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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr L Humby**

**Respondent:** **Barts Health NHS Trust**

**Heard at:** **East London Hearing Centre**

**On:** **On 23-26 October 2018 and 20 November 2018 (in chambers)**

**Before:** **Employment Judge Moor**
**Members:** **Mr S Dugmore**
**Mrs B Saund**

**Representation**

Claimant: In person

Respondent: Mr J Mitchell, counsel

## RESERVED JUDGMENT

**The unanimous judgment of the Employment Tribunal is that:-**

1. **the Claimant is not a disabled person within the meaning of the Equality Act 2010;**
2. **the Claimant is a person who has had a disability within the meaning of the Equality Act 2010;**
3. **the claims of disability discrimination against the Respondent do not succeed.**

# REASONS

1. These two claims arise out of the Claimant's employment as a Coding Lead with the Respondent Trust. The Claimant remains employed. He contends he is disabled and that the Respondent has discriminated against him because of his disabilities and/or because of something arising in consequence of them and/or because it has failed in a duty to make reasonable adjustments. The Respondent denies that he is disabled and, in any event, that it discriminated against the Claimant.

***List of Issues***

2. The parties agreed a list of issues as follows (we have removed one repeated item and changed some wording to accord with the statutory language).

Jurisdiction

3. The Respondent accepts that acts occurring after 23 August 2017 are in time.

4. In respect of any act or omission that is alleged to constitute unlawful disability discrimination that occurred before 23 August 2017:

    4.1 do such acts/omissions constitute part of conduct extending over a period for the purposes of section 123(3)(a) of the Equality Act ('EQA')?

    4.2 if not, is it just and equitable to extend time in respect of such acts/omissions, section 123(1)(b) EQA?

Disability, section 6

5. Is the Claimant a disabled person within the meaning of section 6 EQA ? The Claimant relies on the following conditions: depression and obstructive sleep apnoea.

6. This issue is repeated below.

Direct Discrimination, section 13

7. Did the Respondent treat the Claimant less favourably and to his detriment than it treated, or would treat, others by:

    7.1 requiring him to transfer to the Whipps Cross site ('WX')?

    7.2 preventing him or otherwise not allowing him to carry out his duties at WX as he had previously been doing at the Royal London Hospital ('RL'), or at all?

    7.3 placing a restriction on him so that he could only undertake bank work when he is supervised by a band 7 member of staff, which was allegedly very infrequent, and prior to that by requiring that he do bank work at WX when the normal departmental practice was that bank work could be carried out at any site regardless of where an employee was currently based in the week?

8. If so, was that treatment because of the Claimant's disability or disabilities?

Discrimination Arising from Disability, section 15

9. Did the Respondent know or could the Respondent reasonably have been expected to know that the Claimant was disabled (section 15(2) EQA)?

10. Did the Respondent treat the Claimant unfavourably by:

    10.1 requiring him to transfer to the WX site?

    10.2 preventing him or otherwise not allowing him to carry out his duties at WX as he had previously been doing at RL, or at all?

    10.3 placing a restriction on him so that he could only undertake bank work when he is supervised by a band 7 member of staff, which was allegedly very infrequent, and prior to that by requiring that he do bank work at WX when the normal departmental practice was that bank work could be carried out at any site regardless of where an employee was currently based in the week?

11. If so, was that treatment because of something arising in consequence of the Claimant's disability or disabilities, namely:

    11.1 an alleged propensity to fall asleep; or

    11.2 the effects, or perceived effects, of depression?

12. If so, was that treatment a proportionate means of achieving a legitimate aim?

Failure to Make Reasonable Adjustments, section 20

13. Did the Respondent have actual or constructive knowledge of:

    13.1 the Claimant's particular disability or disabilities; and

    13.2 the particular disadvantage at which the Claimant was likely to be placed as a result of the application of the PCP in question.

14. The Respondent admits that it applied the following PCPs:

    14.1 Band 6, Clinical Coding Quality Leads are required to work across various hospital sites at the Respondent, including WX; and

    14.2 employees are required to work core hours (10.00 – 15.00).

15. Did the Respondent also apply the following alleged PCPs:

    15.1 that it moves people between sites without any or proper consultation, notice, or consideration of how they will perform their contractual role or

develop at that site, and without any equity or fairness between employees; and

15.2 that the Respondent has a practice of playing a radio in offices even though not everyone can work while the radio is on;

16. In respect of the application of the matters above that are found to be PCPs was the Claimant placed at a substantial disadvantage as compared with non-disabled persons? The Claimant says that the substantial disadvantage at which he was placed was:

16.1 in relation to 14.1 and 15.1 because moving him at the time and in the manner that he was moved gave rise to an episode of depression and made it difficult to tackle his sleep apnoea;

16.2 in relation to 14.2 because his sleep apnoea causes him to wake up with apnoeas in the night and lowers his oxygen saturation levels while he is sleeping and in consequence of that he can feel excessively tired in the morning;

16.3 in relation to 15.1 because by being moved to a site where he is not able to perform his contractual role or there is no appropriate role for him to perform can trigger a recurrent episode of depression; and

16.4 in relation to 15.2 because while the Claimant has never been able to work with the radio on playing a radio when he is tired because of his sleep apnoea or depressed can make it even more difficult to work with the radio on.

17. If so, would taking any of the following steps have avoided the disadvantage at which the Claimant was placed:

17.1 In relation to 14.1, that he be permitted to return to his alleged contractual place of work RL; and

17.2 In relation to 14.2, that on nights where he has particularly interrupted sleep he be permitted to come to work later in the morning, and/or that he be permitted to work evening shifts on particular days as he has done in past;

17.3 In relation to 15.1 that in future consideration be given before any future move to the role that he is to perform at a new site and that it is appropriate to his experience and development; and

17.4 In relation to 15.2 that a radio not be played in an office in which the Claimant is working.

18. If so, was that step a reasonable one to take?

19. If so, did the Respondent fail to take that step?

Remedy

20. If the Claimant was unlawfully discriminated against, what compensation should the Claimant be awarded under section 124 EQA?

**Case Management**

21. This case was listed for a 4-day hearing. At a preliminary hearing on 16 April 2018, EJ Jones made Case Management Orders including that all witnesses must prepare written witness statements and the parties must exchange witness statements on or before 10 September 2018. They agreed some delay in this timetable but, by the first day of this hearing, the Claimant was not ready to exchange statements. He had not made any requests to the Tribunal for an extension of time. While the Respondent complained about this to the Tribunal, it was too late to make further orders prior to the hearing.

22. On the first day of the hearing, the Respondent suggested three options to resolve this problem: (a) the Tribunal could treat the Claimant's statements of claim and his grievance statement as setting out the facts of his claims and begin hearing the case; or (b) adjourn the hearing, which would put the Respondent to the significant cost of at least Counsel's brief fee and would further delay the outcome of the Claimant's grievance which he did not wish to resolve until the hearing of this claim; or (c) to begin hearing evidence on the second day listed, giving the Claimant time produce his own and to read the Respondent's witness statements.

23. The Claimant stated he had not yet finished his statement, albeit that he had spent many hours on it, and that it was currently about 13,000 words. He was unwilling to state how much longer it would take to complete it, but did not wish his case to be heard simply on the basis of his statement of claims and grievance.

24. The Tribunal applied the overriding objective at Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules'). This requires the Tribunal to manage cases 'justly and fairly' which includes ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay, so far as compatible with proper consideration of the issues; and saving expense.

25. We decided that a postponement would not save expense or avoid delay. Nor, given that the Claimant was still employed and in the midst of an unresolved grievance, would it be in the parties' interests to delay the claim. The Respondent would incur significant cost unfairly by such a postponement. The Claimant had not given a good reason for failing to comply with the order: he had had many months within which to prepare his statement. The Tribunal were concerned that, even with more time, the Claimant could not confidently say when he was likely to complete it. The Claimant had prepared a lengthy draft statement already. We reached the view that we could avoid formality and ensure the Claimant was on an equal footing, by reading his statement in draft and asking him questions prior to cross-examination to ensure he had an opportunity to give evidence on the issues. We therefore ordered the Claimant to send his draft witness statement to the Tribunal and Respondent electronically by 2.30pm on

the first day of the hearing. This gave him time to return home and send an email. We decided to use the afternoon of the first day to read this statement, the Respondent's witness statements and associated documents and to begin the oral evidence on the second day.

