



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104636/2018

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Held in Glasgow on 2, 5, 6 and 7 November 2018

Employment Judge: Lucy Wiseman

10 **Mr Mark Houston**

**Claimant
In Person**

Student Loans Company Ltd

**Respondents
Represented by:
Ms K Norval -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on the 10 May 2018 alleging he had been discriminated against because of the protected characteristic of disability. The claimant brought a complaint of indirect discrimination concerning the application of the respondent's Attendance Management Policy which, it was said, impacted disproportionately on disabled persons because they were more likely to have higher levels of absence; and a complaint of failure to make reasonable adjustments.

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2. The respondent entered a response setting out the background to these claims, but denying the allegations of discrimination.

3. The respondent conceded the claimant was a disabled person in terms of section 6 of the Equality Act. The disability was stress, anxiety and

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depression. The claimant also has diabetes and sleep apnoea, but those matters were not the subject of this complaint.

4. The parties had agreed a list of issues for the tribunal, and it is helpful to set
5 out the list of issues to be determined by the tribunal:

- Timebar (Ms Norval, having heard all of the evidence, accepted in her submissions that this was no longer an issue to be determined by the tribunal);
- 10 • Did the respondent's decision to place a ban from applying for internal secondments and permanent roles on employees who had triggered a formal warning under the Attendance Management Policy constitute a PCP for the purposes of the Equality Act 2010;
- Did the respondent apply the PCP to persons with whom the claimant
15 does not share the protected characteristic of disability;
- Did the PCP put individuals with whom the claimant shares the protected characteristic of disability at a disadvantage when compared with individuals with whom the claimant does not share the characteristic? If so, what was that disadvantage;
- 20 • Was the PCP a proportionate means of achieving a legitimate aim;
- In respect of the complaint of failure to make reasonable adjustments, did the PCP put individuals with whom the claimant shares the protected characteristic of disability at a disadvantage when compared with individuals with whom the claimant does not share the
25 characteristic? If so, what was the disadvantage;
- If so, did the respondent know, or ought reasonably to have known, that the claimant was likely to have been placed at a substantial disadvantage by the PCP because of his disability and
- If so, did the respondent fail to take reasonable steps to avoid or
30 alleviate any such disadvantage being created.

5. We heard evidence from the claimant; Mr Graeme Pollock, Datacentre Engineer; Mr Mohammad Mohsin Haq, Desktop Support Team Leader; and Ms Laura Curtis, HR Adviser for the Technology Group; Mr Eddie O'Hara,

Head of Technology Services and Mr Ian Gillespie, Head of Business Transformation Improvement Activity. We were also referred to a jointly produced folder of documents.

5 6. The claimant asked the tribunal to order the attendance of two witnesses (Ms
Linda Hainan, HR and Mr Saleem Butt, his manager). We noted the claimant's
request for a witness order had recently been refused because it had been
made too late. We informed the claimant that we would consider his request
once we had heard his evidence. We duly did so, but refused the request
10 because we did not consider the witnesses could add to the claimant's case.
We reviewed that decision on two subsequent occasions, but reached the
same conclusion.

15 7. We, on the basis of the evidence before us, made the following material
findings of fact.

Findings of fact

20 8. The respondent is a non-profit making, government-owned organisation set
up in 1989 to provide loans and grants to students in universities and colleges
throughout the UK.

9. The claimant commenced employment with the respondent on the 4 March
2002. He was employed as a Desktop Support Analyst, which involved
troubleshooting software issues and dealing with hardware application and
access issues.

25 10. The claimant worked as part of a team of eight Desktop Support Analysts, six
of whom were employees and two of whom were contractors. The claimant
reported to Mr Haq, team leader, who in turn reported to Mr Saleem Butt. Mr
Eddie O'Hara was the Head of Technology Services.

30 11. The respondent's Sickness Absence Policy was produced at page 54; the
Attendance Management Policy at page 57; the Attendance Management
Procedure at page 79; the respondent's Guidance regarding Absence

Triggers at page 104; the Guidance on Absences exempt from the Attendance Policy at page 106; the guidance on determining the type of absence and applying discretion at page 107 and the guidance on disability and reasonable adjustments at page 110.

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12. The respondent revised its Attendance Management Policy in 2016/2017 following consultation with managers and the recognised trade union. The procedure was revised to reduce the number of stages from four to three, to adjust the triggers for disability-related absence and to introduce a (discretionary) ban on applying for vacancies and secondments if the formal procedure had been invoked. The ban was introduced because of the adverse impact of sickness absence on secondments, and to ensure sickness absence was dealt with consistently by the manager who held all of the information.

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13. The claimant had various periods of sickness absence during 2013 which culminated in a referral to Occupational Health (OH) in May 2013. The report from OH (page 132) noted the claimant had had substantial difficulties associated with poor control of his diabetic condition.

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14. The respondent implemented the recommendations set out in the OH report which included allowing the claimant to work from home two days a week, on a temporary basis, whilst the new diabetes medication was trialled. The respondent also put in place regular meetings between the claimant and his manager.

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15. The claimant continued to have intermittent absences throughout 2013 and a Stage 1 meeting in terms of the respondent's Attendance Management Procedure was held on the 22 July 2013. A stage 2 meeting was held on the 13 January 2014. It was at this time the claimant informed the respondent that although he was fit to carry out his role, he was unhappy in the role due to lack of promotion prospects and relationships within the team. The claimant was advised he was not eligible for redeployment, but the matter would be kept under review.

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16. The claimant, following this meeting, requested a change to his working hours. The respondent obtained OH input to assess what adjustments would assist the claimant, and upon receipt of the OH report, the respondent agreed to move the claimant to an early shift pattern to help combat the fatigue he felt later in the day.
17. The claimant, on the 13 July 2015, raised a complaint that a contractor on the team had sworn at him. Ms Lynda Hainan, HR Business Partner, met with the claimant on the 22 July 2015 to obtain more information regarding the complaint. A facilitated meeting was arranged between the contractor and the claimant, so the contractor could apologise (verbally and in writing) to the claimant.
18. The claimant subsequently (on the 17 August 2015) raised another complaint about another contractor on the team, alleging the contractor had banged on his desk when he thought the claimant was falling asleep due to his sleep apnoea. The claimant was not satisfied with the informal steps taken by the respondent to resolve the complaint, and so he raised a formal grievance.
19. There was a delay in progressing the grievance due to the claimant's absence from work on the 15 August 2015. The respondent referred the claimant to OH for a report which was received in early September (page 175). The report noted the claimant was currently absent from work because of stress, which the claimant believed was work-related. The claimant reported to OH that the reason for his absence was the result of an ongoing situation with certain colleagues within his team. The claimant felt the situation had been ongoing for some time and that he had not been supported by his manager. The claimant reported that he felt he would be unable to return to the same work situation. The OH nurse confirmed the claimant was currently unfit for work because of his ongoing symptoms.
20. The report noted the work situation appeared to have had a negative effect on his psychological and physical health, and the OH nurse "did not envisage a return to work until his perceived work concerns had been addressed, as

this appears to be the main barrier to his return.” The nurse concluded the claimant was fit to participate in the grievance process, and that when fit to return to work he would benefit from a phased return.

- 5 21. The respondent proceeded to investigate the claimant’s grievance, and an Investigation Report was produced which upheld the allegations of bullying by both contractors and made a number of recommendations. The Investigation Report was considered by a Grievance Panel in December 2015. The Panel upheld the investigation report and informed the claimant his grievance was well founded and that a number of corrective steps would be actioned in order to address the relationship issues complained of.
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22. The claimant returned to work on a phased basis on 9 November 2015. It was agreed he would be placed in a temporary role in the Disaster Recovery Project team whilst the work issues were ongoing and subject to resolution. Mr O’Hara, Technology Manager, was asked to identify a post for the claimant outwith Desktop Support. Mr O’Hara identified Disaster Recovery because there was a need for work to be done to assist the manager (who was a contractor) with documents and additional research.
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23. The claimant remained in the Disaster Recovery post from 9 November 2015 until 31 July 2017. The claimant was very happy in this post and noted, in an OH report dated 11 February 2016 (page 238) that since taking up the role, his stress had significantly reduced. The claimant did not wish to return to his role as a Desktop Support Analyst.
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24. The claimant made a flexible working request on the 8 November 2016, asking that he be permitted to work from home on occasion. The claimant made the request because he would have found it helpful to be able to work from home on occasion prior to attending medical appointments, because this would have reduced the amount of travelling for him.
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25. A meeting to discuss the request was arranged to take place on the 25 November 2016, and Mr O’Hara was appointed to chair the meeting assisted
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by Ms McLean, HR. The claimant, upon learning that Mr O'Hara was to chair the meeting, decided to withdraw his request.

