EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr A Britliff		**Birmingham City Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 23 – 27 September 2019, 1, 3, 4, 7, 9, 10,14 & 16 October 2019
18 October 2019 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mr TC Liburd**
Mr SG Woodall

Representation
For the Claimant: **In Person**
For Respondent: **Mr E Beever (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of direct discrimination; discrimination arising from disability; indirect discrimination a failure to make adjustments; and victimisation made pursuant to Section 120 of that Act, are dismissed.

2 The claimant was fairly dismissed by the respondent. The claimant's claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Adrian Britliff who was employed by the respondent, Birmingham City Council, as a Social Worker, from 1 December 2008 until 15 May 2017 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was capability.

2 After completion of the Early Conciliation Procedure through ACAS, by a claim form presented to the tribunal on 9 October 2017, the claimant claims that

he was unfairly dismissed; that he suffered discrimination by reason of disability; and that he was victimised. The strands of discrimination alleged by the claimant are direct discrimination; indirect discrimination; discrimination arising from disability; and a failure to make adjustments. The claimant also purports to bring claims for violations of various international treaties.

4 The respondent and admits that the claimant was dismissed but asserts that this was a fair dismissal on by reason of capability. The respondent concedes that, at all material times, the claimant was a disabled person as defined in the Equality Act 2010 (EqA) by reason of his suffering from a number of mental health conditions: Sleep Apnoea; Depression; Dysexecutive Syndrome; and Anxiety. The respondent denies any form of discrimination and maintains that all appropriate and adjustments were made the respondent further denies the alleged victimisation.

The Status and Application of International Treaties and EU Directives

5 At the outset of proceedings the claimant indicated an intention to rely on the UN Convention on the Rights of Persons with Disabilities 2009; and the following Articles of the Charter of Fundamental Rights: Articles 31, 20, 35, 7, 1, 3 and 14. His case is that these are all of direct effect and relevant to his claims. The respondent acknowledges that there is an interpretive obligation placed on the tribunal so that domestic legislation must be interpreted so far as possible to give effect to EU law. The claimant also seeks to rely on Article 216 of the Treaty of Lisbon, albeit he acknowledges this does not have direct effect and Article 6 of the ECHR which he asserts is of direct effect. The claimant also relied on a substantial body of EU case law. The respondent in broad terms accepts that references to EU case law may be relevant.

6 At a Closed Preliminary Hearing (CPH) conducted by Employment Judge Self on 23 February 2018, the learned judge listed an Open Preliminary Hearing to consider whether or not the UN Convention referred to above is of direct effect in UK law providing the claimant with the route to claim disability discrimination outside the provisions of EqA. This issue was determined by Employment Judge Woffenden in a reserved judgement promulgated on 13 July 2018. Judge Woffenden's decision was that the treaty was not of direct effect. At the time of the commencement of the Hearing before us, Judge Woffenden's judgement had been upheld in the EAT and the Court of Appeal. Our understanding is that the claimant intends to appeal further if permitted.

7 On the first day of the Hearing before us, the claimant applied for an adjournment for an unspecified period pending in his oral application for permission to appeal Judge Wolfenden's judgement to the Court of Appeal and onwards to the Supreme Court. At the time of the Hearing, permission to appeal had been refused in a short judgement given by Leggatt LJ. Having heard the

claimant's application and the respondent's representations, we refused the adjournment. In our judgement, the interests of justice required that this trial should proceed; and the claimant was unable to articulate to us the basis upon which he suggests that a remedy might be available to him if the Convention were of direct application which would not be available to him by application the provisions of EqA.

8 During closing submissions, we heard extensive argument from the claimant as to the direct effect of the European treaties and provisions to which he had referred. Again, the claimant could not articulate to us any basis upon which, on the direct application of such treaties, a remedy would be available to him which was not available under EqA. It was acknowledged that were we to find that in on the facts of the claimant's case there was a divergences between the EqA and European legislation, the respondent being an emanation of the state, it may have been necessary for us to directly apply the European treaty. However, on the facts of this case no such divergences could be detected. We indicated to the claimant that of course we would apply the interpretive obligation created by EU law. In our judgement, no such purposeful interpretation arises in this case which on its facts clearly and squarely falls under the provisions of EqA and the Employment Rights Act 1996 (ERA).

9 The claimant expended considerable energy in the pursuit of his case for the application of EU law. For example, he addressed as at length on the doctrine of *necessity* under which in certain circumstances Contracting States may derogate from international obligations - usually on the grounds of national emergency or national security. It was unnecessary for the claimant to pursue this argument: it was never the respondent's case that circumstances had arisen whereby such derogation was justified; and, of course, the respondent's case was that there had been no such derogation that for the purposes of this case the UK's international obligations towards disabled people in employment were properly enshrined in EqA. The respondent sought nothing more than a determination under the provisions of that Act.

10 Following our preliminary reading-in to the case, we indicated to the parties that we could see no issues arising which could not properly be determined by the application of UK legislation together with UK and European case law. We indicated that, once we had heard the evidence, if our position changed we would invite submissions: it was not necessary for us to invite such submissions; although the claimant nevertheless addressed as length on this.

Adjustments Made for the Hearing

11 On 11 June 2018, Employment Judge Findlay conducted a CPH specifically to consider what adjustments to normal tribunal procedure may be

required to accommodate the claimant's disability. Applying the guidance set out by Judge Findlay, we have applied the following adjustments: -

(a) We did not sit for more than two consecutive days - ensuring that the claimant had the opportunity for rest away from the Hearing.
(b) We had regular breaks as and when requested.
(c) With Mr Beever's cooperation (for which we are grateful), we ensured that the claimant always had an up-to-date running order - knowing exactly which witnesses he could expect to hear from and when.
(d) If moving between witnesses during the course of the hearing day, the claimant was given time to review the next witnesses' evidence and make final preparations for cross-examination.
(f) Compliant with the claimant's request, the parties will receive five days advance notice of the issue of this Reserved Judgement.

The Claimant's Witness Statement

12 At a CPH conducted by Employment Judge Harding on 26 & 27 September 2018, the parties were ordered to exchange witness statements by no later than 20 May 2019. For various reasons there was slippage in the timetable set by Judge Harding. There was a final CPH conducted by Employment Judge Wynn-Evans on 2 September 2019, the claimant failed to attend. Judge Wynn-Evans directed that the parties should exchange witness statements by no later than 13 September 2019. The respondent complied with this direction; the claimant did not. As at the first day of this Hearing the claimant had not produced a witness statement; the tribunal was to spend three days reading-in and so we granted an indulgence to the claimant - extending time for the service of his witness statement until 4pm on Wednesday 25 September 2019. The claimant did comply with this final deadline.

Facts & Issues

13 The particulars of the claim included with the claim form run to 111 pages. It is a very difficult document to read and the precise details of the claim are not easily accessible. Many of the 111 pages included detailed legal argument refer to UK, EU, and International Law. The claimant was then ordered to provide a document setting out the factual basis of his complaints: the document he then produced runs to over 400 pages. At the CPH on 23 & 24 September 2018, Judge Harding painstakingly extracted the precise factual events leading to the claims and then, with the claimant, she categorised them under the various provisions of EqA. The claimant relies on 33 specific allegations as follows: -

1 On 10 June 2013 the claimant was told that on his return from a secondment he would have to return to a role in either North or South Birmingham.

2 The respondent failed to transfer the claimant into a city centre role and failed in particular to allow the claimant to transfer between Directorates so that he could be transferred into a city centre role. This failure took place between June and September 2013.

3 The respondent failed to provide the claimant with counselling and/or a psychological assessment from 13 August 2013 onwards. This is described as an ongoing failure which continued until the claimant was dismissed.

4 On 9 September 2013 the claimant started work as a children's social worker. He was required to start at 8:45 AM.

5 The claimant submitted a grievance in September 2013. The respondent did not investigate this promptly and in fact it took the respondent just over 2 years to complete the grievance process.

6 From January 2014 onwards the claimant was forced to work part-time, 18.5 hours a week over 4 days.

7 A grievance submitted by the claimant in September 2014 was ignored by the respondent.

8 At the beginning of December 2014 the claimant appealed against the grievance decision in relation to his grievance submitted September 2013. The respondent delayed in arranging and holding the grievance appeal meeting which did not take place until 9 February 2015.

9 In 2014 - 2015 the respondent failed to keep the claimant on full pay whilst he was working part-time.

10 In 2014 – 2015, during periods of sickness absence, the claimant's pay was allowed to drop from full pay to half pay and then to statutory sick pay. It is the claimant's case that he should have been maintained at full pay.

11 In February 2015 the respondent agreed to transfer the claimant back to a role working as a children's social worker. The respondent then delayed in implementing this transfer until July 2015.

12 On 5/6 May 2015 the claimant raised a grievance. The respondent failed to investigate this grievance.

13 On 20 July 2015 the claimant returned to work following a period of sickness absence. He was working as a social worker in the fostering and adoption service. He was required straightaway to work part-time 4 days a week, 12.30 to 5.00PM each day, equivalent to 18.5 hours a week.

14 The respondent refused to allow the claimant to return to full-time work whilst he was working as a social worker in the fostering and adoption service.

15 July 2015; the respondent failed to take steps to manage and/or resolve conflict at work between the claimant and his colleagues.

16 From February 2015 onwards the respondent failed to provide the claimant with training.

17 From July 2015 onwards the claimant was left off general circulation emails (BCC emails) and team circulation emails.

18 From late 2015 onwards there was a failure to provide the claimant with a wellness recovery action plan.

19 On 12 December 2015 the claimant raised a grievance against his Team Manager and the HR manager, amongst others. The respondent refused to transfer the claimant whilst the grievance was investigated.

