EMPLOYMENT TRIBUNALS

Claimant: A

Respondents: B and C

Heard at: Manchester **On:** 14, 15, 16 and 17 May 2018
19. 20 and 21 September 2018
26,27 September,1 October 2018
(in Chambers)

Before: Employment Judge Ross
Ms A Jarvis
Mr S T Anslow

REPRESENTATION:

Claimant: Mr K Ali of Counsel
Respondent: Miss R Wedderspoon of Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. By a majority of the Tribunal: *Progressing matters to stage one on 28/11/16 notwithstanding OH reports that year (June 16, November 16)* is an act of disability related harassment pursuant to S.26 Equality Act 2010 and an act of unfavourable treatment pursuant to s.15 Equality Act 2010.

2. By a majority of the Tribunal: *Failure to properly discuss with the claimant her proposals and proposed adjustments to facilitate a return to work at the 28 November meeting* is not an act of disability related harassment pursuant to S.26 Equality Act 2010, nor an act of unfavourable treatment pursuant to s.15 Equality Act 2010, nor an act of disability discrimination pursuant to s13 Equality Act 2010, nor an act of victimisation pursuant to s27 Equality Act 2010.

3. By a majority of the Tribunal: *Issuing the claimant with a stage 1 warning* is not an act of disability related harassment pursuant to S.26 Equality Act 2010, nor an act of unfavourable treatment pursuant to s.15 Equality Act 2010, nor an act of disability discrimination pursuant to s13 Equality Act 2010, nor an act of victimisation pursuant to s27 Equality Act 2010.

4. By a unanimous decision of the Tribunal: *issuing a letter of invitation to a stage two meeting invitation on 8 February 2017 before the claimant's stage one appeal had been determined* is an act of unfavourable treatment pursuant to s.15 Equality Act 2010 and an act of victimisation pursuant to s27 Equality Act 2010.

5. By a majority of the Tribunal: *Failing to uphold the appeal against stage one* is not an act of disability related harassment pursuant to S.26 Equality Act 2010, nor an act of unfavourable treatment pursuant to s.15 Equality Act 2010, nor an act of disability discrimination pursuant to s13 Equality Act 2010, nor an act of victimisation pursuant to s27 Equality Act 2010.

6. By a unanimous decision of the Tribunal: *In pressuring the claimant into accepting a demoted role as leading practitioner* was not an act of disability related harassment pursuant to S.26 Equality Act 2010, nor an act of unfavourable treatment pursuant to s.15 Equality Act 2010, nor an act of disability discrimination pursuant to s13 Equality Act 2010, nor an act of victimisation pursuant to s27 Equality Act 2010.

7. By a unanimous decision of the Tribunal*:* comments 1, 4, 5, 8, 10, 11 made to the claimant by D during conversation on 19 January 2017 are acts of disability related harassment pursuant to S.26 Equality Act 2010 and comments 2 and 3 are acts of victimisation pursuant to s27 Equality Act 2010.

8. By a unanimous decision of the Tribunal*:* comments 1, 3, 6, 8, 9, 13 made to the claimant by D during conversation on 8 February are acts of disability related harassment pursuant to S.26 Equality Act 2010.

9. By a unanimous decision of the Tribunal: *comments made in drafts of a performance management review document in December 2016,* draft 1 was an act of victimisation pursuant to s27 Equality Act 2010 in relation to comments identified in the judgement below and draft 2 was an act of victimisation pursuant to s27 Equality Act 2010 and an act of unfavourable treatment arising from disability pursuant to Equality Act 2010 in relation to comments identified in the judgment below.

10. By a unanimous decision of the Tribunal: *failing to provide the claimant with an outcome to the performance management process until May 2017* was not an act of disability related harassment pursuant to S.26 Equality Act 2010, nor an act of unfavourable treatment pursuant to s.15 Equality Act 2010, nor an act of disability discrimination pursuant to s13 Equality Act 2010, nor an act of victimisation pursuant to s27 Equality Act 2010.

REASONS

Introduction

1. The claimant is employed by the respondent as Assistant Head Teacher at a state maintained school. It is a comprehensive school for children aged 11 to 16.

2. There is a Senior Leadership Team ("SLT"). The SLT is responsible for managing the school on a day-to-day basis, ensuring the school provides a high

quality teaching environment for its pupils, that the syllabus which is taught is suitable as per the requirements established by law or Central Government direction. The full SLT meets on a weekly basis and currently consists of two Deputy Head Teachers and six full-time and one part-time Assistant Head Teachers. The SLT has regular informal meetings.

3. There is no dispute that the claimant is an excellent classroom teacher.

4. The claimant brought a claim for disability discrimination against the respondent, B, and the Head Teacher, E. The claim was heard 12-16 September 2016 and in chambers on 12 October 2016. The judgment was sent to the parties on 4 November 2016. The claimant succeeded in part. She did not initially succeed in her claim for failure to make reasonable adjustments for the period February to June 2015. She appealed successfully to the Employment Appeal Tribunal who remitted the issue back to the original Tribunal. The original Tribunal consisting of Employment Judge Ross, Mrs Harper and Mrs Gill, overturned their original decision and found that there had been a failure to make reasonable adjustments for that period of time.

5. In these proceedings the claimant brings claims for harassment relating to disability, direct disability discrimination, discrimination arising from disability and victimisation. The issues are clearly identified by Employment Judge Franey. His note of case management hearing can be found in bundle 1 at page 82.

6. In addition, at the outset of the hearing the claimant's counsel clarified the facts relied upon in item A as:

(1) Progressing matters to stage 1 on 28 November 2016 notwithstanding Occupational Health reports that year (June 2016/November 2016);

(2) Failing to properly discuss with the claimant her proposals and proposed adjustments to facilitate a return to work at 28 November meeting;

(3) Issuing the claimant with a stage 1 warning;

(4) Progressing to a stage 2 meeting on 9 February 2017 before the claimant's stage 1 appeal had been determined;

(5) Failing to uphold the appeal against stage 1.

7. The claimant's representative also provided a detailed transcript identifying 13 comments in relation to the 9 January 2017 meeting and the 15 comments in relation to a meeting on 8 February 2017 with D (both of which were part or in full covertly recorded by the claimant).

The Relevant Law

<u>Direct discrimination – section 13 Equality Act 2010</u>

8. Section 13 Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex –

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Comparison by reference to circumstances:

9. In relation to the comparator, section 23(1) Equality Act 2010 states:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if –

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.

(3) If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married is not a material difference between the circumstances relating to each case.

Discrimination arising from disability – section 15 Equality Act 2010

10. Section 15 Equality Act 2010 states:

> (1) A person (A) discriminates against a disabled person (B) if--
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

11. The parties also relied upon Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKUEAT0397/14, IPC Media Limited v Miller [2013] IRLR 707; Pnaiser v NHS England [2016] IRLR 174; Hardy & Hansons PLC v Lax [2005] ICR 1565' Allonby v Accrington & Rossendale College [2001] ICR 1169; Hensman v Ministry of Defence UKR+EAT0067/14.

Harassment – section 26 Equality Act 2010

12. Section 26 Equality Act 2010 states:

> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if –
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if –
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristic here is disability;

Victimisation – section 27 Equality Act 2010

13. Section 27 Equality Act 2010 states:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

14. The Tribunal had regard to Richmond Pharmacology v Dhaliwal [2009] IRLR 336

15. The Tribunal took into account the burden of proof provisions pursuant to section 136(2) and (3).

16. The Tribunal had regard to Igen Limited & others v Wong [2005] IRLR 258; Laing v Manchester City Council & others [2006] IRLR 748; Madarassy v Normura International PLC [2007] IRLR 246; Network Rail Infrastructure Limited v Griffiths-Henry [2006] IRLR 865; and Ayodele v Citylink Limited [2007] EWCA Civ 1913.

Time Limits – section 123 Equality Act 2010

17. Section 123 Equality Act 2010 states:

> (1) [Subject to section 140A] Proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of –
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

The Facts

The Tribunal found the following facts:

18. There is no dispute the claimant was at the relevant time a disabled person by reason of the impairments of depression and anxiety. There was no dispute the respondent had knowledge of the condition at the relevant time.

19. We heard from the claimant, her union representative, Mr Hulse, and a union representative, F. For the respondent we heard from D, Chair of Governors; E, the Head Teacher; G, a Deputy Head and the claimant's line manager at the relevant time; H from B Human Resources; I, a Deputy Head; J, an Assistant Head; K, an Assistant Head at the relevant time although no longer working for the respondent; and L, Director of Progress.

20. The previous Tribunal was held 12-16 September 2016. The claimant told the Tribunal that following her attendance at that Tribunal she felt unable to return to work. She was absent from work from 19 September 2016 until 1 March 2017. Sickness absence was certified as follows:

26/9/16 – 31/10/16	Depression NOS (page 1431)
18/10/16 – 28/11/16	Depression NOS anxiety and stress (page 1432)
23/11/16 – 23/12/16	Depression/anxiety/stress (page 1433)
20/12/16 – 31/1/17	Depression NOS (page 1434)
24/1/17 – 27/2/17	Depression NOS (page 1435)
27/2/17 – 28/2/17	Depression NOS (page 1436)

21. The final fit note 28/2/17 to 29.3.17 covered the period certifying the claimant fit for a phased return to work. The illness remained depression, NOS and anxiety.

22. We find a referral was made by the respondent to Occupational Health on 24.10.2016 by E's PA, M. P1375. The claimant was invited to an Occupational Health meeting on 7 November 2016 by letter dated 27/10/16 at page 1377. The claimant also explained in her statement that she had received a telephone call from E's PA informing her in October that she was being referred to Occupational Health.

23. The claimant told us that the date of the appointment was rearranged twice. There is confirmation in the bundle confirming the rearrangement from 7/11/16. It is undisputed that the claimant attended on 14/11/16. The Occupational Health report is at page 1379. We find this is an amended version dated 18/11/16. We find there must have been an original report and this is consistent with the claimant's evidence that she had made corrections to the original report (which the Tribunal does not have). We note that the Occupational Health report states, "the employee wishes to view…" so we find it is unlikely that the respondent would have received the original report before claimant had authorised its release.

24. We find that by a letter 17 November 2016 (page 642) the claimant was invited to a stage one meeting under the respondent's sickness absence policy. The policy commences at page 1628 of the bundle. There is no dispute that the claimant was being seen under the long-term absence policy. The long-term absence policy is

at pages 1646-1651. The definition of "long-term sickness absence" is a continuous sickness absence which exceeds six weeks. The policy states at 13.1:

> "13.1 Long-term sickness is a continuous sickness absence which exceeds six weeks. During the period of sickness absence managers should maintain regular contact with employees on an informal basis in addition to the formal process outlined below. See sections 5 and 6. The purpose of the contact is to ensure employees feel supported and are offered all appropriate assistance.
>
> 13.2 After six weeks' absence (or earlier if it known beforehand that the absence will last six weeks) employees should be referred to the Occupational Health Service. Individuals may be referred at an earlier stage where appropriate following consultation with B Human Resources. The employee must be informed in advance by their line manager that they are being referred to Occupational Health.
>
> 13.3 In exceptional cases, for example where employee sickness absence is known to be terminal, it may not be appropriate to arrange a referral to Occupational Health. Any exception should be determined by line managers in consultation with B Human Resources."

25. At the point the claimant was referred to Occupational Health she had been absent for six weeks. (19 September-24 October 2016.) On 19 October the claimant had alerted the respondent she was in receipt of a fit note which would cover her absence for a further period of almost 6 weeks until the end of November 2016.p640.The fit note was issued on 18 October 2018. (p1432, p648.) Therefore at the point of the OH referral the respondent knew the claimant was likely to be absent until 28 November 2016 (a total of 10 weeks.)

26. The Tribunal also notes that a previous Occupational Health report had been obtained in June 2016, during the summer term when the claimant was at work (see page p1370-2).

27. We find a letter of invitation to a stage 1 meeting under the respondent's Long-Term sickness absence review procedure was sent on 17 November 2016. The proposed date of the meeting was 25 November. See p 642.

28. The claimant replied by email dated 21 November raising concerns about lack of sufficient notice because she had only received the letter that day and a concern that she had been invited to a meeting before E had received the Occupational Health report. (p643)

29. E's PA responded later the same day to the claimant confirming the respondent was now in receipt of the latest Occupational Health report and also confirming that the stage 1 meeting had been rearranged to Monday 28 November.p644.

30. The Tribunal finds the respondent used a computer programme, SIMS, to track the sickness absence of staff. The system issued an alert when a point relevant to the sickness policy was reached. At that point the Headteacher's PA would raise the matter with the Headteacher e.g. in relation to an OH referral.

31. The Tribunal finds that on 17 November, the day the invitation letter to the stage 1 meeting was sent to the claimant the Respondent had not yet received the OH report because the amended report is dated 18 November and the reply from the PA suggests the amended report was received by 21 November. The Tribunal finds it unlikely, as suggested by the Headteacher, that the respondent had received the unamended original report given that the claimant had informed OH she wished to see the original report before it was disclosed. We find the Head Teacher was in receipt of the amended Occupational Health report when the invitation to stage 1 meeting was rearranged for 28 November 2016.

32. Meanwhile, on 23 November 2016 the claimant was sent a letter from N, Chair of the Pay Committee (see page 646). We find that all teachers, including the Senior Leadership Team ("SLT") must complete performance management documents each year if they wish to be consider for an award. The performance management policy states:

> "The performance of teachers must be reviewed on an annual basis. Performance planning and reviews must be completed for all teachers by 31 October and for the Head Teacher by 31 December."

33. We find that the governors' pay performance management/pay review committee meeting which met on 22 November 2016 (page 1001) considered the performance management review documents of all staff, and the pay progression for those eligible for a discretionary award. It was noted that the claimant had not submitted her annual performance review by the deadline of 31 October. The chair of the Pay Committee wrote to the claimant. He explained normally they would consider failure to submit an indication she did not wish to be considered for an award. However, noting she was absent from work, he invited her, as a reasonable adjustment to submit a late application for their consideration. P646

34. There was then a discussion between the claimant and her line manager, G, about the method of communication, and it was agreed they would communicate in relation to the performance review by email. The first draft was produced on 12 December 2016 (page 703) and a reply showing the claimant's concerns is at page 206. We find that G corrected his comments in line with the claimant's wishes (see page 741). We find that G discussed his final assessment with the Head Teacher once he had completed it. We accept E's evidence that he did not see the first draft but saw the second draft. We accept G's evidence that he was "his own man", and it was his decision in relation to the assessment.

35. Meanwhile the first Tribunal judgement was sent to the parties on 9 November 2016.There had also previously been a grievance. The complexity of the issues causing the claimant's absence were referred to by the trade union representative on 14 November 2016.p648

36. A long-term absence review meeting took place on 28 November 2016 in accordance with the policy. Present were the claimant, her representative, Mr Hulse, and F from the union as an observer. For the respondent there was E, the Head Teacher; a representative from B, O, and M as a note taker (pages 655-661).

37. The Headteacher referred to the OH report and the work-related stressors. The OH report of November 2016 stated: "Given her current psychological difficulties and her ongoing perceived work concerns my opinion is that a successful and sustained return to work is unlikely without further steps towards a resolution."

38. The report stated that: "The way forward lies with organisational matters rather than medical solutions" It concluded: "In my opinion her ability to render reliable service and attendance is more dependent on resolution of the perceived work-related stressors rather than medical factors."

39. The previous OH report was obtained in June 2016 when the claimant had returned to work, "A is currently in work completing her full duties and hours" (see page 1370). The report referred to: "The current maintaining factor to her psychological distress from her account is the perceived work -related difficulties which remain unsolved." The report refers to "interpersonal difficulties between A and senior management at her school". (Page 1370)

40. At the meeting on 28 November the union representative suggested an action plan (see page 655). A stress risk assessment was discussed (see page 655). The Head Teacher asked the claimant if she wanted to elaborate on her perceived work stressors (see pages 656). The claimant spoke about these factors (p656-7).

41. The union representative stated: "There have been two processes, the grievance and the Employment Tribunal, both have raised issues that need attention". P657. The Headteacher said "things not linked to the Tribunal can be considered to support the claimant". P657

42. The Headteacher asked the claimant to outline her concerns in writing so that a dialogue could begin to prepare the ground and get a plan in place (see page 658).

43. The Head Teacher confirmed the claimant was on stage one of the sickness monitoring and would move to stage two if she was off for a further two months. The union representative stated that the Head Teacher could use discretion and exceptional circumstances to choose not to place on stage one. He asked the Head Teacher not to conclude the stage one as the action plan was not yet in place. The Headteacher said it was not possible to put the action plan in place at that meeting. See page 661.