26. The Claimant complied with our order and we were able to finish the oral evidence and submissions in the time allotted. The delays of the first day meant that we had to complete our deliberations on an additional day, hence this reserved written decision.

**Application for Anonymisation Order**

27. The hearing of the evidence took place over 2 days in public and closing submissions took a further half a day. No member of the public or press happened to attend. At the end of the hearing, when it became apparent we would have to give a written decision that would be published on the internet, the Claimant made an application under Rule 50(1) for it to be anonymised. We allowed both parties to make written submissions about this.

Claimant's Submissions

28. The Claimant made intelligent and succinct written submissions, dated 12 November 2018, in support of his application. He first set out the law under Rule 50 of the Tribunal Rules, as interpreted by Slade J in AB v EF (UKEAT/0525/13/DM). He submitted we approach a balance between Article 8 (respect for private and family life) and Article 10 Convention Rights (freedom of expression) by referring to Supreme Court case: Re Guardian News and Media UKSC1. He relied on Bensaid v UK (case no 44599/98) (2001) 11 BHRC 297 in establishing that mental health was part of private life (see para 47). And he referred to Z v Finland (case no 22009/93) 45 BMLR 107 to illustrate how publication of a person's medical history could undermine their Article 8 rights.

29. He made the application on the basis of '*disclosures made during the course of proceedings regarding the Claimant's history of depression, and in particular comments and the disclosure'* at the meeting on 11 July 2017. He is concerned about the effect such disclosures might have on '*his mother, who is unaware of much of his history and background of depression. The Claimant also has a fiancée who is a national of another country whose family are also not aware of such details.'*

30. He also referred to section 60 EQA, that it is unlawful for an employer to enquire about the health of a prospective employee before making them an offer of employment, and argued that this provision would be undermined by his identification in this case because it was likely in the future that he would search for other jobs and employers might search the Tribunal database of decisions to find out if he had brought a claim.

31. The Respondent did not make any submissions. Orally, Mr Mitchell stated that an anonymisation order would probably have to include the name of the Respondent in order to avoid material that could identify the Claimant: there being few code leads employed at his level.

Law on Anonymity Orders

32. Rule 50(1) of the Tribunal Rules provides that: *'A Tribunal may **at any stage** of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers **necessary** in the interests of justice or **in order to protect the Convention rights** of any person …'* (our emphases).

33. Rule 50(2) provides that: *'In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.'*

34. Rule 50(3) provides that such orders may include – *'(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record.'*

35. '*Convention rights*' has the meaning given to it in section 1 of the Human Rights Act 1998, that is the rights and fundamental freedoms set out in the European Convention of Human Rights, Articles 2-12 and 14. The right the Claimant relies upon is the Article 8 right '*Everyone has the right to respect for his private and family life, his home and his correspondence.*'

36. The most recent decision on Rule 50 in the EAT is A v Sec State for Justice UKEAT/0263/17. That case emphasised what is apparent from the Rules, that Rule 50 requires application of two matters:

    36.1 first, the Tribunal must decide whether there is any basis under Rule 50(1) allowing for an order. The restriction on public disclosure can only be imposed in so far as the Tribunal considers that it is necessary for at least one of the three specific matters set out in Rule 50(1) (in this case the Claimant relies upon his alleged need to protect his Convention rights); and

    36.2 second, the Tribunal must give full weight to the importance of the principle of open justice and to the right to freedom of expression.

37. The default position is full publication, as both Slade J in EF v AB (above) and Simler, P in BBC v Roden [2015] IRLR 627, have held. In Roden at para 50 Simler P explained why open justice was so important:

    '*The default position in the public interest is that judgments of tribunals should be published in full, including the names of the parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party's name is an obvious derogation from it, requiring cogent justification for its restriction … The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear.'*

38. The danger in any case is that the principle of open justice might not seem paramount to the individual parties. They might not wish the facts of the case to be public, taking the view that it is not much to do with anyone else or that they would rather facts about or potential criticisms of their conduct be kept from public view. But the principle of open justice goes beyond such individual views: it is of paramount importance because justice must be seen to be done. Court proceedings and decisions must be open to public scrutiny in order to maintain their integrity. In a democracy, the public must know what the courts are doing in order that the public consent upon which the administration of justice depends can continue to be given. This is why it is only when it is strictly necessary to limit full publication that we can do so, whether or not the parties have a strong view either way, and whether or not the press is particularly interested in the case. This point was made in F v G [2012] ICR 246, and referred to at para 47 of Roden:

'*So far as the interests of open justice are concerned, I do not accept Mr Bowers' submission … that in the present case there is no public interest in full publication of what is essentially a private employment claim (particularly given the potentially devastating consequences for G in being identified). This was addressed by Underhill P in* F v G *[2012] ICR 246 at [49] as follows:*

*'I turn, therefore, to the second question, namely whether the injury to the article 8 rights of the students and staff concerned outweighs the interests of open justice. I do not find that easy. As Tugendhat J makes clear in* Gray v UVW *[2012] EWHC 2367 (QB), the default position in English law is and should be that it is in the public interest that the full decisions of courts and tribunals, including the names of the parties, should be published. I need not elaborate the reasons for that view … It is not a right specifically of the press but reflects the public interest generally. It applies irrespective of the subject-matter of the case. (I do not suppose that the judge's observation at para 19 of the reasons that this was "an individual employment claim" which did not "raise issues of public interest in the wider sense" meant that she believed that there was only a public interest in full publication in cases where the subject-matter of the claim itself happened to involve issues of general public importance; but I should make it clear that if that was what she meant, I cannot agree.) In addition to that public interest, weight must also be given to the claimant's wish for the judgment to be published in a form which names herself and the college. It is entirely legitimate that someone who has had their rights vindicated after a hard-fought piece of litigation should wish to be able to report, and produce the evidence of, that victory without constraint.'*

39. If the basis for the restriction under Rule 50(1) is Convention rights, then Tucker HH held that the Tribunal had to undertake a proper evaluation of those rights and give full weight to the right of freedom of expression and the principle of open justice. She referred, in her judgment, to '*balancing one against the other'* before reaching a decision. This echoes In re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593, Lord Steyn, referring to the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 AC 457, which had considered how the conflict between the competing rights under the two articles might be reconciled, said (at para 17):

*'What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.'*

40. We have so far considered the principle of open justice and why it is so weighty. Now will consider on the Claimant's particular submissions as to why it is necessary to derogate from it to protect Convention rights in his particular case.

41. In Bensaid (above), para 47, the ECHR held that:

*'Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings…The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.'*

In that case, the Applicant argued that the state's actions would damage his mental health.

42. In Z v Finland the wife of an HIV positive man convicted of sexual assault and manslaughter disputed the criminal court's order limiting the non-disclosure of her identity to 10 years after the conviction. While agreeing with the state that the interference with her private life was necessary in a democratic society for the purpose of investigating a crime, the European Court of Human Rights decided that allowing her identity and records to be accessible after 10 years was a disproportionate interference with her Article 8 rights because insufficient weight had been attached to her interests.

43. It seems to us, if we identify an aspect of private or family life that is likely to be interfered with by publication of this decision, that is not the end of our analysis. We must consider the degree to which this right is interfered with and weigh that against the importance of fully public decisions.

Application of Law to the Application

44. The first question, therefore, is whether the Claimant or his mother's or his wider family's Article 8 rights to respect for private and family life are engaged and whether they make it necessary for us to make an anonymisation order.

45. The main point the Claimant made orally, and now in writing, is that he does not wish his mother and wider family to find out about the comment he made to his employers. It has not been necessary in our decision to state more than that a comment was made that caused concern. In our view, on its own, this would not be sufficient detail to interfere with the Claimant's Convention rights. Those with whom he has relationships would not know enough for them to be engaged. Thus

the Claimant would not establish the first leg of Rule 50(1) that an order was necessary for this reason.

46. In the Claimant's written submissions he adds that he is concerned that his wider family and mother do not find out about his history of depression. His fiancée's family know nothing. From the written submissions, it is clear his mother does know some of the history. We do not know how much. In our decision we will have to set out the Claimant's description of his history of depression and how it is referred to in his medical records in order to determine whether or not he is or has been a disabled person.

