



EMPLOYMENT TRIBUNALS

Claimant: Mr. M. James

Respondent: Optimum Skills Limited

Heard at: Newcastle

On: 19 & 20 October 2020

Before: (1) Employment Judge A.M.S. Green
(2) Mr. R. Dobson
(3) Mr. E. Euers

Representation

Claimant: Mr. P. Kerfoot - Counsel

Respondent: Ms. G. Nicholls - Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claim of discrimination arising from his disability is upheld.

REASONS

Introduction

1. For ease of reading, we refer to the claimant as Mr. James and the respondent as Optimum.
2. The Tribunal conducted a remote video hearing using the CVP platform on 19 & 20 October 2020. The Tribunal deliberated on the 20 & 21 October 2020.
3. The parties and the Tribunal worked from a joint digital bundle and heard evidence from the following people who adopted their witness statements:
 - a. Mr. James
 - b. Mr. Humble (who was Mr. James' line manager)

c. Mr. Kirsopp (one of Optimum's directors)

The representatives made closing oral submissions.

4. In reaching our decision, we have considered the oral and documentary evidence, the representatives' submissions and the EHRC Code of Practice in Employment (the "Code"). The fact that we have not referred to every document produced should not be taken to mean that we have not considered it.

The claim and the response

5. Mr. James claims unlawful disability discrimination. He says that he resigned from his position of tutor/assessor following a period of absence caused by his disability (cancer). He claims that Optimum reduced his workload and required him to resume classroom teaching. He says that this adversely affected the possibility of his obtaining further qualifications and an enhanced salary. He alleges that this amounted to unfavourable treatment because of something arising in consequence of his disability contrary to Equality Act 2010, section 15 ("EqA").
6. Optimum accepts that Mr. James is disabled but denies any discriminatory treatment. Alternatively, it says that any such treatment was a proportionate means of achieving a legitimate aim.

The issues

7. The parties have agreed the following list of issues which the Tribunal must determine.
8. Did Optimum subject Mr. James to unfavourable treatment? Mr. James relies on the following:
 - a. Optimum varying his role so that he lost apprentices resulting in him being deprived of:
 - i. the opportunity to complete the assessor award; and
 - ii. secure a salary increase and having to travel twice as much previously.
 - b. Being placed in a position where he had no option but to resign.
9. If so, did such unfavourable treatment occur because of something arising in consequence of Mr. James' disability? What is the "something" Mr. James relies on? He claims it was his:
 - a. absence from work; and
 - b. phased return to work.
10. If so, can Optimum justify such treatment as a proportionate means of achieving a legitimate aim? Optimum relies on the following legitimate aims:

- a. maintaining its high level of service
- b. ensuring that its clients, who were students, were not prejudiced by poor service; and
- c. upholding its business during a visit by a regulatory body. Optimum notes that if it incurred a poor grading then it would not be able to take on new clients until it is satisfied that the regulator that it had improved its standards.

Burden and standard of proof; assessing evidence and credibility

11. EqA, section 136 provides that once Mr. James has proved facts from which the Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to Optimum to prove a non-discriminatory explanation. In the context of a claim of discrimination arising from (discrimination) disability in order to prove a prima facie case of discrimination and shift the burden to Optimum to disprove his case, Mr. James will need to show:

- a. that he has been subjected to unfavourable treatment
- b. that he is disabled and that the employer had actual or constructive knowledge of this
- c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment
- d. some evidence from which it could be inferred that the 'something' was the reason for the treatment.

12. If the prima facie case is established and the burden then shifts, Optimum can defeat the claim by proving either:

- a. that the reason or reasons for the unfavourable treatment was/were not in fact the 'something' that is relied upon as arising in consequence of Mr. James' disability; or
- b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

13. The standard of proof is on a balance of probabilities.

14. The Tribunal can only decide whether a party has discharged the evidential burden of proving their case once the evidence is complete and thus only after it has come to some conclusion about the quality of the evidence presented. This assessment involves ascribing weight to items of evidence to decide what influence (if any) such items bear on the matters to be decided. The question of the weight to be attached evidence is one for the Tribunal to decide as a fact-finding body or "industrial jury".