20 The respondent delayed any investigation of this grievance until well after Christmas.

21 The respondent failed to deal with the claimant's grievance of 12 December 2015 under the Dignity at Work policy.

22 On 2 September 2016 the claimant raised a grievance. The respondent failed to follow the Dignity at Work process, in particular the respondent failed to investigate this grievance.

23 From February 2016 onwards the respondent failed to transfer the claimant into a permanent post.

24 On 25 September 2016 the claimant raised a grievance. This was ignored by the respondent.

25 On 24 October 2016 the claimant raised a grievance. This was ignored by the respondent for many months.

26 The claimant emailed Ms P Holland on 22 December 2016. The respondent failed to respond to this email.

27 From September 2016 onwards the respondent started looking for alternative roles for the claimant outside of social work. This was against the claimant's wishes.

28 In September 2016 the claimant was put onto the Priority Movers program.

29 Despite being a Priority Mover the respondent failed to terminate agency worker assignments in order to accommodate the claimant in a role. On 12 January 2017, Angela O'Neill emailed the claimant to inform him that he was being denied access to Social Worker jobs because of OH advice.

30 On 6 February 2017 the claimant raised a grievance. This was ignored by the respondent.

31 On 9 August 2016 the respondent started disciplinary action against the claimant which continued until the claimant was dismissed. For the avoidance of doubt this disciplinary action, it was accepted, was unrelated to the claimant's dismissal.

32 There is also a complaint of a failure to make reasonable adjustments in relation to the disciplinary process. It is the claimant's case that a PCP was applied that letters would be written to the claimant.

33 The claimant was dismissed.

The Evidence

14 The claimant gave evidence on his own account: he did not call any additional witnesses. The claimant gave evidence first. The respondent called eleven witnesses as follows: -

Mrs Fiona Mould - Principal Social Worker
Mr Christopher Philip Bush - Head of Service: Disabled Children's Social Care
Ms Sally Jellis - now retired: formerly Group Manager (Workforce)
Miss Lisa Cockburn - HR Business Manager
Ms Bernadette Young - now retired: formerly Team Manager (Fostering)
Mrs Sonia Williams - Senior HR Practitioner
Mrs Marie Gavin - Assistant Director
Mrs Gian Saini - Group Manager
Ms Angela O'Neill - HR Support Advisor
Ms Alison Talheth - Locum Manager
Ms Pauline Holland - HR Officer

15 In addition, we were provided with an agreed trial bundle comprising in excess of 2500 pages. We have considered those documents from within the bundle to which we were referred by the parties during the hearing.

16 During the course of the hearing we considered a number of OH Reports which had been obtained by the respondent. There were two additional medical reports to which we were not referred during evidence, but we were referred to them by the claimant during his closing submissions. These were a letter addressed to the claimant dated 30 January 2017 from Dr Ingamells and a further letter dated 22 February 2018 addressed to whom it may concern from Dr Iqbal. The letter from Dr Ingamells was heavily redacted and contains nothing which has been of any relevance to our determination of the issues in this case. The letter from Dr Iqbal is primarily in support of the proposition that the claimant should be recognised as a disabled person under EqA, this is not in dispute.

17 Fundamentally, the claimant was an honest witness. But we found that his perceptions of reality were heavily distorted by his belief that he has suffered significant injustice. The claimant has invested a large amount of time and energy in his determination that the respondent's conduct towards him was in breach of international treaties and of his human rights, but he failed to focus on the issues to be determined by the tribunal under the provisions of EqA.

18 By contrast, and without exception, we found the respondent's witnesses to be credible and compelling. Their evidence was consistent throughout; consistent with each other; and consistent with contemporaneous documents.

19 Where there is a discrepancy of fact between the evidence given by the claimant and that given by the respondent's witnesses, we accept the evidence of the respondent's witnesses. We have made our findings of fact accordingly.

The Facts

20 In December 2008, the claimant commenced employment with the respondent as a Grade 4 Social Worker based in a central Birmingham location in the Adult Assessment and Support Planning Team.

21 In December 2011, the claimant was seconded to a Social Enterprise Project known as *Activ8*. The secondment was for an initial period of two years; the claimant was based in a central Birmingham location.

22 In May 2013, the respondent decided to terminate the *Activ8* project: seconded staff including the claimant were to be transferred back to the direct employment of the respondent. The work was to be split between two teams: one based in North Birmingham; and the other in the south. It was agreed that there would be a series of one-to-one meetings: staff who had come from the originating North and South Physical Disability Teams would be transferred to their originating localities; staff, such as the claimant, who had volunteered for the secondment from other social work teams would have a choice of relocation to the North or South Teams. At the meetings, staff would have the opportunity to discuss any issues they had regarding the process.

23 The claimant lives in Birmingham City Centre; and, because of his disability, he was quite anxious at the prospect of having to relocate either to locations in the North or the South of the City. To avoid such a prospect, upon being notified of the proposed re-deployment locations, the claimant set about securing an alternative role within the respondent's organisation but located in the City Centre. The claimant applied for a role in the Disabled Children's Service based in Central Birmingham. This was quite independent of the re-deployment process described above. On 18 June 2013, the claimant was interviewed for the role; his application was successful; and he agreed a start date of Monday 9 September 2013.

24 On 10 June 2013, the claimant had his one-to-one meeting with Mrs Mould. At this time, he was awaiting interview for the post with the Disabled Children's Service and he informed Mrs Mould of the position. It was at this meeting that the claimant first informed the respondent of his need of a City Centre location because of his disability. The claimant indicated that, if he had to move to a location in the North or the South of the City, then his choice would be the South.

25 The claimant did not keep Mrs Mould informed of progress regarding his application to Children's Services. And so, she had to proceed on the basis that he needed to be re-deployed following the closure of the *Activ8* Project. After the meeting on 10 June 2013, the respondents commissioned an Occupational Health (OH) report.

26 The OH report was received on 13 August 2013: and made a number of recommendations. Principal amongst these, were that the claimant should, if possible work from a City Centre location; and that she should be given a flexible start time possibly allowing him to start work as late as 10am - this was because his medication cause drowsiness in the mornings.

27 Mrs Mould became aware of the claimant's success in his application to children's services and of his agreed start date of 9 September 2013. But the claimant did not formally resign his position with Adult Services; and so, as a matter of formality, Mrs Mould wrote to the claimant on 29 August 2013 formally confirming his re-deployment to the Adults & Communities Directorate based in South Birmingham. This letter did not constitute a direction to the claimant to work from the South Birmingham location, because on the day following that letter, Mrs Mould also emailed the claimant confirming that she had facilitated his transfer to Children's Services to take effect immediately at the conclusion of his *Activ8* posting - and so, it would be unnecessary for him ever to re-deploy to the South. (Mrs Mould effectively waived any notice period which the claimant may have been required to give to Adults Services.)

28 Mrs Mould provided a reference in support of the claimant in his application to Children's Services. But she did not pass on the OH report or provide details of adjustments which Adults Services were proposing to make. Mrs Mould explained her view that these were confidential matters which should not be disclosed without the claimant's express consent. She expected the claimant would notify Children's Services of the adjustments required and that he would provide them with a copy of the OH report.

29 On Friday 6 September 2013, the claimant had a meeting with Mrs Sylvia Gordon of Children's Services in readiness for the start of his employment there on Monday 9 September 2013. The claimant did not inform Mrs Gordon of his disability; of any adjustments which he required and/or which had been agreed with Adult Services. He did not inform Mrs Gordon of the need for a later starting time; and he did not provide her with a copy of the OH report. When the meeting ended the claimant was well aware of the clear expectation that he would attend work in readiness for an 8:45am start on Monday. In evidence, the claimant provided no coherent explanation for his failure to provide this important information to Mrs Gordon. He pointed out that he had completed a medical questionnaire at the time of his application; and, arguably, some of the answers given might have prompted further enquiries from Children's Services. In

response, Mrs Gordon explained that the medical questionnaire is not provided to the Directorate at the time of recruitment. (As a protection against disability discrimination.)

30 In the event, the claimant did not attend work at all on Monday 9 September 2013. And, despite well knowing that his attendance was expected by no later than 8:45am, the claimant did not contact the office until 12:20pm; explaining that he had taken some sleeping tablets the night before and had overslept. It was arranged that he would meet Mr Bush when he attended work the following morning.

31 At the claimant's meeting with Mr Bush, Mr Bush pointed out that he and the claimant's line manager at Children's Services were wholly unaware of any disability or of the need for the claimant to be given a flexible starting time. In Children's Services the default starting time was 8:45am and the claimant was expected to attend by that time unless there was an agreement otherwise. Mr Bush made it clear that he would consider any necessary reasonable adjustments once he was appraised of the full facts of the claimant's disability. The claimant signed an authority for the release to Children's Services of the existing OH report; and it was agreed that Children's Services would commission their own OH report as soon as possible. The following day the claimant commenced a period of sick leave and he never returned to work in Children's Services.

32 On 2 September 2013, the claimant had raised a grievance to the effect that he had been denied a transfer back to Adults' Services in a central location following the termination of the *Activ8* Project; he had been required to transfer to a North or South location. This grievance was under investigation by Mr Lloyd Wedgbury - Group Manager, Workforce. On 5 September 2013, Mr Wedgbury wrote to the claimant inviting him to an investigatory meeting on 11 September 2013, the claimant did not attend. The meeting was rearranged and eventually took place on 2 October 2013.