44. An outcome letter from the meeting confirming the claimant was at stage 1 of the process was issued on 1 December 2016. Pages 683-685

45. The outcome letter confirmed the reference to the work stressors and confirmed that in terms of medical appointments the claimant's need for further ongoing support was understood and that this could be accommodated if reasonable through the normal process. It confirmed that the claimant explained the only way she could return to work was for an action to be put in place, and the Head Teacher agreed to consider her views and perceptions but also the need to consider the views of other people.

46. The Tribunal finds that the paragraphs at page 2 of the letter in relation to the absence management procedure are standard paragraphs from the respondent's template letter.

47. On 2 December 2016 the trade union representative wrote to the Head Teacher with specific information in writing to enable the school to support the claimant fully. He listed suggestions in 12 points (see pages 687-691).

1. On 8 December 2016 the union chased the "action plan" (see page 701). By a letter of 8 December 2016 the claimant appealed against stage one (see pages 694-700).

2. On 13 December 2018 the Head Teacher acknowledged the email from the trade union representative and explained he was seeking advice.

3. There is no dispute that in early December 2016 the claimant was considering an appeal to the EAT in relation to the original Tribunal decision (see pages 692-693). The appeal eventually took place in August 2017.

4. The school then closed for the Christmas holidays. On 9 January 2017 the Head Teacher replied to the trade union in detail about the suggested points raised in his letter of 2 December for the action plan (see pages 742-743). He dealt in detail with each of the 12 points raised by Mr Hulse. One of the suggestions was:

> "Consideration will be given to temporarily halting the absence monitoring procedure as a reasonable adjustment to enable the action plan and A's return to work enough genuine space to breathe". (Page 743)

5. Meanwhile on 13 December 2016 the claimant had written to the Chair of Governors asking for a meeting (see page 719). D, the Chair of Governors, acknowledged her email but explained he was going to be away for two weeks from that Thursday and would be unable to action the matter until the New Year. He indicated the claimant might also be referring to her appeal against stage one of the absence management procedure and indicated that matter too could not be dealt with until the New Year (see page 719).

6. By a letter dated 10 January 2017 the Chair of Governors acknowledged the claimant's appeal and invited her to attend an appeal hearing on 20 January 2017 (see page 747).

7. On 11 January 2017 the claimant's union representative reverted to the Head Teacher in relation to the action plan (see page 749).

8. On 13 January 2017 D responded to the claimant's request for a meeting and they arranged to meet on Thursday 19 January 2017 (see pages 787-788).

9. On 16 January 2017 B sent the claimant a standard letter explaining that she would go on half pay from 5 March 2017 (page 772).

10. On 18 January 2017 the trade union representative, Mr Hulse, and the Head Teacher were liaising to fix a date to discuss the action plan (see pages 773 and 745). The emails are entitled, "Meeting to discuss action plan". The Head Teacher's letter to H of HR refers to a meeting "in order to discuss a stress risk assessment and action plan to support A's return to work" (see page 745).

11. H from B HR confirms her attendance at a meeting now arranged for 24 January 2017 for the Head Teacher, the claimant, her union representative and HR to "discuss a stress risk assessment and action plan to support the claimant's return to work" (page 781).

12. On 19 January 2017 the claimant met D. There is no dispute that the claimant asked for this meeting. The meeting started in a booked meeting room. However, partway through the meeting it was discovered the room was booked for someone else. Accordingly, the claimant and D went to E's PA to find a room for them to continue their discussion. They then moved to a smaller room.

13. There is no dispute that the claimant covertly recorded the meeting from the point when they moved to a smaller room. The claimant produced handwritten notes at pages 789-791 which she states she made later on 19 January 2017.

14. The claimant then reconstructed the first part of the meeting (which was not recorded (see pages 792-793)). She also produced a transcript of the part of the meeting she recorded (see pages 793-819). There is no independent professional transcription available for the Tribunal. The parts of the conversation relied on by the claimant as allegations of discrimination/victimisation/harassment were identified by the claimant's counsel at the outset of the hearing and are referred to later in this judgment.

15. In cross examination the claimant confirmed that at this meeting D was concerned about her health and that the focus of the meeting was a new role of a leading practitioner which she suggested to D as a way of resolving the issues between the parties. We find there was a discussion in this meeting of the claimant's ill health and she told him she had previously attempted suicide (see page 796).

16. We also find that the claimant told D she used to be sick before Senior Leadership Team "SLT" meetings (see page 812).

17. We find D, whose style is extremely forthright, blunt and direct, believed he was in "dad mode". He said: "I had my dad hat on, I was trying to help her". The Tribunal accepts that he believed he was genuinely was trying to assist the claimant.

18. The claimant says recording the conversation was not something she is particularly proud of. Her explanation for pressing the record button her smartphone was because she wanted to be sure that when they discussed the leading practitioner role she could be clear afterwards what was said.

19. The Tribunal accepts the claimant believes this to be true. However, the Tribunal also notes that it would have been possible for the claimant to explain to D that she was going to record the conversation so she could be clear later about what was discussed.

20. There is no dispute that both parties were very positive at the end of this meeting. The leading practitioner role was the claimant's idea. It was something she had not even discussed with her trade union representative, "the only person I've really talked to about this potential other role is R" (her ex-partner) (see page 817). D was saying:

> "If we can get ourselves a way out of it let's get out of it and put yourself under less pressure, do a job you really enjoy and you know, move on."

21. D reassured the claimant there was no plan to constructively dismiss her (see page 817).

22. The meeting concluded with D saying: "I'm fairly positive, I really am, I hope you are", and the claimant saying, "I am". D said, "Hopefully we can get you back into school and back on an even keel, getting you back into school", and the claimant said, "hopefully".

23. There is no dispute that the meeting arranged for 24 January 2017 to discuss the action plan and stress risk assessment with a view to enabling the claimant to return to work was converted into a meeting to discuss the leading practitioner role. The idea was that the role would take the role out of the senior leadership team but she would be responsible for teaching and learning. There were no notes produced by any party of that meeting.

24. On 24 January 2017 the Head Teacher also wrote to the claimant and her union representative confirming that the appeal against stage one of the long-term absence procedure due on 27 January 2017 would be postponed at her request (see page 820). On the evening of 24 January, following the meeting, the trade union representative sent a detailed email suggesting figures for the proposed salary for the new role and further information about it. The claimant also attended her GP that day who issued a further fit note saying the claimant was unfit for work until 27 February 2017 (see page 1435). That fit note was sent to the respondent on 27 January 2017 (see page 821).

25. On 1 February 2017 the Head Teacher contacted the trade union with a proposed draft job description for the leading practitioner role and confirmation of a discussed salary proposal. P826

26. On 3 February 2017 the claimant met her union representative and informed him she could not accept the salary cut (see paragraph 103 of Mr Hulse's statement). The claimant confirmed in cross examination the reason the negotiations in relation to the leading practitioner role broke down was because of money.

27. On 6 February 2017 the claimant contacted the Head Teacher with a view to visiting school in advance of a return to work (see page 844a).

28. On 7 February 2017 the claimant contacted N, the Chair of the Pay Committee, asking him if he had received her document about the performance management award (see page 839c).

29. Also on 7 February 2017 the trade union informed the Head Teacher and the Chair of Governors that the claimant was unable to accept the leading practitioner role (see page 839a). The respondent had offered to protect the claimant's existing salary for a period of 19 months from her likely return in March 2017 through until 31 August 2018. From that point onwards the respondent, who had initially suggested a salary range of L4-L8, agreed to raise the salary range from L10 to L14 with the claimant moving onto L10 on 1 September 2018, allowing for four further points of progression.

30. The claimant she wished to remain on L14, her present position and was unable to drop to L10 in 2018 for personal reasons-she is a single parent with outgoings and could not afford the proposed reduction in pay. (see page 839a).

31. The following day, on 8 February 2017, D on picking up the claimant's email contacted her to say he was extremely disappointed she had rejected the role. We find D had expended a lot of effort in trying to make the solution succeed. He stated, "I genuinely think you are making the wrong call" and invited the claimant to contact him if she would like to have another informal chat (see page 902).

32. The claimant contacted D. She covertly recorded the conversation. Once again she made handwritten notes (see pages 846-855). Once again a professional transcript has not been produced. The claimant's "transcript" of the conversation starts at pages 846-875. Where the recording is inaudible the claimant has reconstructed D's comments from her notes.

33. That same day, 8 February 2017, the Head Teacher sent a letter of invitation to the claimant to a second stage absence meeting (see page 845).

34. On 13 February 2017 the trade union representative contacted the Head Teacher indicating he was disappointed the claimant had received this and noting that there was the outstanding stage one appeal yet to be heard (page 886). He also stated that he thought from the 24 January meeting there was a "fresh start" with the slate wiped clean as far as the absence management procedure was concerned.

35. On the same day there was an email exchange between the claimant and her union representative about "we need to be clear where all this is leading" (see page 887) and a reference to further legal claims.

36. On 15 February the Head Teacher indicating he had tried to contact the trade union representative by telephone but confirmed that the stage two meeting had been put on hold until there had been an outcome from the stage one appeal meeting which had been fixed for 27 February 2017. We find it is likely he had followed advice from H HR not to pencil in a stage 2 meeting until stage 1 appeal had concluded (p897).

37. On 15 February 2017 the claimant also wrote to the Head Teacher suggesting a return to work was likely on 1 March (see page 888).

38. On 24 February 2017 the claimant wrote to D (see pages 916 and 916a-b). She stated:

> "I intended to give in touch with you after our last conversation to thank you for the considerable time that you have spent on discussing the situation since Christmas. I believe that your concern for my health and desire to resolve the situation was genuine. I also believed that your promise that you were not trying to force me out of my job was genuine."

She then went on to raise other concerns.

39. D responded the same day stating that he had tried twice to negotiate an amicable way through the issue and it appears to have "failed spectacularly on both

occasions". He indicated he was not minded to go over old ground and stated, "I do really wish you well".

40. The stage one appeal took place on 27 February 2017. There are no minutes in the bundle. There was a detailed outcome letter issued on 6 March 2017 (see pages 939-941). The claimant had been informed on 27 February 2017 that there would be a delay in sending out the decision.

41. On 1 March 2017 the claimant returned to work in her existing role as Assistant Headteacher, on a phased return. At the date of this Tribunal she remained at work.

Applying the Law to the Facts

42. We turn to the first factual allegation:

> "(a) In the handling of the absence management process from November 2016 including progressing to stage two before an appeal against stage one had been determined, and in subsequently failing to uphold the appeal at stage one".

43. We remind ourselves that this allegation was further refined at the outset of the hearing as follows:

(1) Progressing matters to stage one on 28/11/16 notwithstanding OH reports that year (June 16, November 16).

(2) Failing to properly discuss with the claimant her proposals and proposed adjustments to facilitate a return to work at 28 November meeting.

(3) Issuing the claimant with a stage one warning.

(4) Progressing to a stage two meeting on 9 February 2017 before the claimant's stage one appeal had been determined.

(5) Failing to uphold the appeal against stage one.

44. Each of these allegations were brought as a claim for harassment relating to disability (section 26), direct disability discrimination (section 13), discrimination arising from disability (section 15) and victimisation. The only exception was that the first allegation, "progressing matters to stage one on 28/11/16 notwithstanding OH reports year (June 16, November 16)" was withdrawn at the submissions stage as a claim for direct discrimination.

45. Accordingly the Tribunal turned to deal with the matters in the order as set out by Employment Judge Franey at the earlier case management hearing. We turned to harassment related to disability.

46. We reminded ourselves of the guidance in **Richmond Pharmacology**, namely that there must be:

(1) Unwanted conduct;

(2) A proscribed purpose or effect; and

(3) The conduct must be related to the protected characteristic of disability.

47. We reminded ourselves that where there is a disagreement about what has taken place we must make clear findings of fact as to what occurred i.e. what were the words used. We also reminded ourselves of the EHRC Code at paragraph 7.18. We reminded ourselves of the principle of **HM Land Registry v Grant**, that even if conduct viewed objectively could be considered to violate the claimant's dignity it will not do so if the claimant's subsequent actions demonstrate that she did not consider it did.

Allegation 1. ***Progressing matters to stage one on 28/11/16 notwithstanding OH reports that years (June 16, November 16)***

48. The Tribunal relies on its finding of fact that both Occupational Health reports referred to the perceived work-related difficulties which remain unresolved. The OH report dated 21 June 2016, page 1371, stated "The current maintaining factor to her psychological distress from her account is the perceived work related difficulties which remain unresolved". The more recent report said, "Her ability to render reliable service and attendance is more dependent on resolution of the perceived work related stressors rather than medical factors" (see OH report 18 November 2016 page 1380).

49. There is no dispute that the long-term absence procedure applies as the claimant had a "continuous sickness absence which exceeds six weeks" (see page 1646). The policy states:

> "After six weeks' absence (or earlier if it is known beforehand that the absence will last six weeks) employees should be referred to the Occupational Health Service."

50. The long-term first stage sickness absence meeting in this section of the policy states:

> "On receipt of the Occupational Health report a stage one sickness absence meeting should be arranged between the employee and the manager."

It states:

> "The purpose of the meeting will be –
>
> (a) Discuss the reason for the absence and the Occupational Heath report;
>
> (b) Establish a likely return to work date if possible;
>
> (c) Identify any work related issues that may be associated with the sickness absence and how these can effectively be addressed;

(d) Whether any support can be offered to enable the employee to return to work;

(e) Explain to the employee in a sensitive manner the effect that the absence has upon the service in terms of service delivery, implications for colleagues' workload and morale;

(f) At the meeting the following options may be considered subject to a medical recommendation by the Occupational Health Service –

- Phased return to work;
- Redeployment within the school;
- Ill health retirement."

51. The introduction section of the policy identifies the importance of high levels of attendance and the importance of effective monitoring and management of attendance (page 1630). The objectives of the sickness absence policy are clearly identified at page 1631.

52. The sickness absence review process is noted at page 639:

"Head Teachers are responsible for reviewing employees' sickness absence in relation to the trigger points defined within the sickness absence procedure and initiating the formal stages of the review process where appropriate."

53. There is an inherent discretion within the policy:

"Any cases where an employee has reached the trigger points yet it has not felt appropriate to initiate the formal stage of the sickness absence procedure should be discussed with Human Resources to ensure consistency."

54. The Tribunal turned to consider the first issue of "progressing matters to a stage one meeting on 28 November 2016 notwithstanding OH reports that year amount to unwanted conduct".

55. The Tribunal majority found that the claimant considered that being invited to a stage one meeting was unwanted conduct. She made it clear she did not wish to be invited to such a meeting. (The minority accepted it was unwanted conduct from the claimant's perspective but bore in mind that the purpose of the procedure is supportive and not disciplinary).

56. The Tribunal turned to the second question: did the conduct have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The Tribunal was not satisfied there was any evidence to suggest that the invitation letter from the Head Teacher initially sent on 17 November and then rearranged on 21 November for 28 November had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

57. The Tribunal turned to consider whether it had the proscribed effect having regard to the claimant's perception, other circumstances of the case and whether it was reasonable for the conduct. The Tribunal was divided.

58. The majority relied on the fact that when the Head Teacher had initially invited the claimant to the absence management meeting at stage one of the long-term absence procedure on 17 November 2016 he had sent the original letter of invitation to the meeting out before he had received a copy of the amended Occupational Health report. The majority took into account that there was a discretion under the policy not to proceed to stage one. The majority took into account the reference in the Occupational Health report for the need for a non-medical solution to the perceived work-related stressors. For all these reasons the majority was satisfied that within the perception of the claimant and the other circumstances of the case it was reasonable for the conduct of sending the invitation to the stage one meeting to have the effect of creating a hostile environment for the claimant.

59. Therefore the majority turned to the last question for the Tribunal: was the conduct related to disability? The claimant was invited to a stage one meeting because of her long-term absence from work due to disability, and in these circumstances the conduct was related to disability. Therefore the majority finds that in progressing matters to stage one on 28 November 2016 notwithstanding OH reports that year (June 16, November 16) amounts to disability related harassment.

60. For the minority it was accepted that the claimant perceived the invitation to a stage one meeting on 28 November 2016 as unwanted conduct However it was not reasonable for the conduct to have that effect taking into account other circumstances of the case. The respondent acted in accordance with the long-term absence policy. The claimant had reached the trigger point under the long-term absence policy because she had been absent for six weeks by 24 October 2016. At that point, in accordance with the policy, an Occupational Health report was commissioned. In fact, on 19 October the claimant had alerted the respondent she was in receipt of a fit note which would cover her absence for a further period until the end of November 2016.p640.The fit note was issued on 18 October 2018. (p1432, p648.) Therefore, at the point of the OH referral the respondent knew the claimant was likely to be absent for longer than 6 weeks. She was likely to be absent until 28 November 2016-a total of 10 weeks.