15. We remind ourselves that if there is a preponderance of evidence on one side, as against a lesser amount of equally good or bad evidence on the other, a Tribunal may well be impressed simply by the volume of evidence

in favour of one party. Put simply because, say, five witnesses are called to give evidence on the same point does not necessarily enhance a party's case. Generally, it is quality not quantity that matters most when assessing the weight to be given to the parties' evidence.

16. We had the benefit of hearing oral evidence and we remind ourselves that in determining credibility, factors such as the demeanour of a witness and the coherence of his or her evidence should be considered. We also remind ourselves that there is no requirement for any evidence given to be corroborated. It is simply for the Tribunal to assess, as a matter of common sense and judgment, the extent to which it finds the evidence of the witness satisfactory reliable.

Findings of fact

17. Optimum is a small company based in Newton Aycliffe and was established in 2013 to help people into employment by working with companies and individuals to help deliver the required skills and knowledge so that they can gain sustained employment. Optimum also delivers apprenticeships to learners ranging in ages from upwards of 16 years old, across a range of sectors including management, business administration, butchery, construction, health and social care, hospitality, and retail. Mr. Kirsopp is one of the directors of Optimum having joined the company about three years ago.
18. Optimum employs qualified assessors and trainee assessors. In his oral evidence, Mr. Humble told the Tribunal that a qualified assessor would typically have responsibility for 40 to 45 learners (apprentices) and a trainee assessor would typically have responsibility for 25 to 30 learners. We have no reason to doubt what Mr. Humble was saying in this respect.
19. Ofsted regulates Optimum. Optimum was a relatively new business and could expect a regulatory visit from Ofsted within the first two years of its establishment and further visits thereafter.
20. Mr. Humble joined Optimum in February 2018. He had experience in (warehousing) manufacturing industrial qualifications (para 21 confirms)
21. Before joining Optimum, Mr. James worked in manufacturing for many years. He subsequently completed a PGCE and trained as a secondary school teacher. He wanted to combine his experience in manufacturing and teaching which is what motivated him to join Optimum.
22. Optimum employed Mr. James from 26 March 2018. Prior to that, Optimum had retained him on a self-employed basis for 6 weeks. He was employed as a tutor/assessor.
23. Optimum issued Mr. James with a contract of employment on 6 August 2018 [47]. The copy produced to the Tribunal is unsigned but there was no disagreement between the parties that this was issued to Mr. James and that the parties were bound by its terms. The following provisions are relevant:

- a. Clause 6 provides that his job title was Learning and Development Trainer
 - b. Clause 7 provides that his duties were to use his best endeavours to promote Optimum's interests and faithfully and diligently to perform duties assigned to him and to abide by any of the company's policies. Where relevant, a job description would be provided which was intended to be a guide and not prescriptive. It anticipated that the job description could be altered from time to time to fit the needs of the business.
 - c. Clause 9 provides that his normal place of work would be in Newton Aycliffe but as Optimum operated from a number of different locations, he could be required from time to time, for the proper performance of his duties, to visit and operate from any other location and/or travel.
 - d. Clause 10 stipulates a salary of £23,000 per year.
 - e. Clause 29 reserves the right to Optimum to vary Mr. James' terms and conditions. It provides that in relation to minor changes, Optimum will give Mr. James written notice with the changes taking effect from the date of the notice or where specified in the notice. Any other changes could only be made after giving Mr. James at least 1 months' notice in writing.
24. We also note a signed copy of the agreement [56]. Diane Shakespeare, one of Optimum's directors, signed the agreement on behalf of Optimum on 16 January 2019. Mr. James signed the agreement on 12 February 2019.
25. Optimum issued a job description to Mr. James [58]. This sets out several key responsibilities which are expressed to be aligned to the company's Teaching and Learning Strategy and handbook for the inspection of further education and skills.
26. Mr. James was initially employed to deliver classroom-based short courses covering various topics including manufacturing and warehousing. These courses were, on average, two weeks in duration. They were delivered at various locations across Co Durham and Teesside. However, because a member of staff left the business, there was an opportunity for Mr. James to become a trainee apprentice assessor. Some of the ex-employee's apprentices were transferred to him. He started the new role in August/September 2018. He was taken off short course delivery and given a portfolio of manufacturing, warehouse and facilities apprentices (learner) for him to work with across the region. This involved him meeting the learners and their employers at workplaces, conducting training, and assessing their learning. He was responsible for managing his own diary and recording and documenting each learner's work. In his oral evidence, Mr. Humble accepted that this amounted to a change from Mr. James' original role.
27. When Mr. James started his assessor role, only Mr. Humble had any experience in assessing (warehouse) manufacturing apprentices. Mr. James had a background in manufacturing.