33 In the meantime, it is the claimant's case that he raised a further grievance relating to his treatment at the commencement of his employment with Children's Services on 9/10 September 2013. There does not appear to be any written record of this grievance although the respondent appears to concede that a grievance was raised in some form because it was later investigated by Mrs Saini.

34 After the investigatory meeting on 2 October 2013, Mr Wedgbury devised a solution which dealt with the immediate problem and which he hoped would provide a permanent resolution to the claimant's grievance. He had established that there was a current vacancy working in a central location in the Adults and Communities Directorate within the Younger Adults Review Team. The claimant

was formally offered that role; he accepted it; and his formal commencement date was 10 October 2013; although at that time the claimant was still off sick. The claimant's lime manager was Ms Jellis. Although Mr Wedgbury's solution provided a way forward for the claimant, he did not accept it as a resolution to his grievance. The claimant was seeking an unspecified remedy for the discrimination which he claimed had taken place in connection with the proposed transfer to the North or South locations. Because the claimant did not accept the proposal as a full resolution to his grievance, Mr Wedgbury's investigation continued. When giving evidence, the claimant confirmed that the move to the Young Adults Review Team essentially resolved his grievance save that he was seeking financial compensation for the distress caused to him at the time of the proposed transfer to North or South.

35 Between October 2013 and February 2014, Mr Wedgbury conducted extensive investigations into the claimant's grievance: this involved lengthy interviews with a minimum of six witnesses. On 6 February 2014, Mr Wedgbury wrote to the claimant providing a brief interim report and inviting the claimant to contact him if he had any concerns regarding the progress of the investigation. It was shortly after this that Mr Wedgbury commenced a period of sick leave. Initially it was hoped that he would return to work speedily and complete his investigation.

36 In the meantime, it was Ms Jellis who managed the claimant's return to work. She and the claimant met on 30 October 2013: and a return to work plan was formulated. The official return to work date was 4 November 2013: but, as the claimant had some outstanding annual leave, his actual return date was agreed as 26 November 2013; and a phased return was set out over a period of four weeks from 26 November 2013 to 23 December 2013. Adjustments were also agreed to the claimant's duties and his equipment; training; and supervision needs. On 13 January 2014, after the completion of his phased return period, it was agreed that the claimant would continue working flexible hours at 50% of full-time equivalent working hours the position to be further reviewed after three months. On 14 April 2014 a stress risk assessment was carried out by Ms Jellis and further adjustments were agreed.

37 By April 2014, Mr Wedgbury had not returned to work; and, it was clear that his absence would be prolonged. Accordingly, the continuation of the investigation of the claimant's grievance was passed to Mrs Saini. In July 2014, Mrs Saini contacted the claimant to inform him that she had completed the grievance investigation and she was seeking to arrange a meeting with him to deliver the outcome. At this point, the claimant insisted that Mr Wedgbury had undertaken to incorporate his grievance against Children's Services into the investigation and report. Mrs Saini was unaware of this and could find no record of any such undertaking. However, she agreed to widen the investigation: this

inevitably delayed the outcome; but the claimant was fully aware of the position and in agreement.

38 In October 2014, Mrs Saini completed the investigation report: it contained a number of recommendations as follows: -

(a) The implementation of the system to cover a situation where an employee facing redeployment needs to work in a particular area or locality.
(b) When staff with disabilities move within Directorates, written permission is sought at an early stage for the sharing of information.
(c) Any future change to the claimants work base or role should be discussed in advance of the move and addressed via open and clear communication between all parties (including the claimant) so as to allow due regard to be given for reasonable adjustments in any new role.

39 The grievance meeting was held on 11 November 2014: the claimant attended accompanied by his wife; Ms Jellis chaired the meeting; and Mrs Saini presented the management case. On 25 November 2014, Ms Jellis wrote to the claimant with outcome. His grievances were partially upheld: Ms Jellis found that the claimant also had a responsibility to pass on information regarding adjustments he required and that he had failed in this responsibility when dealing with Ms Gordon on 6 September 2013. Ms Jellis did not uphold the claimant's request for financial compensation.

39 At the conclusion of the grievance process, the claimant advised that he would now find it difficult to work in Adult Services under the managers involved in the grievance; he requested a transfer of position into Children's Services. Ms Jellis could see nothing in the grievance which prevented the claimant from continuing to work within Adult Services. She advised that if he wished to move to Children's Services he would need to apply for advertised posts in the usual way.

40 The claimant appealed against Ms Jellis' decision. The appeal was heard by Mr Charles Ashton-Gray; the claimant attended accompanied by his wife; the appeal meeting commenced on 9 February 2015 and was concluded on 12 February 2015. Mr Ashton-Gray did not uphold the appeal; but he did agree to progress a move to Children's Services as requested by the claimant. No timescale was set for this to be implemented.

41 In the meantime, the claimant raised a grievance on 3 September 2014: his contractual sick pay was being reduced to half pay as the claimant was again on prolonged sickness absence. This grievance was never the subject of a formal investigation; the claimant was simply informed that the reduction in his sick pay was in-line with his contractual entitlement.

42 On 17 February 2015, and again on 6 May 2015, the claimant raised further grievances: the first of these was 22 pages in length and is essentially a generalised complaint that the respondent continued to disregard his health and safety; the second, was a complaint of delay in implementing the claimant's move to Children's Services.

43 In fact, work was going on to facilitate the move. The claimant was still based in Adult Services and was continuing to take regular and prolonged absences from work due to ill-health.

44 A role was found for the claimant in Children's Services. There was no actual vacancy; he was to be a supernumerary; but it was hoped that he would find a permanent role. The claimant commenced work in Children's Services on 20 July 2015 in the Fostering and Adoption Service; his team manager was Ms Young. It was agreed, as an adjustment, that the claimant would work reduced hours: initially from 12 noon until 4pm (as the claimant had previously indicated that he found working in the morning difficult due to his medication); later his start time would be brought forward to 10am; but still working a reduced working day and only four days per week.

45 It appeared that the claimant settled in well with his new team. At a meeting on 22 October 2015, the claimant requested full-time working: Ms Young and Mrs Saini (who for the sake of continuity had continued to manage the claimant alongside Ms Young) responded that the claimant should trial out part-time working during morning hours before progressing to full-time hours.

46 On 7 December 2015, there was an incident in the workplace involving the claimant and a social work colleague SP. It is alleged that the claimant behaved aggressively towards SP; this led to a disciplinary investigation.

47 On 11 December 2015; 20 January 2016; and 4 February 2016, the respondent received complaints and/or concerns were raised about the claimant's conduct by foster carers. These concerns were later incorporated into the disciplinary investigation.

48 On 9 December 2015, the claimant commenced a period of sickness absence. In the event he did not return to work before his dismissal 17 months later in May 2017.

49 On 12 December 2015, the claimant raised a further grievance to the effect that the respondent had failed to provide a risk assessment or reasonable adjustments. One of his complaints here was that, since his move to the Fostering and Adoption Service, the appellant had not been included in team emails. When giving evidence however, Mrs Young explained that the claimant had not been included the team list for emails because he was not a substantive

member of the team; however, she had ensured personally that he did in fact receive every email which was relevant to him. She demonstrated by reference to the bundle in front of us, occasions upon which she had specifically forwarded the team emails to the claimant. On other occasions, other members of staff had done so. We accept Ms Young's evidence on this.

50 On 21 February 2016, the claimant raised a further grievance which was dealt with along with his grievance of 12 December 2015. These grievances were investigated by Mr Charles Greer – Head of Service, who conducted a number of investigatory meetings and ultimately produced a report recommending that some of the complaints should proceed to a grievance hearing.

51 The claimant remained off work. There were a number of contact meetings: some the claimant attended with his trade union representative; but there were others including meetings scheduled for the 6 and 12 May 2016, and 14 June 2016, which the claimant simply did not attend. During the claimant's absence, the respondent continued to obtain advice from OH. On 22 July 2016, Mrs Saini and Mrs Williams attended a case management discussion with the OH Physician Dr Southam. On 28 July 2016, Dr Southam issued a report expressing the opinion that medical redeployment was appropriate in the appellant's case as his mental health was such that he was unsuited to the stresses of front-line social work practice.

52 In the light of Dr Southam's report, in an attempt to find suitable employment for him, the claimant was placed on the Priority Mover Programme with effect from 1 September 2016. The Priority Mover Program is operated by the respondent to assist employees to find suitable alternative vacancies within its organisation. It is only open to those who have been given notice of redundancy or where there is an OH recommendation for medical redeployment. The claimant's Support Advisor on the Programme was Mrs O'Neill. The claimant attended an induction meeting with Mrs O'Neill and Mrs Saini in early September 2016.

53 On 2 September 2016, the claimant raised a further grievance. Upon perusal, this was found to be a repetition of grievances previously dealt with. The claimant was promptly issued with a grievance outcome letter on 22 September 2016: essentially declining to deal with the grievance as the substantive issues had already been dealt with.

54 On 25 September 2016, the claimant raised a further complaint that vacant social work positions were not being offered to him in preference to others including agency workers. He received a prompt response to the effect that the professional medical opinion from OH is that he is not suited to the role of Social Worker and that he should be redeployed into some other suitable role - hence he was not being considered for social work positions.

55 Contact absence meetings continued: at one stage it was agreed that the claimant would return to work on 11 December 2016; but this did not materialise and a further sickness absence note was received.

56 In December 2016, the claimant expressed interest in the role of Senior Family Support Worker: his application did not proceed as it was found that this was not a “skills match”. On 12 January 2017, Mrs Saini identified a role of Enablement Community Support – however, the claimant refused to engage on this; demanding an immediate return to a social work job in the Children’s Directorate. On the 6 February 2017, Mrs O’Neill provided details of four further opportunities which she considered to be suitable - but again, the claimant failed to engage.