61. The minority takes into account that by the time the stage one meeting was rearranged on 21 November, the respondent did have the amended OH report (See 644) so had fully complied with the procedure at p1647. (The claimant had objected to the stage one meeting taking place on 25 November, in part because she said the respondent did not yet have the OH report., the respondent responded promptly to her objection and rearranged the meeting to 28 November.)

62. The minority finds that failure to exercise an inherent discretion not to follow the absence management policy can not reasonably regarded as conduct having the proscribed effect.

63. The minority also took into account that it is appropriate, as the purpose of the sickness absence policy indicates, where an employee has been absent from work for a lengthy period of time for there to be a formal meeting with the school to

discuss the nature of the absence and to identify and address factors in the workplace which could be affecting the employee's attendance including the recommendations in the OH reports. The minority is not satisfied that inviting the claimant to such a meeting can reasonably have the proscribed effect

64. The minority finds that to call an employee to a stage one meeting in accordance with the respondent's long-term absence management policy when all the circumstances are taken into account does not amount to harassment

65. There is no requirement to consider this allegation as direct discrimination because the claimant withdrew this.

66. The Tribunal turned to consider this allegation as section 15 discrimination. The Tribunal reminded itself of the guidance in **Secretary of State for Justice v Dunn 2018 EWCA Civ 1998**. Firstly, the Tribunal must identify the "unfavourable treatment". Secondly, there must be "something" which arises in consequence of disability. Thirdly, the unfavourable treatment must be because of (i.e. caused by) the "something" which arises in consequence of disability. Finally, can the respondent can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

67. In this allegation the unfavourable treatment is the progressing matters to stage one on 28 November 2016. The majority is satisfied that this is "unfavourable treatment" because the claimant made it clear she found it distressing to be invited to such a meeting. The majority also relied on the fact that if the claimant progressed through all stages of the absence management procedure by the final stage she was at risk of dismissal.

68. The minority finds that the sickness absence monitoring procedure is intended to be supportive and includes within its aims "to identify and address factors in the workplace which could be affecting employee attendance" (page 6130) and so invitation to a stage one meeting is not unfavourable treatment.

69. In case the minority was incorrect in this the minority, like the majority, turned to answer the second question. The second question is: what is the "something" which arises in consequence of disability? In this case the claimant relied upon "higher than normal absence levels, required time off to attend therapy sessions, was vulnerable to stress, and was perceived to have communication issues" (see paragraph 47B page 84 ET1).

70. The Tribunal then turned to the third question: is the unfavourable treatment because of (i.e. caused by) the "something" which arises in consequence of the disability?

71. The claimant relied upon "higher than normal absence levels". The Tribunal found this a difficult concept. The Tribunal was given no evidence of "normal" absence levels. However, there was no doubt that at the point the claimant was invited to the stage one meeting she had been absent from work for over eight weeks, a long-term absence. The majority was satisfied that the claimant was invited to the stage one meeting because she had been absent from work for an extended length of time which was a "higher than normal absence level", and that

her absence from work arose in consequence of her disability of anxiety and depression.

72. For the minority found the phraseology “higher than normal absence levels” unhelpful because it is entirely unclear what “normal” absence levels are. The minority was satisfied that the claimant was invited to a stage one meeting because of her long-term absence from work and that arose in consequence of her disability.

73. All members of the panel therefore turned to consider the last question: the respondent cannot show the unfavourable treatment is a proportionate means of achieving a legitimate aim. For the majority, the Tribunal finds that progressing matters to a stage one meeting on 28 November 2016 was not a proportionate means of achieving the legitimate aim. The majority has had regard to the discretion held by the Head Teacher under the policy not to progress to stage one. The majority relies on the fact the Occupational Health reports refer to issue with relationships rather than medical matters being responsible for the claimant's absence. The majority relies on a suggestion from the claimant and her union that matters could be dealt with informally outside the formal procedure as evidence that moving to stage one was not a proportionate means of achieving a legitimate aim.

74. Therefore the majority found *Progressing matters to stage one on 28/11/16 notwithstanding OH reports that years (June 16, November 16)* is upheld as an allegation of unfavourable treatment because of something arising in consequence of disability.

75. For the minority, the “legitimate aim” of the respondent was monitoring the attendance of its employees absent on sick leave for the good of its organisation. The minority accepts the respondent’s contention that it is in the interests of the students of the school that members of the teaching staff and senior leadership team demonstrate consistency of service. The minority finds that it is appropriate to have a sickness absence management procedure so that meetings can be held with an employee who is absent from work on sick leave and support offered where necessary to investigate the reason for absence and help employees return to work if possible. The minority also took into account that by the time the stage one meeting was convened for 28 November the claimant had been absent from work on sick leave for ten weeks and that the respondent had received a further fit note three days before the meeting (page 651) which signed her absent from work for a further month until 23 December 2016. The minority finds to have a formal meeting at that stage in accordance with the respondent’s policies was a proportionate means of achieving a legitimate aim.

<u>Victimisation</u>

76. Finally, the Tribunal turned to consider this allegation as victimisation. The Tribunal reminded itself that in a victimisation claim there must be:

(a) a protected act; and

(b) a detriment.

77. The Tribunal must then consider the causal connection, having regard to the burden of proof. The Tribunal reminded itself that pursuant to section 212 of the

Equality Act 2010 “detriment” does not include conduct which amounts to harassment. Therefore, the majority having found that this allegation amounts to harassment, it cannot also amount to victimisation and accordingly this claim must fail

Allegation 2 ***Failure to properly discuss with the claimant her proposals and proposed adjustments to facilitate a return to work at the 28 November meeting***

78. The Tribunal turned first to consider this as an allegation of harassment. The majority finds that at the meeting on 28 November 2016 the claimant, supported by her trade union representative, had an opportunity to discuss the issues. There was a detailed discussion about the issues and the claimant was given an opportunity to list the work related stressors (identified in both OH reports). The majority finds that the situation was complex given that the stressors related to a breakdown of some relationships and the issues were also intricately tied up with a previous grievance and a previous Tribunal claim for which at that stage the parties had received the decision, although part of it was being appealed. The majority finds in these circumstances it was reasonable for the claimant to be asked to put her specific concerns in relating to the perceived work related stressors in writing before moving to a discussion about an action plan and stress risk assessment.

79. For the minority the respondent did not properly conduct the meeting on 28 November 2016. The minority felt the meeting should have moved to organise a stress risk assessment and mediation at that meeting to enable the perceived work related stressors as identified by the OH reports to be dealt with.

80. The Tribunal turned to consider the first question: was there unwanted conduct? All members of the Tribunal accepted that the claimant considered there was a failure at the meeting on 28 November to properly discuss with the claimant her proposed adjustments.

81. The Tribunal turned to consider the next issue: did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The Tribunal is satisfied there was no purpose in conducting the meeting in such a way.

82. The Tribunal turned to consider the proscribed effect. In an “effect” case the Tribunal must take into account the claimant's perception, other circumstances of the case and whether it was reasonable for the conduct to have that effect. The Tribunal has taken into account that at the meeting the claimant was represented by her trade union representative and was given an opportunity to identity the work-related stressors as identified by Occupational Health. The Tribunal majority relies on its finding that it was reasonable for the employer, given the lack of clarity about the nature of some of the work-related stressors, to ask the claimant to put those concerns in writing (which the claimant’s union representative later did on 2 December 2016) so that they could form a view as to what could be done to support the claimant. Accordingly, the majority is not satisfied that taking all the circumstances into account the way the meeting was conducted had the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

83. The minority relied on their findings of fact to find that the failure to deal with the claimant's specific recommendations at that meeting did amount to a hostile environment for the claimant, and it was reasonable for the claimant's perception to have that effect.

84. Finally, the majority turned to whether the conduct related to the protected characteristic. The majority is not satisfied that even if there had been a failure to properly discuss with the claimant her proposals and proposed adjustments that such a failure was related to her protected characteristic of anxiety and depression. The minority finds that it was.

85. Accordingly, the allegation that failing to properly discuss with the claimant her proposals and proposed adjustments to facilitate a return to work at the 28 November meeting is an allegation of harassment fails (by a majority).

86. The Tribunal turns to consider this as an allegation of section 15 discrimination. The Tribunal reminds itself it must answer four questions:

(1) Is there unfavourable treatment?

(2) Is there something which arises in consequence of disability?

(3) Is the unfavourable treatment because of (i.e. caused by) the "something" which arises in consequence of disability?

(4) The respondent cannot show the unfavourable treatment is a proportionate means of achieving a legitimate aim?

87. For the majority answering the first question, there is no unfavourable treatment because the majority find it is factually incorrect to state that the respondent failed to properly discuss with the claimant her proposals and proposed adjustments to facilitate a return to work at the 28 November meeting. The majority finds there was a meeting properly held where the claimant had an opportunity to discuss her proposals and proposed adjustments to facilitate a return to work, and the respondent reasonably suggested that she provide a list of her concerns in relation to the work related stressors so that consideration could be given to them, and a stress risk assessment and/or action plan. Accordingly the allegation fails at that stage.

88. The minority finds that the way the meeting was conducted on 28 November amounted to unfavourable treatment. The minority has then gone on to consider whether there is "something" which arises in consequence of disability. The minority finds that the "something" arising in consequence of disability which is relevant here is the "vulnerable distress" and "was perceived to have communication issues "(see paragraph 47(B) page 84). The minority is satisfied that those matters arose in consequence of the claimant's disability of stress and depression and the reason for E's treatment of the claimant in that meeting was because she was vulnerable to stress and was perceived to have communication issues. The minority is not satisfied the respondent can show that the failure to conduct the meeting properly was a proportionate means of achieving a legitimate aim.

Victimisation

89. The Tribunal reminds itself it must ask: Is there a protected act? The answer to this question is "yes". It is conceded that bringing the earlier Tribunal claims amount to a protected act. Is there a detriment? If yes, is the detriment because of the protected act having regard to the reverse the burden of proof? The Tribunal reminds ourselves of **Madarassy**: it is not sufficient to have a detriment and a protected act, to shift the burden of proof. There must be a "something more" to shift the burden.

90. For the majority we turn to the second question: is there a detriment? We are not satisfied that there is. A detriment must be looked at from the claimant's point of view but her perception must be reasonable in the circumstances. The majority is satisfied that the claimant had an opportunity properly discuss with the respondent her proposals and proposed adjustments to facilitate a return to work at the 28 November meeting, and accordingly the claim fails at that stage. For the minority, having found that this allegation amounts to harassment it cannot also amount to victimisation and therefore, in accordance with section 212 of the Equality Act 2010, this claim cannot succeed.

91. Finally, the Tribunal turns to consider this claim as direct discrimination. The Tribunal must ask itself whether the claimant has been treated less favourably than a hypothetical comparator in the same set of circumstances because of her disability. The Tribunal reminds itself of the narrow range of comparator when constructing when constructing a **Shamoon** type hypothetical comparator. The Tribunal finds that a hypothetical comparator with the same limitations on abilities as the claimant suffering from anxiety and depression but who previously brought an Employment Tribunal claim with the same work -related stressors as the claimant as identified in the Occupational Health reports and who was not disabled would have been treated in the same way. Accordingly this claim must fail.

Allegation 3. Issuing the claimant with a stage one warning

92. For the majority, the letter issued to the claimant following the stage one sickness review meeting is not a warning letter, it is an outcome letter. For the minority, although the letter is not termed a warning letter it should be considered as such because it reflects a formal stage in the procedure which, if the claimant reached the final stage, could result in her dismissal.

93. The Tribunal turned to consider this allegation first as an allegation of harassment. All the Tribunal members were satisfied that the claimant viewed the letter of outcome at pages 683-685 as unwanted conduct. This is illustrated by her letter of appeal at page 694 where she objects to the outcome letter

94. The Tribunal turns to the next question: does the letter have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The Tribunal is satisfied that in issuing the letter, which summarised the outcome of the meeting and the stage the claimant had reached in the procedure, E did not have the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

95. The Tribunal therefore considered the allegation as an "effect" case. The Tribunal must take into account the claimant's perception, other circumstances of the case and whether it was reasonable for the conduct to have that effect. For the majority the Tribunal finds the Head Teacher sent a detailed letter confirming that, in accordance with the policy, the claimant had triggered the first stage of the long term absence procedure because she had been absent for of more than six weeks. As of the date of the meeting he noted she had been absent for ten weeks. He referred to the medical treatment being sought by the claimant and the reference to perceived work stressors in the Occupational Health report. He asked the claimant to outline those stressors and confirmed that Mr Hulse from the NUT had requested that an action plan be put in place as soon as possible to enable her to return to work.

96. He attempted to summarise the lengthy discussion which had taken place (see page 684) and indicated when the claimant was well enough there could be a phased return to work. We find the final paragraphs of the letter he used a template to indicate where the claimant was in terms of the procedure. He informed her she was entitled to appeal.

97. For the majority, taking all the circumstances in the case, the Tribunal finds it was not reasonable for a detailed letter to the claimant reflecting the outcome of a meeting which had taken place in accordance with the respondent's absence management procedure to have the proscribed effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The claimant had received an outcome letter for a meeting to which the respondent was entitled to invite her in accordance with its absence management procedure. The letter simply summarised the nature of the meeting, the next steps to be taken and where she was in the process.

98. By contrast the minority found that it was reasonable for the conduct to have the effect of creating a hostile environment for the claimant. The minority finds the matter could have been dealt with outside the formal absence management process with the Head Teacher exercising his discretion having regard to the Occupational Health reports and so issuing a formal letter following the stage one meeting did amount to behaviour which created a hostile environment for the claimant.

<u>Unfavourable treatment – section 15</u>

99. The Tribunal reminded ourselves we must answer four questions:

(1) There must be unfavourable treatment.

(2) There must be "something" which arises in consequence of disability;

(3) The unfavourable treatment must be because of i.e. caused by, the "something" which arises in consequence of disability;

(4) The respondent cannot show the unfavourable treatment is a proportionate means of achieving a legitimate aim.

100. For the majority this allegation fails when answering the first question. The majority is not satisfied that sending an outcome letter from a stage one meeting

properly conducted under the respondent's absence management policy can amount to "unfavourable treatment". Accordingly the claim fails at that stage.

101. However, if the Tribunal majority is wrong about that the Tribunal must consider the "something" arising in consequence of disability. The claimant relies on higher than normal absence levels, required time off to attend therapy sessions, was vulnerable to stress and was perceived to have communication issues. The Tribunal accepts that although badly expressed the claimant did have high absence levels and that arose as a consequence of her disability. The Tribunal accepts the claimant was required to have time off for therapy sessions and that was a consequence of her disability. The Tribunal is not satisfied there is any medical evidence to suggest that the claimant was vulnerable to stress because of her anxiety and depression, nor is there evidence to state that the claimant was perceived to have communication issues because of her anxiety and depression.

102. The Tribunal turns to the next question: was the unfavourable treatment (the sending of the outcome letter of stage one) because of the "something" which is arising in consequence of disability? The claimant was not sent the outcome letter because she was required to have time off to attend therapy sessions, nor because she was vulnerable to stress nor because she was perceived to have communication issues. The claimant received the outcome letter because she had attended a meeting in accordance with the respondent's procedure and the respondent had properly sent her a letter identifying where she was in the procedure and the matters which had been discussed at the meeting. Accordingly the claim also fails at this stage.

103. The minority is satisfied that sending an outcome amounts to unfavourable treatment (for the same reason it amounts to detriment as described above). The minority is satisfied that the claimant's higher than normal absence levels arose because of her disability, to answer the second question. In answering the third question, the minority is satisfied that the reason the claimant was sent the stage one letter was because she had higher than normal absence levels which resulted in the meeting at stage one. Turning to the last question, the minority is not satisfied that sending the claimant an outcome letter following the stage one meeting was a proportionate means of achieving a legitimate aim.

Direct discrimination – section 15 Equality Act 2010

104. The Tribunal constructs the same hypothetical comparator as in the previous allegation and finds that a hypothetical comparator in the same set of circumstances as the claimant but not suffering a disability would also have been issued with a standard letter at stage one if the individual had attended such a stage one meeting, and accordingly that claim fails.

Victimisation

105. For the majority this claim fails because the majority finds that there was no detriment in issuing the claimant with a stage one warning. The majority finds that the claimant's point of view is relevant, but her perception must be reasonable in the circumstances. The majority finds that sending the claimant an outcome letter from a meeting which reasonably reflects the meeting does not amount to a detriment.

106. For the minority, this claim fails because the minority finds this allegation amounts to harassment and in accordance with section 212 of the Equality Act 2010 cannot also be victimisation.