47. Part of the Claimant's Convention right to respect for his private and family life relates to how he chooses to form relationships with others. It seems to us that this includes his right whether or not to inform family of his mental health history. Bensaid is sufficient authority for that proposition. Publication on the internet of this decision has the potential to undermine that right. It will not necessarily do so.

48. How weighty is this potential interference in his Convention rights?

    48.1 First there is only a potential to do so. It is not such an extreme case as Bensaid where the Claimant's mental health was going to be damaged by the state's action.

    48.2 Moreover, the potential interference with the Article 8 rights here is not the Claimant's primary concern (that is the comment and we have dealt with that in another way). His mother does know some of the history of depression – it would not be therefore in the case of the Claimant's relationship with her a large interference. But the Claimant is about to gain a new family and he chooses not to inform his fiancée's relatives of his history of depression.

    48.3 The context is that the evidence was heard in public without objection. The Claimant did not seek a restricted reporting order prior to the public hearing. He has not himself been disinhibited from making this claim, knowing from the outset that it would involve him giving evidence in public of his medical history. While a litigant in person, he is in the process of undertaking an LLM and the Tribunal Rules were available to him from the start. This context suggests to us that the interference is less weighty, given that the Claimant did not request anonymity from the start. Having said that, it is the publication on the internet that concerns the Claimant, who presumably knew that his relatives would not attend.

    48.4 Having taken into account all of these factors, in our judgment, publication will be only a limited interference in the Claimant's Article 8 right.

49. We have then considered the submission about section 60 of the EQA. This is a superficially attractive point. The right not to be asked questions about health prior to a job offer may be undermined by the publication of the Claimant's name in this decision in a form that can be easily searched. The difficulty for us,

however, is that section 60 was enacted when the default position is open justice: there is no presumption that all claimants in disability discrimination should be granted a Rule 50 order. If it is a factor at all, it is an interests of justice factor under Rule 50(1) and not a weighty one.

50. Finally, the Claimant argues that there is no public interest in the facts of his particular case. But as we have set out above, that there is no point of public importance in the case is not the point. The Convention Rights to freedom of expression and open justice are rights that reside with the public, not just the press.

51. We bear in mind the reminder in Rule 50(2) that we must give full weight to the principle of open justice, and the dicta we have set out above that explain this principle. We note that even in a case like F v G above, where the parties were extremely vulnerable individuals and staff members whose Article 8 rights were very clearly engaged, Underhill J found the factors in each direction difficult to weigh. This shows how weighty the principle of open justice is.

52. It has been difficult to judge the weight to be given to the limited interference in the Claimant's Convention rights with the full weight to be given to the principle of open justice but we find on balance that the principle of open justice is more weighty than the limited interference in the Claimant's Convention right. While Article 8 is engaged, the interference is limited. The Claimant's main concern does not require anonymisation and his mother already knows something of his history of depression. While his wider family do not, there is only the chance of intereference rather than certainty. Whereas, the principle of open justice is a cornerstone of the administration of justice and rule of law. In those circumstances, anonymisation would not be a proportionate step. We therefore do not make the anonymisation order requested by the Claimant.

Temporary Anonymity Order to Preserve Appeal Rights

53. We are conscious that the Claimant may wish to consider appealing this part of our decision but that an appeal would be pointless if our decision had already been published. It is therefore necessary in the interests of justice (namely the right to consider an effective appeal) for us to make a time-limited anonymisation order. We therefore will order that the judgement and reasons be anonymised to prevent publication of any material identifying the Claimant for 1 year, by which time an appeal and its hearing should have taken place. We consider this should include preventing publication of the identity of the Respondent, its staff and sites, given that the Claimant was in a role few others occupied (see separate order). We have appended to that order a schedule which sets out a key to the persons and sites we have named by letter in order to prevent identification of the Claimant.

***Findings of Fact***

54. Having heard the evidence of the Claimant, Ms Szul and Mr Jobling, and, having read the documents referred to us in the evidence, we make the following findings of fact.

55. The Claimant started his employment with the Respondent on 8 November 2004 and was promoted in January 2014. He is a Clinical Coding Quality Lead, at band 6 and relatively senior. The Trust went through a merger in April 2012. The Respondent Trust encompasses St Barts, Whipps Cross (WX), Newham General and Royal London (RL) Hospitals.

Coding

56. In order to be paid for the work it carries out, the Respondent invoices Commissioning Services by reference to standard codes. Each code relates to a particular diagnosis, procedure or treatment. A member of the Respondent's coding team reviews a patient's record after a visit or stay in hospital and translates it into codes. The coding can be straightforward, if one procedure has occurred, or complex, if a patient has multiple conditions and several treatments.

57. The patient record is paper or electronic. The RL has solely electronic records whereas at WX there are still some paper records.

58. The Respondent is subject to very strict monthly deadlines for submitting codes to Commissioning Services. If it misses the monthly deadline, it is not paid for the work it has done. Accurate and timely coding is therefore crucial: the Trust's income depends upon it.

Job Description

59. In his band 6 role, the Claimant was initially located at RL. There, Coding Leads managed a team of coders within specific clinical academic groups ('CAGs'). The Claimant led the surgery CAG. As a coding lead, he had to ensure that all coding for his CAG was accurate and complete for the monthly deadline. He had to manage the team to do this including: advising coders and resolving their queries; helping coders develop; managing performance and setting standards; doing complex coding himself; doing other coding to stay aware of current systems and practices; and liaising with managers to help plan workloads to ensure deadlines were met.

60. Another part of his role was to work with clinicians and review working methods to identify where processes could be changed or new ones implemented to help with effective coding. For example, he would encourage clinicians to adopt common terms or full descriptions in order to ensure that the necessary information was captured in the record so that it could be fully coded to maximise income.

Location

61. While at the RL, the Claimant's workplace was a short walk or public transport journey away.

62. His first contract, however, required him to work at any location (130):

> '*Your initial appointment will be with the Corporate - Medical Directorate based Trustwide. To meet the needs of the organisation you may be required to undertake duties at such other locations as the Trust may reasonably require.'*

When he was promoted in, his letter of appointment stated his work was at RL (136) but other terms remained unchanged. His final contract is silent on the issue, but the job description for his final post confirmed that the location of the role was dependent on the service needs of the Trust (144). *'The post holder might be required to work across the Trust at any time throughout the duration of his/her contract, which may entail travel and working at different hospital[s].'* (144)

63. From these documents and his oral evidence, we find that the Claimant knew he could be required to work in any location at the Respondent.

64. From about July 2015 until about April 2016 the Claimant worked at WX for 3 days a week. He did not like it there because more of the coding work was less complex and it was further to travel to work. We find, on balance, he did not have a depressive episode when working at WX at that time. This is because he stated in his evidence that he had been free of depression for about 10 years; and although, in cross-examination he had a number of opportunities to state he had a depressive episode at his first spell at WX, he did not. There is no gap in his GP records for this period, but he did not visit to his GP at that time, when on other occasions he had visited is doctor with low mood. We find he may have felt himself in danger of a depressive episode but it did not materialise.

The Coding Teams

65. The Claimant was managed by Mr Jobling, Clinical Coding Operations Manager, who was assisted in this by Ms Szul, Interim Clinical Coding Manager. They were both based at WX in offices next door to the coding team office there.

66. At WX, just before his move, there were 17 staff with 2 Coding leads. At RL there were 13 staff with 4 Coding leads.

67. At WX there were 2 band 6 leads. There the leads did not have academic specialities, but jointly managed the whole team. Coding was done according to wards. This is because WX is a district hospital.

68. At RL, Ms Keller, was a Clinical Coding Quality Lead for the Women and Children's Team. Study for an LLM (SOAS)

69. The Claimant was studying at SOAS for an LLM over 3 years. In the academic year from September 2016 until late May 2017, he took one module and audited another (i.e. following the subject but not taking the exam). He attended about one lecture a week and did the associated reading and essay writing. While he backtracked in his evidence somewhat, we find that during term time he studied at the university library at least 4 and sometimes 5 weekday evenings after work until about 10.30pm. His initial evidence was that he also spent a 'significant part' of the weekend studying and although he resiled from this as cross-examination progressed, we find that he did study at the weekend during term time. He passed his exams and was successful in his studies, although he was upset to have missed out on a distinction.

