EMPLOYMENT TRIBUNALS

Claimant: A

Respondents: 1. B
2. C

CERTIFICATE OF CORRECTION
Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the anonymised reserved judgment sent to the parties on 9 November 2016 is deleted in its entirety and is corrected by substituting the attached judgment which is the anonymised version of the judgment dated 4 November 2016 (which was sent to the parties on 9 November).

Employment Judge Ross

Date 12 March 2017

SENT TO THE PARTIES ON

13 March 2018

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: A

Respondents: 1. B
2. C

HELD AT: Manchester **ON:** 12, 13, 14, 15, 16 September 2016
12 October 2016
(In Chambers)

BEFORE: Employment Judge Ross
Mrs M A Gill
Mrs J Harper

REPRESENTATION:

Claimant: Mr K Ali, Counsel
Respondent: Ms R Wedderspoon, Counsel

RESERVED JUDGMENT

1. The claimant's claim that the respondents failed to make reasonable adjustments is not well founded and does not succeed.

2. The claimant's claims that the respondents subjected her to unfavourable treatment because of something which arose in consequence of her disability in respect of (a) invoking the sickness absence management procedure (c) the rejection of the appeal at stage one of that procedure and (d) the outcome of stage 2 of that procedure are not well founded and do not succeed.

3. The claimant's claim that the respondents subjected her to unfavourable treatment in the outcome of stage one of the sickness absence management procedure is well founded and succeeds.

4. The claimant's claim for direct discrimination is not well founded and does not succeed.

5. The claimant's claim for victimisation that the respondents excluded her from the senior leadership team away weekend which took place on 3rd July 2015 is well founded and succeeds.

6. The claimant's claims of victimisation of the moving of her office at the school in July 2015 and of increasing the claimant's workload in the academic year beginning September 2015 are not well founded and do not succeed.

7. The case will proceed to remedy. This has been listed for a telephone case management hearing on 7th December 2016 at 10am where the case will be listed for a Remedy Hearing and any appropriate directions will be issued.

REASONS

1. We heard from the claimant, from D, her union representative and E , formerly of the respondent's estates department.

2. For the respondent we heard from the Head Teacher C, from Vice Chair of Governors at the time I and from another governor J. We heard from K, from the Human Resources Department. A statement from M was agreed and so she was not called.

3. The following are findings of fact.

4. The claimant was employed by the respondent as a Teacher from September 2003. She was promoted to the role of Assistant Head Teacher commencing on 1st September 2012. The promotion to the role of Assistant Head Teacher placed the claimant in the senior leadership team, a very responsible role with a significant increase in salary and responsibilities.

5. The claimant's employment contract is subject to national terms of service for school teachers, page 1187 to 1254 and as an Assistant Head Teacher her hours are a minimum of 1265 (see page 1305). The claimant accepted that this was a minimum.

6. The claimant's employment contract is also subject to a number of different local authority policies adopted by the school including the sickness absence policy. This is for short or long term absence. Following any absence a Teacher meets the Head Teacher (pages 1134 to 5).The short term sickness absence procedure (page 1136 to 1142) has four stages.

7. Of particular relevance to this case is stage one, page 1136. "Apart from those cases where it is not felt appropriate to initiate the formal stages of the

procedure, a stage one sickness meeting should be arranged between the employee and the Head teacher in the event of the employee being absent for either: ten days in a rolling twelve month period or five instances of absence within a rolling twelve month period." Stage one starts the six month period review where absence is formally monitored.(p1137)

8. Stage two is triggered during the six month period where there is an absence for a total of five or more working days or three or more instances of sickness absence (see page 1137).

9. There is a requirement that an employee is kept fully informed. See page 1137 "the consequence of further sickness should be formally explained to the employee i.e. that the employee would move to stage two of the procedure if the trigger points were reached, this information should be confirmed in writing" on the first stage and again at the second stage page 1138 "the employee should be formally warned about the consequence of further sickness absence i.e. that the employee would move to stage three of the procedure if the trigger points were reached, this should be confirmed in writing. The level of seriousness of this stage of the procedure should be clearly explained i.e. that failure to improve their attendance would trigger the third stage sickness absence meeting and that a subsequent failure to improve their attendance at this stage may ultimately lead to their dismissal".

10. The policy also includes a long term sickness absence review policy, see page 1142 onwards. Long term absence is continuous sickness absence which exceeds six weeks. See paragraph 13.1 at 1142. This states that after six weeks absence (or earlier if it is know beforehand) that the absence will last six weeks employees should be referred to the occupational health service.

11. We rely on the evidence of K in cross examination that an employee can move across from a stage in the short term absence to the long term absence policy and vice versa.

12. There is also a section under the policy dealing with disability discrimination see page 1147 to 1148.

13. We were also taken to the guidance notes for managers at page 1160 and in particular page 1167.

14. There was no dispute that an employee is entitled to appeal against any formal action under the sickness absence management policy (see page 1182). The guidance states "the purpose of the appeal process is to review the fairness of the original decision".

15. We were also referred to the leave of absence for school based staff policy at page 1349A to H and in particular the leave of absence policy for discretionary paid and unpaid leave (page 1349G). This policy notes that unavoidable medical appointments should normally be made outside of working hours.

16. In January 2014 the claimant had three days absence; it was noted as being "stomach bug/sickness" see page 164. However we find some time later probably by 6th February 2014, but certainly by early March the claimant had made C aware that the true reason for her absence was a miscarriage that she had suffered in January. It is not disputed that C was sympathetic. On 6 February he referred her urgently to counselling, see page 166 which was paid for by the school.

17. On 12th February the claimant was absent for a medical appointment, see page 167 and she was then absent sick from 13th February 2014 to 3rd March 2014 although it is not disputed that the claimant worked from home on 20th and 21st February 2014(during half term) see page 170. We rely on paragraph 12 of C's statement where he said that he was told when he conducted the return to work interview with the claimant on 6th March, page 170 that her absence due to stomach bug/sickness. He explained he subsequently received a sick note provided by the claimant's GP indicating that the reason she was unfit for work on a later period between 5th and 19th March was due to low mood and a recent miscarriage (p169) which he therefore inferred had occurred during the period of absence that he had reviewed on 6th March. The panel cannot find a copy of the fit note for the period 13th February to 3rd March in the bundle but we note that half term was during this period and that the claimant agreed in cross examination that it was the agreement of the Head that she had worked on 20th and 21st February.

18. We find the claimant was further absent from work from 10th March 2014 until the 24th March 2014 page 175.

19. The fit note for this period actually covered 6th to 19th March 2014 and stated "low mood/miscarriage" see page 1455. There was a further fit note at page 1456 from 19th March 2014 to 25th April 2014 which stated "phased return to work, altered hours amended duties, to do reduced hours and avoid stressful roles". The diagnosis was depression and OS**.**

20. There is no dispute that at the return to work meeting on 25th March it was agreed the claimant would have a phased return to work with a partial teaching timetable and light Senior Leadership Team ("SLT") duties until Easter initially, see page 175.

21. There is no dispute that there was an arrangement between C and the claimant to enable her to have as he described it a "phased return" and as the claimant described it "flexible working" during the Summer term of 2014. The claimant stated that this flexible arrangement worked well for her.

22. We find that the agreement as the respondent understood it allowed her time off usually on a Wednesday morning although the claimant did not always take this time.