Allegation 4. ***Progressing to stage two meeting on 9 February 2017 before the claimant's stage one appeal had been determined***

107. The Tribunal finds that it is factually inaccurate to say that the claimant progressed to a stage two meeting on 9 February 2017. What actually happened was on 8 February 2017 the Head Teacher issued an invitation to a stage two absence meeting (page 845). When the claimant's representative objected on 13 February 2017 given the stage one appeal had not yet taken place (page 886) the Head Teacher promptly contacted the union and by letter of 15 February 2017 confirmed that stage two was on hold until stage one appeal outcome had been held. There is no dispute that after that stage one appeal meeting, which took place on 27 February 2017, the claimant returned to work on 1 March 2017 and so never progressed to stage two. Accordingly the Tribunal finds that it is not factually accurate to state the respondent was "*progressing to stage two meeting on 9 February 2017 before the claimant's stage one appeal had been determined.*

108. The Tribunal finds what is accurate to state is that *the respondent issued a letter of invitation to a stage two meeting invitation on 8 February 2017 before the claimant's stage one appeal had been determined.*

109. The Tribunal turns first to consider this statement as an allegation of victimisation. The first question is: has there been a protected act? The answer to that question is agreed to be "yes", the previous Tribunal proceedings. The second question is: has there been a detriment? We remind ourselves of the guidance in EHRC Employment Code "Generally a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage." The Tribunal finds that an invitation to a stage 2 meeting of a procedure that could ultimately end in her dismissal did amount to a detriment for the short period between when she received the invitation (it was sent by post on 8 February 2017) and when it was rescinded by the Headteacher on 15 February. p885

110. Having found there was a protected act and a detriment the Tribunal turns to consider the casual connection. The Tribunal finds it was the Headteacher who was responsible for the decision to send out the invitation letter to Stage 2. It is a letter in his name.

111. The Tribunal has taken into account that during January where both parties seemed close to resolving their issues by discussing the proposed action plan and then the leading practitioner role there was a suggestion to "park" the absence management procedure on both sides. At the claimant's request the forthcoming appeal hearing against stage 1 of the absence management procedure was postponed by the Headteacher on 24 January. See p820. It was suggested earlier in January by the Headteacher when responding to the trade union about the proposed action plan "Consideration will be given to temporarily halting the absence monitoring procedure as a reasonable adjustment to enable the action plan and A's return to work enough genuine space to breathe". (Page 743)

112. Given that the Head Teacher had postponed the appeal hearing a relatively short time earlier, we find he was aware that there was a pending appeal. We rely on the evidence of the Head Teacher that during these months he was seeking advice, both from the respondent's legal team and from HR, given that there had already been one Tribunal claim and that at this stage the outcome was subject to an appeal to EAT. We rely on the clear and cogent evidence of H from HR that she always advised completion of one stage of the process, namely the appeal stage, before moving to the next stage. Given the letter of invitation to stage 2 was issued before the appeal was heard we find E had not sought advice at that point from H.

113. We note that the letter of invitation to stage 2 of the absence management procedure was issued on 8 February 2017. We note it was only the previous day that the respondent had been informed by the claimant's representative that she was unable to accept the leading practitioner role (see pages 839(1) and (b)). The Tribunal accepts the evidence of D that he was extremely disappointed. We find that both E and D had made great efforts, as indeed had the claimant, to investigate the alternative role of a leading practitioner.

114. It is unclear why the Head Teacher had not sought advice before sending out that letter of invitation to stage 2. Although the claimant had indeed reached stage two of the policy because she had been absent from work, at this stage since 19 September 2017 continuously, nevertheless there was a postponed stage one appeal meeting yet to take effect. We find it likely that the Head Teacher was frustrated when he sent the letter of invitation to the stage two meeting. We are not persuaded by the Headteacher's explanation that he thought the claimant was not proceeding with the appeal. The appeal had been postponed in the context of negotiations about the LP role (which the claimant had just rejected on 7 February) and to enable the claimant to attend her GP (which the respondent knew she had done by 27 Jan. (P821)

115. When considering the casual connection, we reminded ourselves of the burden of proof. Given that there was a poor relationship between the claimant and the headteacher, such that another member of the senior leadership team had taken on responsibility for managing the claimant, we are satisfied this is sufficient to shift the burden to the respondent.

116. We are not satisfied the Headteacher has shown a non-discriminatory explanation for sending out the invitation to stage because we are not persuaded by his explanation that he thought the claimant was not proceeding with the stage 1 appeal. We find he was aware the appeal had only been postponed in the context of the LP negotiations. p840. In the absence of non discriminatory explanation when the burden of proof has shifted we find the allegation of victimisation succeeds.

117. We turn to consider whether this allegation can amount to direct discrimination. We find it cannot, having regard to the limited nature of the comparator (see our previous reasoning).

118. We turn to consider whether it could amount to an allegation of unfavourable treatment because of something arising in consequence of disability. We turn to the first question: is there unfavourable treatment? We find the answer to that question is "yes". The claimant perceived being invited to stage two of an absence management

procedure was unfavourable treatment because it could result ultimately in her dismissal.

119. We turn to the second question: what is the "something" which arises in consequence of disability? We find the "something" is "higher than normal absence levels". Although poorly expressed we find at this stage the claimant had been absent from work since September 2017.

120. We then ask ourselves whether the unfavourable treatment was because of i.e. caused by the "something" which arises in consequence of disability. The answer to this question is "yes". The reason the claimant received the invitation to the stage two meeting was because of her extended absence from work which arose in consequence of her disability.

121. We turn to the final question: can the respondent show the unfavourable treatment is a proportionate means of achieving a legitimate aim. We find they cannot. H told us it was usual for the respondent to deal with an appeal of a previous stage of the procedure before inviting an individual to the next stage. Her advice on 15 February p897 confirms this. Therefore, the proportionate means of achieving a legitimate aim in this case in relation to the management of the claimant's sickness absence would be to deal with the appeal first before moving to the second stage. Accordingly, the respondent cannot show that the treatment is achieving a legitimate aim. Therefore this allegation also succeeds.

122. We turn to harassment. The Tribunal reminded itself that pursuant to section 212 of the Equality Act 2010 "detriment" does not include conduct which amounts to harassment. Therefore, having found that this allegation amounts to victimisation, it cannot also amount to harassment and accordingly this claim must fail

Allegation 5. ***Failing to uphold the appeal against stage one***

123. The Tribunal turned to deal with this as an allegation of harassment.

124. The Tribunal reminded itself that in accordance with the respondent's policy, the purpose of the appeal process is to review whether or not the Head Teacher's decision at stage one was reasonable given the evidence and circumstances and the time of the decision.

125. The majority relies on its earlier findings that the respondent had acted within the absence management policy and had been entitled, in accordance with that policy, to invite the claimant to a stage one meeting. The majority accepted the evidence of H, whom we found to be a clear and credible witness, that it is not the respondent's practice to double trigger points on a long-term absence management policy (unlike the short-term absence policy) because the purpose of the policy is to ensure that a long-term absent employee has an opportunity to discuss with the management the reasons for their absence.

126. The appeal officer reviewed the decision and noted that the stage one meeting occurred after an absence of ten weeks at a point where there was no fixed certainty of the claimant returning to work as she had at that stage provided a fit note to 23 December 2016. The letter from the appeal officer dealt with the allegation that

the respondent had failed to deal properly with the sickness absence management policy (see page 940).

127. Thus the majority finds that failing to uphold the appeal against stage 1, although perceived by the claimant to be "unwanted conduct" did not have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In reaching this decision the majority took into account the claimant's perception, other circumstances of the case and whether it was reasonable for the conduct to have that effect. In reaching that conclusion, the majority noted the limited remit of the appeal, the fact that that the stage one meeting had been properly constituted having regard to the respondent's own procedure and that the claimant's own representative appeared to question (page 887) the purpose of appealing against the stage 1 outcome.

128. For the minority the unwanted conduct was the failure to uphold the appeal. For the minority it was reasonable to consider this had the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant because the Tribunal did not hear from the governor, Q who considered the appeal and the minority was not satisfied that the detail of the claimant's appeal letter had been dealt with by the governor who heard it.

129. The Tribunal turns to consider this an allegation of unfavourable treatment pursuant to s.15 Equality Act. The Tribunal founds the claimant considered the rejection of her appeal to be unfavourable treatment. We turn to the second question: what is the "something" which arises in consequence of disability? We find the "something" is "higher than normal absence levels". Although poorly expressed we find at this stage the claimant had been absent from work since September 2017.

130. We then ask ourselves whether the unfavourable treatment was because of i.e. caused by the "something" which arises in consequence of disability. The majority finds the answer to the question is no. The respondent failed to uphold the claimant's appeal because, as was explained in the detailed outcome letter, it was satisfied the respondent had followed the absence management procedure. Accordingly for the majority the claim fails at this point.

131. For the minority the failure to uphold the appeal was because of the claimant's absence and the failure was not a proportionate means of achieving a legitimate aim.

132. The Tribunal was unanimous in finding the direct discrimination failed because it was satisfied a hypothetical comparator in the same circumstances as the claimant, absent for the same reasons and same length of time but who was not disabled would have been treated in the same way.

133. The Tribunal turned to consider victimisation. There is no dispute there is a protected act. There is no doubt the claimant considered failing to uphold her appeal against stage one was a detriment. The key issue is the casual connection. The majority is satisfied that the reason the appeal was rejected was because the appeal officer found the respondent had followed the absence management procedure, not

because the claimant had brought a Tribunal claim. The minority has already found this allegation was harassment so did not consider victimisation.

Allegation 6. ***In pressuring the claimant into accepting a demoted role as leading practitioner*****.**

134. The Tribunal is unanimous in finding that the respondent did not pressure the claimant into accepting a demoted role as leading practitioner. The idea of the leading practitioner role was the claimant's, and she sought out an opportunity to speak to D to make this suggestion to him. He engaged very positively with the suggestion. He contacted the Head Teacher on the evening of 19 January, the same day as the claimant had met with him.

135. He reverted to the claimant that same evening saying:

> "I had a conversation with Ian this afternoon and he is agreeable to the idea of you moving to the position of lead practitioner…The actual job description, duties, etc., would have to be negotiated with him but I don't see that being a huge problem given goodwill by both parties. We discussed the reduction in your salary and I am confident that we could work something out that would have as minimal effect as possible." (Page 787)

136. The claimant responded: "I agree with you that this seems to be the way forward. My solicitor and union rep are also cautiously optimistic."

137. Both sides put considerable effort into discussing the role. It was discussed at a meeting on 24 January (originally arranged to discuss an action plan for return to work) but unfortunately the proposal foundered when the claimant was unable to accept a salary cut.

138. The Tribunal is not satisfied there was any pressure put on the claimant to accept this role. It was her idea and there was a genuine effort on both sides to seek resolution. As is common in negotiations during that period, both parties offered concessions whilst negotiations were taking place. The respondent had previously indicated they could put the absence management procedure on hold, and the claimant requested at this stage to postpone the stage one appeal.

139. Both sides were frustrated and disappointed by the failure of these negotiations. D's frustration and disappointment is illustrated in the telephone conversation which the claimant covertly recorded on 8 February. The Tribunal is not satisfied that in that conversation D was pressurising the claimant to accept the role which she had already rejected for financial reasons.

140. Accordingly, having found as a matter of fact that this was a suggestion which came from the claimant, was negotiated in good faith between the parties and having found that D's comments in a covert recording after the claimant had rejected the role, did not amount to pressure to accept the role, this claim must fail because in the absence of a finding there was any pressure the claim for discriminatory treatment cannot succeed.

Allegation 7 ***In comments made to the claimant by D during conversations on 19 January 2017.***

141. The Tribunal turns to the detailed extracts from "transcripts" relied upon by the claimant. In relation to the 19 January 2017 the claimant identified thirteen separate allegations. She alleged each comment was an act of disability related harassment and/or direct discrimination and/or unfavourable treatment pursuant to s15 and/ or victimisation. The Tribunal considered each of the thirteen comments in relation to each allegation of discrimination.

Comment 1, page 792 (lines 8 to 10) ***"you didn't really win most of the Tribunal complaints were petty. The complaint about the residential was petty. Most people wouldn't have cared. It is because you are over sensitive because of your illness. You can't expect people to tip toe around you because you are ill".***

142. As in all of these comments the Tribunal reminded itself of the overall context in which they were made. The meeting on 19 January was arranged at the claimant's request to discuss her suggestion of the leading practitioner role. Part way through the meeting she started to covertly record it. After the meeting she was very positive with D about the outcome of the meeting. In cross examination she agreed he was concerned for her welfare at that meeting.

143. The Tribunal also reminds itself that the first part of the meeting which is in italics is entirely reconstructed from the claimant's notes and was not recorded.

144. The Tribunal turns to the first allegation as an allegation of disability related harassment. The Tribunal must ask itself whether there was unwanted conduct. The claimant's evidence that she found these comments unwanted is accepted. The Tribunal goes on to consider whether it had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

145. The Tribunal entirely accepts D's evidence that his purpose in this meeting was to listen to the claimant and once she raised the Leading Practitioner role to try and help her in seeking a resolution by exploring the possibility of that role with the Head Teacher. The Tribunal finds this is not a "purpose" case so far as the proscribed effect is concerned. The Tribunal turns to whether this as an "effect" case. In an effect case the Tribunal must take into account the claimant's perception of the circumstances of the case and whether it was reasonable for the conduct to have that effect.

146. On the one hand, the claimant told the Tribunal she found this conduct unwanted. There is no dispute that the claimant who suffers from anxiety and depression, perceived these comments to be hurtful. On the other hand, the claimant at no point stopped the meeting or indicated to D at the time that the comments were unwanted. The Tribunal has borne in mind that these comments in allegation one were made before the claimant started recording.

147. However, in cross examination D said clearly and forcefully that he did make these comments. D told the claimant very directly that she was over sensitive and that over sensitivity was because of her illness. Although this was a meeting to discuss a suggestion of the claimant, the Tribunal finds that the effect of these comments created an offensive environment for the claimant, a person who was

suffering from mental ill health. The Tribunal draws a distinction between a person failing to object to remarks she finds offensive and a person stating they have no objection. Although the claimant did not at any stage object to these comments the Tribunal is satisfied she found the remarks hurtful. The Tribunal finds the claimant's primary purpose in this meeting was to discuss the Leading Practitioner role which she considered a possible solution to the issues between her and the respondent and was willing to tolerate such comments at that time to achieve that objective.

148. Accordingly, the Tribunal is satisfied that taking into account the claimant's perception and the circumstances of the case it was reasonable for the conduct to have the effect or an offensive environment for the claimant.

149. The Tribunal turns to the last question did the conduct relate to the claimant's protected characteristic of disability. We find that it did. D expressly referred to the claimant's illness. Therefore the comment: "*you didn't really win most of the Tribunal complaints were petty. The complaint about the residential was petty. Most people wouldn't have cared. It is because you are over sensitive because of your illness. You can't expect people to tip toe around you because you are ill"* amounts to disability related harassment.

150. This allegation was also put as a claim for direct discrimination. The Tribunal finds this claim fails because a hypothetical comparator in the same set of circumstances as the claimant with the same limitations on ability and same mental health issues but not suffering from a disability within the meaning of the Equality Act would have been treated in the same way D. When giving his evidence the Tribunal found D to be a very direct plain-speaking individual, forthright to the point of rudeness. We find any hypothetical comparator would have been treated in the same way and so the claim for direct discrimination fails. We rely on this reasoning in relation to each allegation of direct discrimination arising out of D's comments to the claimant at the meeting on 19 January 2017.

151. The claim for victimisation cannot succeed because Section 212 of the Equality Act does not permit a claim for detriment was well as a claim for harassment. Accordingly, this claim must fail.

152. Finally, we turn to the Section 15 claim. The Tribunal reminded itself that firstly the Tribunal must identify the unfavourable treatment. In this comment and the other twelve comments the claimant objects to which were made on 19 January 2017 we find the claimant relies on the comment itself as the unfavourable treatment.

153. The Tribunal then must identify the "something which arises in consequence of disability". In this case the claimant relied upon higher than normal absence levels, required time off to attend therapy sessions, was vulnerable to stress and was perceived to have communication issues. The next issue is: did the unfavourable treatment occur because of the "something" which arises in consequence of disability.

154. The Tribunal is not satisfied it was provided with evidence that the claimant's "vulnerability to stress" and "was perceived to have communication issues" arose in consequence of her disability of anxiety and depression. The Tribunal has already

expressed its concern about what "higher than normal absence levels" means in the absence of evidence of "normal "absence levels but finds that the claimant had been absent for extended periods of time due to her disability and had required time off for therapy sessions because of her disability.

155. The Tribunal went on to consider the reason for the unfavourable treatment. The Tribunal finds D did not make the remarks in allegation 1 because the claimant had time off for therapy sessions or because she had an extended period off sick. His remarks were made in the context of the previous Tribunal claim and his perception that the claimant was oversensitive because she was ill.