5 26. The claimant had further periods of absence due to flu and stomach upsets during 2016/2017. The absences triggered a Stage 1 meeting under the respondent's Attendance Management Procedure. The meeting took place on the 16 February 2017 and a note of the meeting was produced at page 295. Mr O'Hara chaired the meeting and was accompanied by Ms Curtis, HR. There was a lengthy discussion regarding the claimant's medical conditions. 10 The claimant told Mr O'Hara that he thought the respondent should obtain another OH report: Ms Curtis agreed it would be helpful. Mr O'Hara noted in the letter following the meeting that they would all meet again "to discuss the forthcoming occupational health review" but in fact a referral to OH was not made at this time.

15 27. Mr O'Hara agreed the claimant would be provided with a locker at work in which to store his diabetes medication, because this would address the requests for emergency leave made by the claimant on the occasions when he had forgotten his medication. It was also agreed the respondent would take 20 steps to reduce the amount of lifting of IT equipment being done. Mr O'Hara confirmed the claimant's attendance would be monitored over a 12 month rolling period and a failure to sustain an improvement may lead to a stage 2 meeting being arranged.

25 28. The claimant, in the period September 2016 to September 2017, applied for a number of internal posts within the respondent's organisation. The claimant was unsuccessful in his applications because he did not demonstrate he had the requisite experience or qualifications. Mr O'Hara suggested to the claimant that he update his CV to reflect the role for which he was applying 30 and to ensure he identified where he could add value to the role. The claimant did not take up this opportunity. The claimant also refused the opportunity to attend a course which Mr O'Hara considered would be helpful to him. The claimant refused on the basis he already had the qualification. The claimant's

subsequent job application was declined on the basis he did not have this qualification in its current format.

5 29. Mr O'Hara decided on the 31 July 2017 that the claimant would return to his substantive role as a Desktop Support Analyst. Mr O'Hara acknowledged the claimant wished to remain in Disaster Recovery, but the Manager in that area had left and there was no continued role for the claimant. Mr O'Hara also considered the claimant to be a very experienced member of the Desktop team and returning the claimant to his substantive role meant contractor numbers could be reduced. Mr O'Hara also took into account the fact the contractors named in the claimant's grievance in 2015 had left, and therefore there was no barrier to his return. Furthermore, a new manager (Mr Butt) had been appointed.

15 30. Mr Butt met with the claimant on the 7 August 2017 to discuss his return to the Desktop role, developments since he had last worked with the team and to confirm the claimant would be able to carry out a phased return to the role in terms of a reduced workload.

20 31. The claimant returned to the post for one day and was then signed off for four weeks with work-related stress.

32. The respondent obtained an OH report dated 22 August 2017 (page 352). The OH report noted the current circumstances as follows:

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"I understand this man is currently on sickness absence after, he tells me, he lasted one day in his original substantive role with the Support Team to which he has been moved back after a prolonged period of secondment. He tells me he feels stressed undertaking this role with regard to his perceptions of the work politics. He advises that he believes the elements of his original grievance are unchanged and he has concerns that other people within the department are friends of individuals whom he has previously had concerns with. He also advises that he continues to have concerns with how he feels he has been supported by management over the years.

5 *With regard to the role itself, he tells me that he struggles with the physical aspects of the role as they make him feel tired. He also reports struggling to cope with what he perceives as a busy workload with constant calls. He tells me that generally he does not believe the role is good for his health, however was unable to elaborate on this.*

10 *This man also advised that in general terms he does not feel his career is progressing which appears to be an additional source of concern for him.*

He describes currently experiencing increased symptoms of a psychological nature that he relates directly to his concerns regarding work ...”

15 33. The Senior OH Advisor noted that it appeared the claimant’s work concerns and perceptions “are of significance to the current exacerbation of his symptoms. Mutually satisfactory resolution to his work concerns and perceptions is likely to support recovery.” Further, in terms of adjustments, the advice was to meet with the claimant to discuss the content of the report and to review his stated concerns and perceptions within the context of an update
20 to a stress risk assessment.

25 34. Mr Butt, Desktop Support Team Leader, accompanied by Ms Curtis, met with the claimant on the 25 September 2017 to discuss the terms of the OH report. A note of that meeting was produced at page 356. The claimant told Mr Butt that he felt there were personal issues with Mr O’Hara and that he felt “quite dismissed” by Mr O’Hara. The claimant stated that things were not going to happen for him as long as Mr O’Hara was in charge and making the decisions, because there was no support for him.

30 35. The claimant told Mr Butt it was well known that he did not want to return to his role because it did not challenge him and he did not like it. The claimant explained it was more to do with the way the role made him feel: there was no progression in the role, no training and a return would be like throwing

away all of his experience. The claimant was scathing of others with less experience holding a more senior position. He described this as being like the apprentice teaching the master. The claimant told Mr Butt he considered himself to be more qualified than a lot of people, and that others with less experience had been getting roles he had applied for.

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36. Ms Curtis explained to the claimant that the respondent could not slot him into a role or create a role for him simply because he did not like his role. She confirmed there were up to 10 people on the redeployment list who had been deemed medically unfit to carry out their role and they had to take priority over someone who did not like their role. Ms Curtis noted that none of the OH reports had stated the claimant was medically unfit to do the role. The OH reports referred to the issues which were the subject of the claimant's grievance. Those issues had been resolved and the contractors were no longer in the department. The respondent was therefore of the view the claimant could return to his substantive post.

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37. The claimant reiterated that he did not want to be doing desktop work after being in the role for 20 years. However, he knew he had to go back to the role because he had bills to pay.

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38. The claimant returned to work on the 13 October 2017 and wrote to HR to make a formal redeployment request. This was refused on the basis the claimant was not medically unfit for the role.

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39. Ms Curtis considered the issues which had formed the basis of the claimant's grievance in 2015 had been resolved. Furthermore, Mr Butt was the new team leader and the claimant had a positive relationship with him. The claimant had clearly voiced issues with Mr O'Hara, and Ms Curtis offered the claimant mediation to resolve any issues he had with Mr O'Hara. The claimant did not accept the offer of mediation.

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40. Mr Butt and Ms Curtis met with the claimant on the 25 October 2017 for a stage 2 absence management meeting regarding his recent absences from

work. A note of this meeting was produced at page 388. The claimant told Mr Butt that he had been happy in the Disaster Recovery role, and the Desktop role was not good for his mental health; and, he felt bridges had been burned and he could not go back to the role after what happened with the contractors.

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41. Ms Curtis was keen to understand the root cause of why the claimant was experiencing mental health issues in relation to the desktop role. The claimant stated that he had 20 years' experience in the role and he found the role monotonous and there was a lack of participation in the decision making process. He also felt that the management of performance was unclear and unfair and that procedures were implemented incorrectly. The claimant stated the role did not stimulate him and there was no progression or movement within the grade. The claimant felt the role made him "brain dead".

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42. Ms Curtis reminded the claimant there was no medical evidence to state he was incapable of doing the role. Ms Curtis told the claimant that if he visited his doctor and obtained medical information to say that he was medically unfit to do the role, then redeployment would be an option and the respondent would fully support the claimant obtaining an alternative position.

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43. Mr Butt wrote to the claimant on the 1 November 2017 (page 407) to confirm the outcome of the meeting was that the claimant's attendance would be monitored for a further 12 months and he would be restricted from applying for a secondment or an internal role until his attendance improved. It had also been agreed that a further OH report would be obtained.