23. There is no dispute that the claimant was attending Relate counselling through the period of February 2014, March and April 2014 and beyond. We find it is likely this was the counselling paid for by the school. By mid 2014 it was noted by her GP that she would benefit from CBT. Counselling is noted to be continuing in

June and the GP notes that CBT has been chased up in the early autumn. The claimant said in cross examination that she was under the care of Alison Pleshak, at the Psychological Wellbeing Service between 22nd October 2014 to 11th February 2015.

24. The claimant was referred to Susan Bryant at Stepping Hill Hospital who is described as an Intensity Cognitive Behaviour Therapist (Group Leader). The precise dates the claimant attended Susan Bryant are not clear from the evidence. it appears that the CBT sessions with her started in or around November/December 2014 until she was discharged by Susan Bryant on the 8th July 2015 although Susan Bryant noted and the claimant agreed that the claimant had "disengaged" from that therapy in May 2015 and Susan Bryant had referred her on to Rachel Iaconianni a different type of counsellor.

25. We find that during the summer holiday of 2014 the claimant remained under the care of her GP. Her GP issued a fit note which is dated 28/8/14 (see page 1459) which states that the claimant is suffering from depression and would benefit from altered hours and amended duties "reduced hours and avoid managerial assistant head stressful roles". There is no dispute that the claimant did not share this fit note with her employer when she returned to work at the start of the Autumn term.

26. The claimant was absent with one day sickness on 23rd September 2014 (see page 219). When the claimant returned to work the next day 24/9/14, the claimant had a conversation with C following that return to work (see email page 196) and her email to her union rep at page 195. We find it was on that occasion that the claimant first shared the fit note from her GP. Indeed the GP had signed a further note dated 24/9/14 which once again stated "altered hours, amended duties, reduced hours and reduced role to avoid stressful factors for the period 24/9/14 to 31/10/14". We find that there were several meetings to discuss this issue. There was a meeting on 1st October and a further meeting on 16th October.

27. We find that although the GP had noted that the claimant would benefit from both reduced hours and a reduced role the claimant did not want a reduction in her role. She told us in evidence that she saw it as a "demotion". We find that the note at page 219 which had been signed by the claimant specifically states A "has given a written submission to override the GP fit note dated 24/9/14 upon her own request". We find that this was in relation to the "reduced role", namely the Assistant Head Teacher role.

28. We find that there was a meeting on the 1st October 2014, see the minutes at page 212 to 215. We find that the Head Teacher found the claimant a reduced timetable for one month as per the fit note to which the claimant agreed, see page 215 and 216. We find the Head teacher confirmed that the CBT for one morning or afternoon a week could go on for a longer period over the Autumn term and that he re-iterated he would not expect the claimant to return to school for meetings after the session. We find that it was only following the meeting with the claimant on 24th September and confirmed in the meeting on 1st October that C became aware that the claimant had not fully recovered and was continuing to suffer psychological problems. The claimant confirmed she accepted the offer of a shortened day once a week for medical appointments, see page 217 by email of 5th October.

29. We find on 16/10/14 there was a further meeting where the claimant produced another fit note for the period 16/10/14 to 30/11/14 which stated "altered hours amended duties". The fit note stated "reduced hours". We find that at this meeting the offer of a shortened day once a week in order to allow the claimant to attend CBT off site was confirmed. It was noted this would operate through until December 2014 if required. See page 219.

30. The claimant had a further sickness absence on 20th and 21st November 2014. See page 243. At a meeting on the 27th November 2014 at page 246 the claimant confirmed that she had suffered a further miscarriage. The note of the meeting signed by the claimant states that "following a discussion with HR no stage one absence to be instigated at this point due to the nature of the absence on the 20th and 21st November 2014 do not include in calculation". The note also states "reduced timetable is formally agreed for A to attend CBT until Christmas" . The fit note at page 245 states reduced hours and notes the condition as depression/early miscarriage for the period 26/11/14 to 5/1/15.

31. We find by this stage the claimant had been referred by her GP to a Psychiatrist. The date of referral was 26th November 2014. The referral notes "frequent suicidal thoughts". She was seen by Dr S K Salujha, Consultant Psychiatrist on 22nd December 2014 who advised doubling her medication dose of anti depressants. The psychiatrist noted her CBT was due to finish the following day.

32. The claimant did not return to work following the Christmas holidays. Her first day of sickness absence was 5th January 2015. She returned on 19th January 2015. Her fit note is at page 1463 for the period 5/1/15 to 30/1/15. It notes depression and notes may benefit from "reduced hours".

33. There was a return to work meeting on 19th January 2015 see page 277, we find that there was a phased return to work. The claimant is noted to be on a "reduced timetable of mainly half days until 26th January. This will then be re-examined and/or extended as appropriate following advice or recommendations."

34. We find it was at this stage the claimant was referred to occupational health see page 277.

35. Meanwhile on 16th January unbeknown to the respondent see page 1359 to 1360, the claimant had been referred urgently to the Mental Health Crisis Team "more recently she is extremely depressed and finds life difficult to cope with having frequent suicidal thoughts and been looking at ways to try and commit suicide". See page 1359.

36. We find before Christmas in 2014 on 12 December 2014 the claimant's partner had suffered a heart attack and undergone heart surgery on 17th December 2014.The claimant was granted permission to leave school early to visit him in hospital.

37. The occupational health report at pages 289 to 291 is dated 27th January 2015, occupational health physician confirmed "A states that her psychological health/ill health is not specifically work related however the stress which can occur at work at times can exacerbate her symptoms". The occupational health physician also confirms that the claimant is likely to be covered by the disability legislation and that it would be good practice to consider adjustments required on that basis. The adjustments suggested are "temporary adjustments and restrictions until her psychological health and resilience improves. He states "she is likely to require time off work to attend appointments and it would be good practice to allow this as it would be beneficial to your employee's health". It also refers to a stress risk assessment and that "you may wish to consider allowing A to work flexibly as part of the stress risk assessment. Should she be allowed to undertake reduced hours at work with flexibility to work at home as required you are likely to see an improvement in her psychological health and therefore attendance going forward .A reports that her symptoms fluctuate and can be unpredictable and therefore she is unable to say when she will require the flexible hours".

38. We find that the claimant accepted in cross examination that she had down played the seriousness of her illness to the occupational health physician. She told us in cross examination that was because she was feeling better at that time. However this is contradicted by the report of the psychiatrist at page 1361 to 1363, whom the claimant had seen only one week earlier, see especially page 1361 regarding self-harm and 1362 suicidal thoughts.

39. She also confirmed in cross examination that she was not taking the full reduction of hours as offered by the Head teacher at this time.

40. We find this is part of a pattern whereby the claimant, downplayed her illness and did not accept the advice of her GP in full .We find the claimant is a highly competent, high achieving individual who struggled to accept the nature and extent of her illness. We find she wanted to continue in her role as Assistant Head Teacher, and she saw any reduction in that role as a "demotion". She was a single parent and there was a significant increase in salary in the Assistant Head Teacher role and she had been an excellent classroom teacher and had received a very positive performance review in December 2014.

41. We find that because of these factors the claimant on her own admission was not always honest with the Head Teacher about the seriousness of her condition and did not take the advice given to her by those caring for her, namely her GP who had suggested both a reduction in hours and a reduction in her role.