Comment 2. "***I feel like E is trying to push me out of my job, he is certainly not doing anything to encourage me back.***

> ***D, can you blame him? What did you think would happen after the Tribunal, that everyone would be friends and say sorry".*** Page 792, 14 – 17

The Tribunal dealt with this comment together with the next comment 3 at page 792, 34 – 37***:***

> **Allegation 3** ***"How is E supposed to get on with running the school with you causing trouble? And how can he trust you on his team? You can't expect him to trust you or want you there***".

156. The Tribunal turned to consider this first as an allegation of victimisation. There is no dispute in answer to the first issue that there has been a protected act. The second issue is: has there been a detriment. The Tribunal accepts the claimant's evidence that she found these comments to be detrimental to her. The Tribunal reminds itself that the concept of detriment has both subjective and objective elements to it. We turn to EHRC Code of Practice on Employment: 'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment' — paras 9.8 and 9.9. The Tribunal finds given the claimant's disability of anxiety and depression and the forthright nature of the comments, they amount to a detriment.

157. We find it is likely that she made no objection to them at that time because she was hopeful that her suggestion of a Leading Practitioner role would be accepted by D and the School.

158. The Tribunal turns to the causal connection between the protected act, i.e. the previous Tribunal claim and detriment of D's comments, the Tribunal reminds itself that there must be "something more" to shift the burden of proof.

159. The Tribunal founds that the entire tone of the conversation makes it clear that D, as Chair of Governors, is very supportive of E and not impressed with the claimant's actions in bringing a claim to Employment Tribunal. For this reason the Tribunal finds that the burden of proof shifts to the respondent to show a non-discriminatory explanation for the treatment. In cross examination D had no clear explanation for his comments other than certain remarks were being taken out of context. He accepted with hindsight that perhaps he should not have said some of the things he did. In this comment he referred expressly to the Tribunal and to the claimant "causing trouble". Having regard to the shifting burden of truth the Tribunal finds that the comments made at allegations 2 and 3 amount to victimisation.

160. The claim for harassment cannot succeed because Section 212 of the Equality Act does not permit a claim for detriment was well as a claim for victimisation.

161. Finally, we turn to the Section 15 claim. The Tribunal reminded itself that firstly the Tribunal must identify the unfavourable treatment. In this comment and the other twelve comments the claimant objects to which were made on 19 January 2017 we find the claimant relies on the comment itself as the unfavourable treatment.

162. The Tribunal then must identify the "something which arises in consequence of disability". In this case the claimant relied upon higher than normal absence levels, required time off to attend therapy sessions, was vulnerable to stress and was perceived to have communication issues. The next issue is: did the unfavourable treatment occur because of the "something" which arises in consequence of disability.

163. The Tribunal is not satisfied it was provided with evidence that the claimant's "vulnerability to stress" and "was perceived to have communication issues" arose in consequence of her disability of anxiety and depression. The Tribunal has already expressed its concern about what "higher than normal absence levels" means in the absence of evidence of "normal "absence levels but finds that the claimant had been absent for extended periods of time due to her disability and had required time off for therapy sessions because of her disability.

164. The Tribunal went on to consider the reason for the unfavourable treatment. The Tribunal finds D did not make the remarks in allegation 2 and 3 because the claimant had time off for therapy sessions or because she had an extended period off sick. His remarks were made in the context of the claimant bringing a previous Tribunal claim -see our findings above.

Comment four, page 92 to line 39 to 44 "nothing would change because we don't accept that the school did anything wrong, we won't do anything on the action plan your rep has put forward because we didn't do anything so we won't change anything. I don't care what the Council says or the Judge says. I am the one with the ultimate authority and E is the one who runs the school. You are someone who is obsessed with rules, laws and policies but I am not interested in all of that. They are just technicalities, I will back up E's decisions regardless of what you or your rep or solicitors says. You can't

expect E to want to work with you when you have taken him to Tribunal and could have got him into trouble

165. The Tribunal considered these remarks as an allegation of disability related harassment. The Tribunal is satisfied that the claimant considers these words to be unwanted conduct. As stated above we find that she accepted these comments in the meeting and did not object to them afterwards because she hoped to have the matter resolved in the suggestion of the Leading Practitioner role.

166. We find there was no purpose on D's part to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant or to violate her dignity. We rely on our finding of fact that he was trying to help the claimant. We considered whether the comments had the proscribed effect. We take into account the claimant's perception. The claimant was suffering from anxiety and depression. The remarks made by D are very forthright and blunt. They are also very personal: "You are someone who is obsessed….". D did not dispute he said these comments even though they are reconstructed by the claimant from her notes and are not recorded. From the personal nature of the comments and taking into account D's professional position as Chair of Governors and his stated scant regard for the Council or the legal process we find it was reasonable for the conduct to have the effect of creating a hostile environment for the claimant.

167. Finally, we must consider whether the conduct related to the claimant's protected characteristic of disability. We find that D was speaking in the context of the action plan which was at that time in the process of being discussed with a view to assist the claimant in her return to work. Having regard to the way s26 Equality Act is drafted "related to disability" we are satisfied that in the widest sense his comments related to the claimant's disability because he is referring to the action plan Accordingly, this claim succeeds.

168. We have not considered the claim as victimisation because a claim cannot be brought for both victimisation and harassment.

169. We rely on our findings above in relation to a hypothetical comparator being treated in the same way by D to find the claim for direct discrimination fails.

170. In relation to a Section 15 claim we find that the comments amount to unfavourable treatment but we are not satisfied that they were made because of "something" that arises in connection with the claimant's disability. D made these comments because he is extremely direct and plain speaking not because of the claimant's higher than normal absence levels ", nor her time off for therapy sessions, nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties". P84 para 47B. Accordingly the s15 claim in relation to this comment fails.

Comment 5 ***"they won't change. E and I won't change. There is no wrongdoing so why would they? The fault here is with you or your illness".***

171. Once again, although this is a comment reconstructed by the claimant and not part of the transcript, D admits saying it so we find it was said. We accept the claimant's evidence that she found such a comment to be unwanted conduct at the

time although she did not complain about it. We rely on our previous finding that there was no purpose by D to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

172. We turn to deal with the comments as an "effect" case. We take into account the claimant's perception as an individual who has been absent from work for many weeks suffering from depression and anxiety. We take into account the very personal and blunt statement made by D "the fault is here with you or your illness". We remind ourselves that D was the Chair of Governors of a publicly funded school. We are therefore satisfied in all these circumstances it was reasonable for the conduct to have the effect of creating a hostile environment for the claimant.

173. We turn to the last issue, was the conduct related to a protected characteristic of disability. We find that it was. D is relating very clearly to the claimant's illness which is her disability. Accordingly, this claim succeeds.

174. A claim for victimisation cannot succeed where a claim for harassment has succeeded. The claim for direct disability discrimination does not succeed for the reasons we outlined earlier in this judgement in relation to a hypothetical comparator being treated in the same way.

175. Turning to a claim for Section 15 unfavourable treatment because of something arising in consequence of disability. The Tribunal accepts the comment amounts to unfavourable treatment. The Tribunal is not satisfied that the comment was made because of any of "somethings" relied upon by the claimant which are said to result from her disability. D made these comments because he is extremely direct and plain speaking, to the point of rudeness, not because of the claimant's higher than normal absence levels ", nor her time off for therapy sessions, nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties". P84 para 47B.

176. Accordingly, that claim does not succeed.

Comment 6 page 793 lines 35 to 36 ***"the clock is ticking for you to get sacked, discussed appointments. Petty point. Shouldn't have got to Tribunal"***. Once again, this is part of the conversation which the claimant reconstructed later that day from her notes made that evening. D agreed he said the vast majority of the comments relied upon by the claimant. However, he expressly said he did not say "the clock is ticking for you to get sacked". He did agree that he said there was a petty complaint but that was at another point in the conversation. (See comment 1). We find the claimant is mistaken that he repeated the "petty point" remark at this time.

177. The Tribunal found that D was a witness who was direct to the point of rudeness, we found him to be an honest witness. He agreed he had made many of the comments relied upon by the claimant in her "reconstructed" transcript. He was certain he had not made this comment. Given it does not form part of the transcript of the actual recording the Tribunal is not satisfied the claimant's recollection is accurate at this point and we are not satisfied the comment was made. Given we are not satisfied that those comments were expressly said by D at that time, the claim for

harassment and/or victimisation and/or Section 15 and/or direct discrimination cannot succeed.

Comment 7, page 796 line 17 to 23 ***"I think your, you've got this idea that everybody is agin you and life's not happening for you at the moment and you know people are lining up to make life even worse for you and some of that to a certain extent there is some truth in that. If you take an action as a reaction and you have got to remember and I haven't spoken to E about this but if you .. if the Tribunal had gone really badly for E, it could have gone really really badly for him, he could have been in real trouble, he could have been in a really difficult situation you know, you've got to understand that you know you going there could have been really really have had serious consequences for him****".***

178. The Tribunal finds these comments are in the transcript section of the conversation recorded by the claimant. D admitted in cross examination that he believed he had probably said this. However, D relied on the fact of the context of this section. Immediately before it the claimant was speaking in detail about her mental health. She specifically said when her GP raised a concern "I think you are going to try and kill yourself after the Tribunal" the claimant had said: "No I'm fine." The claimant went on to say, "I was fine because nothing matters because on that Friday I could go to a hotel and that would be that it would be done and if that judgment had come on the Friday we wouldn't be here now, probably be an awful lot happier and you probably would as well".

179. We find that is a reference to the claimant's original plan to commit suicide on the last day of the Tribunal which she did not do because the Tribunal reserved its judgment (see her statement). D says in direct response to that "no no no let me tell you one thing for certain the last thing I need is for that to happen". He then goes on to explain about perception and refers to matters from the respondent's perspective.

180. We therefore turned to consider this allegation as harassment. We turn to consider if there is unwanted conduct. We accept from the claimant's perceptive she found these comments unwanted and so from her perspective it did amount to unwanted conduct, although she did not explain that to D at the time.

181. For the reasons relied on above we find there was not any intention on D's to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We find he had his "dad hat on". He was trying to help the claimant by discussing the leading practioner role and the circumstances around the dispute between the parties generally during the conversation between him and the claimant.

182. We turn to consider this comment as a "effect case", we took into account the claimant's perception of the circumstances of the case and whether it was reasonable for the conduct to have that effect.

183. We have taken into account the context of this part of the conversation. We find comments were made by the claimant which referred to a plan to commit suicide and we find D's reaction to that comment was to say that the claimant committing suicide was the last thing he wanted and he then attempted to set out the issue of

perception in relation to the respondent. Therefore, taking all these circumstances into account the Tribunal find it is not reasonable for the conduct to have that effect. Accordingly, this comment does not amount to harassment.

184. We turn to consider the comment in the alternative as victimisation. The claimant considers these remarks amount to a detriment. The Tribunal must consider the claimant's point of view but her perception must be reasonable in the circumstances. In the particular circumstances of this comment and the remarks made immediately before it by D the Tribunal find that this comment does not amount to a detriment and accordingly there is no requirement for us to consider it any further.

185. The Tribunal returns to comment 7 as a claim for unfavourable treatment because of something arising in consequence of disability. The claimant perceived these remarks to be unfavourable treatment. Turning to this question was the comment made because of (i.e. caused by "something") which arose in consequence of the ability. The Tribunal finds the answer to the question is no. we are not satisfied that they were made because of "something" that is in connection with the claimant's disability. D made these comments because he is direct and plain speaking not because of the claimant's higher than normal absence levels ", nor her time off for therapy sessions, nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties". P84 para 47B. The comments by D were made because he was responding to a sensitive conversation with the claimant about complex issues she had raised and her suggestion that she had previously intended to commit suicide. He was trying to respond by discussing issues of perception. Therefore this allegation fails.

Comment 8, page 798 line 6

D ***"I understand that you but you are very intense aren't you.***

A ***Yeah***

D ***Yeah and that intensity makes things I think more difficult for you, you are not like me, the type of person to say sod it all, I don't think you are a sod it all type of person are you.***

186. The Tribunal considered this first as an allegation of harassment Tribunal finds that this part of the conversation was recorded by the claimant and is in her transcript. D agreed he made these comments and agreed that he was talking about the claimant's "condition".

187. The Tribunal finds that the claimant, although she did not say so to D at the time, considered the comments to be unwanted conduct. The Tribunal turns to the second question whether it has the proscribed purpose or effect. The Tribunal as stated above finds that D did not intend to have the proscribed purpose in any of these comments. The Tribunal turns to consider it as an effect case. The comment is a very personal comment. We find it was related to the claimant's disability because D said in cross examination it was about her "condition" which we understand to mean her impairment of anxiety and depression.

188. The Tribunal reminded itself that this was part of a serious conversation and shortly after these comments D expressly said that "I have not come here to trick you I genuinely want a compromise where you get better. That is the number one thing really, really genuinely it is the number one thing for you to get better."

189. Nevertheless D was aware that the claimant was suffering from a mental impairment of anxiety and depression. We find he should have realised to make a very personal comment about her intensity was unlikely to be well received. Having regard to the circumstances of the case the nature of the claimant's illness and the personal nature of the comment the Tribunal finds it was reasonable for the conduct to have the effect of creating a hostile environment for the claimant. Accordingly, we find this comment amounts to harassment.

190. It cannot amount to victimisation for reasons we have given above where we have made a finding of harassment. It does not amount to direct disability discrimination for reasons we have already given about a hypothetical comparator being treated in the same way.

191. In terms of Section 15 discrimination although we find the comment from the claimant's perception was unfavourable treatment we are not satisfied that the comment was made because of "something" that is in connection with the claimant's disability. D made these comments because he is extremely direct and plain speaking not because of the claimant's higher than normal absence levels ", nor her time off for therapy sessions, nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties". P84 para 47B.

192. Accordingly, the claim for Section 15 fails.

Comment 9, page 802 lines 31 to 35.

> **D** **If *you're not in that day to day interface with the people you've got issues with, maybe that's the best thing you know you move and over time we can build relationships, build trust. And you know it will take time, you know I've said you've made decisions that have put E in really difficult situations where I'm sure having spoken to him about it, I've thought to myself you know he could be in deep doo-dah if all this goes pear-shaped…***

193. The Tribunal finds this is also part of the conversation which was recorded and transcribed by the claimant. Once again, D agrees he made these comments. The Tribunal turn to consider it as an allegation of harassment. The Tribunal accepts the claimant although she did not say so at the time considers these comments to be unwanted conduct.

194. The Tribunal considers these comments in the context of the part of the conversation where they took place. Immediately before the comments D is engaging with the claimant where she explains that she thinks the whole thing was tied into her being a perfectionist and being a high achiever and she states her wish is that when she comes back to work "I just don't want it to happen again".

195. We find that D is alluding to the leading practitioner role when he says, "if you are not in that day to day inter face of the people of who you've got issues with may

be that is the best thing you know, you move and over time we can build relationships, build trust". The Tribunal cannot find anything objectionable at all in those comments. He goes on to say, "and it will take time you know, you know I have said you have made decisions that have put E in a really difficult situations where I am sure having spoken to him about it I have thought to myself you know he could be in deep doo-dah if these all goes pear shaped".

196. The Tribunal accepts that the claimant found this comment was unwanted conduct although she did not express that to D the time. The Tribunal relies on its previous finding that this is not a case where D had the proscribed purpose. The Tribunal considers whether it had the proscribed effect. Having regard to the nature of the comments and in particular the positive context of the conversation where the leading practioner role is being discussed and the fact D is simply identifying the situation from the Headteacher's perspective in relation to why it will "take time" to rebuild relationships, The Tribunal finds the direction of the conversation at this point is very positive. The Tribunal is not satisfied that these comments created the proscribed effect for the claimant.

197. The Tribunal turned to consider the matter as a claim for victimisation. The Tribunal is not satisfied that the comments here amount to detriment given the nature of the comments, that they are made in the immediate context of a conversation about the leading practioner role and the comments to which he claimant takes exception are by way of explanation by D as to why "it will take time" to rebuild relationships. Therefore a claim for victimisation fails.

198. In terms of Section 15 discrimination firstly we do not find the comment was "unfavourable treatment" although we accept that was the claimant's perception. If we are wrong about that, we are not satisfied that the comment was made because of "something" that is in connection with the claimant's disability. D made these comments because he is direct and plain speaking and was trying to discuss a solution to the ongoing issues namely the leading practioner role, not because of the claimant's higher than normal absence levels ", nor her time off for therapy sessions, nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties. P84 para 47B.

Comment 10, page 803 lines 22 to 27.

D **It's not going to happen. All that will happen is and I'm not sure because there will be a push against that, you know, and that's going to happen so that's not going to happen and then you're going to end up, not going to get any better, end up at stage 1, and then if you don't come back we'll end up on stage 2 and then maybe technicalities and all that but will end up at the end of the day at stage 2 because you have not come back to work and then we end up at stage 3 and then what you will do when you get to a position when you are in real danger of losing your job? You'll come back but you're not well and make yourself worse.**

199. The Tribunal finds this is a comment is from a part of the conversation which was recorded by the claimant. D agrees he probably said these words.