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44. The OH report dated 8 November 2017 was produced at page 423. The report from Dr Ghafur noted *"Having spent approximately an hour with Mr Houston today, in my opinion a key issue appears to be longstanding feelings of workplace stress related to his Desktop Support Analyst role. He describes feeling unchallenged, under-stimulated, disillusioned and dissatisfied with this role and he does not feel that this situation will ever change. I have suggested to Mr Houston that it would be beneficial for him to think about counselling again, but having spoken to him I do wonder whether it will be possible to*

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break down his strong beliefs with regard to his current role at work. He does appear to have developed some very fixed ideas and feelings about this and feels that his only option is to move away from his current role.”

5 45. The claimant, on the 2 November 2017, appealed against the outcome of the stage 2 attendance management meeting.

46. The claimant had also, on the 27 October 2017, raised a grievance regarding the respondent's refusal to transfer him to a role outwith Desktop Support.
10 The claimant was invited to attend a meeting to agree the scope of the grievance, and the terms of reference were subsequently agreed with the claimant.

47. The claimant agreed with the respondent's proposal to deal with the Stage 2
15 appeal and his formal redeployment request after the grievance.

48. Ms Elaine Pawson, Partner Services Support Desk Manager, was appointed to investigate the claimant's grievance. Ms Pawson carried out the investigation and produced an Investigation Report (page 448) which found
20 there was no evidence to support the claimant's allegation that he had been discriminated against.

49. Mr Ian Gillespie, Lean Practice Lead, was appointed to chair the panel convened to consider the Investigation Report. Mr Gillespie noted the nub of
25 the grievance was that the claimant believed he was being harassed and bullied by Mr O'Hara, and that this manifested itself in failure to make reasonable adjustments. The allegations included that Mr O'Hara had refused home working and the claimant's laptop had been removed; the recruitment process for internal roles was flawed and that was why the claimant had not
30 been successful in gaining a post and the manner in which his complaints about the Desktop team had been dealt with was not acceptable.

50. Mr Gillespie met with the claimant on the 29 January 2018 (page 480) to discuss his decision. Mr Gillespie felt there was an unwillingness on the part
35 of the claimant to participate in the process. The meeting had been cancelled

twice previously by the claimant at short notice, and when it did take place the claimant arrived late and stated he had to leave in 20 minutes. The claimant felt the process was not going to be conducted properly and so there was no point in engaging.

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51. The claimant was adversarial in his approach to the meeting. Mr Gillespie noted the case for not being medically fit for the post was not being made, and so he asked the claimant to consent to allow OH to approach the claimant's GP for further information and/or medical reports. The claimant refused to do this on the basis his doctor was not an expert in mental health and he believed the respondent already had all the necessary information.

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52. Mr Gillespie noted, in connection with the attendance management procedure, that the respondent had adjusted the triggers in the policy to take into account the fact many absences were related to the claimant's various conditions.

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53. The claimant had, in his grievance, raised allegations of bullying by Mr O'Hara. Mr Gillespie asked the claimant for additional evidence regarding the allegations of harassment. The claimant confirmed he had the information but had not brought it to the meeting. Mr Gillespie concluded there was no evidence of bullying or harassment. He reached that conclusion after having had regard to the fact that a number of the claimant's witnesses stated that rather than being bullied or harassed, the claimant had been treated more favourably.

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54. The claimant had also raised concerns regarding the recruitment process, but Mr Gillespie was satisfied the claimant had not met the criteria for the roles.

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55. Mr Gillespie wrote to the claimant on the 9 February 2018 (page 488) setting out the conclusions regarding the claimant's grievance. Mr Gillespie noted each point raised in the grievance and explained why each point had not been upheld.

56. The claimant appealed against Mr Gillespie's decision (page 491). A grievance appeal hearing took place on the 21 March 2018 and a note of that meeting was produced at page 497 - 509. The grievance appeal was heard by Ms Elaine Whitefoot, Technology Portfolio Lead, Ms Claire McGhee, Head of Marketing and Mr Gavin Kerr, HR Business Partner. The claimant attended and was accompanied by Ms Taylor, Employee Representative.
57. The grievance appeal panel interviewed Mr Michael Watson, Delivery Manager, Technology Group (page 513); Mr Mo Haq, Desktop Support (page 516); Mr Paul Houston, Desktop (page 519); Mr Alan Graham (page 522), Mr Butt (page 527) and a number of other employees who wished their statements to be anonymised (page 525).
58. A letter confirming the outcome of the grievance appeal, dated 4 April 2018 (page 530) was sent to the claimant. The letter dealt with the points raised by the claimant and concluded as follows:
- adherence to the respondent's grievance policy and procedure – the appeal panel reviewed all documentation and were satisfied the respondent had followed the correct process;
 - witnesses related to the original grievance – the appeal panel considered the claimant had had ample opportunity to suggest witnesses in the original grievance and during the investigation process, but failed to do so. Instead the claimant raised additional witnesses during the appeal panel meeting. The appeal panel had met with the additional witnesses and concluded they provided no additional information to substantiate the claim of direct discrimination;
 - disability discrimination – the appeal panel reviewed the two OH reports received prior to the claimant's grievance, as well as the latest report received after the grievance had been submitted. It was noted the reports confirmed the claimant's diabetes and sleep apnoea were the only conditions which were likely to come under the provisions of the Equality Act. The appeal panel noted the reports referred to the claimant suffering from psychological symptoms and work related

stress, none of the reports stated these were likely to come under the provisions of the Equality Act. It was noted the claimant had refused permission for the respondent to gain access to his medical records. The appeal panel was satisfied there was no evidence to demonstrate the alleged actions of Mr O'Hara were as a direct result of his diabetes and/or sleep apnoea. They were also satisfied the respondent had put in place reasonable adjustments to support the claimant. It was noted the claimant had consistently said that he was able to do the job in Desktop Support and that it was his dislike of the role, his working environment and the perceived lack of development opportunities that had resulted in his unhappiness in the team;

- pending working from home request – the most recent OH report had not made reference to working from home being a reasonable adjustment, and there was no documentation available from the claimant's GP making this recommendation. The appeal panel noted the claimant's desire to work from home was related to caring for his mother, rather than as a reasonable adjustment due to any underlying health condition and
- witnesses related to the Technology Group town hall meeting - the appeal panel spoke to the witnesses the claimant had suggested, and concluded the claimant was not singled out and that the claimant was part of a group of employees spoken to by Mr O'Hara for perceived non-participation in the group activities.

59. The appeal panel dismissed the grievance appeal, but made a number of recommendations to support the claimant, which included discussing mediation (the claimant and Mr O'Hara) with HR; exploring available support on Digital Learning Academy to assist with career development opportunities; discussing and completing with his line manager an Individual Stress Risk Assessment to review his current working environment; discussing and submitting a flexible working application with a view to making a request to work from home and granting permission for HR to access his medical records.

60. The claimant's outstanding formal request for redeployment (a decision on which had been delayed until the grievance appeal had concluded) was dealt with by letter of the 1 May 2018 (page 536). The request was refused because the respondent did not consider redeployment to be an appropriate or viable option. It was noted that in reaching that decision the following points had been taken into account: (i) the OH reports, and the fact the reports noted the claimant was "medically fit for the functional demands of his post"; (ii) the respondent had met with the claimant to discuss the root cause of why he believed the role had an adverse effect on his mental health, and the claimant had referred to lack of career progression; the politics of the company; the fact he felt that undertaking the role was like the "apprentice teaching the master" because he had had the responsibility of running teams before and the fact he felt processes were not implemented appropriately within the team and directorate; (iii) the claimant's dislike of the role also stemmed from the grievance raised in 2015, but all individuals involved in the grievance had now left the company and (iv) the claimant had expressed a dislike of the company, but redeployment would not resolve that matter.
61. The letter concluded that since the claimant was not medically unfit to do the role on a permanent basis, and the fact the reasons why he disliked the role were more to do with the culture of the company, the decision had been made that redeployment was not a suitable option.
62. The claimant was, by letter of the 21 May 2018 (page 551) invited to attend an appeal meeting regarding his appeal against being placed on stage 2 of the formal attendance procedure. The appeal hearing took place on the 18 June 2018, and was chaired by Ms Jackie Currie, Head of Operations.
63. The appeal outcome letter dated 25 June 2018 (page 563) confirmed that at the appeal hearing there had been a discussion regarding the decision to issue the claimant with a formal monitoring period for twelve months and to restrict him from applying for a secondment or internal role (as per the respondent's policy) until his attendance improved.