70. It was also the Claimant's practice to work overtime as 'bank staff' coding for the Trust. He usually did this for 6 hours on a Saturday and 4 hours on a Sunday every weekend it was possible to do so (except prior to his exam or when he was away).

71. It follows that in a typical week during term time, what with full time work, study and overtime, the Claimant had little time for rest and recuperation: there were very few days during term time when he did not spend part of them working and most weekday evenings he was studying. He spent a fairly good part of the time at weekend, when not working overtime, studying.

72. We find that even without a sleep disorder, in such a week during term time the Claimant would have been fatigued. (We note that the Working Time Regulations 1998 were enacted to limit working time in order to safeguard health. They require a break of at least 24 hours in each week. The Claimant was not allowing himself this minimum in term time by volunteering for overtime.)

Cyber Attack

73. In May 2017, the Trust experienced a very damaging cyber attack. Three weeks' worth of electronic records were lost. The coders at RL were particularly effected because they worked solely from electronic records. In June and July and then into the summer, the coding team were under enormous pressure to find other material from which to code and still meet the strict deadlines.

Sleeping and Complaints

74. Ms Szul saw the Claimant nodding off at his desk, for example in April 2017. She had spoken to another senior manager who worked in the team about this and had asked whether the Claimant had any disabilities that she needed to know about. The manager told her that the Claimant studied a lot in the evening and that she thought that explained his tiredness.

75. Ms Keller complained to Mr Jobling on 12 June 2017 (167) and asked that *'someone needs to bring up [his] sleeping, again. It's happening all the time and junior members are seeing it. It doesn't set a good example.'* Mr Jobling told Ms Keller he would speak to the Claimant and he may well have done because the Claimant told his GP that he had received a warning about sleeping at work. This was not a formal warning. Ms Keller told Mr Jobling the Claimant's sleeping had been mentioned to her a few times by different people.

76. On 4 July 2017 Ms Keller complained again, stating that the Claimant had not coded a single patient from 10am until 1.25pm. This at a time when it was 'all hands to the pumps' because of the cyber attack. Ms Keller informed Mr Jobling that she was going to look for another job as she could not work among that selfishness any longer (270).

77. Given the seriousness of her second complaint, and the fact that the Claimant admitted to his GP that he had been sleeping at work, we do not accept the Claimant's suggestion that Ms Keller was merely wont to complain. We find that she would not have told a manager that she was looking for another job easily.

78. We find in the light of her complaints, and the Claimant's admissions to his GP, his sleeping at work was not a one off, but a problem he was aware of. It was not a momentary nodding off but that he fell asleep. We find junior staff felt awkward at having to wake him.

79. Mr Dalby, clinical coding coordinator, told Mr Jobling the tension in the office was unbearable. There was plainly tension in the RL team caused by the stress of the cyber attack and summer heat in the office, but we also find that the Claimant's sleeping contributed to such tension. It is highly likely that colleagues would have been resentful of a senior colleague sleeping at work, especially at a time of crisis when the whole team was under significant pressure.

Meeting 5 July 2017

80. A meeting took place between managers at RL to discuss how to meet the impending coding deadline in the absence of electronic notes. A number of options were discussed including bringing paper notes over to the coding office. The Claimant did not think this was the correct approach. He recalls struggling to get his point across that the volume of notes was too high and a different approach should be taken. Ms Szul and Mr Jobling recall that he refused to code from paper notes. We find it is likely that the Claimant, in expressing his frustration at the situation, did initially refuse to code from paper notes at this meeting. He preferred coding from electronic notes; Ms Szul had observed him thumping the notes down on the floor showing that he was grumpy about doing them; and he suggested others, 'the girls', should do them. His refusal is also consistent with Ms Keller's second email.

81. We find at this meeting the Claimant was plainly agitated. From his point of view he was not getting his point across. We do not accept that his behaviour was threatening: at the most he was being awkward.

82. Ultimately the Claimant agreed to code from paper notes after being instructed do so.

Meeting 11 July 2017

83. Mr Jobling and Ms Szul met on 6 July and mooted between them the idea of moving the Claimant temporarily.

84. They had the following genuine concerns and reasons for such a move: his sleeping at work; the tension in the team caused in part by his sleeping; his low productivity; and his conduct at the last meeting including his initial refusal to code from paper notes. They reached the view that moving him would relieve tension in team at a very stressful time and also enable them to supervise and monitor his productivity and sleeping. They decided that this now had to be done by more senior managers.

85. They met with the Claimant at an informal meeting on 11 July 2017. To make it easier to make his point, Mr Jobling may well have said that his manager required him to make changes. But we find that the idea of the move was his and Ms Szul's.

86. The Claimant did not want to go to WX. He first referred to the increased travel time, an extra 20-30 minutes (455). He suggested an alternative room at RL, but this option was rejected because it would not have given him coders to work with or enabled him to be supervised. When Mr Jobling reminded the Claimant that his job description was to work across all sites, the Claimant stated it would be detrimental to his health to move and referred to his diagnosis of sleep apnoea and his concern that he would become depressed.

87. Both managers suggested sick leave was an option but the Claimant did not want to take this.

88. We find the Claimant was left with no choice but to go to WX. It was agreed, however, that he would continue doing RL work while at based at WX, which reinforces us in our finding that this was a temporary move. It does not appear to have been made clear to the Claimant that the move was temporary.

89. At end of the meeting, the Claimant made a remark that caused the managers concern about his wellbeing and they made a referral to Occupational Health ('OH'), who advised Mr Jobling to take him to A&E. He did this the next morning but there was a long waiting time and the Claimant did not stay. We find it likely that the Claimant has put this event out of his mind. The Claimant now regrets making the remark, which was not meant with any seriousness.

90. In her evidence, Ms Szul said that this remark was the biggest reason in her mind for the move to WX. As a matter of chronology, this cannot be right, because the decision had been made beforehand. We do not consider she was seeking to mislead us when stating this: the remark has loomed large in her memory since and it reinforced her decision.

Move to Whipps Cross

91. On 12 July 2017, the Claimant moved to work at the coding office at WX. This was a large room where about 19 people worked. Mr Jobling had a quick word with the 2 current band 6 leads to inform them that the Claimant was coming over. He did not want to give them the full reasons. Ms Szul told us their 'cover story' was that he was coming to mentor staff and help with coding. The Claimant knew some staff from his previous stint at WX. He did not discuss with the band 6 leads how the management work was to be organised once he had arrived: this is perhaps understandable because, for the first few weeks, he continued to do RL complex coding electronically. He attended a presentation with nephrology, which was part of a band 6 role.

92. The Claimant no longer makes a complaint about how the work was distributed.

93. During this time the Claimant was not studying because it was the summer holidays. He continued to work overtime on both days of the weekend.

94. The Claimant does not complain about the work at WX while he was doing RL coding, except for the radio (see below).

OH Report

95. The OH report, 8 August 2017, is inadequate. It gave managers little guidance as to what to do and why. It did not identify any health condition. It suggests a risk assessment which could not be found on the HR system. We agree with the Respondents' witnesses that it was vague. It advised regular 1:1s: and that was realised by the move to WX so that he could be nearer to his direct managers.

Radio

96. In the coding office at WX, staff listened to a radio tuned to Magic/Radio 2, playing a mixture of music and talk. The Claimant complained that it affected his concentration and meant he could not code as easily. The other staff in the office liked the radio and wanted it kept on. Efforts were made to find a compromise. Initially the volume was turned down. Ms Szul says it was on very low but the Claimant stated he still found the background noise distracting. On 22 August, a senior coder, came up with the idea of a compromise by having the radio on in the morning (as the Claimant came in later, at 10) and off in the afternoon. The Claimant was still unhappy and wrote on his audit sheets 'radio' to explain why he had done little coding.