200. The Tribunal considers the next comment in conjunction with **Comment 11** P803. Lines 29-34:

D **No but what I am saying is that if you want this list of expectations, I won't call them demands I'll call them expectations I don't think you are in a position or situation to do that because it is not going to happen.**

A **What, none of it is going to happen**

D **I'm not saying it won't happen but I think it is less likely of those things happening if you put them on a list, see what I'm saying**

A **We were asked to though, that's what E asked for. He wanted it in writing**.

201. In cross examination D admitted he did not know about the detail of the discussion between the Head Teacher and the Union Representative in relation to the action plan.

202. The Tribunal notes that between these comments the claimant expressly stated, "our discussion has been really productive".

203. The Tribunal turns to consider these comments as allegations of harassment. The Tribunal accepts that the claimant now says that these comments amount to unwanted conduct although it was not clear at the time because she was referring to "our discussions being really productive" see page 83 line 28. However, we find that is likely to be in relation to the discussion around the Leading Practitioner role. Accordingly, on balance the Tribunal accepts that these comments amount to unwanted conduct.

204. The Tribunal considered the claimant's perception. The claimant admits her perception, when she says at page 804 "I am concerned with everything and I appreciate it's my perception, concerned that everything is a move to move me out of my job.

205. The Tribunal accepts the claimant's perception meant these fears were compounded when there was a suggestion in comment ten that she was in "real danger of losing her job" and that D was suggesting the list of "demands" that her union representative had put forward in relation to the action plan as requested by the Head Teacher was not going to be properly considered.

206. We are satisfied that the comments amount to unwanted conduct creating a hostile environment for the claimant when taking all the circumstances into account. Although the claimant's perception may have been over sensitive, we have taken into account that D was the Chair of Governors and he was giving factually inaccurate information at this point. When he was speaking about matters in relation to the way the claimant was being treated by the school, it was important for him to have his facts straight so he could comment accurately.

207. We are satisfied that the comments are in the wider sense related to the claimant's disability because they are broadly about the sickness absence management procedure where the claimant was at present at stage one because she was long term absent from work.

208. The claim cannot amount to victimisation because we have found harassment. The claim for direct discrimination fails for the reasons we have already stated in relation to a hypothetical comparator as we have stated above. The claim for Section 15 discrimination also fails. Although the comments can be considered to amount to unfavourable treatment, of the four "somethings" arising in consequence of disability relied upon by the claimant" only "higher than normal absence levels and required time off to attend therapy sessions" are somethings which arise in consequence of the claimant's disability.

209. The unfavourable treatment must be because of the "somethings". These comments made by D were not because of the claimant's higher than normal absence levels, nor were they because of her time off for therapy sessions. The comments were made in the context of a conversation about the way the respondent was dealing with the claimant. Accordingly the s.15 claim does not succeed.

Comment 12. page 804, lines 11 to 18

D **Can we, I don't want to be personal with you but I am in an organisation, I am dealing with somebody that I am having problems with, difficulties, I am not saying this is what E said because I have not had that conversation with him but I am putting myself in that situation and they come along to me and say blah blah blah blah blah blah blah blah blah and I say "well I'm running the show and that's the way I want it running, if you are not happy with that you have got an option, you can go". I think it's the sort of thing that anybody in any organisation would say but I wouldn't have took that as being personal you know I'm running a show, this is the way I'm running the show if you are not happy with that if it doesn't suit you I'm not going to sack you but if you don't like it …**

The Tribunal dealt with this comment along with **Comment 13** p804 lines 22-30

D **Can I tell you really truthfully that the organisation I work for this would not have happened.**

A **What do you mean, none of this?**

D **None of this.**

A **None of this?**

D **None of it, it wouldn't have got this far. Cos I tell you what they would have happened they would have sacked you and paid you off. That would have been it.**

A **Sacked me for what**

D **Whatever, find something it doesn't matter**

A **Well that's why I'm worried**

210. We considered these comments as an allegation of harassment.

211. The Tribunal finds these comments were made in the part of the conversation which was transcribed. D accepted he had made these comments but said it was the context in which he made them which was important.

212. We accept that D said in the course of his conversation with the claimant he had "his dad hat on". Earlier on in the conversation, see page 798 both the participants in the conversation talked very personally about the importance of their families in their lives.

213. The Tribunal finds that in these comments D was speaking hypothetically. He was speaking in the context of if the claimant was working for a different employer, she would have been treated differently. We find this is clarified by lines 31 and 39 where he explained how in different organisations employers say: "you're sacked, fired get out the bloody door." He alluded to Donald Trump in the context of staff being fired by some employers. We find was making the comments to the claimant at comments 12 and 13 by way of contrast because his point was that the claimant was working for an organisation which did care. At the end of this section of the conversation he says this explicitly: "but the point I am making is that you are in an environment and you are already in an organisation that does care and does (I know you might not think so) but does care, does try to do the best for people who work for it and I entirely agree with that.

214. D goes on to speak positively about schools "and I think in most schools, the vast majority of schools that's my experience, I don't know a lot of schools but I know a few schools but my experience is they look after the people that work for them. It's generally a nice environment to work in, people are treated fairly. People always want more money but compared with some industries, it really is a lot better".

215. The Tribunal turned to deal with these comments at 12 and 13 as an allegation of harassment. The Tribunal finds that the claimant considered that these comments were unwanted although she did not clearly object to them at the time. The Tribunal is satisfied, as with all of Mr D's proscribed purpose. The Tribunal turns to the proscribed effect. The Tribunal has taken into account the claimant's perception, the circumstances of the case and whether it is reasonable for the conduct to have the effect of violating her dignity of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

216. The Tribunal finds that in the context of the conversation which followed D was clearly trying, perhaps in a clumsy way, to reassure the claimant. He was clearly stating that he might hypothetically deal with the claimant in a different way but that was not the way that she was being dealt with and made it very clear that the claimant was "in an environment and in an organisation, that does care and does try to do the best for people and I entirely agree with that". In the circumstances we are not satisfied it was reasonable for the conduct to have the proscribed effect and the claim fails.

217. The Tribunal turns to consider these comments as victimisation. There is no dispute that there was a protected act in this case. The Tribunal turns to consider whether it is detrimental treatment. Detriment must be looked at from the claimant's point of view but her perception must be reasonable in the circumstances. In the circumstances of the rest of the conversation it was not reasonable for the claimant to find that comment amounted to a detriment for the reasons we have given above.

218. If we are wrong about that we must turn to consider the reason for the comment. Was it the protected act? The Tribunal finds the reason for the comment was that D was trying to reflect, perhaps clumsily, the difference between the way the claimant might be dealt with in a different organisation and the way the claimant was being dealt with in a school, a caring organisation. It was not the fact she previously brought a Tribunal claim

219. The claim for direct discrimination fails for reasons given above. The claim for Section 15 discrimination also fails. The Tribunal is not satisfied for the reasons given above that comments 13 and 13 are unfavourable treatment. If we are wrong about this, we must consider whether the comments were made because of something arising in consequence of disability. We find the comments were not made because of the something which arose in consequence of disability, namely the higher than normal absence levels or the required time off to attend therapy sessions, nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties. The comments were made in effort to suggest to the claimant that by contrast to some employers, her employer was treating her reasonably and was caring. Accordingly, the Section 15 claim also fails at that point.

Allegation 8 ***In comments made to the claimant by D during conversation on 18 February 2017***

220. The Tribunal thinks this is a typographical error here and the conversations referred to by the claimant occurred on 8 February (not 18) February 2017.The Tribunal now turns to the comments objected to by the claimant which were made on 8 February 2017**.**

221. The Tribunal reminds itself that the context of this conversation was different. In the conversation of 19 January, the parties agreed afterwards it had been a positive conversation with a view to exploring the Leading Practitioner role. By the time the conversation of 8 February, also covertly recorded by the claimant, although both parties had worked hard to make the Leading Practitioner a real possibility, negotiations had broken down over the salary available for the role. D had only become aware of the failure of the negotiations the previous day.

Comment 1, page 856, 30 to 34. ***It will be difficult to go back to the role. Too many bridges to build. Do you need that hassle? I can see the situation going backwards. People are people. They will behave how they want. E still thinks he never did anything wrong and always treated your professionally so he won't change. He won't back down. You are being naive. Can you cope with things being the same with your health?***

222. The Tribunal reminds itself that this section is transcribed by the claimant in italics because is a section where the recording was inaudible and the claimant has reconstructed what she believes to be D's comments from her handwritten notes at p846. D did not deny making these comments and they are consistent with the claimant's notes at 846, broadly speaking and accordingly the Tribunal is satisfied the words were spoken. The Tribunal turned to consider these comments as an allegation of harassment.

223. The Tribunal accepts the claimant's evidence that she found these comments unwanted. The Tribunal turned to consider whether they had the proscribed purpose or effect.

224. The Tribunal accepts D's evidence that although he was frustrated at this stage that the claimant had not accepted the offer, particularly after he and E had put a great deal of work in, he still had some hope that the role and the negotiations might be salvaged. Accordingly, we are not satisfied he had the proscribed purpose.

225. We turn to consider the conduct as a "effect case". The comments made by D are very negative. They are also very personal. He suggests it would be difficult for the claimant to return to her old role and appears to suggest the situation is not salvageable "too many bridges to build".

226. The Tribunal notes that at this stage the claimant was still absent from work on sick leave due to anxiety and depression and in her perception, this was a negative comment which created a hostile environment. The Tribunal reminds itself that D, however frustrated he was, remained the Chair of Governors and in these circumstances, finds it was reasonable for the conduct to have that effect.

227. The Tribunal turns to the last question was the comment related to the claimant's disability? We find it was because D refers to her health. Accordingly, the Tribunal finds these comments amount to harassment. Because we have found they amount to harassment they cannot also amount to victimisation. We find it is not a Section 13 claim because we find a hypothetical comparator in the same circumstances who as not disabled would have been treated the same.

228. We find it is not Comment 1 is not Section 15 discrimination. Although the comments from the claimant's perspective amount to unfavourable treatment the comments are not made because of a "something" such as the claimant's higher than normal absence levels ", nor her time off for therapy sessions, nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties.P84 para 47B.We find the comments are made because D is frustrated that the Leading Practitioner role in which he has invested time and effort is not going to amount to a resolution to the issues between the claimant and the respondent.

Comment 2, page 857 line 42**:**

D **Changes by who you're expecting … there'll be no changes, what's going to change.**

D **There won't be a fresh start if you come back in your old role.**

D **(Scribbling.)** ***The relationships will be bad. E cannot trust you now because of the Tribunal. I isn't going to be professional with you and you can't make him like you. Prepare yourself. He can't be forced to be professional*.**

D **So the relationships won't work. (inaudible)**

229. The Tribunal reminded itself that part of this section, which is in italics, was re-constructed by the claimant because D's comments were not audible. D did not agree he made all of these comments. He was adamant he did not say "E cannot trust you now". He agreed he said that he, D, could not trust her but not the Headteacher. He said he always maintained E was professional. D accepted he said: "I isn't going to be professional." D conceded he was "bloody annoyed" in this meeting.

230. We turned to consider this as an allegation of harassment. We find that the claimant said these comments amounted to unwanted conduct. We turned to consider the proscribed purpose or effect. We accept the evidence of D that there was no intention to violate the claimant's dignity or create an intimidating, hostile, degrading and humiliating environment for her and rely on our reasoning above in the previous comment as to why we accept this.

231. We turned to consider these comments as an effect case. We must consider the claimant's perception and the circumstances of the case and whether it is reasonable for the conduct to have that effect. Given the claimant does not have a clear transcript of this comment and given that D is sure that he did not say the Head Teacher "could not trust the claimant now" we accept his recollection on this point, and find the comment was not said, particularly as D entirely accepted the majority of comments in both transcripts were said even where the claimant has reconstructed them.

232. In relation to the comment that "I isn't going to be professional" we have taken into account that the claimant said immediately in reply "in fairness I wasn't professional with I at one point as well as we had a big row so yeah". We find in relation to I, the claimant is agreeing that she has not been professional either so we find it is factually correct that this relationship is difficult.

233. We find that another of the comments by D in this section was factually correct namely we find the parties were referring to the claimant returning to work in her old role of assistant head, not the leading practioner role and it is therefore accurate that in that D is accurate in stating there would not be a "fresh start."

234. Accordingly, taking into account the sides of the conversation (see p 857 lines 43-4 and p 858 lines 1,2,4,5 and 9 for the claimant's part in the conversation) in all the circumstances of this case we are not satisfied it was reasonable for the conduct to have the effect of creating an intimidating, hostile, degrading or offensive environment for the claimant.

235. We turn to consider a claim for victimisation. The Tribunal is not satisfied these comments amount to a detriment for the reasons above. If we are wrong about that we turn to the reasons for the comments. We rely on the evidence of D to find the reason he made the comments was frustrated that his efforts to resolve these problems had failed when the Leading Practitioner job was not accepted because of the salary available for the role. We find that accordingly the reason for the treatment is not because the claimant previously brought a Tribunal claim.

236. The claim for direct discrimination fails because we are satisfied a hypothetical comparator in the same set of circumstances would have been treated in the same way for the reasons we have already explained.

237. We find the Section 15 unfavourable treatment claim fails. Firstly, we are not satisfied the comments amount to unfavourable treatment for the reasons given above. Secondly we do not find the comments were made because of something arising in consequence of disability. We rely on our reasoning above that the comments were made because D was "bloody annoyed" the negotiations had failed not because of the claimant's "higher than normal absence levels ", nor her "time off for therapy sessions", nor the fact she was said to be "vulnerable to stress" nor her alleged "perceived communication difficulties". P84 para 47B.

Comment 3, page 858, lines 37 to 39

> **D (Inaudible)**
>
> **I can work with…** ***but you're ill how are you going to cope with them being unpleasant with you or thinking that they are being (scribbling).*** **You're telling me you're well enough to cope with that situation, that's fine, are you?**

238. This is a section of the transcript which is inaudible and so it has been reconstructed by the claimant. D accepted in cross examination he probably said those words and accordingly we find it probably was said.

239. We considered it as an allegation of harassment. The claimant considered this amounted to unwanted conduct.

240. The claimant was absent from work with mental health issues. Taking into account D was the Chair of Governors and that this conversation was being held whilst the claimant was still absent from work in the context where D was aware from his conversation with the claimant on 19 January that she was vulnerable to suicide we find that it was reasonable for the conduct to have that effect on the claimant i.e. to create a hostile environment for her.

241. We find that this comment was related to the claimant's disability because D was relating to her disability of anxiety and depression: "you're ill".

242. We do not need to deal with the matter as an allegation of victimisation because it cannot be both victimisation and harassment. The Section 15 claim does not succeed because D made these comments because he was "bloody annoyed" as the negotiations about the Leading Practitioner role had broken down not because of something in consequence of the claimant's disability.

243. The claim for direct discrimination fails because we are satisfied a hypothetical comparator in the same set of circumstances would have been treated in the same way for the reasons we have already explained.

Comment 4. page 859, lines 15 to 26.

D **(Inaudible)**

He'll be really wary of you … Tribunal. copping for it (inaudible) he could have been out on his ear (inaudible). You could say (scribbling) wary how he deals with you (inaudible).

A **Yeah, I think both of us will be and that's as you say that's reality.**

D **Inaudible, scribbling *only if it's the new role*.**

A **I'm only going off what he said D I mean I get what you are saying but….**

D **I am sure Ian said he had been professional, scribbling, inaudible, can he trust you, can he tell you these things like that. Not after the Tribunal from his perspective is he really going to make you his confidant or tell you things what are going on.**

A **To be fair that's never happened so no probably not.**

D **It should but not now with the Tribunal.**

A **Well it should yeah but it doesn't.**

D **Inaudible. Scribbling. *Can't work after the Tribunal in old role,* I think that is really badly damaged.**

244. We considered the comment as an allegation of harassment.

245. The claimant relies on these comments as unwanted conduct. Once again, this is a section where the claimant has reconstructed what D, the transcript was not audible. D agreed it is likely he made these comments. The Tribunal notes that there is very little of this exchange which clearly makes sense. D is referring to the Head Teacher saying he had been professional and the suggestion that the Headteacher teacher would be wary of the claimant. The claimant agrees she too would be wary of the Head. She also agrees she has never been the "confidant" of the headteacher.

246. Given the very brief nature of this part of the conversation the fact that it is almost completely inaudible and that it is difficult to understand clearly what is being said, the Tribunal taking all the circumstances into account including the claimant's perception finds it is not reasonable for the claimant to consider these words have the proscribed purpose or effect of violating her dignity or of creating an intimidating, hostile, degrading or humiliating environment for the claimant. The Tribunal is not satisfied these comments relate to the claimant's protected characteristic of disability.

