Employment Rights Act

    3) Automatically unfair dismissal contrary to Section 101 of the Employment Rights Act (Health & Safety)

52. It is uncontroversial that a claim of constructive dismissal can only be established if:

    1) There has been a substantial breach of contract by the respondent

    2) In response to which the claimant resigns and brings his employment to an end

53. In this case the claimant relies upon breaches of the implied term of trust and confidence and to secure the health, safety and wellbeing of an employee. As is customary there is no dispute in this case about there being such implied terms in the claimant's contract of employment. The claimant's resignation letter at page 1692 is dated 26th April 2016. That resignation letter also has to be looked at in the context of a letter of the 9th February

2016 from the claimant's solicitors to the respondent, in which the claimant raised a grievance concerning the events arising out of the meeting referred to above, which took place on 29th January 2016, which the letter alleges that caused the claimant such distress that his existing health condition was worsened and that he is now absent through work-related stress and anxiety, and in relation to which the claimant alleges through his solicitors that the respondent was in breach of the implied term of trust and confidence. The resignation letter contends the claimant is left with no alternative but to resign as a result of the University's treatment of him, which amounts to constructive unfair dismissal and disability discrimination. It goes on to say "I have laid out some of the details of the treatment in question in my grievance letter dated 9th February 2016 submitted by my solicitors". He also goes on to refer to the respondent's letter of 14th April to his solicitor's, which contained the decision to remove the claimant's access to buildings and also, according to the claimant's resignation letter, "remove access to my University email". It is quite clear that those two letters refer primarily to the incident of 29th January 2016, and its consequences, and also to the respondent's letter of 14th April, but nothing else. In his witness statement at paragraph 68, the claimant says "on 26th April I went to tender my resignation from the University on three months' notice, relying upon the reasons set out in my grievance letter, and the further actions of the respondent subsequent to that letter, including the removal of my access to the University, and the threat to remove access to my emails."

54. Neither the letters, nor paragraph 68, make any reference to matters occurring prior to 2016. Neither does the claimant through his letters, or in his witness statement, appear to contend that he was resigning on any grounds other than what had occurred in 2016; nor has it been suggested that the events of 2016 were in any way a last straw, when set against the background of the previous employment history, and the claimant's disputes with the respondent. In those circumstances therefore, the Tribunal must consider whether the conduct of the respondent, as alleged in 2016, is:
    (a) established;
    (b) whether it amounts to a breach of either of the implied terms relied upon.

55. So far as the meeting of 29th Janaury 2016 is concerned, as we have to some extent heretofore observed, the claimant had wished to see the Vice Chancellor with regard to the laboratory inspection he had heard had taken place. The Vice Chancellor was unavailable and he was invited into a meeting with Mr Taylor and Mr Alan, where he requested details of the complaint that had been made, asked to see the letter, and wished to know who had sent the letter. He was informed that an inspection had taken place, and the lab had been passed as safe. The claimant was clearly in an agitated state and claims that he was rebuked, impliedly threatened with disciplinary action, and that he was given a management instruction not to inform the regulatory bodies including the Environment Agency. That evidence is disputed by Mr Taylor and Mr Alan, whose evidence we prefer. What in fact happened was that the claimant was told that the laboratory had been passed as safe, that there was no need for him to report the matter as Mr Taylor would be reporting the matter himself, and that a copy of the inspection report would be provided to the Environment Agency. He was not given a 'management instruction' as the claimant terms it. Neither was there any implied threat of disciplinary action made against him.

56. As to the letter and showing it to the claimant, as Mr Taylor explained, at the time the matter was being treated as a whistle blowing issue, and on that basis the author of the letter needed to remain anonymous. The Tribunal can see that no conduct on the part of Mr Taylor or Mr Alan, or indeed the University, on the 29th January, which could sensibly be said to amount to a breach of the implied term of trust and confidence, as was alleged by the claimant in his grievance letter at 1640, upon the 9th February 2016.

57. As to the events thereafter, as is clear from the grievance letter itself, the claimant's solicitors informed the respondent that it should not communicate directly with the claimant, and so the respondent thereafter communicated with the solicitors. Of course, at this stage the claimant was signed off as unfit to attend the workplace, and remained unfit and off work until the termination of his employment by virtue of his resignation. In addition, of course the respondent was aware that the claimant regarded himself as having serious mental wellbeing issues. The letter of 14th April (1690) from Mr Alan to the solicitors was his second to the claimant's solicitors, because he had not received a reply to his first letter.

58. Whilst the claimant was off as unfit to work, he attended the University on at least two occasions. He was seen on the 22nd March emptying his office and Miss Turner was notified on the 1st April 2016 by persons in the Radiochemistry Department, that the claimant was in a meeting with Professor Reed in the latter's office. Whether the claimant was there to mark Professor Reed's departure from the University, as he alleges, or not, it was proper for the respondent to, in its' letter of 14th April, remove the claimant's access to the building. He was absent due to illness and it is a fundamental part of the claimant's case that his mental wellbeing was fragile, and that his workplace and work requirements, as set out by the respondent, were responsible for that. In addition, from Professor Reed's letter of 22nd January 2016 which brought about the inspection of the laboratory, the respondent was aware of Professor Reed's reference to the fragility of staff with mental health issues. The evidence of Miss Turner (witness statement paragraph 28, and the keyholder policy pages 282-283) indicate that individuals cannot be permitted to be present at the Graham Oldham building unless they need to be there for work purposes. Also at the time, the respondent was waiting for up-to-date medical advice in relation to the claimant, and as the letter at 1690 makes clear, the withdrawal of access was pending further occupation health advice. As to the question of access to emails, the respondent simply indicated that it was 'considering' the claimant's access to emails, and 'considering' restricting them. In fact, that did not take place.

59. In those circumstances the Tribunal does not accept the proposition that the actions of the respondent in relation to what was said in the letter of 14th April 2016, amounts to a breach of the implied term. The respondent had reasonable cause for taking the steps that it did, and making the points that it did in the letter of 14th April, and as we have previously indicated, we are entirely satisfied that the reason for giving those instructions had no connection with the fact that the claimant alleges, that he was making protected disclosures.

60. In all the circumstances therefore, given our finding as to the reasons why the claimant resigned which we have set out above, and our finding that the conduct of the respondent, both at the meeting on the 29th January, and in the letter of 14th April 2016, do not amount to a breach of either of the implied

terms relied upon in this case, it follows that there was no fundamental breach of contract by the respondent as alleged, entitling the claimant to resign and claim constructive dismissal. In those circumstances, each of his claims of constructive unfair dismissal must fail.

Employment Judge Solomons

Date: 9 March 2018

JUDGMENT SENT TO THE PARTIES ON

12 March 2018

.....

.....
FOR THE TRIBUNAL OFFICE