42. The confirmation that the claimant was not taking the full amount of reduced hours permitted to her is at page 303 of the bundle. A fit note for the period 28/1/15 to 2/3/15 notes reduced hours and time off for medical appointments, see pages 293 for the period 28th January to 2nd March which states depression and that the claimant may benefit from altered hours, the comments include "reduced hours and time off for medical appointments".

43. On the 9th February the claimant was invited to a stage one meeting (see page 305). The invitation states "following your return to work meeting and now that we are in receipt of your occupational health report you are required to attend a short term first stage sickness absence meeting under B's sickness absence policy and procedure for schools on 23rd February. The purpose of the meeting is to discuss your sickness absence to date and to agree an action plan for the future".

44. By agreement of the claimant's union representative the stage one meeting was moved back to the 25th February, see page 307A. In the same letter the union representative asked for clarification. There then was an email exchange which was rather confusing on both sides, pages 308 to 311.

45. We find that on Friday 13th February the Head Teacher stated "as you now have been back at work for four weeks on a phased/reduced hours basis and as per B's absence management policy I would expect you to return to work week commencing Monday 23rd February on a full time normal contractual hours/responsibilities basis. In the interests of consistency and continuity for the school I would ask now that any ongoing CBT/counselling appointments, if required are arranged outside of normal school hours. I am happy however of course to consider and support any NHS arranged medical appointments that may be necessary for you to attend via the arrangement of your GP or medical specialist during school hours. Please complete an absence request form if required for this purpose".

46. The claimant responded almost immediately "please clarify regarding being allowed to go to CBT appointments as that is an NHS arranged medical appointment arranged by the GP taking place at Stepping Hill". The Head Teacher's response to that is confusing. He states "as noted below I am happy to consider unavoidable medical appointments during school hours however regular counselling/CBT should really be arranged outside of normal working hours. I would appreciate it if that could be arranged if it is required going forwards". P308

47. We find by this stage the claimant in mid February was very unwell and had been since just before Xmas but the Head teacher was unaware how serious the claimant's illness was because the claimant had downplayed her condition to the Occupational Health Physician

48. The claimant's GP's notes show that she was attending her GP very regularly at this time. On 21st January she was referred to describing "suicidal feelings much the same".

49. On 29th January "didn't sleep well last night as was going over yesterday's chat about suicidal ideas" and " very tired and feels worse asking for sleeping tablets just to get through next days and avoid further suicidal remuneration".

50. On 4th February "much the same…. continues to research suicide on the internet".

51. These entries are very much at odds with the tone of the occupational health report.

52. We find there was also some confusion about the therapy the claimant was undergoing by mid February 2016.Originally the counselling the claimant had undertaken had been as referred by the school. It is unclear precisely what was happening in terms of the claimant's CBT. The records note that at page 1359 CBT was due to finish December 2014 and that there was a three week gap over Christmas. There is a note 14/1/15 had further CBT session. We find that the claimant has had sessions of CBT which are coming to an end, the last session 11th February 2015, discharged 23 February 2015, see page 1375, there are more arranged for her. We note that Alison Pleschak stated "client's risk is being monitored weekly/fortnightly by CBT therapist at Stepping Hill where she commenced treatment last week". Page 1375.

53. We find that on Sunday 22nd February (following half term) the claimant informed the Head Teacher "in the absence of clarification to the contrary I am assuming your email of 13/02/15 implicitly rejects my current fit note as the recommendations in that are precisely the things which you have stated in your email cannot now occur. As you know a you may be fit to work note becomes you are not fit to work if it is rejected. As a result based on medical and union advice I find myself in the position of being unable to attend work this week. This is not what I want. What I want is to be able to return to work and also to follow medical advice, I hope this situation can be resolved as soon as possible, see page 310".

54. The claimant is then absent from work on sick leave, the claimant's sick note at page 322 dated 25/2/15 states she is not fit for work due to depression from 25/2/15 to 3/4/15. The claimant is in fact absent from work for the period 23 February 2015 to 17 June 2015.

55. We find that the stage one meeting took place on 25 February. We find at that meeting the claimant advised the respondent she was likely to require a further 20 weeks of CBT treatment which could vary. The claimant wanted a flexible arrangement as she had had previously. For the respondent by this stage having provided support for the claimant for over twelve months, the Headteacher stated that "CBT appointments should now be made outside of school hours". He also stated that "I advised that if you would prefer I would be happy to consider a temporary reduction in contract to help facilitate your appointments".

56. Both parties agreed that at this point not including absences related to the claimant's miscarriage she had been absent for 16.097 days and therefore had met the stage one trigger, page 350.

57. We find the claimant continued to be very unwell. Unknown to the respondent, we find at the start of March the claimant took an overdose of Paracetamol and alcohol, as evidenced by the claimant's GP notes .See page 1379 and 1440.

58. On 13th March 2015 the claimant submitted an appeal against the decision made by C during my recent stage one absence meeting, see page 3583 to 3587.

59. The respondent's absence management procedure states at page 1146 "an employee will be entitled to appeal against any formal advice/information that they

have reached stage one/two/three of the policy". It states "this appeal will normally be to the Head Teacher or member of the school's management team other than the Head Teacher/delegated manager who chaired the most recent sickness absence hearing and wherever possible would be heard at a more senior level than the manager who chaired the meeting".

60. We find that in this case because the Head Teacher had made the decision it was entirely appropriate that the appeal against the stage one decision should be to the Governors.

61. The procedure goes on to state "the purpose of the appeal process is to review the fairness of the original decision in all the circumstances". We also refer to the section of the policy which deals with disability discrimination, 1147. It specifically states that if an employee is disabled the employer making reasonable adjustments may reach agreement to a higher level of sickness absence which may involve an adjustment of the trigger points in this procedure.

62. We find that the respondent relied on an analysis of the claimant's absence at page 321. We find that in a twelve month rolling period from 22 January 2014 to 5 January 2015 there were six periods of absence totalling 26.9 days. C explained that he had not included days absent in relation to miscarriage. He had therefore included four separate periods of absence totalling 16.9 days.

63. C stated that although he knew from the occupational health report that the claimant was disabled it was his understanding that the adjustment to trigger points was not retrospective i.e. it was not appropriate to exclude the ten days sickness depression for the period 5/1/15 to 16/1/15. If that had been excluded the claimant would not have reached the trigger point because she would have had 6.9 days absence over three periods which does not meet the requirement for triggering the first stage of sickness absence (short term namely ten working days within a twelve month rolling period or five instances of absence within a rolling twelve month period).

64. At the appeal stage the claimant gave very detailed information about her personal circumstances and her psychiatric ill health to the governors which she had not made available to the Head Teacher.

65. We find that at the stage one meeting and stage outcome there is no evidence to suggest that C had received specific advice from HR about any adjustment to the triggers given the Occupational Heath report conceded she was disabled.

66. By the time of the appeal K from HR advised the appeal panel that the normal triggers for a stage one sickness absence meeting are that an employee has been absent for ten working days or five instances over the previous twelve months as at their date of return to work. However she informed them that if an employee is defined as disabled under the Equality Act it is the normal practice that a reasonable

adjustment is made and triggers are doubled for absences related to the medical condition (disability).