247. The Tribunal turns to consider this allegation as victimisation. Once again, it is very unclear from the comments made precisely what it is which amounts to detrimental treatment. If there are any negative comments the Tribunal finds that D said them because he was frustrated that the negotiations had broken down, not because of the previous Tribunal claim. Accordingly, this claim fails.

248. The Section 15 claim fails because any unfavourable treatment was because D was frustrated with the breakdown of the Leading Practitioner role not because something arising in consequence of the claimant's disability. The direct discrimination fails because we are satisfied a hypothetical comparator in the same set of circumstances would have been treated in the same way for the reasons we have already explained.

Comment 5. page 862, lines 12 to 24.

D **Inaudible. E and he has been (inaudible), E will be very wary of you, inaudible said but your course of conduct could have sent his career spiralling.**

D **(Inaudible)** ***but he still is going to have a problem with you, you could have ruined his career*.**

249. Once again, the claimant has reconstructed what D said in relation to part of the comment (the part in italics) but she has noted some of the conversation is inaudible so it is difficult for the Tribunal to understand properly the context and meaning of the comments. D in cross examination agreed he probably made these comments and so the Tribunal finds they were said.

250. We find D is talking about a hypothetical situation. The claimant says this amounts to unwanted conduct. We are satisfied there was no proscribed purpose at this meeting. We therefore turned to consider the proscribed effect. We are not satisfied these comments had the effect of violating the claimant's dignity or of

creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. D was expressing how he thinks the Head Teacher may feel. When looking at the claimant's part of the conversation she agrees, "yeah and I get that and vice versa" and then states she can recognise the headteacher's professional qualities and thinks he recognises the same qualities in her: "I think the same is true the other way around."

251. D makes a further hypothetical comment "but of course your conduct could have sent his career spiralling" and she responds: "well of course E's conduct could have meant that I died".

252. The Tribunal has taken both sides of the conversation into account and the context of this conversation. The claimant's comments are p862 13-18 and 20-24. Immediately above this exchange D says he is trying to be honest and the claimant says in response "no, I know you are and I appreciate the honesty".

253. In these circumstances we are not satisfied it was reasonable for the conduct to have the proscribed effect, and her claim for harassment fails.

254. Turning to victimisation the Tribunal is not satisfied that there is any detrimental treatment in comment 4. Mr D the claimant entirely accepts: "I get that and vice versa" suggesting she will be wary of him too. Where the feeling of wariness is a mutual feeling, we find expressing it is not a detriment, particularly when the claimant has just thanked D for his honesty. Even if the comments can amount to a detriment the Tribunal finds he made them because he was frustrated the negotiations had broken down, not because the claimant brought a Tribunal claim.

255. The Section 15 claim fails because any unfavourable treatment was because Mr D because something arising in consequence of the claimant's disability. The direct discrimination fails because we are satisfied a hypothetical comparator in the same set of circumstances would have been treated in the same way for the reasons we have already explained.

Comment 6, page 863, lines 6 to 11

A **You know we've said before haven't we that this isn't about me being incapable of doing my role and so a 7-point loss is quite a big huge drop if we are not saying I am not competent at doing that job do you know what I mean.**

D **It's not about competency. It's about medically fit, are you medically fit to do the job A?**

A **I'm fit to do the role, I'm fit to do that job what I'm not fit to do is to be treated badly but if E said well you won't be then fine do you know what I mean**

256. We turn to consider this comment as an allegation of harassment. We find the claimant considered his remarks to be unwanted conduct. We are not satisfied this is a purpose case for the reasons given previously. We turn to consider whether

it has the proscribed effect. We find D reconstructed from notes. D agreed he probably said it. We find it is a very direct and personal question to an individual he knows is absent from work on long term sick leave due to anxiety and depression and has been since before Christmas. In these circumstances of the case we find it is reasonable for the conduct to have the effect of creating a hostile environment for the claimant. We find it is related to the claimant's disability because it relates to her illness. Therefore we find it is disability related harassment.

257. There is no requirement for us to deal with this as a matter of victimisation because it cannot be both harassment and victimisation.

258. We find it is not direct discrimination because D would have spoken in the same way to a hypothetical comparator.

259. We find it is not Section 15 disability discrimination because the comment was made due to D's frustration that the leading practitioner role negotiations breaking down, not because of one of the "somethings" which arose in consequence of the claimant's disability as stated at P84 para 47

Comment 7, page 863, lines 16 to 17

D **(Inaudible). At the Tribunal (Inaudible) *victimisation claim*, about being invited to the weekend (Inaudible) *petty and pointless, seemed very trivial.***

260. Although this alleged comment is partially reconstructed-see the section in italics - D agreed he probably did make a remark similar to this and it is consistent with a similar comment made at the very start of the meeting on 19 January.

261. We considered it as an allegation of harassment. Unlike on the previous occasion there is no reference to the claimant's illness. We find this is a comment in relation to an allegation in the previous employment tribunal that failure to invite the claimant to a residential weekend was an act of victimisation. We find this was trivial in D's view. We find there was then a discussion about perception where the claimant expressed her view about why it was not trivial to her. D remained of the opinion it was trivial but he accepted from the claimant's perspective it was not trivial. Line 23.

262. We find there was no proscribed intention in this meeting.

263. We therefore considered whether the comment had the proscribed effect.

264. We find from the claimant's perspective this was unwanted conduct but having regard to all the circumstances of the case we find it was not reasonable in the particular context of this discussion for the conduct to have that effect. It is clear that both the claimant D were discussing perception and whether the incident could be considered trivial. As the conversation develops the claimant is reflecting on her perception "I've said to you before that I have to bear in mind when I come back not to be over sensitive to stuff". (Line 25) p863.

265. Even if we are wrong and the conduct had the proscribed effect we find on this occasion it was not made in reference to the claimant's disability. We find there is no reference to the claimant's disability in this section of the conversation.

266. We turned to consider victimisation. There is no dispute there was a protected act. We turned to consider whether the comments amount to detriment. This has both a subjective and objective element. We rely on our findings about the nature of this conversation where both the claimant and D make concessions at this point in the conversation: D accepts the claimant's perception that she found the failure to invite her to a residential weekend was not trivial from her perspective and she accepts when she returns to work she must not be oversensitive. In these factual circumstances we are not satisfied that the remarks amount to detriment. Therefore the victimisation claim fails.

267. We find it is not direct discrimination because D would have spoken in the same way to a hypothetical comparator.

268. We find the s15 claim fails because even if the remark can amount to unfavourable treatment it does not arise because of one of the "somethings" which arose in consequence of the claimant's disability as stated at P84 para 47.

Comment 8, page 864, lines 39 to 43

> **D** **(Inaudible) a little thing will blow up and you know something that you find very ..upsets you but other people might not even think about it (inaudible). People do things they don't think about (inaudible) people won't have time everybody is very busy (inaudible) like oh my god you know (inaudible) (scribbling). If you feel that you are well enough to go back to work (Inaudible) (scribbling). *Have to make an effort to toughen up (inaudible) (scribbling)*. I see it all going back to square one and not working well**.

269. We turned to consider this comment as an allegation of harassment.

270. Once again sections of this comment are reconstructed by the claimant- the part in italics. Also, sections are noted to be inaudible.

271. However D emphatically agreed when cross examined that he said those words, including the words in italics and stood by them. The Tribunal noted the claimant considered these comments to be unwanted conduct.

272. We are not satisfied this is a purpose case for the reasons given previously. We turn to consider whether the conduct has the proscribed effect. The Tribunal notes that the claimant was absent from work with mental health issues. D knew that the claimant had raised the issue of suicide with him in a previous conversation. D had a responsible position as a Chair of Governors. Although he did not know he was being recorded and anticipated that this was a private conversation nevertheless in his position knowing the claimant as he did, to make such direct and personal comment that she should make an effort to "toughen up" amounts to

conduct which had the effect of creating a hostile environment for the claimant. We find that implicit that D is referring to the claimant's illness, as her refers to her return to work and accordingly it is related to her disability. We therefore find that remark "have to make an effort to toughen up" is disability related harassment.

273. There is no requirement for us to deal with victimisation because we have found this comment amounts to harassment. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way. We find the claim pursuant to Section 15 discrimination arising from disability fails because the reason for the comment was D's frustration in the negotiations breaking down.

Comment 9, page 866, lines 25 to 34

D **I believe that I am sure that you've been genuine (inaudible) trying to be honest (inaudible) I think I'm pretty good at seeing the writing on the wall and if you do come back, come back ASAP and I've got to tell you that I can see things going badly.**

A **But why**

D **Because something will happen and somebody will say something you'll not be well, you'll take it the wrong way, you'll take it personally.**

A **I think that's unfair D I think it's unfair to say that everything is just**

D **It might even be a direct slur or a direct jibe at you, people are like that but then you'll take it personally and it will affect you very badly (inaudible) (scribbling) if you're telling me you're mentally strong enough to go back into it?**

274. We turned to consider this comment as an allegation of harassment. D admitted he made these comments. The Tribunal finds the claimant considered these comments to be unwanted conduct. The Tribunal is not satisfied D had the proscribed purpose for the reasons given previously.

275. We turned to consider it as an effect case. The Tribunal is satisfied that the comment amounted to a hostile environment for the claimant. The Tribunal has taken into account that D knew the claimant had attempted suicide in the past, that she was absent from work with anxiety and depression, that she was disabled within the meaning of the Equality Act and has alluded earlier to the fact that he considers the claimant takes matters very personally. In these circumstances to make a comment that she will take it personally and asking if she was mentally strong enough to go back into it we find amounts to conduct which had the proscribed effect. We find the reference to the claimant's mental health "if you're telling me you're mentally strong enough" is a remark related to the claimant's anxiety and

depression and therefore we find this comment amounts to disability related harassment.

276. There is no requirement for us to deal with victimisation because we have found this comment amounts to harassment. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way.

277. We find the claim pursuant to Section 15 discrimination arising from disability fails because the reason for the comment was D's frustration in the negotiations breaking down, not one of the "somethings" which arose from the claimant's disability. Only a few lines earlier he says, "I have just wasted my time".

Comment 10. Page 867. Lines 10 to 11

> **D** **Everyone is very wary of you, all going to be worried about getting dragged into Tribunal with you. inaudible (*a real danger).* They will ….in human nature…**

278. D admitted he made these comments. He explained in cross examination that a lot of Governors did not want to be involved in something which could end up in Tribunal.

279. We turn to deal with this allegation of harassment. The claimant considers now it amounted to unwanted conduct. It is not a purpose case for the reasons already given. We considered whether it had the proscribed effect.

280. We find it did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We find this in the context of conversation where in the lines above D and the claimant were talking about her perception and other people's perception of her. We rely on her response to this comment. "That's fine. I don't need to be friends with everyone." We rely on the fact that earlier in the conversation on 8 February the claimant had agreed she would be wary of the Headteacher when it was suggested he would be wary of her. In all the circumstances it was not reasonable for the conduct to have the proscribed effect. We find this is not harassment.

281. We turn to consider victimisation. There is no dispute there is a protected act. We turn to detriment. We find the comment does not amount to a detriment. Although the claimant considers the comment is detrimental we remind ourselves there is an objective as well as a subjective element to this. We remind ourselves of para 9.8 and 9.9 of the EHRC guidance. We take into account the claimant's comment that she did not need to be "friends with everyone" D's honest comment that some governors not wanting to get involved.

282. If we are wrong and the comment is a detriment, we find the reason the comment is made is D's frustration that the negotiations have broken down, not the previous Tribunal claim.

283. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way.

We find the claim pursuant to Section 15 discrimination arising from disability fails because the reason for the comment was D's "somethings" at p82, para 47B.

Comment 11 Page 867. Lines 36 to 40

D **Your way of going (inaudible) you come back on first of March and then this is like with the Tribunal, when we agreed to do this and that but then it was all off because the Tribunal happened and that's it. (inaudible) you end up appealing(inaudible)like with the pay.**

A **performance management**

D **(Inaudible*) There is no point appealing we won't uphold so why do it.***

284. The Tribunal finds that the comment at line 40 has been reconstructed because it is in italics. D did not admit he made that comment. He said it was not a matter for him in relation to the appeal process. Given that D has admitted the majority of the comments even where they have been reconstructed we find we prefer his recollection. We also find that the comment made by the claimant at line 41 does not immediately make sense in relation to the alleged comment at paragraph 40 and there are considerable sections of this part of the conversation which are noted to be inaudible. Therefore the Tribunal finds the comment in italics was not made and there can be no discriminatory finding in relation to it.

285. The Tribunal considered the rest of the comment at lines 36 to 38. We find does not amount to harassment. It appears to be a factual statement. The Tribunal is not satisfied it had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

286. We find there is no victimisation because the comment at lines 36-8 is not detrimental treatment.

287. The claim pursuant to s13 fails because a hypothetical comparator would have been treated in the same way. We find the claim pursuant to Section 15 discrimination arising from disability fails because there was no unfavourable treatment. If we are wrong about that we are not satisfied the reason for the comment was one of the "somethings" at p82, para 47B.

Comment 12. P869 lines 15-18

D **He would say that he always treats you professionally.**

A **And he did most of last year, it went a bit wrong at the end especially on the last day but most of the last year he did so if we can work if I can work with E like that again then great.**

D **Didn't stop you slagging him off at the Tribunal.**

288. We turn to deal with this allegation of harassment. The claimant considers now it amounted to unwanted conduct. It is not a purpose case for the reasons already given. We considered whether it had the proscribed effect

289. The Tribunal is not satisfied that this amounts to unwanted conduct which had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant when we take into account all the circumstances of the case. We rely on D's comments and the claimant's comments immediately after that comment. A said, "I thought I was quite balanced about him at the Tribunal" and D said, "see, back to perception, you thought you were balanced and I thought you weren't". The Tribunal relies on its earlier findings that there had been a discussion earlier in this conversation between D and the claimant about perception. The Tribunal is not satisfied that it was reasonable for the claimant to perceive as hostile a comment that she had spoken in a negative way about the headteacher at the last Tribunal. .Accordingly, taking the circumstances into account with the perception of each party we are not satisfied that it was reasonable for the conduct to have that effect.

290. We find it is not victimisation because firstly it is not a detrimental comment and secondly even if it is, we find the reason the comment is made is D's frustration that the negotiations have broken down.

291. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way. We find the claim pursuant to Section 15 discrimination arising from disability fails because there was no unfavourable treatment. If we are wrong about that we find the reason for the comment was D's frustration in the negotiations breaking down not because of one of the "somethings" at p82, para 47B.

Comment 13, page 871(a), lines 34 to 41.

D (**Inaudible) even if you are right (inaudible)** ***they're always going to be worrying they'll say something and then you will either take them to a Tribunal or do something daft like hurt yourself or prepare for another Tribunal.***

A **but why would I do that when I'm saying I want to come back and get on with my life?**

D (inaudible) you know what I mean don't you?

A **If I wanted…if my goal was to go back and trap people into doing things that would be bad at tribunal**

D (inaudible) ***but what about if things go wrong because you don't take the new role and there's your suicide risk*****.**

292. The comments at page 871a, lines 34 to 36 have been reconstructed by the claimant. D accepted in cross examination he had said these words. However, he

disputed he had said the words listed at lines 40 to 41: *but what about if things go wrong because you don't take the new role and there's your suicide risk*"

293. Although D was at times belligerent in his manner when being cross examined the Tribunal found him to be a frank and honest witness. The Tribunal accepts D's evidence that he did say the lines 34 to 36. The Tribunal also accepts his evidence that he did not say the words reconstructed at lines 40-41 and accordingly those words can not to amount to discrimination or victimisation because they were not said. The Tribunal finds the claimant is mistaken in her recollection.

294. We turn to deal with lines 34-6 as an allegation of harassment. The claimant considers now it amounted to unwanted conduct. It is not a purpose case for the reasons already given. We considered whether it had the proscribed effect The Tribunal finds that this does amount to unwanted conduct and it had the proscribed effect because D was aware of the claimant's vulnerability and it was highly inappropriate for him to make such personal comments. It was reasonable for the conduct to have that effect. It is clearly related to the claimant's disability and accordingly we find harassment.

295. Having found harassment, it cannot be victimisation.

296. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way. We find the claim pursuant to Section 15 discrimination arising from disability fails because the reason for the comment was D's frustration in the negotiations breaking down not because of one of the "somethings" at p82, para 47B.