57 During his period on the Priority Mover’s Programme, the claimant put forward a number of available roles for which he considered himself suitable: most of these involved promotion - and he was advised that he would have to apply in the usual way. One was specifically for a newly qualified Social Worker and funding for the post depended upon the candidate being newly qualified.

58 Once registered on the Priority Mover’s Programme, the claimant had full access to the respondent’s Learning Zone (a website where vacancies are advertised), and the claimant was aware that he shared the responsibility of finding suitable vacancies.

59 When the claimant had been on the Priority Mover Programme for six months without success, in accordance with the respondent’s policy, there was a hearing to determine whether his employment with the respondent could continue. The hearing was on 9 February 2017, conducted by Mr Devinder Kalhan; the meeting was adjourned part-heard because of the claimant’s ill-health; and resumed on 20 February 2017. The outcome of the process which was communicated to the claimant by letter dated 1 March 2017 was that his contract of employment was determined on 12 weeks’ notice unless he secured an alternative post in the meantime. During the period of the claimant’s notice, he continue to receive support from Mrs O’Neill to try and secure an alternative vacancy. No role was identified, and the claimant’s Effective Date of Termination was 15 May 2017.

60 On 22 May 2017, the disciplinary investigation concluded. A report was issued. There had been several attempts to engage the claimant in the disciplinary process, but he had failed to respond. On 10 July 2017, the claimant was informed that there was a disciplinary case to answer and that the matter would have proceeded to a disciplinary hearing but for the fact that his employment had been terminated in the meantime.

61 Throughout his period on the Priority Mover's Programme, the claimant had lodged further grievances: 23 October 2016; 16 December 2016; 5 February 2017; and 7 April 2017 (57 pages in length). On 9 February 2018, the claimant received a final outcome letter dealing with each of these grievances - none of which were upheld.

The Law

62 **The Equality Act 2010 (EqA)**

Section 4: The protected characteristics

The following characteristics are protected characteristics
age;
disability;
gender reassignment;
marriage and civil partnership;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

Section 13: Direct discrimination

(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.

Section 15: Discrimination arising from disability

(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.

Section 19: Indirect discrimination

(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.

(3) The relevant protected characteristics are

Age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation.

Section 20: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Section 21: Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 27: Victimisation

(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.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) as to B's terms of employment;
(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(*c*) by dismissing B;
(*d*) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123: Time limits

(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.

(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.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

Schedule 8 – Part 3: Limitations of the Duty to make adjustments
Paragraph 20: Lack of knowledge of disability etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(*a*) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
(*b*) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

63 **The Employment Rights Act 1996 (ERA)**

Section 94: The Right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) ……where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

64 **Decided Cases**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**
A -v- Chief Constable of West Midlands Police **UKEAT/0313/14 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.
In a victimisation claim there must be a causal link between the detriment and the making of the complaint in the first place.

High Quality Lifestyles Limited –v- Watts **[2006] IRLR 850 (EAT)**
Aylott –v- Stockton on Tees Borough Council **[2010] IRLR 994 (EAT)**

In order to establish direct discrimination, it is not sufficient for the claimant to show that his treatment was on the grounds of his disability. It has to be established that the treatment was less favourable than the treatment which would have been afforded to a comparator in circumstances that are "not materially different" There are dangers in attaching too much importance to constructing a hypothetical comparator and to less favourable treatment as a separate issue. If a claimant is dismissed on the ground of disability then it is likely that he will be treated less favourably than a hypothetical comparator, not having the particular disability, would have been treated in the same relevant circumstances.

Owen v Amec Foster Wheeler Energy Ltd and another **[2019] ICR 1593 (CA)**

Sections 13(1) and 23 of the Equality Act 2010 require a comparison to be made between the claimant and a person whose circumstances, while materially the same in all other respects, did not include the particular disability the claimant had. In constructing a hypothetical comparator, the employment tribunal should attribute to that comparator the characteristic of [a high medical risk on assignment] while not having the claimant's particular disabilities.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**
JP Morgan Europe Limited –v- Chweidan **[2011] IRLR 673 (CA)**

There can be no question of direct discrimination or discrimination arising from disability where everyone is treated the same.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**

In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in

isolation on the hypothetical comparator but to ask the crucial question “why did the treatment occur?” In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Morse –v- Wiltshire County Council **[1999] IRLR 352 (EAT)**

A tribunal hearing an allegation failure to make reasonable adjustments must go through a number of sequential steps: It must decide whether the provisions of [EqA] impose a duty on the employer in the circumstances of the particular case. If such a duty is imposed it must next decide whether the employer has taken such steps as it is reasonable all the circumstances of the case for him to have to take.

Smith –v- Churchills Stairlifts plc **[2006] IRLR 41 (CA)**

The test is an objective test; the employer must take "such steps as it is reasonable to take in all the circumstances of the case”. What matters is the employment tribunal's view of what is reasonable.

Tarbuck –v- Sainsbury’s Supermarkets Limited **[2006] IRLR 664 (EAT)**

There is no separate and distinct duty of reasonable adjustment on an employer to consult the disabled employee about what adjustments might be made. The only question is objectively whether the employer has complied with his obligations or not. If the employer does what is required of him than the fact that he failed to consult about it, or did not appreciate that the obligation even existed, is irrelevant. It may be entirely fortuitous and unconsidered compliance but that is enough. Conversely if he fails to do what is reasonably required it avails him nothing that he has consulted the employee.

Project Management Institute –v- Latif **[2007] IRLR 579 (EAT)**

In order for the burden of proof to shift to the respondent, the claimant must not only establish that the duty to make reasonable adjustments has arisen but also that there are facts from which it can reasonably be inferred that it has been breached.

Environment Agency –v- Rowan **[2008] IRLR 20 (EAT)**

An employment tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

(a) the provision criterion or practice apply by or on behalf of the employer,
(b) the identity of non-disabled comparators, and
(c) the nature and extent of a substantial disadvantage suffered by the claimant.

Unless the tribunal has gone through that process it cannot go on to judge if any proposed adjustment is reasonable.

Nottingham City Council -v- Harvey **UKEAT/0032/12 (EAT)**

The flawed application of a discipline or grievance procedure is not a "*practice*". Practice has the element of repetition about it. It is not sufficient merely to identify that an employee has been badly treated by the flawed application of such a procedure; or that are non-disabled individual may not have suffered to the same extent. There needs to be a causative link between the PCP (rather than its flawed application) and the substantial disadvantage.

DWP –v- Alam **[2010] ICR 665 (EAT)**
Wilcox –v- Birmingham CAB Services Limited **[2011] EqLR 810 (EAT)**

The duty to make adjustments is not engaged unless the employer knows (or ought to know) of both the disability and the substantial disadvantage.

Royal Bank of Scotland –v- Ashton **[2011] ICR 632 (EAT)**

Before there can be a finding that there has been a breach of the duty to make reasonable adjustments an Employment Tribunal must be satisfied that there was a provision criterion or practice that placed the disabled person, not merely at some disadvantage viewed generally but, at a disadvantage that was substantial viewed in comparison with persons who are not disabled. When addressing the issue of reasonableness of any proposed adjustment, the focus has to be on the practical results of such measures that might be

taken. It is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make an adjustment. It is practical outcomes rather than procedures which must be the focus of consideration. A proposed adjustment from which the claimant could in reality derive no benefit is unlikely to be "reasonable".

RLCH –v- Dunsby **[2006] IRLR 351 (EAT)**

There is no absolute rule that an employer must ignore "disability related" absence.

O'Hanlon -v- Revenue & Customs Commissioners
[2007] EWCA Civ 283 (CA)
Meikle -v- Nottinghanshire County Council **[2004] EWCA Civ 859 (CA)**

The payment of wages and sick pay beyond that provided for in an employer's policy was not a "*reasonable adjustment*". Save in exceptional circumstances, payment of wages or sick pay to disabled person absent from work could not constitute on its own reasonable adjustment because it could not be said to facilitate a return to work.

Orr –v- Milton Keynes Council **[2011] ICR 705 (CA)**

The tribunal is concerned with what is in the mind of the manager who actually makes the decision complained of.

Burrett –v- West Birmingham Health Authority **[1994] IRLR & (EAT)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
St. Helens MBC –v- Derbyshire **[2007] IRLR 540 (HL)**

The fact that a claimant honestly considers that he has been less favourably treated or subject to detriment does not, of itself, established that there has been less favourable treatment or detriment. Whether there is detriment is for the Employment Tribunal to decide.

Detriment exists if a reasonable worker would or might take the view that treatment was in all the circumstances to his or her disadvantage. An unjustified sense of grievance cannot amount to a detriment.

Wilson –v- Post Office **[2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis the and a matter for the tribunal to determine.

Taylor –v- Alidair Limited **[1978] IRLR 82 (CA)**

In a capability dismissal the correct test of fairness is whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.

Lynock –v- Cereal Packaging Limited **[1988] IRLR 510 (EAT)**

In determining whether to dismiss an employee with a poor record of sickness absence and employers approach should be based on sympathy understanding and compassion. Factors which may prove important include: the nature of the illness; the likelihood of the illness recurring; or of some other illness arising; the length of the various absences and the periods of good health between them; the need of the employer to have its work done; the impact of the absences on those who work with the employee; the adoption and exercise of a policy in connection with absence due to sickness; the importance of a personal assessment in the ultimate decision; and the extent to which the difficulty of the situation and the position of the employer have been explained to the employee. A disciplinary approach, involving warnings, is not appropriate in a case of intermittent sickness absence - but the employee should be cautioned that the stage has been reached when it has become impossible to continue with the employment.