97. At this hearing a number of other options were considered. The Claimant did not wish to wear noise cancelling earphones. Ms Szul agreed that staff could listen to the radio through headphones but she did not suggest this as a solution because a number of incidents made her conclude that the Claimant's complaint was not credible:

97.1 the Claimant had worked at Newham for a day with the radio on and told her that it had not bothered him (283(j)). He said: '*I didn't recall that there was a radio when I was last here, although it seems a bit better perhaps because it is my right ear not my left*';

97.2 when he had worked in Mr Jobling's office for a period to be away from the radio he had left the door open, thus allowing its background noise to enter the room; and

97.3 he had been observed to have been listening to his own music when working late.

98. Mr Jobling thought the Claimant and other band 6s were senior enough to sort this matter out for themselves and did not get involved.

99. While we can well understand that a radio might affect a worker's concentration, on the facts of this case, we find, for the same reasons as Ms Szul, that the Claimant was not genuinely distracted by the radio. The Claimant wanted a move back to RL and he was using the radio issue to try to encourage this.

The 'Monday Email'

100. On 18 August 2017, Mr Jobling sent the Claimant an email informing him that he was going to do WX surgical work and would not be required to work at RL for next month either weekdays or weekends.

101. Mr Jobling told us, and we accept, that he did this because the nephrology figures at RL, for which the Claimant was responsible, were not good enough.

102. The Claimant was upset at the removal of RL work, which was more complex and interesting.

103. The Claimant began a grievance about this on 10 October. The grievance was investigated internally but there has been no outcome. The Claimant was invited to an outcome meeting in April 2018 but refused to go because he wanted to await the outcome of this Tribunal. While we can understand the Trust's view that it had no option to do as the Claimant asked, the limbo that the Claimant has been in since at work has been entirely unsatisfactory. The ACAS Code requires both employers and employees to act promptly to resolve internal grievances. The Tribunal is not part of the internal grievance procedure. It should not have been delayed for this hearing.

Management Role at WX

104. After the move to WX the Claimant spent far less time engaging with clinical staff. We find that he was not prevented from doing so. This work is self-generating in the sense that it arises from the coding that the band 6 does. Once the Claimant started work on WX coding, those opportunities would have arisen: he would have seen examples of matters to raise with clinical staff, identified the relevant staff from the records, and could very easily have engaged with them and, in so doing, built up a network of contacts. If the Claimant did less clinical contact work, it because he chose not to take those opportunities, as he had done successfully at RL. It was also the case that in the first part of the summer, because of the cyber attack, clinical engagement was not a priority.

105. As for management of staff, the Claimant was not prevented from doing so. He was known to be a band 6 and therefore the person staff could go to with queries. He was a relatively senior manager knew one of the band 6 leads and members of the team from his earlier stint at WX. It would have been possible for him to discuss with the band 6s how he was to fit into the team. We find he did not do so because he did not want the arrangement at WX to work. It is not clear to us that the Claimant complained about this situation; but if he had done so it is likely that Mr Jobling would have told him to take the initiative and discuss the management of the team with the other band 6s.

106. We accept Mr Jobling and Ms Szul's evidence that there were not many management meetings at this time because the backlog from the crisis was their priority. That Mr Jobling did not include the Claimant in one email in which he referred to his senior team is insufficient evidence to suggest that the Claimant was excluded from it. We accept Mr Jobling's evidence that this was an error.

Sleeping at WX

107. In the autumn of 2017 the Claimant continued in his studies and practice of regular bank work.

108. The Claimant contended in his evidence that his sleep apnoea had improved after a change of diet and loss of weight. There is no evidence that he was asleep at work over the summer. By the autumn Ms Szul observed him asleep at work twice and had to wake him. Mr Jobling did so once.

Overtime: change to conditions

109. Mr Jobling observed that the Claimant was still undertaking overtime in the autumn but that he had been seen sleeping and his coding productivity was still poor. He found out in November that the Claimant often did coding in the renal office at RL alone at the weekend. Mr Jobling was concerned about the health and safety issue of the Claimant working alone when he fell asleep. He also struggled to see how working at the weekend would help him with the fatigue he exhibited by sleeping at work. He discussed the matter with his boss. Instead of taking the option of stopping overtime altogether, they decided to allow the Claimant overtime but only where there was a senior manager present with him. It is agreed that this would limit opportunities for overtime because fewer senior managers worked at weekends.

110. Mr Jobling informed the Claimant about this on 28 November 2017. The Claimant continued to work some overtime shifts.

Core Hours

111. The Respondent operated a flexitime system, which the Claimant took advantage of. He started work at 10am. This enabled him to come round in the morning after his broken sleep. He was still able to arrive at WX by 10am after the move.

Disability *Fatigue*

112. As early as

2015, the

Claimant was

waking up in the

night and not

feeling refreshed

when he woke.

The first detailed

exploration of

this by his GP was 16 December 2016. He told his GP he was working and doing a masters at the same time; that he had a stressful, unrewarding job; he had a low mood with several personal reasons for that. He described apnoeic episodes. He said he sometimes fell asleep at work and was very self conscious about it (511). His GP explored the possible mental and

physical causes and commented in the notes that the sleeping problem was 'likely multifactorial'. She referred him to a psychologist, made an exercise referral and a sleep study, commenting in the notes '*if sleep apnoea, main treatment would be weight loss, may help to motivate'*.

113. A person experiencing sleep apnoea has episodes of interrupted breathing during sleep. The reduction in oxygen means that the person wakes up. This interrupted sleep results in fatigue during the day.

114. The Claimant was assessed at a sleep clinic. Oximetry tests showed that he had mild sleep apnoea. The letter to his GP confirming this was dated 5 July 2017.

115. The Claimant claims that he felt more tired in the mornings than afternoons. We find that it probably took him longer to 'come around' after a broken night's sleep, but do

not accept his evidence that he would have been somehow less tired in the afternoon. The Claimant was seen sleeping in the afternoons at work.

116. In discussion with his doctors, the Claimant changed his eating habits to lose weight. His oral evidence was that he had some success in this and that during the summer of 2017 he experienced fewer symptoms. We accept this but by the autumn he was still tired during the day because he was seen sleeping at work.

117. We find that, except for a break in study over the summers, the diet of work and study that the Claimant adopted during term time, week in week out, is likely to have made him very tired even without a mild sleep disorder. Many individuals 'burning the candle at both ends' like this would fall asleep at work. His mild sleep apnoea contributed in a minor way to his fatigue but the fact that he did not fall asleep in the summer when not studying suggests to us that his studying was a much bigger factor.

118. The Claimant found it difficult to provide us with any concrete examples of where his fatigue had an adverse impact on his day-to-day activities. He contended that his tiredness affected his concentration and use of a computer. But the clear facts of his case at the relevant time are that he was studying for a masters successfully as well as doing full time and overtime work. He chooses not to drive. The sleep apnoea is described as mild. While high-level studying is not a day-to-day activity the fact that the Claimant managed to do it and successfully is an indication that his concentration levels were good. We do not therefore find on the evidence before us that his mild sleep apnoea had a more than minor or trivial effect on his ability to carry out day-today activities. That he fell asleep at work is not evidence to the contrary because of the intensive workload of work, overtime and study that he subjected himself to. While we accept he was tired, we find as a fact that this only had a minor effect on his ability to carry out day-to-day activities.

*Depression*

119. The Claimant obtained a 23-page print-out of his GP notes. He has disclosed 7 pages of this document. He states, and we accept, that the remaining notes are not relevant. In other words in the remainder of those notes do not refer to a depressive episode. While there is probably a gap in the notes after 2004, we therefore find that the Claimant did not have a depressive episode causing him to go to his GP from 2004 until 16 December 2016.

120. The summary of past problems on page 506 of the GP notes does not record depression.

121. The Claimant's evidence is that he had experienced depression in his twenties and thirties. He had had to take a year out of his studies at that time. He was prescribed Prozac from which he received no benefit (he informed his doctor of this in the notes that we have seen). His description of how he experience depression was feeling 'a heaviness'. He felt he had largely beaten it after that time.

122. The Claimant referred in his evidence to having bouts of depression in 2005, 2007-8 and 2012 but none of these led him to his GP and given his view that he had

largely beat his depression and his other evidence that he had been depression free for 10 years, we find those bouts were no more than minor.