64. Ms Currie noted the purpose of the respondent's policy is to ensure transparency and consistency when managing absence (for example, to ensure an employee with a sickness absence record is not moved from department to department). Ms Currie however accepted that individual
5 circumstances had to be taken into account. She decided to uphold the claimant's appeal against the imposition of the restriction, and confirmed it would be removed from his record immediately. Ms Currie also noted there had been a demonstrable improvement in the claimant's attendance in the months prior to the latest absence, and she decided his absences would no
10 longer be formally monitored under the policy, and that the claimant was free to apply for secondments/internal roles.

Credibility and notes on the evidence

65. We did not find the claimant's evidence to be entirely credible or reliable and there were two main reasons for this. Firstly, the claimant's evidence (and
15 cross examination questions) lacked focus. The claimant did not (even when guided to do so) give his evidence and account of events in chronological order, and did not refer to documents. He was impatient with attempts to try to reference when the events to which he was referring occurred, and this was compounded by the fact he made general statements rather than explaining
20 why he felt aggrieved by something. For example, the claimant's evidence regarding his role as Desktop Analyst and why he did not like it was totally conflicted. On the one hand he made reference to the role making him ill and causing him stress. He was critical of managers, processes and Mr O'Hara. On the other hand, however, the claimant applied for the Desktop Support
25 Manager role and told Mr Butt he would only return to the role if he was managing the team. We acknowledged the claimant felt he could do a better job than the manager in post, but his desire to manage the team, which would bring him into more contact with Mr O'Hara, did not sit comfortably with his stated view that Mr O'Hara was against him. Another example was that the
30 claimant did not like Mr O'Hara, but at no time explained to the tribunal what it was that Mr O'Hara had (allegedly) done. The claimant blamed Mr O'Hara for his lack of success in obtaining another post, even when Mr O'Hara was

not involved in the interview process (for example, when the claimant applied for the post in the Data Centre).

- 5 66. The second reason related to the fact the claimant sought on many occasions to re-write history. By that we mean there were many occasions when minutes/notes of meetings which had been agreed by the claimant at the time, were disagreed with at the Hearing. Further, the claimant maintained the OH reports supported his position when clearly they did not. The OH reports stated the claimant was fit for the role of Desktop Analyst, but the claimant sought to portray something different.
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67. The claimant came across to the tribunal as someone who no longer wants to do his substantive role. He has been in Desktop for many years and we formed the impression from the evidence that he resents the lack of promotion and considers others doing the role and supervisors/managers to be inferior to him in terms of qualifications and experience – hence his reference to the apprentice teaching the master. This was not a case where the claimant was medically unfit to undertake the role: the OH reports repeatedly confirmed he was fit to do the role. The issue was that the claimant no longer wanted to do it and he is frustrated by the fact the respondent will not accept this and move him.
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68. The evidence of Mr Pollock and Mr Haq did not add to the evidence material to determining the legal issues before this tribunal. Mr Pollock in particular had his own gripe with the respondent and this was a theme which ran through his evidence. Mr Pollock and Mr Haq confirmed it was common knowledge the claimant did not want to be in the Desktop role and, upon his return to that role, he had been frustrated, aggressive and argumentative and they questioned the point of having him in the team.
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69. We found Ms Curtis to be a credible and reliable witness who gave her evidence in a straightforward and honest manner. Ms Curtis very calmly and in detail addressed all of the issues raised, and told the tribunal she felt the

claimant's condition had not always been managed well, but that this had improved when Mr Butt took over as the manager.

5 70. We also found Mr O'Hara to be a credible and reliable witness and he rejected any suggestion he had targeted the claimant by returning him to work in Desktop. It was very clear Mr O'Hara and the claimant saw things completely differently: for example, the claimant maintained the role in Disaster Recovery had been ongoing and Mr O'Hara simply moved the claimant back to Desktop to be difficult. Mr O'Hara accepted Disaster Recovery work is ongoing (insofar as it is a constant and ongoing type of work) but explained the claimant's role 10 had been to assist the supervisor in some of his work. This tailed off because the supervisor was leaving. This was a good example of the claimant's approach: he was only interested in the fact the work in Disaster Recovery was ongoing, without having regard to the detail of what his role had involved.

15 71. We also found Mr Gillespie to be a credible and reliable witness. He gave his evidence in a very clear and straightforward manner and it was clear from his evidence that he had been surprised and disappointed with the claimant's refusal to give consent for OH to approach his GP and obtain his medical 20 records.

25 72. This case has had a very lengthy history and there was no dispute regarding the fact the respondent has put in place many adjustments to assist the claimant at work. The claimant's frustration with the respondent is that they will not do the one thing he wants, and that is to move him to another role. The history of the case demonstrated the claimant had, essentially, made every application and taken every action possible, to try to force the respondent into accommodating his desire to move to another role. The claimant, during the course of his evidence, fixed upon certain points – for 30 example, failure to do a work risk assessment when he returned from sickness absence and failure to arrange an OH appointment for 9 months. We acknowledged these points were of great importance and significance to the claimant. However these points were not alleged acts of discrimination and were not material to the claim in circumstances where the respondent

explained, in detail, their position regarding these matters. This was not a case where an inference could be drawn from these facts. We say that because the overwhelming weight of evidence demonstrated the respondent had made reasonable adjustments over the years.

5 **Claimant's submissions**

73. Mr Houston confirmed there were two main aspects to his claim: (a) a claim of indirect discrimination and (b) a claim of failure to make reasonable adjustments.

10 74. Mr Houston identified the provision, criterion or practice (PCP), in relation to the claim of indirect discrimination, as being the employer's policy (or how they applied the policy) that prevented employees applying for other posts where their sickness absence reached a certain level. He submitted this put persons with a disability at a substantial disadvantage because they were more likely to be affected by this policy than non-disabled employees. Mr Houston submitted that the way in which the policy had been applied to him took no consideration of his increased absence because of his disability. Mr Houston acknowledged he had been successful in his appeal regarding this matter, but argued that it had taken him eight months to get to that position, during which time he had not been able to move away from his Desktop position which was the cause of his stress and anxiety. This aggravated his symptoms and left him feeling trapped with no way to escape his main stressor.

25 75. Mr Houston challenged the respondent's position that the policy was a legitimate aim because the aim could have been achieved by other means which would have been less damaging. Also, better advice to managers regarding the policy would help to avoid the situation.

30 76. Mr Houston felt the respondent had:-

- failed to follow their own absence management policy;
- allowed HR to leave responsibility to management;

- been lacking in common sense by not allowing the claimant to try to move away from the very thing that was causing him stress and
- lacked a sense of urgency when hearing the grievance and appeal.

5 77. Mr Houston referred to the fact the respondent had conceded he was a disabled person. He submitted the respondent should have put in place reasonable adjustments at work to remove the substantial disadvantage he was experiencing. The respondent, he argued, had a duty to mitigate the disadvantage caused by his disability. The role of Desktop was causing him stress and anxiety. He had applied to take on the desktop management position to make improvements to the desktop role, but even though he is the longest serving analyst, and better qualified than the current manager, he did not get an interview. Mr Houston realised he would not be able to change anything in the desktop role, and he had therefore been applying for numerous positions but had not been successful. The role exacerbates his stress and it would have been reasonable to move him from the role.

78. Mr Houston considered there had been:-

- a failure to arrange an OH appointment for 9 months;
- a failure to do a work risk assessment when he returned from sickness absence;
- the grievance panel had not taken OH advice that the role was the main stressor;
- line manager not aware of his responsibilities with regards to who manages OH;
- failure of the line manager to implement reasonable adjustments where he would have had the ad-hoc ability to work from home and
- failure to move him out of the desktop role.