67. Her advice goes on to state "my concerns which I raised with the Governors are that in line with the absence policy a referral was made to occupational health for medical advice. They confirmed in their report of 27th January 2015 that they considered the claimant's case is likely to be covered by disability legislation. Therefore I would expect that upon receipt of this advice the trigger points would be doubled as a reasonable adjustment". We find that based on this information the panel were minded to overturn the decision to move the claimant to stage one because a doubling of the triggers would have meant that stage one had not been reached.

68. However we find that the Head Teacher became aware that the claimant had disclosed significant personal information about her psychological condition to the Governors which she had not shared with him. At this point he intervened to write to the Governors, see page 427A to 478E.

69. We find that following this intervention the Governors decided to reject the claimant's appeal against reaching the first stage of the short term sickness absence review process.

70. We find that the claimant had a stage two absence meeting on 30th April 2015, see page 513 to 515. We find that this was held under stage two of the long term sickness absence. We find that long term absence is defined as "continuous absence which exceeds six week", see page 1142.

71. The claimant submitted that if she had been allowed to work flexibly and had time off for her CBT then she never would have been absent from work and the stage two trigger would not have been reached. The Tribunal is not satisfied there is evidence to support this contention.

72. The claimant had continued working at a very high level through 2014 with an adjustment for flexible working including time off for CBT appointments. However by 2015 she was much more seriously ill. She was absent the first two weeks in January 2015 while her mental health deteriorated following two personal issues namely a further miscarriage in November and the serious illness of her partner. She was having regular and persistent ideas of suicide.

73. The claimant also suggested that if the respondent had doubled the triggers for the long term absence then the claimant would not have been placed at the second stage of the sickness absence policy at the point where she was.

74. However, we find that the claimant was absent from work on a long term absence between 14th January 2015 until 17th June 2015. Therefore even if she had not been placed in the procedure as of 30th April she would have been placed in it prior to her return to work. The outcome of the stage two sickness meeting is recorded on 7th May 2015 at page 532 to 534. The sickness appeal hearing took place on 16th June 2015, see page 660 to 666. The outcome was given on 19th June 2015 see page 679 to 682 and was not upheld. Meanwhile on 17th June the

claimant had returned to work. There was agreement that the claimant would have a phased return to work and that she would have time off for twenty one hour specialised treatments and that a stress risk assessment would be carried out, page 668.

75. The claimant lodged a grievance about her appeal and the outcome on 30th June 2015 at page 693.

76. We find that on Tuesday 30th June a SLT meeting took place. In the meeting was a reference to a Senior Leadership working event booked for that Friday 3rd July which included an overnight stay. The claimant realised she had not been invited. It was not disputed that at that point the claimant had not been invited. We find the Head Teacher did then ask in the same meeting if she would like to be included in the event. We find the claimant said no as it would be embarrassing, see page 703**.**

77. On 1st July 2015, page 701 the claimant lodged a grievance concerning her exclusion from the residential trip. . We find the Head Teacher responded at page 703 informing her that the event had been booked over a month ago while she was signed off work on long term sickness leave. He also explained that given she was on a phased return to work he thought it slightly inappropriate to invite her given her concerns about hours of work.

78. On 15th July the claimant was sent an email asking her to pop in to see the Head teacher to discuss an office move, see page 731B .Later that week the claimant moved offices. The claimant objected. See p732.

79. The claimant also raised concerns about her workload in the new academic term in September 2015. See emails page 775 to 792. We also rely on the evidence of the Head Teacher at paragraph 68 of his statement and page "……..A reported that her needs for her workload to be reduced was based on reasonable work load expectations and was not disability related". It also states "she recently had a meeting with the Head Teacher and she felt the meeting was positive and polite and she would like to build on this to improve her working relationship with the Head Teacher".

Relevant Law

1. The relevant law is found and the Equality Act 2010 Section 13 (Direct Discrimination), Sections 20 to 21 (Duty to make reasonable adjustments), Section 15 (Discrimination arising from disability) and Section 27 (Victimisation). The burden of proof provisions are relevant, Section 136 and time limit provisions, Section 123**.**

2. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007]

ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL.

80. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 … 524 CA. The parties drew our attention to the Secretary of State for Work and Pensions (Job Centre Plus) –v- Higgins UKEAT/579/12 2014.

81. The Tribunal also had regard to the EHRC Code of Practice and in particular paragraphs 6.1, 6.10, 6.16, 6.29 and 6.28.

82. In the Section 15 claim the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT. The Tribunal also had regard to para 5.9 EHRC.

83. In the direct discrimination the Tribunal had regard to Section 23(1) Equality Act 2010 concerning the comparator and Shamoon –v- The Chief Constable of RUC 2003 ICR 337 and the principle in High Quality Life Style Limited –v- Watts 2006 IRLR 850 and Stockton on Tees Borough Council –v- Aylott 2010 ICR 1278 CA.

Victimisation

84. The Tribunal had regard to the principles in Derbyshire and others –v- St Helens Metropolitan Borough Council and Others 2007 ICR 841 and Chief Constable of West Yorkshire Police –v- Khan 2001 ICR 1065 and Nagaragan –v- London Regional Transport 1999 ICR 877 . Fecitt and others –v- NHS Manchester UKEAT/01/0150/10/CEA 2012 ICR 372 was referred to us by the claimant's representative although we noted that was a case concerning public interest disclosure.

The Issues

85. The issues are identified in the case management note of Employment Judge Franey. This is at pages 72-3 in the bundle.

Applying the law to the facts

86. There was no dispute in this case that the claimant was a disabled person by reason of depression at the material time.

87. We turned to the first claim, breach of the duty to make reasonable adjustments, Sections 20 to 21.

88. The issues were identified as did the respondent apply a provision, criterion or practice (PCP) of:

(a) requiring an Assistant Head Teacher to be physically present in the school during school hours and/or

(b) requiring staff to attend medical appointments outside school hours?

(c) If so did either PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled because her disability made it more likely that she would need to attend medical appointments during school working hours?

(d) If so, did either respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage?. The claimant contends that a reasonable adjustment would have been to have allowed her to attend therapy appointments for one hour a week during non-contact time for such a period as was necessary to enable treatment to be completed.

89. We turned to the first question of the PCP. We find that the respondent did require an Assistant Head Teacher to be physically present in the school during school hours and required staff normally to attend medical appointments outside school hours. We rely on the evidence of the Head Teacher which was not disputed that as a member of the senior management team the Assistant Head Teacher was normally required to be physically present in school during school hours. We rely on our finding of fact in relation to the school's policy that staff were normally required to attend medical appointments outside school hours.

90. We turned to the second question, did either PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled because her disability made it more likely that she would need to attend medical appointments during school working hours.

91. The Tribunal had regard to the facts of this matter. The claimant suffered from depression. She required medical appointments to manage her condition. She regularly attended GP appointments and later psychiatric appointments. Initially she attended counselling which was funded by the school. Later she began Cognitive Behavioural Therapy. We find that theoretically the PCP would place the claimant at a substantial disadvantage in comparison with persons who were not disabled because the intractable nature of her depression and the deterioration of her condition meant that she continued to require Cognitive Behaviour Therapy. We find that a person who was not disabled required medical appointments for example for a short term condition would be less likely to require ongoing medical appointments during school hours.

92. However, we remind ourselves we must consider whether the claimant was put at a "substantial disadvantage". In this case the claimant was permitted by the Head Teacher to attend CBT appointments, authorised from February 2014. The claimant agreed that she was permitted to work flexibly which included time off for her CBT appointments during the Summer Term of 2014. There is a lack of clarity about the situation during the Autumn Term of 2014 but the evidence suggests that the claimant was continuing to attend CBT appointments although it is unclear whether these were during school hours.