123. The Claimant suggested in his evidence that he felt he was slipping into depression in 2015 at Whipps Cross. We find he successfully avoided a depressive episode at that stage: he has been to his doctor when he experiences low mood and he did not go in 2015; he had no time off; and it is inconsistent with his evidence that he had been depression-free for 10 years.

124. In his discussions with his GP in December 2016 he was referred to a psychologist. On 7 February 2017 they recorded his patient questionnaire as indicating moderate depression and mild anxiety (512); however in the discharge summary recorded in the GP notes of 12 May 2017 (510) the Claimant disagreed that he thought he was experiencing depression. He understood the difference between depression and unhappiness and thought his unhappiness was understandable given his personal circumstances. He thought his then low mood was more to do with his not having grieved for his father who had died 18 months before and as a result he was referred to bereavement counselling. This indeed is what he states in his written evidence (p5 of his witness statement). We find, therefore, in early 2017 on the Claimant's own view, he was unhappy but not experiencing depression. He well understood the distinction between the two.

125. The Claimant returned to his doctor on 3 August 2017 with low mood and workrelated stress and again, as an emergency appointment on 24 August with ongoing 'work issues'. On 23 November he attended again with 'ongoing stress with work and housing situation' and low mood and again on 12 December 2017. Each of these episodes does not describe depression but stress arising from the work situation the Claimant was experiencing, namely that he was unhappy to have been moved to WX.

126. Doing the best that we can with all of this evidence, we find the Claimant is a person who has had depression in the past in his twenties and thirties.

127. On his own case he was not experiencing depression at the time of the events he complains about. In early 2017 he did not want treatment for what he regarded as unhappiness in his life and a need properly to grieve for his father. There is no doubt that once moved to WX he was unhappy about that, but before this move the evidence does not support a finding that then he was experiencing a depressive episode.

128. Even if his unhappiness could be called depression, we have to ask whether it had a substantial effect on his ability to carry out day-to-day activities. We have concluded that it did not. He was motivated to work full time; study in an intellectually demanding course and undertake overtime. There is nothing he has identified that could be regarded as a normal daily or regular activity that was adversely affected in more than a minor way.

Knowledge

129. When the Claimant joined the Respondent he did not report that he had a disability (129).

130. Both managers had received complaints that the Claimant had been sleeping at work. The fact he was sleeping at work did not put them reasonably on notice that he had a disability because there was another explanation for it: Ms Szul heard he was studying for a masters.

131. The Respondent admits they had actual notice of the two conditions the Claimant relies on from 11 July 2018.

**Submissions**

132. Mr Mitchell for the Respondent made lengthy written submissions, which we therefore do not need to set out here. We were assisted by his careful analysis of the evidence.

133. The Claimant made able and relevant submissions, referred to the appropriate legal principles. He to persuade us against each issue, why on the evidence he should succeed. This very brief summary merely picks out the main points of his oral submissions.

    133.1 He argued that although things had improved with diet and exercise, his sleep disorder was still a problem, affecting his concentration and this was sufficient to qualify as a disability. He argued the move to WX in 2015/6 caused depression as did the later one.

    133.2 In relation to the move to WX he argued it was a detriment and unfavourable treatment because there was less management work for him to do at WX and less complex coding work and greater travel time; he argued that something arising from his disability was at least partly the cause of the move and that was all the section 15 causation test required. In particular he argued it was disproportionate to move him because the stated management concerns could have been dealt with at RL. There was no plan as to how he fit in and WX; he had never been told it was a temporary move and that there should have been more discussion with him about it. He disputed that his sleeping at work was as large a problem as his managers had identified and it was merely a question of momentary nodding off. He contended he was excluded from management. That the radio affected his concentration, especially in addition to his fatigue.

    133.3 His main argument about the overtime was that it was not a proportionate response to the perceived problem and management could have found a way that enabled him to keep doing overtime even if not alone. It was a large organisation and something could have been worked out. ***Law***

134. The complaint here is that the Respondent discriminated against the Claimant: contrary to section 39(2)(d) EQA '*by subjecting him to any other detriment'* and the discrimination claimed is under section 13 (direct because of disability) or 15 discrimination (arising from something in consequence of a disability) and/or, by failing to comply with a section 39(5) duty to make reasonable adjustments (contrary to section 20-21 as read with Schedule 8).

*Disability*

135. Section 6 EQA provides *'A person (P) has a disability if – (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'*

136. Under section 6(5) EQA, the government has published Guidance 'on matters to be taken into account in determining questions in relation to the definition of disability'. It is sensible for us to consider the Guidance in assessing the question whether the Claimant has a disability.

137. The cause of the impairment need not be established (Guidance A3).

138. Long-term, here, is defined further in Sch 1 EQA, which, at para 2(1) provides: *'The effect of an impairment is long-term if – (a) it has lasted for at least 12 months, (b) it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected.'*

139. Where an impairment stops having a substantial adverse effect then, under para 2(2) Sch 1 EQA it is to be treated as continuing to have that effect '*if that effect is likely to recur.'* Furthermore, the provisions of the EQA we are concerned with apply to a person who has had a disability, section 6(4) EQA.

140. In the EQA '*substantial*' means '*more than minor or trivial'*, see the interpretation section 212(1).

141. In considering whether the adverse effect on day-to-day activities is substantial: the Guidance reminds us to look at the picture as a whole rather than single out each day-to-day activity.

142. Day-to-day activities are the things people do on a regular or daily basis. Again the cumulative picture should be considered. They do not include activities that only a small group of people would do for example activities requiring a high level of skill or ability. The Guidance gives the following examples:

*'shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'*

143. In its Appendix, the Guidance describes *'persistent distraction or difficulty concentrating' and 'persistent general low motivation or loss of interest in everyday activities'* as matters which are likely to be regarded as a significant effect on day-today activities. Whereas it describes the inability to concentrate on a task requiring application over several hours as not significant.

*Detriment*

144. 'Detriment' under section 39 is broadly defined. We must ask whether, *'by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work'* Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. An unjustified sense of grievance cannot amount to 'detriment' but nor is it necessary to demonstrate some physical or economic consequence.

*Section 13*

145. Section 13 of the EQA provides that: *'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'*

146. The comparator for these purposes, must be a non-disabled person who is in the same or not materially different circumstances. After London Borough of Lewisham v Malcolm HL [2008] IRLR 700 it became difficult for disabled Claimants to succeed in section 13 claims, because it was decided the circumstances must include the reason for the treatment but not the disability. For example, if here the Claimant proves he is disabled by his sleep apnoea, he must show that he would have been treated differently to someone asleep at work but who did not have a disability.

147. Section 13 includes direct discrimination against a person wrongly perceived to be disabled. This is because the words of section 13 do not relate to a particular person's disability but 'disability' in general. It also applies to people discriminated against because they have had a disability.

*Section 15*

148. Section 15 of the EQA was enacted to counter the difficulties that Malcolm presented. It provides that:

> *'(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.'*

149. This is a form of discrimination distinct from direct discrimination. Section 15 recognises that a disabled employee may be adversely treated for something that other employees would be adversely treated for, but where that 'something' arises '*in consequence of their disability*' the disabled employee is afforded greater protection. There is no need for the employee to point to a comparator.

150. We must first identify whether there was unfavourable and detrimental treatment.

151. The meaning of 'unfavourably' was considered by the EAT in Swansea University Pension and Assurance Scheme Trustees v Williams EAT 0415/14.

Langstaff P held: '*In this use it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability'* (para 28).

152. Where it considers it relevant the Tribunal may have regard to the Equality and Human Rights Commission's Code of Practice 2011 ('the Code'). It states at, para 5.7, that 'unfavourable treatment' means the disabled person '*must have been put at a disadvantage*'. Para 5.7 states that, even if the employer thinks it is acting in her best interests, it may still treat a person unfavourably. We reject, therefore, the Respondent's submission, as we have understood it, that just because it intended to act in the Claimant's best interests that it could not have acted unfavourably.

153. In Williams, Langstaff P held that 'unfavourably' did not mean 'detriment'. In this claim the Claimant must establish both that he has been subject to a detriment at work under section 39 and unfavourable treatment under section 15. We observe that it is probably an unusual case where a worker's reasonable view of disadvantage (detriment as per Shamoon) is not the same as the disadvantage described in Williams and para 5.7 of the Code.