Polkey –v- AE Dayton Services Ltd. **[1987] IRLR 503 (HL)**

In a case of incapacity, an employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to improve and show that she can do the job.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

65 **The ACAS Code**

We have considered Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, the ACAS Code of Practice 1 on Disciplinary and

Grievance Procedures 2015 ("the ACAS Code") and the ACAS Guide: Discipline and Grievances at Work (2011).

The Claimant's Case

66 By reference to the details recorded by employment Judge Harding on 23/24 September 2018, the claimant puts his case as follows in respect of each of the factual matters identified and set out at paragraph 13 above: -

(a) **Complaints 1 – 3**: *Failure to make reasonable adjustments*

A PCP was applied to the claimant that he had to return to a substantive Social Worker post in either North or South Birmingham (rather than the City Centre). The substantial disadvantage said to have been caused is that; firstly, the claimant was on medication for his sleep apnoea which made him drowsy in the mornings, roles in North and South Birmingham entailed additional travelling time and it was therefore harder for the claimant to arrive at work on time; and secondly, the claimant's sleep apnoea made him more susceptible to reactive depression and stress and anxiety and the failure to accommodate him in the City Centre exacerbated this. The reasonable adjustments contended for are; the claimant could have been allocated a substantive position in his old team (the Complex Review Team); the respondent could have allowed the claimant to transfer between Directorates into another role in the City Centre; he could have been allowed to work from home in the mornings if he was working in either North or South Birmingham; and, so far as the second asserted substantial disadvantage is concerned, the respondent should have provided the claimant with counselling/psychological assessment; it should have carried out a Human Rights Assessment; and should have done a Health Impact Report.

(b) **Complaint 4**: *Failure to make reasonable adjustments*

A PCP was applied that from 9 September 2013 the claimant was required to start work at 8:45am. The substantial disadvantage it is asserted this caused was that it was hard for the claimant to start work at this time in the morning because the medication that he was taking for depression made him drowsy in the mornings. The adjustment contended for is that the claimant should have been allowed to start work later between 9.45 and 10am.

(c) **Complaints 5, 7, 8 & 12**:

Failure to make reasonable adjustments

(i) The asserted PCP is that the respondent had a practice of not dealing with grievances promptly and/or not investigating them properly and/or not providing updates on progress. The substantial disadvantage that this is asserted to have

caused is that these failures or exacerbated the claimant's work-related stress which he is particularly susceptible to as a result of his sleep apnoea. The reasonable adjustments contended for are that; the grievances should have been dealt with more quickly and in accordance with the timescales set out in the respondent's policies, external people should have been bought in to investigate the grievances and deliver an outcome quickly and the claimant should have been provided with updates.

Victimisation

(ii) The delay and failure to investigate his grievances was a detriment under Section 27 EqA (victimisation). The asserted protected acts are the grievances raised in September 2013, September 2014 and May 2015.

(d) **Complaint 6**: *Failure to make reasonable adjustments*

The asserted PCP is the requirement to carry out the full duties of the Social Worker role full-time. The substantial disadvantage this is said to have caused is that the claimant was unable to work full-time because of stress and anxiety and he was therefore at risk of having to work part-time at a lower rate of pay. The adjustment contended for is that the respondent should have maintained the claimant on a full rate of pay when working part-time.

(e) **Complaints 9 & 10**

It is the claimant's case that these matters were a consequence of a failure by the respondent to make reasonable adjustments. Accordingly, these were matters that may be relevant to remedy. They are not stand-alone complaints themselves.

(f) **Complaint 11**: *Failure to make reasonable adjustments*

The asserted PCP is that the respondent had a practice of failing to implement adjustments in a timely fashion (in this case a transfer to another role). The substantial disadvantage that this is said to have caused is that this increased the claimant's anxiety and stress, to which he is susceptible, and caused him to go off sick resulting in a reduction in pay. The reasonable adjustments contended for are that the respondent should have transferred the claimant to another role in February 2015 and/or retained him on full pay and/or allowed him to take holiday rather than sick leave.

(g) **Complaint 13**: *Failure to make reasonable adjustments*

The asserted PCP is that, when the claimant returned to work in July 2015, he was required straightaway to work part-time 4 days a week, 12.30pm - 5.00pm

each day; equivalent to 18.5 hours a week. The substantial disadvantage that this arrangement is said to have caused is that the claimant's anxiety and depression made him susceptible to stress and it was hard for the claimant to work 18.5 hours a week without it exacerbating his stress levels as he had by this time been off work for a considerable period of time. The reasonable adjustment contended for is that the claimant should have been allowed a phased return to work under which he gradually built up his hours. The claimant also asserts that it would have been a reasonable adjustment to carry out a stress risk assessment and to arrange mediation between the claimant and SP.

(h) **Complaint 14**: *Failure to make reasonable adjustments*

The asserted PCP is that he was required to continue working part-time. The substantial disadvantage is that this meant the claimant was kept on half pay. The asserted reasonable adjustment is that the claimant should have been allowed to return to work full-time on a phased return to full-time work.

(i) **Complaint 15**: *Failure to make reasonable adjustments*

The asserted PCP is that the claimant was required to work in a workplace where he was in conflict with colleagues. The substantial disadvantage contended for is that because of the claimant's depression, anxiety and susceptibility to stress it is more difficult for him to cope with conflict. The reasonable adjustment contended for is that the respondent should have taken steps to manage the conflicts between the claimant and SP – i.e. the respondent should have arranged for mediation.

(j) **Complaint 16**: *Failure to make reasonable adjustments*

The asserted PCP is that the claimant was required to carry out the children's social worker role to a certain standard without a proper induction or training. The substantial disadvantage that this is asserted to have caused is that this exacerbated the claimant's stress, anxiety and depression. The reasonable adjustments contended for are that the claimant should have been trained on the respondent's computer system; he should have been given *Right Time Right Place* training; and should have been trained on how to support foster carers with children in therapy.

(k) **Complaint 17**: *Failure to make reasonable adjustments*

The asserted PCP is that from July 2015 onwards the claimant was required to work without access to the respondent's email system. The substantial disadvantage this is said to have caused is that this exacerbated the claimant's stress, anxiety and depression. The reasonable adjustments contended for are that the respondent should have put the claimant on the email system. The

claimant additionally asserts the respondent should have carried out an assessment of the claimant's Human Rights and a Health Impact Assessment.

(l) **Complaint 18**: *Failure to make reasonable adjustments*

The asserted PCP is that the claimant was required to go to work with emotional distress and discomfort. The substantial disadvantage it is said this PCP caused was that the claimant's anxiety, stress and depression was exacerbated. The reasonable adjustments contended for are that the respondent should have put in place a Wellness Recovery Plan; it should have carried out a Human Rights Assessment; and should have done a Health Impact Report.

(m) **Complaint 19**

This was pursued both as a Section 15 claim and a claimant of a failure to make reasonable adjustments. The unfavourable treatment for the purposes of the Section 15 claim is a refusal to transfer the claimant. The claimant asserts that this happened because he had submitted a grievance and he asserts this grievance arose in consequence of disability because the grievance was about disability discrimination. For the reasonable adjustments claim the asserted PCP is being required to work with people who the claimant felt had discriminated against him. The substantial disadvantage is that the claimant was unable to go to work because of the stress and depression caused by this and the adjustment contended for is that the respondent should have transferred the claimant into a different role.

(n) **Complaints 20, 21, 22, 24, 25 & 30**:

Victimisation

(i) These complaints are all pursued as acts of victimisation. The detriments about which complaint is made are that the grievances were delayed/ignored/or not properly investigated. Each grievance is relied upon by the claimant as a Protected Act.

Failure to make reasonable adjustments

(ii) These complaints are also pursued as a failure to make reasonable adjustments. It is the claimant's case that there was a PCP of delaying/ignoring grievances. The substantial disadvantage contended for is that this exacerbated the claimant's stress, anxiety and depression. The reasonable adjustments contended for are that the respondent should have dealt with the grievances promptly and investigated them properly.

(o) **Complaints 23** & **26**: *Failure to make reasonable adjustments*

This is a complaint of a failure to make a reasonable adjustment. The PCP is that the claimant was not able to go to work on an equal basis with others without emotional distress and discomfort. The substantial disadvantage is that this exacerbated the claimant's anxiety and depression. The reasonable adjustments contended for are that the respondent should have carried out a Psychological Assessment and followed any recommendations. It should also have carried out a Human Rights Assessment and should have obtained a Health Impact Report.

(p) **Complaint 27**: *Section 15 Claim*

The unfavourable treatment is that the respondent started looking for alternative roles for the claimant outside of social work. It is the claimant's case that the respondent did this because of the claimant's illness and sickness absence which arose in consequence of his disability.

(q) **Complaint 28**

Section 15 Claim

(i) The unfavourable treatment is being put onto the Priority Movers Programme. The claimant's case is that this happened because of advice that the respondent had received from OH that he was no longer able to carry out his Social Worker role. This inability to carry out this role arose in consequence of his sleep apnoea; anxiety; and depression.

Failure to make reasonable adjustments

(ii) The asserted PCP is that he was not able to go to work on an equal basis with others without emotional distress. The substantial disadvantage is an exacerbation of the claimant's depression, anxiety and stress. The reasonable adjustments contended for are that the claimant should have been transferred into a Social Worker post; the respondent should have carried out a Human Rights Impact Assessment; and should have carried out a Health Impact Assessment.