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79. Mr Houston, if successful, wished payment for injury to feelings and a recommendation regarding consideration of OH reports.

Respondent's submissions

80. Ms Noval set out a number of findings in fact she invited the tribunal to make. Ms Norval submitted the claimant's evidence had at times been vague and lacked precision. The claimant tended to make general statements without
5 locating them in time or supporting them with reference to any documentation or witness evidence. This was true both in his evidence in chief and cross examination of the respondent's witnesses, which at times curtailed their ability to meaningfully comment. The claimant also distanced himself from contemporaneous documents, suggesting they were not accurate or
10 incomplete, despite having had the opportunity to amend or comment on some of them at the time they were created and indeed signing them to confirm their accuracy.

81. The evidence of Mr Haq and Mr Pollock was of limited use to the points in
15 dispute between the parties. They were clearly friendly with the claimant and therefore not objective.

82. The respondent's witnesses, in contrast, were credible, reliable and supported by relevant documentation. The witnesses, it was submitted, came
20 across as individuals who had tried their best to support the claimant and treat him fairly in respect of his various health complaints and grievances over the years, in what could be, at times, challenging circumstances.

83. Ms Norval set out the statutory definition of indirect discrimination and failure
25 to make reasonable adjustments in sections 19 and 20 respectively of the Equality Act. She submitted, with regard to indirect discrimination, that it was for the claimant to identify the PCP that he wished to challenge and thereafter it was for tribunal to determine whether it was in fact a PCP. The PCP relied on by the claimant was "the practice of preventing employees from applying
30 for internal secondments and full time positions for twelve months after an absence trigger" under the respondent's Attendance Management Procedure. The respondent accepted this constituted a PCP for the purposes of the Equality Act.

84. The respondent also accepted it applied the PCP to individuals who do not share the claimant's protected characteristic. However, the respondent did not accept the PCP put employees with whom the claimant shared the protected characteristic at a particular disadvantage, such that group disadvantage was satisfied.

85. Ms Norval referred to section 6(3) Equality Act which provides that "in relation to the protected characteristic of disability .. a reference to persons who share a protected characteristic is a reference to persons who have the same disability." Ms Norval also referred to the EHRC Code which states "It is important to be clear which protected characteristic is relevant. In relation to disability, this would not be disabled people as a whole but people with a particular disability, for example, with an equivalent level of visual impairment."

86. Ms Norval noted the claimant confirmed the disability he sought to rely upon in respect of this claim was stress/anxiety/depression. Accordingly, those who experience stress/anxiety/depression would comprise the relevant group. The question to be determined is whether that group is at a particular disadvantage as a result of the PCP relied upon, compared to those with other disabilities or no disability.

87. Ms Norval submitted the claimant had led no evidence to show that people who experience stress/anxiety/depression were at a particular disadvantage as a result of the PCP relied upon. The claimant could have produced statistical information or evidence from a witness who also suffered from stress/anxiety/depression but he did not do so. There were, therefore, insufficient facts to support the basis for the legal proposition advanced by the claimant.

88. It was submitted that in the absence of any evidence, it was reasonable to assume that those who experienced stress/anxiety/depression were not at any particular disadvantage when compared with others who did not experience that condition but who may be absent from work for other health

reasons and therefore restricted from applying for other roles. Those two groups would be equally impacted by the PCP, as would non-disabled employees with absences for other reasons. The Attendance Management procedure operates a system of warnings and other sanctions in respect of specified levels of absence and has the same effect on all employees equally, whether disabled or not, because anyone having the requisite levels of absence will be subject to its terms. Ms Norval submitted that if the claimant, and others who share his particular disability, have been treated in the same way as such comparators, they cannot be said to be at a comparative disadvantage.

89. The respondent's Attendance Management Procedure made an accommodation for disability-related absences when applying the PCP, and accordingly disabled employees were treated more favourably in practice. The application of the PCP was already adjusted to take account of the fact that employees with disabilities could be disadvantaged if nothing was done to account for their potentially higher levels of absence.

90. Ms Norval submitted no group disadvantage had been established. Furthermore, the claimant had not been placed at any personal disadvantage by the application of the PCP because it did not result in his dismissal or prevent him from working, it simply meant he remained in his substantive post; it did not result in him taking sickness absence and the claimant did not lead any evidence of any vacancies or secondments that were available whilst the PCP applied, and which would have been suitable for him to apply for. Accordingly, no personal disadvantage had been established.

91. Ms Norval submitted that if the tribunal found the PCP placed the claimant and those in the relevant group at a disadvantage compared to those with other disabilities or no disability, then the respondent could objectively justify the PCP. Ms Curtis gave evidence regarding the purpose of the PCP, which was to ensure the employee in question was managed by someone who was aware of their wellbeing issues, and that this had resulted from proposals put forward by managers who found high levels of absence had a

disproportionate impact on secondments, given their duration, such that secondments were not able to be fulfilled.

5 92. The legitimate aim of the respondent was to manage employees with absence issues consistently. This was beneficial not only to the employee but also to the manager who will be aware of the relevant background. Ms Norval submitted it must be a legitimate aim for an employer to want to actively manage attendance because employees are paid to be at work and to perform their duties. Employers, however large, cannot tolerate significant or unlimited periods of sickness absence. Absences can be a drain on managerial resources and other employees.

10 93. Ms Norval invited the tribunal to accept the clear evidence of Ms Curtis that managing absence was the respondent's motive for changing the Attendance Management Policy to introduce the PCP, because of its impact on secondments.

15 94. The respondent accepted that even if the aim was legitimate, the means of achieving it must be proportionate. The PCP did not impact on all staff: it only affected staff who had met certain levels of absence such that their absence needed to be managed under the formal policy. This, together with the fact the procedure expressly makes adjustments for employees with disability-related absence, and is only pursued after the informal process has been exhausted, demonstrated that consideration was given by the respondent to the amount of absence in each individual case it was prepared to allow (and pay for) as well as the possible impact of the PCP on disabled employees, before the restriction on applying for roles was applied. In the circumstances, it was submitted the PCP was a proportionate means of achieving a legitimate aim and could, therefore, be objectively justified.

20 25 30 95. The claimant, with regard to the complaint of failure to make reasonable adjustments, relied on the same PCP. His position was that the PCP placed him at a substantial disadvantage in comparison with person who are not disabled because *“statistically disabled persons are more likely to have higher*

absences than non-disabled persons, resulting in the above ban, which in my case resulted in increased stress and anxiety and prevented me from moving to another position to free myself from my stressful job.”

- 5 96. The claimant asserted the respondent had failed to make an adjustment to (i) reassign him to another role or (ii) to allow him to continue in the Disaster Recovery project or (iii) allow him to continue with the Data Centre Manager Andy Hastings. The claimant believed there was still work to be done in both of these positions. The claimant also made mention of an alleged failure to
10 allow him to work from home on occasion.
97. The respondent accepted it applied the identified PCP, and that it constituted a PCP for the purposes of the Equality Act. The tribunal had next to determine whether the PCP placed the claimant at a substantial disadvantage in
15 comparison with persons who were not disabled. Ms Norval referred to the EAT decision in **Royal Bank of Scotland v Ashton 2011 ICR 632** where the EAT held there had been a failure by the tribunal to identify the specific disadvantage suffered by the employee. In that case the absence policy applied to everyone who worked for the respondent whether disabled or not,
20 and the respondent had a discretion to pay full pay to someone who was disabled and might suffer greater periods of sickness absence than those without a disability. On the face of it therefore the employee had been treated advantageously rather than disadvantageously in terms of the application of the policy.
- 25 98. Ms Norval submitted the claimant had not, for the same reasons as set out above, suffered disadvantage in this case by the application of the PCP. Additionally, although the claimant did not like his role, there was no medical evidence to suggest he was unable to do the role or that the requirements of
30 the role itself impacted on his health. As such, the claimant was no worse off than any other employee who did not like their role. The evidence before the tribunal was that most of the Desktop team wanted to leave that role, and this added further credence to the respondent's position that the PCP did not

place the claimant at a substantial disadvantage with persons who are not disabled.