154. We must then decide what the reason for the unfavourable treatment was by considering what was in the mind of the person making the decision.

155. We must then ask whether that reason was something arising in consequence of the disability, which could allow for a number of causal links. The something may have a number of causes but the disability must have a significant (more than trivial) influence on it, see Pnaiser v NHS England [2016] IRLR 170 EAT.

156. There is no need for the Respondent to know that the 'something' was the consequence of a disability, City of York Council v Grosset [2018] EWCA Civ. 1105 CA.

157. Furthermore, unlike direct discrimination, treatment contrary to section 15(1) can be justified under section 15(2) if it is a proportionate means of achieving a legitimate aim.

    157.1 A legitimate aim is a real, objective consideration. A real need.

    157.2 To be proportionate the means must be appropriate to achieving that aim and reasonably necessary (not the only possible way but we must ask ourselves whether lesser measures could have achieved it). This requires an objective balancing exercise between the discriminatory effect of the treatment and the importance of the aim. This is an objective test and does not matter if employer did not have these reasons in its mind at the time: 'What has to be shown to be justified is the outcome, not the process by which it was achieved' (see Williams above).

158. If there has been a failure to make reasonable adjustments then this may be relevant to the question whether any subsequent unfavourable treatment within section 15(1) can be justified.

*Section 39(5): Reasonable Adjustments*

159. The discrimination alleged is the failure to comply with section 39(5), namely the failure to comply with a duty to make reasonable adjustments.

160. A duty to make reasonable adjustments arises, under section 20 and Sch 8 in this way:

160.1 the Respondent applies a policy, condition or practice (a PCP);

160.2 that places an 'interested disabled person' at a substantial disadvantage in relation to a relevant matter in comparison to non-disabled persons.

161. In considering whether the PCP puts the Claimant to a disadvantage we must not get tied up with the technicalities of causation.

162. The duty is to take such steps as are reasonable to have to take to avoid the disadvantage. This test is an 'objective one'. It considers 'the practical result of the measures which can be taken' rather than whether any adjustments were actually considered or not. Thus if there are no adjustments to be made it does not matter that an employer did not consider them. Likewise, if there is an adjustment to be made, it does not matter that the employer had a good excuse for not considering it (unless that is relevant to whether it is reasonable or not), see Newham Sixth Form College v Sanders [2014] EWCA Civ. 734.

163. The duty does not arise if the Trust:

163.1 did not know or could not be reasonably be expected to know the Claimant was disabled; or

163.2 did not know or could not be reasonably expected to know that the Claimant was likely to be placed at the disadvantage.

*Time Limits*

164. Section 123 of the EQA provides that all claims of work related discrimination must be brought before the end of the period of 3 months starting with the date of the act complained of or such other period as the Tribunal thinks 'just and equitable'.

165. Here any act prior to 23 August 2017 is out of time.

166. In a reasonable adjustments case, according to the Court of Appeal in Hull City Council v Matuszowicz [2009] ICR 1170, it is the employer's failure to do something that is at issue and this is a continuing omission. Often in reasonable adjustment cases this is not a deliberate omission but an inadvertent one. The Court realised that for time to start running in such a case an artificial date had to be found. It held that the employer is treated as having decided on omitting to make reasonable adjustments at the time when it might reasonably have been expected to make them i.e. not the same date as the date when the duty first arises. Abertawe Bro Morgannwg University Local Health Board v Morgan [2018]

IRLR 1050 CA added to this analysis the point that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the Claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the Claimant at the relevant time.

**Application of Facts and Law to Issues**

*Issue 5: Disability*

167. For the reasons set out in our findings of fact we decide that the Claimant is a person who has had a disability (namely depression). We have found that he experienced depression in the past. He took Prozac for it without any benefit. He had had to take a year out of his studies at that time. These pieces of evidence suggest to us that the depression he experienced at that time had a substantial adverse effect on his ability to carry out day-to-day activities and was long term. It was significant enough for the Claimant to stop his studying. This alone would suggest it had a major impact upon him.

168. There is insufficient evidence in this case for us to find that this depression was likely to recur. We have found that after this period the Claimant was depression-free. He had an understandable fear of recurrence but this is not borne out in credible evidence of recurrence.

169. On the basis of our findings of fact, we do not find that as at July 2017 and thereafter, the Claimant was a disabled person by reason of depression. He was not experiencing depressive episodes at that time. He was unhappy but he understood the difference. If we are wrong and his low mood was a form of mild depression, we consider it had a no more than minor adverse effect on his ability to carry out day-today activities. (We have set out our reasons for this in our findings of fact and do not repeat them here.)

170. Nor do we find that the Claimant was a disabled person by reason of a sleep disorder or sleep apnoea. We have found as a fact that his sleep disorder did not have substantial adverse effect on his day-to-day activities. Our main reason is that his concentration cannot have been affected in a more than minor or trivial way because he successfully carried out serious study at the same time as being in full time work and doing overtime. While his broken sleep means that it was inevitable that he was tired, we have been careful to assess the significance of its adverse effect on the facts of his case. We are not satisfied that his tiredness in the form of reduced concentration had more than a minor impact on day-to-day activities.

171. We will go on to consider the Claimant’s claims: both that he is a person who has had a disability and, on the basis that we are wrong in our decision that he is not disabled. The Claimant is currently employed, both parties have spent time and effort putting their respective cases and our decision (even if hypothetical now that we have decided he is not disabled) may assist them in their future working relationship.

172. We first consider the claim as to reasonable adjustments because this may inform the section 15 claim.

*Reasonable Adjustments*

173. The Claimant's past disability did not require any reasonable adjustments to be made. He has not put his case on this basis. We have found it was not likely to recur: therefore that he was a person with a past disability, did not place him at a substantial disadvantage at work vis a vis any of the contended for PCPs.

174. We go on to consider the claim on reasonable adjustments if we are wrong about our decision on disability.

Issue 13: Knowledge

175. On our findings of fact, the Respondent had actual knowledge of the alleged disabilities on 11 July 2017. Managers did not know until then that the Claimant was a person who had had a disability.

176. In our judgment, there was nothing to put the Respondent reasonably on notice that the Claimant was allegedly a disabled person before this time. While he had been seen sleeping at work, there was an alternative reasonable explanation for this: namely his studying. Indeed the Claimant had only been diagnosed himself with mild sleep apnoea on 5 July. Nor had he been experiencing any episodes of depression that were exhibited at work: his awkwardness at the 5 July meeting did not display signs of depression as opposed to frustration at the crisis the cyber attack had caused.

Issue 15 PCPs

177. We do not find that the PCP contended for at issue 15.1 is a PCP (moving without notice or proper consultation) because there is no evidence that this was the Trust's practice overall. The Claimant was moved without notice and after only one meeting at which he was consulted. But there is no evidence that the Trust adopted this approach with staff generally. Evidence of a single instance does not support that there was a practice. It seems to us that this alleged PCP incorporates the conduct about which the Claimant complains against him personally. That is not an appropriate PCP, which must be a practice applying to all or at least a section of the workforce.

178. In relation to the PCP contended for at issue 15.2: plainly there was a practice whereby a radio was played in offices at the Trust. This took place both in the WX coding office and at Newham; it applied to a number of coding staff; it was not a one-off situation but a state of affairs.

Issue 16 Alleged disadvantage

179. In relation to the PCP at issue 14.1, the requirement to work across various sites, we find that the Claimant was not placed at a substantial disadvantage by it in relation to his depression because the previous move had not given rise to a depressive episode. The Claimant was unhappy to move but that is distinct, in our findings ,from an episode of depression.

180. Nor do we find that the extra journey time of 20-30 minutes placed the Claimant at a substantial disadvantage in comparison with non-disabled persons. This is because we find the extra journey time involved did not have a more than minor impact on his fatigue. It was not a lengthy extra period. It did not increase his tiredness so that he had to stop, for example, his studying again in the next term or working overtime. There is no evidence that the Claimant became more tired by the extra journey, indeed on his own account his sleep disorder improved over the summer. Nor was the Claimant late for work.