(r) **Complaint 29**:

The asserted PCP is that the claimant was required to carry out the full duties of a social worker role in the Fostering Team. The substantial disadvantage is that this caused the claimant emotional distress because of the discrimination and a failure to make reasonable adjustments and carry out a Stress Risk Assessment. The reasonable adjustment contended for is that the claimant should have been transferred into an alternative social worker role.

(s) **Complaint 30**: *Direct Discrimination*

The claimant was denied access to Social Worker jobs: this was less favourable treatment because of disability. Accordingly, it is a direct discrimination claim. In the alternative the claimant seeks to pursue a complaint under Section 60 EqA. The respondent should have identified a job to transfer him to before they took OH advice and should have put him through a selection process before doing so. It is his case that taking OH advice in advance of this being done is a breach of Section 60.

(t) **Complaint 31**: *Direct Discrimination/Victimisation/Section 15*

The detriment for the purposes of the victimisation claim is the disciplinary action against the claimant which he asserts was done because he had raised grievances complaining of disability discrimination. For the Section 15 claim the unfavourable treatment is the disciplinary action. The claimant asserts that the conduct and behaviour for which he was disciplined (sitting at a desk; scaring someone; and upsetting a colleague SP) arose in consequence of his disability - his behaviour was a manifestation of the claimant's anxiety and mania. The less favourable treatment for the purposes of the direct discrimination claim is the disciplinary action.

(u) **Complaint 32**: *Failure to make reasonable adjustments*

The asserted PCP is that the respondent had a practice of contacting people by letter during a disciplinary investigation. The substantial disadvantage this is said to have caused is that the claimant could not open the letters because his mental health meant that he adopted avoidance strategies. The reasonable adjustment contended for is that the respondent could have bought the claimant in to work in order to give him the letters in the office in the presence of a support worker.

(v) **Complaint 33**: *Section 15/Indirect Discrimination/Failure to make reasonable adjustments/Unfair Dismissal*

The unfavourable treatment for the purpose of the Section 15 claim is the dismissal. The claimant asserts his dismissal happened because of his sickness absence which he asserts arose in consequence of his disability. The asserted PCP is a requirement to attend work to a certain level (i.e. to be below a certain level of sickness absence) in order to avoid warnings/a possible dismissal. The substantial disadvantage is that it was harder for the claimant to achieve the required level of attendance because he was more likely to have sickness absence because of his disability. The reasonable adjustments contended for are that the respondent should have carried out a Human Rights Assessment and Health Assessment and actioned any findings. For the indirect discrimination

claim the PCP and group and particular disadvantage are as above. The claimant also pursues a claim of unfair dismissal.

Discussion & Conclusions

The Move to North or South

67 Complaints 1 - 3 all relate to the potential relocation of the claimant either to North Birmingham or South following the termination of the *Activ8* Project. Because of, or for reasons relating to his disability, the claimant wished to relocate to a central location.

68 The duty to make an adjustment only arises when the respondent has sufficient knowledge of both the disability and the potential disadvantage which may be caused if a PCP is applied. In our judgement, the respondent was only possessed of this knowledge upon receipt of the OH report on 13 August 2013.

69 By that date, the appellant was well advanced with his application for a role in Children's Services; and Mrs Mould was well aware of this.

70 The reality is that the PCP complained of was never applied to the claimant at any time either before or after 13 August 2013. Quite properly, there was a consultation process relating to the respondent's proposals; by the time the respondent was possessed of the requisite knowledge it was clear that the PCP would not be applied because the claimant would be moving to a central location within Children's Services.

71 The claimant relies heavily on the letter from Mrs Mould dated 29 August 2013 - but this has to be read in conjunction with her email the following day. In the email, Mrs Mould made it clear that she was aware of the claimant's start date with the Children's Services and that she had facilitated his prompt start there by waving any notice period he might otherwise have been required to work in Adult's – accordingly, despite the formal re-deployment to the Adults & Communities Directorate based in South Birmingham, the claimant would never actually be required to work there. Thus, the PCP of a move to the southern location was never applied to him.

72 Absent the application the PCP, no disadvantage could arise, and there was no obligation to make the adjustment.

73 The suggestions of Counselling/Psychological Assessment and/or a Human Rights Assessment and/or and a Health Impact Report are examples of the processes which a respondent might have adopted in order to establish what, if any, adjustments were required. They are not adjustments in themselves. And, as stated the obligation to make the contended for adjustment did not arise.

74 For these reasons, in our judgement, there was no breach of the duty to make adjustments arising from the claimant's redeployment or relocation following the termination of the *Activ8* Project between June and September 2013. Complaints 1 - 3 are without merit and are dismissed.

9 September 2013: The Requirement to Start Work at 8.45am

75 Again, in our judgement, the question of requisite knowledge arises. The claimant had a meeting with Mrs Gordon on 6 September 2013 and was well aware of the expectation that he would commence work with Children's Services at 8:45am on 9 September 2013. The claimant made no reference to this presenting him with any difficulty or disadvantage. Even if it was the case, which the claimant contends to be the position, that Children's Services must be fixed with any knowledge then held by Adult's Services, there was nothing in place stating that it was *impossible* for the claimant to attend work at 8:45am on any given day. Following the meeting with Mrs Gordon, the respondent was justified in assuming that the claimant was comfortable with that start time at least on his first day.

76 In any event, the PCP complained of was not actually applied. The claimant was not presented with a requirement or directive to attend at 8:45am; and he was not subject to any disciplinary process for his failure to do so.

77 Finally, applying ***Royal Bank of Scotland –v- Ashton***, the contended for adjustment (a flexible start time between 8:45am and 10am) could not have alleviated the disadvantage complained of in this instance. The claimant failed to attend work at all on 9 September 2013; and, did not contact the respondent until 12:20pm to explain his absence.

78 Accordingly Complaint 4 is without merit; and is dismissed.

Failure to deal with Grievances

79 Complaints 5, 7, 8, 12, 20, 21, 22, 24 & 25 all relate to the claimant's allegation that the respondent failed to deal with his grievances promptly and/or that it did not investigate them properly and/or that it did not provide updates on progress. This is said to comprise a failure in the duty to make reasonable adjustment and to amount to acts of victimisation.

80 The PCP complained of simply does not exist; and was not applied. The respondent does not have a *practice* of failing to deal with grievances promptly or properly: there may have been instances where matters were not dealt with as quickly as they might have been; but, at best, this would amount to a flawed application of the procedure and not the procedure itself.

81 In any event, in our judgement, there is no evidence of a failure on the respondent's part to deal properly with any of the claimant's grievances. It was not always possible to deal with them within the timescales provided for in the respondent's procedures: this would be for a variety of reasons including the claimant's health and the availability of this trade union representative. Further, the claimant made repeated grievances often covering the same ground as those previously dealt with. By way of example, in relation to the first grievance, raised on 2 September 2013, this was promptly acknowledged ;and a meeting was offered as early as 11 September 2013. The meeting was rearranged at the claimant's request. By 2 October 2013, Mr Wedgbury had come up with a creative solution to the immediate problem - namely relocating the claimant to a role within Adult's Services in a city centre location. The remainder of the grievance was inevitably "historic" - the claimant confirmed in evidence that all that was outstanding was his request for financial compensation. The conclusion of the grievance was delayed by two matters: firstly, Mr Wedgbury's prolonged illness; and secondly, the claimant's request then to incorporate additional matters when Mrs Saini's report was complete.

82 In terms of the proper investigation of the claimant's grievances, our judgement is that his grievances were investigated exhaustively and thorough. The only possible exception to this is the grievance raised by the claimant on 2 September 2016. The respondent refused to investigate this; but the evidence shows that the grievance was properly considered, and the conclusion was reached that the matters complained about had already been dealt with. The claimant promptly received a letter explaining the respondent's position.

83 So far as victimisation is concerned, the suggestion seems to be that because some of the claimant's grievances were Protected Acts as defined in Section 27(2) EqA, the respondent either delayed in dealing with them or did not deal with them properly. If the grievances had not been Protected Acts (raising issues other than discrimination), they would have been dealt with differently. Our judgement is that there is no basis whatsoever for this assertion.

84 In the circumstances, and for these reasons, we find that Complaints 5, 7, 8, 12, 20, 21, 22, 24 & 25 are without merit and are dismissed.

Part-Time Work – Full-Time Pay

85 Complaint 6 was clarified during the claimant's cross-examination. He agreed that it would have been wrong for the respondent to insist that he should work full-time during the period October 2013 – July 2015 (whilst in Adult's Services under the management of Mrs Jellis), therefore the issue is simply that, whilst he was working part-time hours, he should have been paid on a full-time rate of pay. The claimant's argument is that it was his outstanding grievance

which made him ill; his illness prevented him working full-time hours; this was caused by the respondent's conduct; and the respondent should therefore pay.

86 Applying ***O'Hanlon*** and ***Meikle***, the starting point is that it cannot be a *reasonable* adjustment to increase pay in these circumstances - as the pay increase does not serve to remove the disadvantage under which a disabled person may be suffering.

87 In any event there is no evidence to establish the necessary causation. It has not been established, as a matter of fact, that it was the manner in which the respondent conducted the grievance which caused the claimant's illness and inability to work full-time hours. The claimant had worked reduced hours for many years including before any relevant grievance.

88 The claimant was advised that, if he believed he had suffered personal injury because of the respondent's conduct, he had the option of making an injury allowance application. The claimant did not pursue this.