93. There is no dispute that the claimant was permitted to attend CBT appointments from June 2015 going forwards for a further 20 appointments, out of hours if necessary.

94. The period of time where the claimant alleges she was placed at a substantial disadvantage in comparison with persons who are not disabled was the period of time from 25th February 2015 to 17th June 2016. This is the period of time the claimant was absent from work (page 347).

95. The Tribunal finds that the wording of the e-mail from the Head Teacher at page 308 on Friday 13 February 2015 was unfortunate because there is a lack of clarity. The claimant specifically asked for clarification as to whether she was entitled to time off for CBT appointments which she stated were an NHS appointment arranged by her GP. See p 308. The reply lacked clarity; it simply reiterated "I am happy to consider unavoidable medical appointments during school hours however counselling/CBT should really be arranged outside of school hours. I would appreciate if that could be done going forwards".

96. There was then a further email from the claimant's representative which was also confusing because it reiterated the request for Wednesday morning CBT appointment but also seemed to suggest a later appointment was also a possibility: "This it would seem has less impact than an after school appointment, the latest of which could be 4pm".In the discussion on 25th February the Head teacher stated "CBT appointments should now be made outside of school hours". He also stated that "I advised that if you would prefer I would be happy to consider a temporary reduction in contract to help facilitate your appointments".

97. The claimant said in evidence that she was never refused an appointment she requested from the respondent. She agreed she was granted medical appointments in school time to see her treating Consultant. She agreed she attended CBT appointments during her absence from work.

98. Given that the claimant was permitted to attend medical appointments during school working hours during the majority of 2014 and from May/June 2015 onwards and that she was never actually refused attendance at a CBT appointment, the Tribunal is not satisfied that she was placed at a substantial disadvantage in comparison with persons who were not disabled.

99. However in case we are wrong about this and the fact that the claimant went off sick in February 2015 because she perceived that she was being refused permission to attend CBT appointments in school hours going forward (and was also being refused the option to work flexibly) the Tribunal has gone on to consider the fourth issue.

100. That is: did the respondents fail to take such steps as it was reasonable to have to take to avoid the disadvantage. We remind ourselves to identify the disadvantage. The disadvantage was that the claimant would be more likely to need to attend medical appointments during school working hours and the policy was employees were not normally permitted to do so. We remind ourselves that we must take into account the relevant provisions of the EHRC code of practice. Whether the step is reasonable depends on all the circumstances of the case. See paragraph 6.29 of the code. Para 6.28 reminds us whether taking any particular steps would be

effective in preventing the substantial disadvantage and we must take into account the practicability of the steps, financial and other costs and disruption, the employer's financial or other resources and the type and size of the employer.

101. There is no dispute that the respondent operates a large secondary school where the claimant worked. All parties agreed that the nature of education is that children can be unpredictable and their behaviour can be challenging. Emergencies can erupt where it is important that the senior management team are available. The Tribunal has taken into account that at the period of time where there was some lack of clarity as to whether the claimant could take time off for her CBT appointments i.e. between February and June 2015 the respondent was unaware of how seriously ill the claimant was. We find the claimant to be a confident and articulate woman who it was not disputed is excellent at her job. At Tribunal and at work she presented highly competent and professional face to the world; however her GP and hospital records make it clear that between December 2014 and June 2015 she was very unwell.

102. The findings of fact show that her medical condition had seriously deteriorated in January 2015 following a further miscarriage and the serious illness of her partner. The medical records show that thoughts of suicide were common at this time and indeed in early March the claimant made a suicide attempt. The respondent was entirely unaware of this at the relevant time. Although it had an occupational health report dated 27th January at the claimant's request there was no detailed information in that report about the seriousness of the claimant's illness. Accordingly the respondent had no information as to the importance of the CBT therapy in relation to the claimant's illness.

103. We considered whether the respondent took such steps as was reasonable to have to take to avoid the disadvantage. We have taken into account that the respondent had permitted the claimant to attend medical appointments outside school hours to see her Psychiatrist and had permitted her to work flexibly which included accommodating appointments in the summer term of 2014 and it continued to permit her this flexibility to attend medical appointments in the autumn of 2014. It had permitted it again once from June 2015.

104. We also considered other adjustments the respondent offered to avoid the disadvantageous effect. The respondent offered the claimant to have shortened hours to enable her to attend appointments and also offered a temporary reduction in contract. Both of these options would have avoided the disadvantageous effect of being unable to attend therapy appointments during school time.

105. After taking into account that although some members of the senior leadership team would inevitably be absent from the school premises from time to time to attend meetings or training courses it is inevitable that there would be some element of disruption for the respondents when the claimant was absent during school time particularly if that absent was recurring over a lengthy period of time.. It is inevitable that as claimant was an essential part of the respondent's senior leadership team then her ability to be present would inevitably have an impact on colleagues. We accept the evidence of the Head Teacher in that regard.

Accordingly the claimant's claim for failure to make reasonable adjustments does not succeed.

Discrimination arising from disability Section 15 Equality Act

106. We turn to the issues. Did either respondent subject the claimant to unfavourable treatment in any of the following respects:-

(a) invoking the sickness absence management procedure;

(b) the outcome of stage one of that procedure;

(c) the rejection of the appeal against stage one of that procedure;

(d) the outcome of stage two of that procedure.

107. Did that treatment also amount to a detriment under Section 39(2)(d) and was that treatment because of something which arose in consequence of the claimant's disability, namely her absence from work? Finally the respondents conceding that they knew or ought to have to know the claimant was a disabled person can the respondent show that the treatment was a proportionate means of achieving a legitimate aim. We turn to consider the first allegation "invoking the sickness absence management procedure"

108. "The Tribunal also reminded itself of Pnaiser –v- NHS England UKEAT/0137/15. We reminded ourselves that as stated in Basildon and Thurrock NHS Foundation Trust –v- Weerasinghe 2016 ICR 305 "the current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something" and therefore has to identify "something" – and second upon the fact that "something must be "something arising in consequence of B's disability" which constitutes a second causative consequential link. These are two separate stages. "

109. In this case the claimant alleges that invoking the sickness absence management procedure on 9th February 2015 is the respondents treating her unfavourably. She says that is because of something namely her absence from work and that her absence from work arose because of her disability.

110. We asked ourselves whether invoking the sickness absence management procedure can amount to unfavourable treatment and whether that treatment also amounted to a detriment under Section 39(2)(d). The Tribunal reminded ourselves that when assessing whether something is "unfavourable there must be a measurement against an objective sense of that which is adverse as compared to that which is beneficial". We find the reason for invoking the sickness absence management policy is as stated at page 305: "the purpose of the meeting is to discuss your sickness absence to date and to agree an action plan for the future". The Tribunal does not find this is unfavourable treatment.

111. The Tribunal has regard to the fact that at this stage the procedure is only being invoked and the outcome has not been reached so the claimant has not been set along the path of receiving an outcome from the procedure. The Tribunal also reminded ourselves that the sickness procedure is not a disciplinary procedure. And that agreeing an action plan to manage sickness is a positive action.