5 99. Ms Norval submitted the claimant had not led any evidence of vacancies or secondments which would have been suitable for him and which were available whilst the PCP applied, and for which he could have applied and potentially got.

10 100. The respondent accepted it knew of the claimant's disability, but it did not know or ought reasonably to have known, the claimant was likely to be placed at a substantial disadvantage as a result of the PCP. There were two reasons for this: (i) the medical evidence and (ii) the claimant himself.

15 101. The medical evidence did not suggest there was any medical reason why the claimant could not fulfil his role, or that the role itself impacted on his health. The OH report of 20 August 2015 referred to the issue being "interpersonal relationships", and the OH report of 22 August 2017 referred to the claimant's perception of "the work politics". The report did go on to say the claimant "generally does not believe the role is good for his health, however he was
20 unable to elaborate on this".

25 102. It was submitted there were reasonable grounds for the respondent to conclude the claimant's dislike for the Desktop Analyst role was not due to any substantial disadvantage as a result of the protected characteristic, but rather was for other reasons, being (a) the terms of the 2015 grievance; (b) the claimant's representations where he continually referred to being more qualified than others and wanting to run the team; (c) his comments to Mr Butt where he said he would not return to the role unless he was running the team; (d) the fact the claimant applied for the Desktop Support Manager role and (e)
30 the fact the claimant returned to work the day before his sick pay was reduced to half pay.

103. Ms Norval submitted the difficulties the respondent had encountered with the claimant were experienced by the tribunal. The claimant was unable to

describe why he found the role stressful, and instead made broad statements such as his return to the role being “ground hog day”. The respondent’s difficulties were compounded by the fact that when they tried to obtain consent to access the claimant’s medical records, he refused; and, he was antagonistic in his approach and responses during the grievance process.

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104. Ms Norval submitted the duty to make reasonable adjustments did not arise. However, if the tribunal found the duty did arise, she invited the tribunal to have regard to the effectiveness of what had been proposed by the claimant. Mr O’Hara gave evidence explaining that the Disaster Recovery supervisor, Mr Davey, was leaving and that meant there was no longer a suitable role for the claimant within that team. Similarly there was no suitable role in the Data Centre and it was only recently that a vacancy had become available. Accordingly, it was submitted there were no grounds upon which to conclude the claimant could have been redeployed to those teams.

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105. Ms Norval also invited the tribunal to have regard to the evidence of Ms Curtis regarding redeployment. The respondent’s primary position is that redeployment is a last resort to be considered only after other adjustments have been made. In this case, there had been a change of manager since the claimant last worked in the role and the contractors who had been the subject of the 2015 grievance had left the department. There was more structure within the department and greater opportunities for promotion.

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106. Ms Curtis had also given evidence to explain that redeployment is for employees who are medically unable to perform their role. Ms Curtis confirmed that had there been clear medical reasons to do so, the respondent would have placed the claimant on its Redeployment Register. However, in the absence of this evidence, the respondent believed those employees who were prevented from performing their role because of medical reasons should take priority, and that the claimant should not be redeployed.

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107. Ms Norval submitted that it was not clear, with regard to working from home, when the claimant alleged this failure occurred. If this complaint related to

November 2016 when the claimant asserted Mr O'Hara asked for the return of his laptop, then it was timebarred. In the alternative, there was no evidence to suggest working at home would eliminate or reduce the impact of the PCP (which was applied after the request to work for home). Furthermore, the claimant withdrew the request before the respondent could consider it.

108. Ms Norval submitted that for all of these reasons the complaint of failure to make reasonable adjustments should be dismissed.

109. Ms Norval submitted that should the claim succeed, the claimant should not be awarded any compensation. He had not provided a schedule of loss and his suggestion that an award for injury to feelings of £25000 - £42000 was grossly excessive. Further, the proposed recommendation that the application of the ban from applying for roles be judged on a case by case basis was no longer appropriate.

Discussion and Decision

110. We decided it would be appropriate to deal first with the complaint of indirect discrimination. We referred to the terms of section 19 Equality Act which provides as follows:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic;

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) it puts, or would put, B at that disadvantage and

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.”*

5 111. The claimant identified the provision, criterion or practice (PCP) as being the practice of preventing employees from applying for internal vacancies, secondments and full time positions for twelve months after an absence trigger. We noted the respondent accepted it had applied this practice and that it constituted a PCP for the purposes of the Equality Act. The respondent also accepted (in terms of section 19(2)(a) above) that it applied, or would
10 apply the PCP to individuals who did not share the claimant’s protected characteristic.

15 112. Section 19(2)(b) above requires the claimant to show the PCP put persons with whom he shares the characteristic at a particular disadvantage when compared with persons with whom he does not share it. Section 6(3) of the Equality Act makes clear that *“in relation to the protected characteristic of disability .. a reference to persons who share a protected characteristic is a reference to persons who have the same disability.”* This means, in terms of group disadvantage, the group would be made up of people who have the
20 same disability as the claimant: that is, stress/anxiety/depression.

25 113. The claimant did not lead any evidence to show that people who experience stress/anxiety/depression are at a particular disadvantage as a result of the PCP relied upon. It is not for this tribunal to make assumptions or proceed on the basis of general assertions made by the claimant to the effect that it would be obvious people who suffer stress/anxiety/depression would be put at a particular disadvantage.

30 114. There was no evidence before the tribunal to indicate whether there were other employees who had stress/anxiety/depression or whether, if there were other employees with the same condition as the claimant, they had triggered the ban due to their absence. We further noted that even if the claimant had established the group for comparison purposes, there was no evidence to inform the tribunal of the nature of the “particular disadvantage”. The

assumption made by the claimant was that employees with the same disability would wish to apply for vacancies and secondments in circumstances where they had been prevented from doing so and because they wished to leave their substantive post. There was however no evidence to support that assumption and no facts from which to draw an inference to that effect.

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115. The onus is on the claimant to discharge the evidential burden in respect of these matters and he has not done so. The claimant has not defined the group or the particular disadvantage.

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116. We did continue to consider whether the claimant had shown, in terms of section 19(2)(c) above, that he had been put to that disadvantage. The claimant asserted the PCP put him at a disadvantage because it meant he could not move to another role and escape from Desktop. We acknowledged this was the effect of the PCP, however, the question for the Tribunal is whether the application of the PCP put the claimant at the particular disadvantage.

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117. The claimant did not lead any evidence to demonstrate there were vacancies or secondments which were suitable and available during the time the PCP was applied to him, and for which he could have applied but for the PCP. His evidence was, again, very general in nature and to the effect there were always lots of vacancies/secondments. There was however no evidence to indicate any particular vacancies or secondments would have been suitable for the claimant and for which he would have applied had the ban not been in place. The only detailed evidence available to the tribunal was to the effect the claimant had applied for posts (prior to the ban being put in place) but had not been successful, and had refused assistance to update his CV and refused to undertake a particular qualification.

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118. We concluded, in the absence of any relevant evidence before the tribunal, that the claimant had not demonstrated the application of the PCP put him at a disadvantage. The effect of the PCP was that the claimant had to remain in post, but this was something he had had to do prior to the PCP being applied

and after the ban had been lifted. We concluded the claimant had not shown he was placed at particular disadvantage.

5 119. We concluded the claimant has not demonstrated the matters necessary for a successful complaint in terms of section 19 Equality Act and we decided to dismiss the claim of indirect discrimination.

10 120. We should state that if the claimant had shown the group and personal disadvantage, we would have had to determine whether the PCP was objectively justified. Section 19(2) Equality Act requires the employer to demonstrate the application of the PCP is "*a proportionate means of achieving a legitimate aim*". The EHRC Employment Code provides that for an aim to be legitimate it must be "*legal, should not be discriminatory itself, and it must represent a real, objective consideration*".

15 121. The legitimate aim of the respondent was said to be the active management of attendance and to ensure secondments were successful. We, in considering whether this was a legitimate aim, had regard to the evidence of Ms Curtis. We accepted her evidence when she told the tribunal that the aim
20 of the respondent, in operating their Attendance Management Procedure, is to ensure employees with absence issues are not only managed but consistently managed.