181. In relation to the PCP at issue 14.2 (core hours). We find that this did not place the Claimant at a substantial disadvantage. While it took him a little longer to 'come round' in the morning, this was not such as to prevent him from arriving at WX by 10am or making that time harder to achieve in a more than minor way. Nor was his tiredness was of a different order in the morning that the afternoon. Any impact on his mornings was no more than minor. It may well have been more of an inconvenience to the Claimant, as to any person who was moved to a place of work further away from his home, but we must consider the comparison rather than this inconvenience.

182. In relation to the PCP at issue 15.2 (the radio), the Claimant has not persuaded us, in fact, that the radio affected his concentration: we have decided his claim as to alleged difficulty with the radio was not credible. This claim would not have therefore succeeded.

183. In summary, therefore, even if we had found the Claimant was disabled, he would not have established that those PCPs we have found to have existed placed him at a substantial disadvantage in comparison to non-disabled persons. He therefore would not have succeeded in his claim that the Respondent failed to make reasonable adjustments.

*Direct Discrimination Section 13*

Issue 7 – detriment and less favourable treatment

184. Issue 7.1: the requirement to transfer. We have concluded that the requirement to move did subject the Claimant to a detriment despite being contractually allowed. WX was a district hospital and a reasonable coding lead could have taken the view that a move to a hospital with less complex work was disadvantageous: less complex work could reasonably be regarded as less interesting and satisfying. The Shamoon test is therefore satisfied.

185. Issue 7.2: preventing or otherwise not allowing to carry out duties at WX. We have found as a fact that the Claimant was not prevented from carrying out all of his duties. Nor was he not allowed to do so in any other way. He had every opportunity to carry out management duties and clinical engagement at WX but chose not to. He was not therefore subject to a detriment in this way.

186. Issue 7.3: restricting overtime: We find that the restriction of overtime was a detriment because the restrictions made it less likely that there was as much overtime available to him as he had previously been used to doing because there were fewer occasions on which senior staff worked a the weekend. This would make any reasonable

employee consider that they had been subject to disadvantage because of the reduced opportunity to make extra money.

Issue 8 - because of disability?

187. We have found that Mr Jobling and Ms Szul moved the Claimant (issue 7.1) in order to reduce the tension in the team at RL and in order to be in a position to supervise and monitor him more closely. We find that they would have moved anyone who had been sleeping at work and been the subject of complaints about this whether or not disabled. Therefore, applying Malcolm, the Claimant cannot succeed in his argument that he has been treated less favourably than a non-disabled person in the same circumstances.

188. In our judgment, the Respondent's reasons for the move were nothing to do with the Claimant's past depression. This is because neither Mr Jobling nor Ms Szul even knew the Claimant may have been previously depressed until near the end of the meeting at which the move was decided. Upon hearing of his past depression, they did not suddenly change course. They had mooted the idea of a move between themselves before the meeting; discussed it with the Claimant. And it was only when the move appeared to have been decided that the Claimant raised his health. As a matter of timing, therefore, the move could not have been because of his past disability.

189. Likewise, Mr Jobling decided to impose the restriction on overtime because the Claimant had been sleeping. Not because of his past depression.

190. If we had found that the Claimant was disabled by a sleep disorder, this however, would not have resulted in success under section 13. This is because in our judgment, Mr Jobling would have made both decisions (the move and the restriction in overtime) in relation to anyone sleeping at work, whether disabled or not and, applying the Malcolm comparison, the claim would have failed.

191. Therefore does not succeed in a section 13 claim on basis of his past depression and he would not have succeeded in this claim if we had found him to be disabled by virtue of a sleep disorder.

*Section 15*

Issue 9 Knowledge

192. The Respondent had actual knowledge of the alleged disabilities from 11 July, prior to each of the alleged detriments. And knew he was a person who had had a disability on that day.

Issue 10 Detriment and Unfavourable Treatment

193. In relation to Issues 10.1 and 10.3, for the same reasons as we set out above, we find that the Claimant had been subject to a detriment and less favourably.

194. For the same reasons as set out above, we find the Claimant was not subject to a detriment in relation to issue 10.2.

Issue 11 Because of Something Arising in Consequence

195. In relation to Issue 10.1, the requirement to move, we would have found that the reason for the move included the fact that the Claimant had been sleeping at work. And, if his sleeping at work had been partly because of a disability, then section 15(1) would have been satisfied.

196. The difficulty for the Claimant in relation to issue 10.1 was whether at the time the move was decided, the Respondent knew or reasonably ought to have known he was disabled. The Claimant only told the Respondent once it became apparent to him in the meeting that the move was going to happen. It follows that section 15(2) was probably not satisfied in relation to issue 10.1.

197. In relation to issue 10.1 we would not have found that there was anything in the reason for the move that related to the Claimant's alleged depression. The reasons in Mr Jobling and Ms Szul's minds were all to do with sleeping and how that affected team morale and productivity. The move was to reduce tension in the team, caused in part by sleeping, and have senior staff monitor/supervise the Claimant more closely. There is no evidence that their perception of the Claimant as having depression, after he had revealed this fact, led to the decision to move, it had pretty much been made by then.

198. Likewise, issue 10.3, the restriction on overtime, was because the Claimant had been sleeping at work. By this time there was no issue but that the Respondent knew the Claimant had a sleep disorder. It was because of the sleeping at work that Mr Jobling was concerned about his health and safety and wanted to make sure that he was not working alone and that required, in his view, supervision by someone more senior.

199. If we had found that the Claimant was a disabled person in relation to his sleep disorder, then in relation to both 10.1 and 10.3, we would have found that the detriments were because of something in consequence of a disability: namely sleeping at work.

Issue 12 Objective Justification

200. In relation to issue 10.1, the move in our judgement a legitimate justification defence would have been made out:

200.1 The Respondent had two real and legitimate needs: to reduce the tension in the team caused partly by the Claimant's sleeping; and to monitor his performance and productivity.

200.2 The move was an appropriate means to achieve the first need: it could not have been met by leaving him in the team. A temporary move elsewhere would have been likely to reduce team tension.

200.3 The move was also an appropriate means to achieve the second need. Both of the Claimant's managers were based at WX and it was only there that he could be more closely monitored and supervised.

200.4 For the same reasons the move was a proportionate measure because lesser means (i.e. leaving at RL) would not have met the aims, certainly of

the second need given where the managers were based, and the move was not permanent.

201. As to issue 10.3 the restrictions on overtime we also find the Respondent would have been able to objectively justify the detrimental treatment:

201.1 In our judgment it had a legitimate need: to ensure the Claimant was safe at work while doing bank work at the weekend.

201.2 The restrictions were appropriate to achieve that aim: namely to ensure that someone was with the Claimant while he undertook overtime.

201.3 Were the restrictions also proportionate to achieve this aim. This would have been a more difficult assessment. But our findings were that more junior employees felt awkward at waking the Claimant. Thus it was reasonably necessary to require supervision by senior members of staff. This reduced the opportunity to do overtime but did not stop it entirely.

202. Thus, our finding would have been that the temporary move to WX and the restriction on overtime were objectively justified.

203. Therefore even if we had found that the Claimant was disabled, his section 15 claim would not have succeeded.

204. We would therefore not have had to determine the time limit issue. ***Conclusion***

205. The Claimant is not disabled but is a person who has had a disability.

206. The claim based on past disability does not succeed.

207. Even if we are wrong about disability, the claims of disability discrimination would not have succeeded.

*The Future*

208. The parties' future relationship is a matter for them to decide. It may assist them to note our concerns as follows:

208.1 We would have expected senior managers to have taken more care to incorporate the Claimant into the WX team upon the move and/or to identify clearly to the Claimant that the move was temporary and/or set a

date for its review and/or set clear productivity/performance targets for him to meet and to clearly communicate their concerns to the Claimant.

208.2 Equally we would have expected the Claimant, in his senior role, to make more effort to make the move, however temporary, to WX work by engaging with his peers and with clinicians at WX. We are concerned that the Claimant complained about fatigue but also volunteered for a great deal of overtime and extra study. We would have expected to him to manage

better his fatigue by incorporating more time for rest and recuperation into his week.

209. The Claimant is obviously a capable and intelligent employee. We hope the grievance can be resolved and that he can continue to work in the NHS as a valued employee.

Employment Judge Moor

Date: 30 November 2018