112. The Tribunal turned to the next issue, whether the claimant suffered a detriment within the meaning of Section 39. The Tribunal reminded ourselves that the detriment is widely construed has to be viewed broadly and be seen from the perspective of the employee concerned.

113. Accordingly having found that the claimant was not subjected to unfavourable treatment the claim fails at this stage.

114. However in case we are wrong about that we have gone on to consider on the basis she did suffer unfavourable treatment because the claimant stated that she viewed being invited to a stage one sickness absence meeting as something which was negative and thereby detrimental.

115. We find that the treatment was because of something which arose in consequence of the claimant's disability namely her absence from work .There was no dispute that the reason why the claimant was invited to the sickness absence management meeting was that she had triggered 16.9 days absence when her absence from depression at the start of January 2010 was taken into account. See our fact finding and C's table showing how he had calculated 16.9 days which was not disputed by the claimant.

116. We then turn to the final issue, can the respondents show that the treatment was a proportionate means of achieving a legitimate aim. We reminded ourselves of the EHRC's employment code and guidance on objective justification. We remind ourselves that the main pursuit should be legal and should not be discriminatory in itself and must represent a real objective consideration.

117. We find that the respondent had the legitimate aim of monitoring the performance of its employees for the good of its organisation. We accept the respondent's contention that it is in the interests of the students at the school that members of the teaching staff and senior leadership team demonstrate consistency of service. We also find that it is appropriate to have a sickness absence management procedure so that meetings can be held with an employee who is absent and support offered where necessary as suggested in the letter sent to the claimant inviting her to the meeting. We have also taken into account that the respondent did not move speedily to invoke the sickness absence management procedure. The claimant had the benefit of an arrangement with the Head Teacher whereby she had worked flexibly in the Summer term of 2014 which had permitted her to have certain absences from work. The claimant had also been permitted to attend CBT appointments during school time. We accept the evidence of the Head Teacher and find that it was only when the claimant had become further absent for

two weeks in January 2015 after almost a year when he had supported the claimant with flexible working and time off for medical appointments that he invoked the sickness absence and management procedure. We have also taken into account that he had excluded pregnancy related absences. We are therefore satisfied that in all these circumstances invoking the sickness absence management procedure was a proportionate means of achieving a legitimate aim.

118. We turn to the second allegation "the outcome of stage one of that procedure". The outcome of the stage one procedure was that the claimant received a letter confirming that she was on "the first stage of the short term sickness absence review process". See p350. She was advised that her attendance would be monitored for a further six months and that because of her ongoing condition triggers would be increased .This meant during the six month review period trigger points were ten working days, five instances of absence (instead of five working days and three instances).

119. For the avoidance of any doubt we find there a typographical error in that letter where at line three on page 351 it refers to stage one triggers being five working days and three instances. The context of the letter is clear that that should read stage two. The Head teacher also offers a temporary reduction in contract to help facilitate her appointments. It states "you are advised that you are expecting to undertake a further 20 weeks of CBT appointments and I advised that as support had been in place for over twelve months these appointments should now be made outside of school hours. I confirmed that I was happy for you to miss after school meetings and enrichment for you to attend at this time".

120. We find that in the outcome of the procedure the respondents subject the claimant to unfavourable treatment because the claimant was placed on a review period which placed her on the first stage of a procedure which going forward if all the stages were eventually completed could ultimately mean her employment being terminated because of her inability to attend work. We reminded ourselves there is no need for a comparator to show unfavourable treatment under Section 15. We then considered whether the treatment was because of something which arose in consequence of the claimant's disability. We find that it was. The "something" was her absence from work in January 2015. We find that did arise in consequence of her disability because her disability was depression and her absence for ten days in January 2015 was because of depression. We accept her evidence that this was a detriment to her.

121. We therefore turn to the next issue, can the respondents show that the treatment was a proportionate means of achieving a legitimate aim.

122. We accept the respondents had a legitimate aim of monitoring sickness absence. However, we have taken into account that the first respondent's policy in the disability section states consideration should be given to the adjustment of the trigger where a disabled employee is concerned.p1147.

123. We rely on the evidence of K from HR that it was usual and normal practice for the respondent to consider doubling triggers under the short term absence management policy. We rely on her evidence to find that once the first

respondent was made aware by occupational health that an individual was disabled at that point it was usual practice to double the trigger point retrospectively. See p432 and her evidence in cross examination.

124. We are not satisfied the respondent has shown that the outcome of stage one was a proportionate means of achieving a legitimate aim.

125. The legitimate aim was monitoring the claimant's performance and ensuring that she remained in work. We find it was the first respondent's usual policy to double the sickness absence trigger once the respondents became aware that the claimant was disabled.

126. We find that if this had been done the at the stage one meeting, where it is not disputed the respondent had received OH advice that the claimant was disabled, the outcome would have been that the claimant would not have been formally triggered under the policy and therefore would not have received the outcome letter which stated she had reached stage one and was now subject to the review period.

127. This is because the two weeks she was absent in January for depression would not have been sufficient to trigger the policy. The usual triggers for stage one are 10 working days or 5 days of absence. The claimant had been absent for 16.9 days.10 of those days were depression in January 2015.If the trigger had been doubled ie to 20 days, the claimant would not have been caught under the provisions of the policy at that point.

128. Accordingly this allegation succeeds.

129. We turn to the next allegation "the rejection of the appeal against stage one of that procedure". We rely on our findings of fact. We turn to the first question. Did the respondent subject the claimant to unfavourable treatment in rejecting her appeal against stage one of that procedure. We find that rejecting her appeal does amount to unfavourable treatment because it meant she remained in a process which ultimately could have resulted in dismissal if all the stages had been completed, in her dismissal.

130. We turn to the next question. Did that treatment also amount to a detriment under Section 39(2)(d) of the Equality Act? We find that it did. The claimant told us that as a professional person she found it distressing to be reviewed under the grievance procedure.

131. We turn to the next question. If so, was that treatment because of something which arose in consequence of the claimant's disability, namely her absence from work?

132. We refer to our fact finding. We found the reason the appeal was rejected was because the Governors who formed the appeal panel were heavily influenced by the intervention of the Head Teacher when he discovered they were minded to grant the appeal. We rely on the emails between the panel members which make it

clear that they were troubled by the intervention of C and reluctant to change their original provisional view that they should grant the appeal. Accordingly we find the rejection of the appeal was because of the intervention of the Head Teacher. We are not satisfied that it was something which arose in consequence of the claimant's disability namely her absence from work. We find the rejection of the appeal at stage one was unrelated to the claimant's disability of depression. We find her appeal was rejected because of the intervention of the Head Teacher. Accordingly the claim fails .

133. We turn to the next allegation "the outcome of stage two of that procedure". We turn to consider the first issue, did the respondent subject the claimant to unfavourable treatment? We find that the outcome of the procedure on the 7th May 2015 informed the claimant that she had been reviewed under the long term sickness absence review process and the meeting had been the second stage sickness absence meeting. She was informed that the implications of any further sickness absence could be found Section 13 of the sickness absence policy.P534 We are satisfied that this amounts to unfavourable treatment in the sense that the claimant was one stage further along the process which could ultimately could have led to her dismissal.

134. There was no dispute that at this stage the claimant had been absent from work since 25th February 2015. At the time of the meeting on 30th April 2015 she had been absent continuously for almost ten weeks. We find that her absence had been triggered because she had been absent for more than six weeks, see paragraph 13.2 at page 1143.