89 Complaint 6 is entirely misconceived and is dismissed.

February – July 2015: Transfer back to Children's Services

90 In Complaint 11, the claimant asserts that the respondent operated a PCP of *failing to implement adjustments in a timely fashion*. This arises from the agreement at the grievance appeal hearing in February 2015 that the respondent would facilitate a move from Adult's Services back to Children's. No timescale for this was agreed and no vacancy was identified. In the event, the claimant was transferred on a supernumerary basis in July 2015. In our judgement, it is nonsense to suggest that the PCP complained of even existed: the respondent had no such practice. The claimant was found the alternative vacancy as soon as possible. The respondent's obligation was to try and find a suitable role; and this was done.

91 There was ample evidence before us of extensive involvement by senior management from February 2015 onwards to identify a suitable role.

92 In our judgement, Complaint 11 is wholly misconceived and is dismissed.

July 2015: Working Hours

93 Complaints 13 and 14 appear to overlap and relate to the claimant's working hours when he was found the supernumerary position within Children's Services in July 2015.In Complaint 13, the claimant complains that he was required immediately to work 18.5 hours per week (approximately 50% fte). In Complaint 14, he complains that he was prevented from working full-time. The

PCP in each Complaint is the same – the requirement to work 18.5 hours per week. In Complaint 13 the disadvantage complained of is that this was too many hours – in Complaint 14 the disadvantage is said to be that the hours were too few. The adjustment contended for is a phased return presumably starting at less than 18.5 hours per week but escalating to full-time hours.

94 The formulation of these complaints is a complete distortion of the facts. Working 18.5 hours per week is what was agreed with the claimant - it was not a requirement imposed upon him. It was a period of afternoon working, intended to be temporary, to give him an opportunity to gain experience in the Fostering Team. There is no evidence to suggest that working 18.5 hours per week was causing any disadvantage to the claimant at any stage. Indeed, to the contrary, after three months, in October 2015, it was the claimant who wished to increase to full-time hours. At this stage, in order to facilitate such an increase, the respondent required the claimant to continue working part-time but to change his hours to include morning hours - in this way, the claimant would be able to demonstrate that he could work both morning and afternoon hours and accordingly progress to full-time working.

95 Even if 18.5 hours per week was the PCP, the claimant's position is wholly contradictory: suggesting that such a PCP caused disadvantage because it involved working too many hours and then later because it involved working too few. There is no evidence that setting the claimants working hours at 18.5 per week caused substantial disadvantage at any stage and accordingly the obligation to make adjustments did not arise. In any event, the respondent was making necessary adjustments: firstly, by allowing the claimant to gain experience working afternoon hours where he was comfortable; and then, offering the opportunity to continue to gain experience but work morning hours in readiness for full-time working. The process was interrupted by the claimant's sickness absence which commenced in December 2015.

96 Complaints 13 and 14 are devoid of merit and are dismissed.

Conflict with SP

97 In Complaint 15 the claimant asserts that the respondent failed to take steps to manage and/or resolve conflict at work between the claimant and his colleagues. This is claimed as a failure to make adjustments: the PCP alleged was a requirement to work in a workplace where the claimant was in conflict with his colleagues.

98 Prior to the incident on 7 December 2015, the respondent had no knowledge of any conflict; it is therefore absurd to suggest that there was a requirement to work in a situation of conflict. Accordingly, there was no PCP applied.

99 There is no evidence to show that the claimant, as a disabled person, was placed at a disadvantage by such conflict compared with his non-disabled colleagues. Accordingly, even if there was a PCP the duty to make adjustments did not arise.

100 The suggested adjustment is to arrange mediation between the claimant and SP. This would be a process rather than an adjustment in its own right.

101 Complaint 15 is without merit and is dismissed.

Failure to provide training

102 Complaints 16 is to the effect that, from February 2015 onwards, the respondent failed to provide the claimant with training. This is said to be a failure to make reasonable adjustments: the PCP alleged is a requirement to carry out the role of the Children's Social Worker without proper induction or training.

103 Ms Young's evidence was clear: the claimant had an extensive induction; sitting in working with team members in the office; going out on visits with colleagues; sitting with the duty worker; and benefiting from the advice and support of Ms Young and Vanessa Godsill - Senior Practitioner. Further, the claimant was provided with all formal training as required.

104 We accept Ms Young's evidence: and, on the basis thereof, we find that there was no PCP as alleged. The claimant was not required to carry out the role without proper induction or training; he was provided with proper induction and training.

105 Accordingly, Complaint 16 is without merit and is dismissed.

Team Emails

106 Complaint 17 is an allegation by the claimant that he was left out of the circulation of team emails whilst part of the Fostering Team. He claims that this was a failure to make reasonable adjustments: the alleged PCP is a requirement to work without access to the respondent's email system.

107 There is no evidence to suggest that the claimant, as a disabled person, was placed at any disadvantage by his absence from the email list when compared to a non-disabled colleague. This being the case the obligation to make adjustments does not arise.

108 The adjustments contended for are that the claimant should have been placed on the circulation list; and that the respondent should have carried out an assessment of the claimant's human rights and/or a Health Impact Assessment.

109 Ms Young's evidence was clear: that although the claimant was not added to the circulation list, she ensured that he received all relevant emails. There is no evidence to contradict this; and no evidence of any important email which was missed to the claimant's disadvantage. The claimant has wholly overstated the case he was not denied access to the email system he was merely not added to a particular circulation list.

110 The suggested Human Rights Assessment and/or Health Impact Assessment are not adjustments. Such measures may have been tools to enable the respondent to establish what adjustments were required if the obligation to make adjustments had ever arisen - which it did not.

111 Complaint 17 is without merit and is dismissed.

Failure to put in place a Wellness Recovery Plan

112 Complaint 18 is a complaint of a failure to make reasonable adjustments: the PCP alleged is a requirement to go to work with emotional distress and discomfort.

113 This complaint is entirely misconceived: a PCP for this purpose is a requirement which applies across the workforce, but which places the disabled claimant at a particular disadvantage. The suggestion that the respondent applied a PCP to its workforce requiring them to go to work with emotional distress and discomfort is nonsense.

114 If there had been evidence, which in the relevant period (late 2015) there was not, that, because of his disability, the claimant was suffering the disadvantage of emotional distress and discomfort in the workplace, it may have been appropriate to make adjustments; and a Wellness Recovery Action Plan may have been part of the process by which such adjustments were put in place.

115 But, our finding is that there was no relevant PCP here; and no obligation to make adjustments. Complaint 18 is wholly misconceived and is dismissed.

December 2015: Failure to Transfer the Claimant to another role

116 The claimant's case in Complaint 19 is that, having raised a grievance on 12 December 2015, he should have been transferred to another role away from the managers who were the subject of the grievance whilst the grievance was

investigated. This is said to be a failure to make reasonable adjustments and discrimination arising from disability.

117 The alleged PCP is that the claimant was required to work with people who he felt had discriminated against him. But the position is that the claimant was on sickness absence when he raised the grievance and he never returned to work. It must follow that he was not required to work with those managers or indeed with any others. The suggested PCP was never applied.

118 The claimant puts the Section 15 claim in this way: he suggests that, because his grievance related to disability discrimination, the grievance was itself a *matter arising* from disability. The refusal to transfer him was unfavourable treatment by reason of that matter arising.

119 In our judgement, the Section 15 claim is utterly misconceived. The raising of a grievance is not a matter arising from disability (unless it be the case that a propensity to the raising of grievances was a feature of the disability - not suggested here), and so any unfavourable treatment was not by reason of a matter arising from disability.

120 But, as the claimant was and remained off sick, and was never required to return to work with the managers concerned, there is simply no unfavourable treatment here.

121 Accordingly, Complaint 19 is wholly misconceived and is dismissed.

February 2016: Failing to Transfer the Claimant to a Permanent Post

122 The claimant had been found a supernumerary post in the Fostering Team from July 2015. He worked in that team until he commenced sickness absence in December 2015 from which he did not return. Complaints 23 and 26 is that he had not been found a permanent position this is said to be a failure to make a reasonable adjustment.

123 The alleged PCP is confusing: "*not able to go to work on an equal basis with others without emotional distress and discomfort*". The adjustments contended for are that the respondent should have carried out a Psychological Assessment and/or a Human Rights Assessment and/or obtain a Health Impact Report.

124 It is absurd to suggest that a PCP was applied to prevent the claimant from going to work on an equal basis with others without emotional distress and discomfort. There was no such PCP. Accordingly, no disadvantage; and accordingly, no obligation to make adjustments.

125 The adjustments contended for are not adjustments at all. They are suggested mechanisms as to how appropriate adjustments might be identified in some cases.

126 At the appellants grievance appeal hearing in February 2015, as part of the outcome, it had been agreed that he would be transferred to Children's Services - but there was no suitable role available. In our judgement, the respondent had no obligation to create a role simply to accommodate the claimant - but the respondent effectively did precisely that and took him into the Fostering Team as a supernumerary. Progress was good until December 2015; thereafter the claimant was absent. Quite how it is proposed that the respondent should then have identified a permanent position is unclear.

127 Complaints 23 and 26 are wholly without merit and are dismissed.

September 2016 onwards: The Search for a role other than as a Social Worker

128 Complaints 27, 28 and 29 relate to the conclusion reached by Mrs Saini and Mrs Williams in August 2016 that it would not be possible at that time for the claimant to return to work as a Social Worker. They concluded that he was unsuited to the stresses of such work; and that he was suitable for medical redeployment. It is the claimant's case that the various decisions following the reaching of this conclusion amounted to acts of direct discrimination; discrimination arising from disability; a failure to make adjustments; and a contravention of the provisions of Section 60 EqA.