25 122. Ms Curtis had been involved in drafting the respondent's new Attendance Management Procedure in 2016. Ms Curtis gave evidence to the effect a change to the Procedure had been made at that time, to introduce the restriction on applying for vacancies and secondments if an employee has triggered the formal attendance procedure. The reason for this was because
30 managers found that high levels of absence impacted disproportionately on secondments; and, it was felt that managers and employees benefitted from a consistent approach from a manager who was familiar with their health and wellbeing. We accepted Ms Curtis' evidence that the position of employees with a disability was protected by adjusting the triggers in the attendance procedure and making the restriction discretionary.

123. We, having had regard to the evidence of Ms Curtis, accepted it is a legitimate aim for an employer to want to actively manage attendance and to ensure that secondments (which appeared to be regularly offered within the respondent) were successful. This aim is not in itself discriminatory, particularly given the safeguards described by Ms Curtis.
124. We next considered whether the means of achieving that aim were proportionate. We had regard to the case of **Hampson v Department of Education and Science 1989 ICR 179** where it was said that consideration of an employer's defence of justification in claims of indirect discrimination required an objective balance to be struck between the discriminatory effect of the PCP and the reasonable needs of the party that applies it.
125. We also had regard to the EHRC Employment Code which provides: *"Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts."*
126. The claimant's position was that the ban on being able to apply for other posts or secondments meant he had to remain in his substantive post in Desktop which exacerbated his disability. We think it is important to note two points again at this stage: firstly, there was no evidence of any suitable posts or secondments for which the claimant could have applied but was prevented from doing so because of the ban in place and secondly, there was no medical evidence to support the claimant's position that remaining in his substantive post exacerbated his disability.
127. We continued however to consider whether the means of achieving the legitimate aim of actively managing attendance and ensuring secondments were successful was proportionate.

128. The first factor to which we had regard was the fact the Attendance Management Policy and Procedure was the subject of consultation with managers and the recognised trade union. There was no evidence to suggest
5 either the policy or the introduction and application of the ban was, or had been, a cause of concern either to the trade union or employees generally.
129. The second factor to which we had regard was that the PCP does not impact on all employees: it only impacts on employees who have certain levels of
10 absence such that they require to be managed under the formal Attendance Management Procedure. Those employees may be disabled and non-disabled employees. We noted there was no dispute regarding (i) the fact the procedure is only pursued once the informal process has been exhausted and (ii) the fact the respondent's policy makes adjustments for disability-related
15 absence by adjusting the triggers set out in the policy.
130. The third factor to which we had regard was the fact the claimant was able to appeal against the imposition of the ban and have its application reviewed by an independent manager. The appeal manager recognised the need for the
20 individual employee's circumstances to be taken into account when considering whether to apply the ban. We inferred from this that there has been a re-enforcement of the discretionary nature of the ban.
131. We concluded, having had regard to the above points, that if the respondent
25 had been required to demonstrate the application of the PCP was objectively justified, we would have decided the application of the PCP was a proportionate means of achieving a legitimate aim. Accordingly, the claim would have failed for this reason.
- 30 132. We decided to dismiss the claim of indirect discrimination.
133. We next had regard to the claim of failure to make reasonable adjustments in terms of section 20 Equality Act. That section provides:

“ .. where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [there is a duty] to take such steps as it is reasonable to have to take to avoid the disadvantage.”

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134. The claimant relied on the same PCP as set out above: that is, the respondent’s practice of preventing employees from applying for internal secondments and full time positions for twelve months after an absence trigger. The claimant identified three adjustments which he asserted the respondent had failed to make: (i) to reassign him to another role, (ii) to allow him to continue in Disaster Recovery or (iii) to allow him to work in the Data Centre. There was also reference (although in another context) to working from home.

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15 135. We noted the respondent accepted the PCP identified by the claimant was a PCP which they had applied and that it constituted a PCP for the purposes of the Equality Act.

20

136. We asked whether the PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled. “Substantial” means more than minor or trivial. We had regard to the case of **Environment Agency v Rowan 2008 ICR 218** where the EAT held a tribunal must consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and what adjustments would be reasonable. A tribunal must not assume that simply because an employee is disabled the employer is obliged to make reasonable adjustments.

25

137. The claimant maintained the PCP placed him at a substantial disadvantage in comparison with persons who are not disabled because *“statistically disabled persons are more likely to have higher absences than non-disabled persons, resulting in the above ban, which in my case resulted in increased stress and anxiety and prevented me from moving to another position to free myself from my stressful job.”*

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138. We noted, firstly, there was no evidence to support the claimant's position that "statistically disabled persons are more likely to have higher absences than non-disabled persons". This was a general assumption made by the claimant. Furthermore, the respondent's Attendance Management Procedure made provision for disability-related absence by adjusting the trigger points invoking the policy. Accordingly, in circumstances where a disabled and a non-disabled employee had the same unacceptable level of absence, the adjusted trigger would mean the disabled person would not be subjected to the policy at that stage.
139. We next had regard to the fact the medical evidence in this case did not support the claimant's position that remaining in his substantive post in Desktop resulted in increased stress and anxiety. The OH report dated 22 August 2017 (page 352) noted the claimant had told the Senior OH Advisor that *"he feels stressed undertaking this role with regard to his perceptions of work place politics"*. Further, *"he tells me that generally he does not believe that the role is good for his health, however was unable to elaborate on this."* The Senior OH Advisor stated that *"It appears that this man is experiencing an exacerbation of longstanding symptoms of a psychological nature. It appears this man's work concerns and perceptions are of significance to the current exacerbation of his symptoms. Mutually satisfactory resolution to his work concerns and perceptions is likely to support recovery."*
140. In the OH report dated 8 November 2017 (page 423), the Consultant OH Physician reported: *"Having spent approximately an hour with Mr Houston today, in my opinion a key issue appears to be longstanding feelings of workplace stress related to his Desktop Support Analyst role. He describes feeling unchallenged, understimulated, disillusioned and dissatisfied with this role and he does not feel that this situation will ever change. I have suggested to Mr Houston that it would be beneficial for him to think about counselling again, but having spoken to him I do wonder whether it will be possible to break down his strong beliefs with regard to his current role at work. He does appear to have developed some very fixed ideas and feelings about this and feels that his only opinion [sic] is to move away from his current role. Having*

assessed Mr Houston today, in my view he is medically fit for the functional demands of his post, but given his reported deterioration in symptoms of depression/anxiety and diabetes since his return to work my view is that if Mr Houston's situation/his perceptions about the workplace situation do not change, it would be difficult to offer any assurances about his ability to provide regular and effective service in the future. I would suggest that you speak to him about this further and consider any options that may be available from an organisational perspective."

10 141. The medical evidence obtained by the respondent indicated the claimant was fit for the functional demands of the post. The OH report by the Consultant OH Physician did not state that carrying out the role increased the claimant's stress/anxiety/depression (although that may have been the claimant's perception). The report clearly indicated the claimant had developed "very
15 fixed ideas and feelings" about his current role and that it may be difficult to address this without counselling.

142. The claimant's evidence regarding the reasons why he did not wish to remain in his substantive post were confused and confusing. There was reference
20 throughout the chronology of these events, in the OH reports and during this Hearing to the claimant not wishing to remain in the role because he was dissatisfied and frustrated in the role and the lack of promotion prospects. The claimant was a long serving and very experienced member of the Desktop team. It was clear from his evidence that he did not rate the ability of others
25 or his managers. He, for example, described that it was like the apprentice trying to teach the master (being a reference to himself). The claimant was also highly critical of the processes introduced and, generally, the way in which things were now done.

30 143. The claimant believed he could make a better job of managing the team. This was evident from two things: firstly, the fact the claimant applied for the Desktop Manager role but was not successful and secondly, the fact he told Mr Butt that the only way he would return to the team was if he was leading it.