135. Going to the next issue, did that treatment also amount to a detriment under Section 39(2)(d). We remind ourselves that the detriment must be widely construed. We find that the claimant considered the outcome to be a detriment because it made her apprehensive that she was at risk of being dismissed.

136. Moving to the next issue, was the treatment because of something which arise in consequence of the claimant's disability, namely her absence from work. We find the answer to this question is yes. The claimant was triggered under stage two of the procedure because she had been long term absent for more than six weeks (almost ten weeks at the time of the meeting). The reason for absence was depression which is the claimant's disability.

137. We therefore turn to the final issue. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim. We find that they can. We rely on the evidence of K that although the respondents policy where it refers to disability discrimination at page 1147 is silent in relation to whether adjustment of trigger points relates to long term absence or short term absence, we rely on her evidence to find that adjustments of trigger points was usually applied in relation to short term absence only.

138. We find the rationale of that policy is that reasonable adjustments are to enable an employee to remain in work with appropriate adjustments. By its very nature a long term absence means that a claimant is absent from work and doubling the triggers for a long term absence would not assist in enabling a claimant to return

to work. Accordingly we find the respondents have shown that their legitimate aim to monitor performance for the good of its organisation. We find and they did this by arranging meetings where the reasons for absence could be considered and reasonable adjustment discussed. Taken these factors into account we find that it was proportionate to hold a meeting with the claimant and to inform her outcome of the meeting was she was at stage two of the respondent's sickness absence management procedure.

139. For the avoidance of doubt we find that the short and long term sickness absence review processes were parallel processes and employees at any particular stage of either review process can transfer/progress to the same/next stage of the procedure as appropriate and either review process according to the nature of their sickness absence. See page 1141 and 1142. This information was confirmed to us by K.

140. For the sake of completeness the claimant appeared to suggest in the course of her case that the outcome of stage two amounted to unfavourable treatment because if stage one had been dealt with correctly she never would have reaches stage two. The Tribunal is not satisfied this is factually correct. The Tribunal has found that the outcome of stage one procedure, letter 27th February 2015 was discriminatory for the reasons we have stated.

141. The Tribunal finds that it was inevitable that the claimant would have reached stage two of the sickness procedure. We find the claimant was absent from work from 25th February to 17th June on long term absence of seventeen weeks and two days. Accordingly even if the respondent had not triggered the claimant under stage one of the short term sickness absence, under the long term absence policy the claimant would have reached stage two in any event because under the long term absence policy the first stage meeting can be triggered after six weeks and a second stage meeting can be triggered two months after the first stage meeting. (Triggers are not doubled under the first respondent's long term sickness absence policy as we have described above.)

142. Accordingly the claimant's claim in relation to the outcome of stage two of that procedure fails.

Victimisation – Section 27 of the Equality Act

143. The issues are:-

(1) Did the claimant do one or more protected acts on the date to be identified in further particulars (see annexe C). We find the protected acts are listed at pages 107 to 109 of the bundle.

(2) If so, did either respondents subject the claimant to a detriment because of one or more of those protected acts in the following respect:-

(a) excluding her from a senior leadership team away weekend which took place on 3rd July 2015;

(b) moving the claimant's office at the school in July 2015;

(c) increasing the claimant's workload in the academic year beginning in September 2015.

(3) The next issue is in relation to detriment C in the previous paragraph. Does the Tribunal have jurisdiction to consider any complaint which relates to actions which post date the issue of the early conciliation certificate on 6th September (second respondent) and 20th September (first respondent) 2015?

144. There is no dispute between the parties that the claimant raised protected acts in relation to her disability and in requesting adjustments on a number of occasions following the occupational health report of 27th January 2015. We therefore turn to consider each of the alleged detriments.

(a) excluding her from a senior leadership team away weekend which took place on 3rd July 2015.

145. We find that the claimant discovered on 30th June 2015 senior leadership team were going three days later on 3rd July 2015 (page 698). We accept her evidence that she only became aware when a colleague N mentioned it in the meeting assuming that she knew. We find that the claimant had only recently returned to work on 17th June 2016. We accept the evidence of the Head Teacher that the away weekend had been planned for some time.

146. The claimant immediately complained see grievance of 1st July (page 701). The Head Teacher responded the following day explaining "the SLT working event was booked well over a month ago while you were signed off work on long term sickness leave. The event was originally planned as a follow up to some previous self evaluation work which myself and SLT were involved in during your absence. However the actual details of the event had not at the point of our conversation on Tuesday been confirmed hence why I had not up until that point discussed it with you formally".

147. The Tribunal is satisfied therefore that there is a protected act and that the claimant suffered a detriment. The Tribunal accepts the claimant found it humiliating at a senior leadership team meeting to become aware she had not been invitedto this event.

148. The Tribunal must then turn to the causal connection, did the respondents subject the claimant to a detriment because of one or more of the protected acts?

149. The Tribunal reminds itself of the burden of proof. The Tribunal is not satisfied that the case of Fecitt and others –v- NHS Manchester UKEAT/01/0150/10/CEA 2012 ICR 372 is the correct case to rely upon with regard to the burden of proof because that is a "whistle blowing case". Nevertheless the Tribunal is aware of the long line of cases including Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v

Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL dealing with the burden of proof. The Tribunal is aware there is very rarely direct evidence of victimisation or of discrimination. The Tribunal is aware of the case and principle of Nagarajen –v- London Regional Transport 1999 ICR 877 and sub-conscious motivation.

150. The Tribunal is aware that the time between the protected acts and detriment is relatively short. The claimant started making complaints in relation to reasonable adjustments and the Head Teacher from February 2015 onwards. This suggests there may be a causal connection.

151. The Tribunal has also taken into account that the claimant's claims are primary about the Head Teacher. The Tribunal has taken into account that in her grievance letter at page 701 the claimant states "you confirmed to me that you did not invite me or make me aware of the event partly on the basis that you felt it would be awkward due to the concerns I have raised about my disability and because I was absent when you booked it due to my sick leave. The Head Teacher does not deny that in email response.

152. The Tribunal is satisfied that the close link in time between the protected acts and the detriment, the fact that the head teacher is the source of the complaint and the person causing the detriment together with the claimant's evidence that she was told would be "awkward to have her at the away weekend" means there is sufficient evidence to shift the burden of proof.

153. It is therefore for the respondent to show there was a non discriminatory explanation namely an explanation that was unrelated to the claimant raising the protected act with him for the decision not to include the claimant on the SLT weekend away.

154. The Tribunal finds that C's evidence was unconvincing on this point. His email at p703 is contradictory. It appears to suggest the claimant was not included simply because the event was booked when she was off sick but then appears to suggest she was considered for attendance but excluded because she was on a phased return and had raised concerns with him about her hours.

155. C had to be asked a number of times in cross examination how the confirmation of the attendees at the event occurred and whether there was any evidence of it. He eventually said he orally confirmed attendance with members of the SLT. It is not disputed that the booking for eight people was attended by eight people, 698C. The booking form suggests that exact numbers would be confirmed one week in advance of the booking, 698B. (The Tribunal has had regard to 698L which explains that the booking confirmation was booked on 9/6/15 and the date 18 August 16 is an automatic update from the hotel).

156. Accordingly given the burden is on the respondent to prove that the detriment did not occur because of the claimant's protected act, the Tribunal is not satisfied the second respondent discharged that burden and the claimant's claim succeeds.