129 By the time that Mrs Saini and Mrs Williams attended a case management conference with Dr Southam in July 2016, the claimant had been absent from work for over seven months and there was no prospect of his return. His absence followed difficulties he had experienced in three different roles since September 2013: each time, the claimant had taken extended sick leave and raised numerous grievances essentially relating to his relationships with managers and colleagues. In July 2016, there was also an ongoing investigation relating to a disciplinary complaint against the claimant and concerns which had been raised by foster parents working for the respondent. During the claimant's absence, extensive efforts were made by Mrs Saini to maintain contact with the claimant: but, he failed to attend on 6 & 12 May and 14 June. Essentially, the claimant simply failed to engage with Mrs Saini in her efforts to get the claimant back to work.

130 In our judgement, upon receipt of the OH Report confirming that the claimant was unsuited to frontline social work, and was therefore a candidate for medical redeployment, it was reasonable for the respondent to begin the process of trying to identify suitable alternative roles. In our judgement, it was also reasonable at that time for them to decline consideration the outright transfer of

claimant to any social work vacancies which arose. (Although, it should be noted that, there was never any prohibition on the claimant applying for such roles – the claimant was advised of this but did not submit any applications.) It was to facilitate the search for alternative role that the claimant was placed on the Priority Movers Programme.

131 As to whether this decision amounted to direct discrimination. Our judgement is that the decision to exclude the claimant from social work roles was not taken on the grounds that he was a disabled person, but on the grounds that the respondent had concluded that he was unsuited to frontline social work. The respondent's actions would have been the same had it reached that conclusion in respect of a non-disabled Social Worker. In our judgement therefore, there was no direct discrimination in play.

132 As to whether the actions amounted to discrimination arising from disability. Firstly, there is no definitive evidence as to causation from which the tribunal could properly conclude that it was the claimant's disability which caused his inability to maintain constructive working relationships in a social work environment. But, even if such causation were accepted or proved, and it followed therefore that the decision to medically redeploy the claimant was taken because of something arising in consequence of his disability, two further considerations arise: -

(a) Was the claimant treated unfavourably? It may be that the decision to medically redeploy him was against his wishes – but, of itself, this does not determine that the treatment was unfavourable; we must decide that objectively. By any standards, the claimant had been unhappy in his working environment for three years; extensive attempts have been made to find a role and an environment which was suitable for him; adjustments had been made in terms of working hours, location and workload. But, the result on each occasion was the same: the claimant became ill; went off sick; raised grievances; and simply could not work constructively with his managers and colleagues. Accordingly, in our judgement, it was not unfavourable treatment for the respondent then to seek to redeploy the claimant into a role away from the stresses of frontline social work.
(b) Even if the redeployment decision could be said to be unfavourable treatment, in our judgement, the treatment is objectively justified in pursuance of the respondents legitimate aims: namely, to get the claimant back to work; and, to ensure that the vital services it provided were maintained.

133 Accordingly, in our judgement, there is no valid claim discrimination arising from disability.

134 As to the alleged failure to make reasonable adjustments: the PCP alleged is "*not able to go to work on an equal basis with others without emotional distress*"; as previously observed in relation to other complaints, this is not a PCP which was applied at all. The principal adjustment contended for was that the claimant should be transferred into a social worker post: the point is that the claimant had been absent from work in a social worker post for eight months with no prospect of being in a position to return. Other adjustments contended for were for the respondent to carry out a Human Rights and/or Health Impact Assessment: again, as previously observed, these are not adjustments.

135 An alternative, and contradictory, PCP is advanced as follows: "*that the claimant was required to carry out the full duties of a social worker in the Fostering Team*" with the suggested adjustment being the transfer to an alternative social worker role. On the basis that the claimant had been recommended for medical redeployment; that he had been absent from work as a social worker for eight months; that there was no immediate prospect of his return; in our judgement, even if a duty to make adjustments had arisen simply transferring him to yet another social worker role would not have been reasonable. And would not have been in the interests of either the claimant or the respondent.

136 As to the claim that there was a contravention of Section 60 EqA. That provision does not create any individual rights: any such contravention is enforceable as an unlawful act only by the Equality & Human Rights Commission. In any event, on the facts of this case, the section is inappropriate: it concerns itself with job applicants and not with those already in an employment relationship.

137 For these reasons, we find that there is no merit in complaints 27,28 or 29 which are also dismissed.

The Disciplinary Investigation

138 We are now concerned with Complaints 31 and 32. The claimant's case is that the initiation of a disciplinary investigation was an act of direct discrimination and/or victimisation and/or discrimination arising from disability. Further, the manner in which the disciplinary investigation was conducted is claimed to be a failure to make reasonable adjustments.

139 The disciplinary procedure was initiated because of a complaint made by, or on behalf, of SP relating to the incident in the workplace on 7 December 2015; and because of complaints and concerns raised by foster parents. An investigation would have been initiated in respect of any employee facing such complaints; accordingly, there is no basis to suggest that the investigation

commenced because the claimant was disabled. There is no merit at all in the claim for direct discrimination.

140 Likewise, the reasons for initiating the investigation are plain: and, clearly established on the evidence, the fact that the claimant had raised grievances, some of which were Protected Acts, was wholly immaterial. There is no merit in the claim for victimisation.

141 As to the claim for discrimination arising from disability. We will assume for the sake of argument (although this has not been established by evidence) that the claimant's conduct both towards SP and the foster parents was a manifestation of his disability. However, the investigation was an entirely neutral act to establish the facts; and, if the claimant had engaged with the investigation, which he did not, quite possibly it would have been established that his disability was in play. This would be a factor to be taken into account in deciding whether the matter should proceed to a disciplinary hearing and if so whether any disciplinary sanction should be applied. But, it is only by a proper investigation of these events that such matters could have been established. In any event, the respondent's decision to initiate an investigation was clearly objectively justified: it cannot be the case that simply because an employee is known to be disabled, that they are immune from investigation of any complaints made against them by colleagues or service users. In our judgement, there is clearly no merit in the Section 15 claim made here.

142 So far as the reasonable adjustments claim is concerned, the alleged PCP is "*contacting people by letter during a disciplinary investigation*". The adjustment contended for is "*bringing the claimant into work in order to give him the letters in the office in the presence of a support worker*". In our judgement, this claim borders on the absurd. There is no evidence at all to support the proposition that, by reason of his disability, the claimant was disadvantaged by the receipt of postal communications; and certainly, no evidence of any basis upon which the respondent could be aware of any suggested disadvantage. Importantly, the claimant has not advanced any case as to how he is to be "*brought into work*" (from his sickness absence) to receive such letters unless he receives a letter asking him to attend. Regrettably, the claimant simply did not engage with or respond to the disciplinary process; he did not make the investigator aware of any concerns regarding receiving letters; or request an alternative method of communication.

143 In our judgement, there is no merit on any basis to Complaints 31 and 32 which are accordingly dismissed.

The Dismissal

144 The decision to dismiss the claimant is claimed to be a failure to make reasonable adjustments; discrimination arising from disability; indirect discrimination; and unfair dismissal.

145 With regard to the claim for a failure to make reasonable adjustments: the alleged PCP is *"a requirement to attend work at a certain level in order to avoid action*". The adjustments contended for are the conduct of a Human Rights and/or Health Assessment.

146 Quite reasonably, the respondent, in common with all employers in our experience, operate a requirement for employees to attend work. If they are unable to do so for disability related reasons, the employer has an obligation to investigate those reasons and make such adjustments as are reasonable to assist the employee back to work. In this case proper investigation was made; and OH advice was received that the claimant would be unable to return to frontline social work. Accordingly, attempts were made to find alternatives. This was the *appropriate* adjustment. The attempts failed in large part because of the claimant's lack of engagement. Our judgement is that all adjustments as were reasonable were in fact made.

147 So far as the indirect discrimination claim is concerned: we will assume for the sake of argument that the same PCP applied; and that a requirement to attend work, places disabled employees, including the claimant, at a disadvantage. There can be no doubt in our mind that a requirement by an employer for employees to attend work and be capable of performing their duties is an objectively justifiable requirement. The legitimate aim clearly is to give effect to the employment contract; and, in the case of this respondent, to maintain vital public services. There is clearly no valid claim for indirect elimination.

148 Discrimination arising from disability: accepting, for the sake of argument, that the reason for the claimant's prolonged absence from work arose from his disability as did his unsuitability for frontline social work, the decision to dismiss the claimant in the absence of any other suitable work was clearly objectively justified. Again, the legitimate aim was to give effect to the employment contract and to maintain vital public services.

<u>Unfair dismissal</u>

149 We are satisfied that the reason for the claimant's dismissal, and the only reason, was capability - because of his medical conditions the claimant was unable to properly conduct the duties of a frontline Social Worker. Capability is a potentially fair reason for dismissal under the provisions of Section 98(1) & (2) ERA.

150 As to Section 98(4), the respondent's conclusion that the claimant was incapable of frontline social work was, in our judgement, genuine; and eminently reasonable bearing in mind the history of his employment between 2013 and 2016 and the medical opinion obtained from Dr Southam. The evidence to justify such a conclusion was overwhelming.

151 The respondent operated an entirely fair process in reaching its conclusion. From May 2016 onwards the claimant simply failed to engage with Mrs Saini's attempts to communicate with him during his prolonged absence.

152 The eventual decision to dismiss the claimant was reasonable and within the range of reasonable responses because efforts had been made over a period of more than six months to find alternatives - including placing the claimant on the Priority Movers Program to assist him. Potential suitable alternative vacancies had been identified and notified to the claimant, but the claimant had failed to engage with the process.

153 In the circumstances, we find that this was a fair dismissal by reason of capability. The claim for unfair dismissal is not well founded and is dismissed.

Employment Judge Gaskell
7 February 2020