144. This evidence undermined the claimant's position that he wanted to leave his post because it impacted on his health. It was not credible to suggest on the one hand that he needed to leave his post because of his health, whilst on the other hand applying for the manager's position and stating he would only return to the team if he was leading it.
145. The evidence also undermined the claimant's position that he had difficulties with Mr O'Hara because if the claimant had been successful in gaining the manager's post it would have required him to work more closely with Mr O'Hara.
146. The respondent endeavoured to get more medical evidence to consider by asking the claimant to give consent for OH to approach his GP for his medical records. The claimant refused this request. He told the tribunal the respondent already had his medical records. We did not accept this evidence because he did not ask the respondent's witnesses if this was correct and further, we considered it would be odd, if indeed the respondent had the medical records, for the request to be made again.
147. The claimant also stated his GP was not the correct person to approach for a report because s/he was not an expert in mental health. We consider this statement exposed a misunderstanding of the process and an obstructiveness by the claimant. The respondent made it clear to the claimant that they did not consider the OH reports supported his position that remaining in his substantive post was impacting on his health. They also made clear that if there was medical evidence to that effect, they would support him in finding an alternative role through redeployment. We considered the request by the respondent for consent to allow OH to obtain the medical records from the claimant's GP was reasonably made; clearly explained to the claimant and would have been the first step in a process to exploring other avenues such as obtaining a medical report from a mental health expert. The claimant's refusal to give consent was, in the opinion of this tribunal, deliberately obstructive and done because the claimant wanted to pressure the respondent into making the decision he wanted them to make.

148. The question we must determine is whether the PCP placed the claimant at a substantial disadvantage in comparison with persons who are not disabled. We concluded, having had regard to the medical evidence available to the respondent and the confused position of the claimant regarding why he wanted to leave the role, that the PCP did not place the claimant at a substantial disadvantage. We say that because the effect of the PCP meant the claimant had to remain in his substantive role and could not apply for vacancies or secondments for a twelve month period. The medical evidence did not support the claimant's position that the role impacted on his health, and in those circumstances, we concluded any disadvantage to the claimant in remaining in the role arose from the fact he did not like the role rather than from any disability. The claimant was, accordingly, at the same disadvantage as a non-disabled employee would have been who did not like their role but had to remain in it.

149. We decided it would be appropriate, notwithstanding our above conclusion, to continue to consider the issues of whether the respondent knew, or ought reasonably to have known, the claimant was likely to be placed at a substantial disadvantage as a result of the application of the PCP and the issue of reasonable adjustments. We were referred by Ms Norval to the case of **Newham Sixth Form College v Sanders 2014 EWCA Civ 734** where the Court of Appeal stated, with regard to the requirement of knowledge *that "an employer .. cannot make an objective assessment of reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP."* Also in the case of **Lamb v The Business Academy Bexley UKEAT/0226/15** the EAT added that *"any adjustments to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage."*

150. We (for the reasons already set out above) accepted Ms Norval's submission that the respondent's awareness of any alleged substantial disadvantage experienced by the claimant in preventing him from applying for

vacancies/secondments, and thus requiring him to remain in his substantive post, was thwarted by two things: (i) the medical evidence and (ii) the claimant.

5 151. The medical evidence, as stated above, confirmed the claimant was fit to carry
out the role and did not suggest there was any medical reason why the
claimant could not fulfil the role or that the role impacted upon his health. The
OH reports, on several occasions, referred to the claimant believing the role
was not good for his health, but in one report it was noted the claimant could
10 not elaborate on this and in the later report it was clear this was the claimant's
perception with no medical basis for it. We concluded that in those
circumstances, and given the claimant's refusal to consent to OH approaching
his GP to obtain his medical records, the respondent did not know, and could
not reasonably have known the claimant was likely to be placed at a
15 substantial disadvantage as a result of the application of the PCP.

152. We further concluded there were reasonable grounds for the respondent to
conclude the claimant's dislike for his role was due to reasons not related to
his health because:

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- the 2015 grievance related to the conduct of sub-contractors. The grievance was resolved in the claimant's favour; he was moved out of the department temporarily and upon his return to Desktop none of the contractors concerned in the grievance remained in the department;
 - the claimant applied for the Desktop Support Manager role;
 - the claimant told Mr Butt that he would not go back to his substantive role unless he was running the team and
 - the claimant continually referred to being dissatisfied in the role because of the lack of promotion prospects; he felt he should be on a
25 higher grade; he felt frustrated with the lack of career path; he felt
others who were less qualified but been successful in applying for roles
30 he wanted.

153. We, for the two reasons set out above, concluded that even if the claimant had shown the application of the PCP placed him at a substantial disadvantage, we would have found the respondent did not know and could not reasonably have been expected to know the application of the PCP to the claimant would place him at a substantial disadvantage.
154. The final issue we considered was the reasonableness of the adjustments proposed by the claimant. The claimant suggested it would have been reasonable for the respondent to reassign him to another role or allow him to continue working in Disaster Recovery or with the Data Centre Manager. The reasonableness of an adjustment is not simply a question of the employer doing what the employee wishes: we must have regard to the effectiveness of the adjustment, that is, the extent to which the adjustment would prevent the substantial disadvantage and also the extent to which it is practicable for the employer to take the step.
155. We reminded ourselves that the purpose of making a reasonable adjustment is to prevent the PCP placing the employee at a substantial disadvantage. We considered an adjustment which would prevent the PCP placing the claimant at a substantial disadvantage would be the removal of the PCP. If the ban/restriction was removed, the claimant would be free to look, and apply, for other roles and secondments. The respondent made this adjustment as a consequence of the appeal process. The ban was lifted on 18 June 2018.
156. We, in considering the proposals identified by the claimant, considered them in the context of the PCP applying. The claimant argued he should have been allowed to remain in Disaster Recovery. We, in considering this, had regard to the evidence of Mr O'Hara. We accepted Mr O'Hara's evidence that the claimant's role in Disaster Recovery was to work with a supervisor, Mr Brian Davey, who was a subcontractor. The need for the claimant's role in Disaster Recovery ended when Mr Davey left his supervisor role. The claimant argued the work continued, but that was a general statement – because Disaster Recovery work continued - and not specific to his role.

157. We also accepted Mr O'Hara's evidence that there was no suitable role in the Data Centre at the time of these events. Mr O'Hara did accept a vacancy had become available in the Data Centre recently.
- 5 158. We accepted that moving the claimant out of Desktop and to another role may have been a reasonable adjustment, but without more information it was not possible to assess the effectiveness of this. We say that for two reasons: firstly, the respondent would need to understand either from the claimant and/or the medical evidence what it was about the role which caused the claimant stress/anxiety/depression. Was it the work, was it reporting to Mr
10 O'Hara or was it something else? The respondent, without knowing this, would not be able to consider (i) what adjustments could be made to the role to remove the substantial disadvantage or (ii) the suitability of other posts.
- 15 159. We formed the impression from the claimant's evidence and the documents produced that the claimant has decided the adjustment he wishes the respondent to make and that is to move him from his Desktop role, and nothing else will do. The claimant is not willing to co-operate with other adjustments or proposals to address him remaining in Desktop. He has
20 become obstructive and argumentative to try to get his own way.
160. Secondly, we noted that given the claimant's skillset it was likely any suitable posts would have ultimately come under Mr O'Hara's remit. The impact of this on the claimant would have to be assessed. The claimant told the tribunal that
25 when he had been based in Disaster Recovery he had reported to Mr Brian Davey, but that Mr O'Hara retained managerial responsibility. The claimant was upset by this and suspicious every time Mr O'Hara came to the department.
- 30 161. The claimant did suggest during the course of his evidence that Mr O'Hara could, and should, have allowed him to work from home. This evidence related to a time when the claimant was in Disaster Recovery, and it was not at all clear to the tribunal how working from home when carrying out the Desktop job would have removed the substantial disadvantage of not wanting

to do that job. In any event, we accepted Mr O'Hara's evidence that no other employee in Desktop works from home because it is not the type of job that is suitable for home working. We, based on this evidence, concluded this would not have been a reasonable adjustment.

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162. We concluded for all of these reasons that even if the duty to make reasonable adjustments had arisen, the adjustments proposed by the claimant were not reasonable.

10 163. We decided to dismiss the claim in its entirety.

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Employment Judge: L Wiseman
Date of Judgment: 24 January 2019
Entered in register : 25 January 2019
and copied to parties