157. We turn to the second detriment, moving the claimant's office at the school in July 2015. We accept the claimant's evidence that she considered this amounted to a detriment because she lost a large office suitable for her needs where she had been based for some years and also she had very short notice of the room change.

158. The Tribunal turns to the causal connection. The Tribunal heard evidence that this was part of a series of room move for September 2015 to September 2016, see page 731A. The Tribunal finds that the claimant was given short notice of the change of rooms see page 731B but we find the claimant was not the only person to be affected by the room move.

159. The witness evidence of the nurse M was agreed by the claimant and thus there was no need for her to attend to give evidence. We rely on her evidence to find that the room she was based in was unsuitable because from March 2015 the School Nurse Service was extended for about eight schools within Stockport by the provision of an additional weekly clinic to young people who may be at risk of sexually transmitted diseases to be screened. The nurse also provided pregnancy testing where necessary. The nurse would also provide appropriate counselling in relation to these matters. We accept the evidence that the provision of this service meant that she needed to operate in a location which was spacious, sufficiently private to guarantee confidentiality and had its own toilet and sanitary facilities. We find the room she was originally based in was unsuitable and that the room (previously occupied by the claimant) was a suitable room.

160. We find C told the nurse it would be unfair to change rooms whilst the claimant was not in work when she was off sick and the move would have to wait until she returned to work. We have taken into account that other people were also asked to move to different rooms namely the caretaker and the claimant's union representative. We are not satisfied there is sufficient evidence to shift the burden of proof. Making a protected act and suffering a detriment are not sufficient to shift the burden, there must be "something more". We are not satisfied that there is.

161. However, if we are wrong about that and the burden of proof has shifted we are satisfied by the respondent's explanation namely that a suitable room was needed for provision of school nurse's sexual health service and the reason for that was entirely unconnected to the complaints the claimant made against C. If C was moving the claimant even in part because she had made complaints against him it was highly unlikely that he would state to the school nurse that he did not want to do it whilst the claimant was off work sick that is wholly inconsistent with the suggestion of victimisation.

162. Accordingly that claim does not succeed.

163. We turn to the third detriment- increasing the claimant's workload in the academic year beginning in September 2015. We entirely accept the evidence of the Head Teacher to find that being a member of the senior leadership team in a large comprehensive is an extremely demanding, rewarding and challenging role. We find that in order to develop his senior leadership team he changed the roles for various members of the team. We find he consulted with the members of the team

although that consultation was not detailed. We rely on C's statement at paragraph 68. We rely on his evidence in cross examination to find that when he initially spoke to the claimant about her role at the end of June or early July of 2015 she told him she was happy with it. We find that members of the senior leadership team including the claimant and the Head Teacher met almost daily. We find that as the Head Teacher and overall manager of the school it was for C to determine the different tasks of his senior leadership team. We find that he had not increased the claimant's workload, that her work was on a par with other members of the team and we find other members of the team had more demanding roles. We find that one of his first priorities was to improve the school and we find that given 40% of the children in the school had a reading age below their chronological reading the task of leadership of Special Education Needs (SEN) held by the claimant was an important role.

164. Accordingly we are not satisfied that the respondent subjected the claimant to a detriment. Thus that claim fails.

165. Finally we turn to the claimant's claims for direct discrimination in refusing the claimant time off to attend medical appointments during school hours. Did either respondent treat the claimant less favourably because of a disability than it treated or would treat a person without a disability in accordance with the further particulars provided in Annex C?

166. The Tribunal reminds itself that in a claim for direct discrimination appropriate comparator must be "no material difference between the circumstances relating to each case, see Regulation 22(1) Equality Act 2010. In addition the circumstances relating to a case include a person's ability if on the comparison for the purposes of Section 13 of the Equality Act the protected act is disability, see Section 23(2)(a)).

167. In this case there was an attempt by the claimant to compare herself to a few individuals who had a physical illness namely O who had been involved in a climbing accident and P who had sufferred back problem. The Tribunal is not satisfied that either of these individuals are appropriate comparators because it is not satisfied that there are "no material differences between the circumstances relating to each case". Each of these individuals suffered from a physical injury. We find there is evidence suggesting that O then had one long term absence from school and then returned and that P had intermittent absences due to back condition.

168. Having determined that those comparators are not appropriate the Tribunal must then construct a hypothetical comparator, the Tribunal reminds itself of the guidance in High Quality Lifestyle Limited – Watts 2006 IRLR 850. We find a suitable hypothetical comparator would be a person who also suffered a psychological illness, who was not disabled but required time off to attend medical appointments. We find that such a hypothetical comparator would have been treated in the same way as the claimant was. In other words for a lengthy period of time the school would have accommodated absences during school time and the permission to work flexibly in order to achieve this but once a year almost had passed it is likely that the school would invoke the absence management policy and other adjustments such as temporary adjustment to contract. Accordingly the Tribunal is not satisfied that there

is any evidence to suggest there was less favourable treatment of the claimant than a hypothetical comparator and the claim fails.

Time Limits

169. The Tribunal having found that the claimant's claim for victimisation in relation to being excluded from the senior leadership weekend on 3rd July 2016 is well founded and that claimant's claim that the outcome of stage one of the sickness absence management procedure was discrimination arising from disability which occurred on 27th February 2015, the Tribunal must consider the jurisdictional issue of time limits.

170. We find the act of victimisation is within time because the act of excluding the claimant was made at the meeting on 30th June 2016. The relevant date is therefore 30 June 2015. The claim was presented to the Employment Tribunal on 16/10/15. The claim was referred to ACAS on the 6th August 2015 (both respondents), the certificate was issued for the second respondent on 20th September 2015 which is date B. (6th September 2015 for the second respondent). The primary limitation expired on 29th September 2015. The claimant then has the benefit of both the additional month permitted from Date B in the Early Conciliation Regulations taking the limitation period to 20/10/15. The claimant also has the benefit of the stopped clock provisions, taking the date for commencement of proceedings to 13/11/15. Accordingly the claim was presented within time.

171. However, even if we are wrong about that the earlier date for conciliation ending against the second respondent was used i.e. 6/9/15, the claim is still within time (limitation expires 29/9/15). Limitation plus stopped clock 31 days 31/10/15, date B plus one month is 6/10/15 so limitation expires 30/10/15.

172. We must then turn to the allegation which succeeded in relation to the outcome of stage one of the procedure and must consider under Section 123(3) whether this is "conduct extending over a period".

173. The Tribunal reminded itself of the guidance in Metropolis –v- Hendricks 2003 ICR 530 CA and Aziz –v- FDA 2010 EWCA Civ 304 CA.

174. The Tribunal has taken into account that it is a relatively short period of time namely a few months between the discriminatory act in February 2015 and victimisation which occurred on 30th June 2015. We have taken into account that the same person, the Head Teacher was involved in both. We find this is sufficient to amount to an ongoing state of affairs which brings the claimant within Section 23(3)(a). Accordingly the first act of discrimination is also in time.

175. The case will proceed to a remedy hearing to be fixed at a telephone case management hearing on 7 December 2015.

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Employment Judge Ross

7 November 2016

JUDGMENT AND REASONS SENT TO THE PARTIES ON
9 November 2016

FOR THE SECRETARY OF THE TRIBUNALS

[JE]