Comment 14, 817b lines 19-31

D **(Inaudible)** ***you won't cope. You'll claim they're picking on you*.**

A **Why I managed last year I was still treated incredibly unprofessionally at various points and I still stayed and so that there is no intention that I am going to stay off work.**

D **(Inaudible)** ***you kept making complaints last year and put them in Tribunal.***

A **Erm, possibly. They were not formal claims. I did not make a claim about how I treated me about S or the performance thing. I didn't make a claim about the pay appeal. I did not make a claim about any of those things.**

D (inaudible) ***you still mentioned them.***

A **no but the actual thing. That was the process. None of these things were included. Why would I keep adding more things in. wanted it to be about my core issues. That was my**

decision against some advice, to not put things in. I wanted it to be about the core issues: the previous academic year when everything went wrong. That's why I wrote to you before the Tribunal

D **(inaudible)** ***you will get ill***

297. The Tribunal finds that this is a section that, so far as D's section of the conversation is concerned is wholly reconstructed by the claimant. It is all in italics. D did not agree he made these comments. The Tribunal accepts the claimant when reconstructing the conversation was doing her best to recollect what was said but has concerns from an evidential point of view particularly as the transcript is noted to be inaudible and the claimant's handwritten notes do not record this level of detail. It is undisputed that the conversation which occurred on 8 February was very lengthy. D stated he did not accept that the record compiled by the claimant which starts at p856 was entirely accurate. The Tribunal is not satisfied the comments in this section were made.

298. If we are wrong and the comments at lines 19, 22, 26 and 31 were made the Tribunal is not satisfied they amount to unwanted conduct which has the proscribed effect when we take all the circumstances into account. Although the claimant says now she found this amounted to unwanted conduct the Tribunal finds this is a part of the conversation where the participants are discussing how the claimant will cope on her return to work to her previous role from which she has been absent for many months. The Tribunal finds, taking all the circumstances into account there is nothing in the remarks made in this section by D which is reasonable to have the proscribed effect. He expresses concern that she will become ill, which is not unreasonable given her current lengthy absence.

299. We find it is not victimisation because firstly the comments do not amount to detrimental treatment and secondly even if it is, we find the reason the comment is made D's frustration that the negotiations have broken down, not because she brought the previous Tribunal case.

300. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way. We find the claim pursuant to Section 15 discrimination arising from disability fails because firstly there is no unfavourable treatment. If we are wrong about that we find the reason for the comment was D's frustration in the negotiations breaking down not because of one of the "somethings" at p82, para 47B.

Comment 15, page 872, lines 13 to 27**.**

D **(Inaudible)** ***well you chose to bring the Tribunal.***

A **That's really unfair.**

D **It's not.**

D **In a normal world you would put up with it or get out (inaudible).**

A **But why what why is that that's not a fair choice is it? Because if someone's treating you in a way that is unfair and both Tribunal and grievance both found there have been elements of unfair behaviour why should the onus be on me to have to move or put up with it or E to treat me fairly? That doesn't make sense to me.**

D **(inaudible).** ***This goes back to being over sensitive about what is and what isn't unfair like the claim about the residential was petty and trivial and not a big deal, pathetic.***

301. Some of D's comments have been reconstructed by the claimant where they are in italics. The Tribunal is not satisfied that the comments at line 13 were made. The Tribunal finds the comment at line 21 was made. D agreed he had and it is consistent with the remarks made by D earlier on in relation to a hypothetical situation. (See our findings in relation to comment 5). The Tribunal finds that the comments at lines 26 and 27 were said but not at this juncture. The Tribunal has already made a finding and about this at a different point in the conversation. (See finding in relation to comment 7.)

302. The Tribunal turns to consider the comment at line 21; "In a normal world you would put up with it or get out (inaudible)." The Tribunal finds there is no proscribed intent for the reasons already given. The Tribunal turned to the proscribed effect. The Tribunal finds D was referring back to the comment he made in the conversation earlier at comment 5. The Tribunal is satisfied for the same reasons it relied on in comment 5 that it is not reasonable for the comment to have the proscribed effect. Therefore the harassment claim fails.

303. The Tribunal finds turns to victimisation. There is no dispute there is a protected act. The Tribunal finds there is no detriment in this remark because it is satisfied that D is referring back to the hypothetical situation referred to in our findings at comment 5. If we are wrong about this we find the reason for the comment is the breakdown in negotiations not the previous Tribunal claim.

304. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way. We find the claim pursuant to Section 15 discrimination arising from disability fails because firstly there is no unfavourable treatment. If we are wrong about that we find the reason for the comment was D's frustration in the negotiations breaking down not because of one of the "somethings" at p82, para 47B

Allegation (d) In comments made in drafts of a performance management review document in December 2016

and in failing to provide the claimant with an outcome to the performance management process until May 2017

305. The Tribunal relies on its findings of fact in relation to the draft performance management review. There were two drafts of the performance management review completed by G. The first draft is at page 703. The claimant objected to that draft

(page 703a), namely the first and second sentences, and asked for them to be removed. G did so. The second draft is at page 741.

306. The Tribunal turned to consider the first draft. That draft states: "A has had a difficult year. I undertook line management to December 2015 as due to strained relations and ongoing legal aspects line management through the Head Teacher was seen as inappropriate. Progress against many of the tasks in targets has been made although I feel the difficulties around communication have impacted on wider overall progress."

307. The Tribunal finds that this first draft amounts to victimisation in relation to the comment about legal proceedings.

308. In reaching this finding the Tribunal asked the first question: was there a protected act? There is no dispute the answer is "yes" namely the previous Tribunal proceedings.

309. The second question is: has there been a detriment? We find the answer to this question is also "yes". The claimant indicated in an email to her union representative that she was "furious" and said she was being set up to fail (see page 704). The Tribunal is satisfied that the comments were negative and it was objectively inappropriate to comment on legal proceedings in a performance document

310. The Tribunal turns to the final question: what is the reason for the detrimental treatment? Finding there was a detriment and a protected act is not sufficient. There must be "something more" to shift the burden of proof.

311. G accepted in giving evidence that his original comments were not entirely appropriate. This is illustrated by the fact that he removed the first two sentences where he referred to "strained relations and ongoing legal aspects". He said when cross examined his words were "ill chosen", and he stated he "wished hadn't mentioned this" in relation to the ongoing legal aspects.

312. The Tribunal finds that G was a genuine and credible witness. We accept that he was under pressure of other work at the time he conducted this task (see his emails to the claimant about how busy he was). The claimant accepted in her evidence he was in a difficult position. He was an Assistant Headteacher and member of the Senior Leadership Team who, unusually had been asked to line manage the claimant, also an Assistant Headteacher and member of SLT. Normally the Headteacher was the line manager for an Assistant Head but given the strained relationship between the claimant and the Headteacher G had been asked to take on line management responsibility. The claimant was very positive when she gave evidence in relation to her relationship with G. It was clear to the Tribunal that despite difficulties G and the claimant had managed to work together.

313. However, the Tribunal finds G was aware of the ongoing legal issues and previous claim. For this reason, the Tribunal is satisfied the burden of proof shifts.

314. G did not have a non-discriminatory explanation as to why he had referred to the legal proceedings in a performance management review. He accepted it was not

relevant. Accordingly, the Tribunal is satisfied the reference to legal proceedings in the first draft performance review amounts to victimisation.

315. Having found victimisation, there is no requirement for the Tribunal to consider harassment because it cannot make a finding of both harassment and victimisation.

316. The claim for direct discrimination fails because the Tribunal is satisfied that a hypothetical comparator in the same set of circumstances as the claimant but who was not disabled would have been treated in the same way.

317. The Tribunal majority is not satisfied that a section 15 claim succeeds in relation to the first review. The Tribunal must first ask itself what is the unfavourable treatment. The unfavourable treatment is the first performance review draft and specifically the words referring to legal proceedings.

318. The next question is: what is the "something" which arises in consequence of disability? The claimant relies on higher than normal absence levels, required time off to attend therapy sessions, was vulnerable to stress and was perceived to have communication issues p84 para 47B. The majority is not satisfied that there is any evidence to say that the claimant's "perceived communication issues" or "was vulnerable to stress" are related to her disability.

319. The next question is: was the claimant treated unfavourably because of something arising in consequence of disability?

320. The answer is no. We rely on our finding above that the words about legal proceedings were inserted because the claimant had brought a previous Tribunal claim, not because of something arising in consequence of disability as identified at para 47B p84.Thus the claim fails.

321. The Tribunal turns to the second performance review which was prepared after G removed the comments to which the claimant objected. It is found at page 741 and states: "Progress against many of the tasks in objectives has been made although I feel the difficulties around communication may have impacted overall progress development and contribution to the school during the year." It then goes on, after referring to targets, to state attendance for the year was at 87.5% (1 October 2015 to 31 October 2016, not including medical appointments).

322. In cross examination G said he wished he had not referred to the claimant's attendance. He agreed that the respondent's own performance policy says that attendance should not be included. (See Pay progression policy p1967 – which says ignore absence – see also page 1958- Performance Related Pay].

323. The Tribunal considered this as an allegation of unfavourable treatment pursuant to s.15 Equality Act.

324. We find the unfavourable treatment is the reference to the claimant's attendance at 87%. We accept the claimant's evidence that this was not relevant information and could prejudice the Pay Committee responsible for considering the performance review award.

325. The next question must be: is the unfavourable treatment because of a "something"? The "something" appears to be the "higher than average sickness absence". The Tribunal has already identified its difficulty with this concept but finds that the claimant had a lengthy absence from work during the period to which the performance review relates.

326. The next question must be: is the unfavourable treatment because of the "something"? The answer to this question is yes. The claimant had an extensive period of sickness absence a from work during the period to which the performance review relates and G recorded information detailing absence because she had been absent for a lengthy period.

327. The final question is whether the respondent can show that noting the claimant's attendance in a review of performance is a proportionate means of achieving a legitimate aim. We find it can not. The Policy say attendance should not be included and Mr Whitehead agreed he should not have included it. Accordingly, this claim succeeds.

328. The Tribunal turned to consider this 2nd draft as an allegation of victimisation The Tribunal is satisfied that a reference to absence from work could be seen as a detriment from the claimant's perspective. We are satisfied that her perception was reasonable in the circumstances given the respondent's own policy said that attendance should not be included.

329. There is no dispute in this case there is a protected act. The issue is therefore causation. The Tribunal is satisfied that the burden of proof has shifted to the respondent because this is the second draft of a performance review where the first version referred to legal proceedings, when we have found to do so amounted to victimisation.

330. The Tribunal therefore turns to consider whether there is a non discriminatory explanation for the inclusion of the information about attendance in the performance review. The Tribunal is not satisfied there is. G accepted that he was breach of the respondent's own policy in detailing her attendance. For this reason, having regard to the Tribunal finds including the information about the claimant's attendance also amounts to victimisation.

331. We find there is no claim for Section 13 discrimination for reasons already given namely a hypothetical comparator would have been treated in the same way. We find there is no harassment claim because we have found victimisation.

Allegation 10: "and in failing to provide the claimant with an outcome to the performance management process until May 2017"

332. The Tribunal relies on its findings that the claimant was given an outcome to the performance management process by a letter of 18 May 2017, which followed a meeting of the Pay Committee earlier on 9 May 2017. (p978). The governors who comprised the pay committee, despite the information submitted by G, upgraded her final objective to "met". Accordingly, the claimant was moved immediately to the top of the leadership scale L17 and her increase in pay was backdated.

333. The Tribunal finds that the claimant had failed to comply with the usual deadline of filing performance management review documentation by 31 October 2016. She engaged with the process when the Chair of the Pay Committee asked her if she wished to do so, given her disability related absence.

334. The claimant submitted her documentation in December 2016. The Tribunal finds that there was a meeting of the Board of Governors in March 2017. However, unfortunately one of the governors of the Pay Committee, P, was absent on sick leave at that time. The Tribunal finds that a meeting of the Pay Committee was convened on Tuesday 9 May (see page 978).

335. The Tribunal reminds itself that the claimant was outside the normal procedure when she filed her performance review documentation late. She was acting on a suggestion from the Chair of the Pay Committee that she should do so as a reasonable adjustment given her absence from work.

336. The Tribunal turns to consider whether failing to provide the claimant with an outcome to the performance management process until May 2017 was an act of victimisation. There is no dispute there was a protected act. The claimant perceived not providing her with an outcome to the procedure until May 2017 as a detriment. She was chasing the matter during February and March (see page 839(c)). The key question is the causal connection.

337. In terms of the burden of proof the Tribunal finds the burden of proof has shifted to the respondent given that the responsibility for convening the committee appears to be with the Head Teacher (see convening of the May meeting) and there is no dispute that there is a strained relationship between the claimant and the headteacher. (That is the reason why G was asked to line manage the claimant.)

338. The Tribunal turns to consider whether there was a non-discriminatory explanation for the treatment. The Tribunal finds that there was. The Tribunal is satisfied that this Pay Committee was meeting in extraordinary circumstances. Their normal work had been completed in the usual way the previous November. The claimant, who was absent on sick leave at the time had not filed any documentation to be considered for a discretionary award based on performance. Normally the Committee would have assumed an individual who failed to supply documentation did not wish to be considered for a discretionary award. The Chair of the Committee had asked the claimant, as a reasonable adjustment, to file her information out of time. The Tribunal accepts there was then a delay. The Tribunal finds the reason was due to the need to convene a special meeting of the governors who comprised the pay committee. The Governors are volunteers, not employees of the school and have other commitments. We find it was difficult to convene a meeting of the pay committee particularly as Governor P was ill at the time of the March Board of Governors meeting which otherwise might have been a convenient time to convene the Pay Committee. Accordingly, the Tribunal finds there was a non-discriminatory explanation for the delay. The claim for victimisation fails.

339. The Tribunal turns to consider this as an allegation of harassment. The Tribunal turns to consider the unwanted conduct. The claimant considered the failure to provide her with an outcome over a period of months was unwanted conduct. The

Tribunal is not satisfied there is any evidence that is an allegation where there is any evidence to suggest there was a proscribed intent.

340. The Tribunal turns to consider the proscribed effect. The Tribunal has considered all the circumstances of the case and taken into account the factors relied on above, namely that this was an extraordinary meeting of the Pay Committee outside the usual timescale following the offer to the claimant to submit her documentation late, as a reasonable adjustment. The Pay Committee consisted of governors, who are volunteers with other commitments, one of whom was ill in March when it might have been possible to convene a special meeting of the Pay Committee. For these reasons he Tribunal is not satisfied that it was reasonable for a delay in the communication of the discretionary pay award to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

341. Finally, the Tribunal is not satisfied that the delay related to the claimant's disability. The delay was due to the unavailability of the respondent's governors, in particular P who had ill. Thus this allegation fails.

342. The claim for direct disability discrimination fails because a hypothetical comparator in the same set of circumstances as the claimant who was not disabled would have been treated in the same way. The Tribunal finds the claimant was being treated more favourably than a non disabled comparator in this instance because she was being permitted to be considered for a discretionary pay award outside the usual timescale as a disability related adjustment.

343. A claim for unfavourable treatment pursuant to s 15 Equality Act in relation to this allegation fails. The unfavourable treatment was the delay in informing the claimant she was successful in obtaining a performance based discretionary award, which was backdated. The delay was not because of something arising in consequence of disability. It was because of the difficulty of convening a special meeting of governors who are volunteers and not employees of the school in circumstances where one governor had been ill.

344. Finally, the Tribunal turns to deal with time limits. The Tribunal is satisfied there has been a course of conduct in relation to the allegations it has found proven because the allegations all relate to the actions of the Headteacher, the Chair of Governors and an Assistant Headteacher and occurred within a period of months.

345. When determining whether a time limit has been complied with, the period beginning with the day after the EC request is received by ACAS up to and including the day when the EC certificate is received or deemed to have been received by the prospective claimant is not counted, Section 207B (3) Employment Rights Act 1996. In other words, the clock stops when ACAS receives the EC request and starts to run again the day after the prospective claimant receives the EC certificate.

346. If the time limit is due to expire during the period beginning with the day ACAS receives the EC request and one month after the prospective claimant receives the EC certificate the time limit expires instead of at the end of that period Section 207B 4 ERA. This effectively gives the claimant one month from the date when he or she receives (or is deemed to receive) to present the claim.

347. In this case the first act of discriminatory treatment which we have found was November 2016. The last act in the course of conduct were the comments made by D on 8 February 2017. On the face of it the time limit expired on 7 May 2017. The claimant went to ACAS within the limitation period. Accordingly, the claimant has the benefit of the clock provisions and the extension of time provisions i.e. 207B (3) and 207B(4). Therefore, although the primary limitation period expired on 7 May 2017 the claimant has the benefit, not only of the stopped clock provisions but also of the additional month. The certificate is issued 5 June 2017 and in accordance with the case of Tanvir v East London Bus and Coach Company. UKEAT/0022/16 the limitation expires one calendar date from that month i.e. 5 July 2017. The claim was presented on 5 July 2017 and accordingly the claim is within time.

348. This case will proceed to a remedy hearing. A case management hearing will be arranged to issue directions and list the remedy hearing.

Employment Judge Ross

Date 19 November 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

29 November 2018

FOR THE TRIBUNAL OFFICE

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