28. Mr. James was responsible for assessing each learner assigned to him against occupational standards and he was required to support his learners to progress through their qualification to hit their target achievement date for acquiring a qualification. To achieve the qualification, the learners had to produce evidence of the knowledge, skills and behaviours that they had developed with the support of their tutor such as Mr. James. Mr. James was also required to communicate with the learner's employer regarding the progress and development of the learner.
29. On 9 October 2018 Mr. James was diagnosed with a malignant neoplasm of his thyroid gland [65]. He was signed off work on 12 November 2018 for the period 6 November 2018 to 27 November 2018 [66]. This was his first period of sickness absence. He received his normal pay during this period. He underwent surgery for his thyroid cancer and returned to work on 27 November 2018.
30. Mr. Humble became Mr. James' line manager in December 2018. He took over from Mr. James' previous line manager, Lyndsey Roddam-Carty. Mr. Humble was responsible for ensuring that Mr. James' work was performed to a high standard. He was also responsible for helping Mr. James with any difficulties that arose in relation to his performance. In his oral evidence, Mr. Humble confirmed that he regularly reviewed Mr. James' work. There was a monthly review, and the two men would also meet weekly to discuss the apprenticeship tracker. An example of the apprenticeship tracker was produced to the Tribunal [143] which is effectively a spreadsheet showing progress being made with each learner in respect of each assessor. Mr. Humble clearly stated in his evidence that he was fully apprised of Mr. James's performance and he would pick up on any issues promptly. He also knew of Mr. James' cancer diagnosis and that he needed to have radiotherapy in December 2018.
31. During Mr. James' absence, Mr. Humble was tasked with covering his learners. This involved reviewing Mr. James's portfolio of learners.
32. On 3 December 2018, Mr. Humble and Mr. James met and agreed an action plan for Mr. James. A copy of this has been produced [69-72]. The start date of the plan was 3 December 2018. The end date of the plan was 31 January 2019.
33. There is disagreement about the purpose of the action plan. Mr. James understood it to be the means to enable his phased return to work after his sickness absence.
34. Mr. Humble's understanding is different. He suggests that in December 2018 he had picked up on performance issues over progress being made with Mr. James' learners and the purpose of the action plan was to address these alleged under performance issues.
35. We prefer Mr. James' interpretation for the following reasons:
- a. Mr. Humble gave confusing answers under cross examination about the date when these performance issues were allegedly identified. It

was unclear whether these alleged issues came to light before or after the action plan.

- b. Mr. Humble accepted that the action plan did not expressly mention any performance issues with Mr. James. Indeed, the express aim of the plan was “to re-engage after absence and agreed plans with employers regarding action plan”. When it was put to him in cross examination that there were no references to performance issues in the action plan Mr. Humble replied, “I worded it wrong”. We find that surprising given his claim to be fully apprised of Mr. James’s progress because of the frequency of the reviews and meetings that he says took place. If there were performance issues, it would be reasonable to expect these to be expressly mentioned in the action plan and reflected in its aim.
- c. Furthermore, under cross-examination Mr. Humble admitted that he had only visited a couple of the apprentices in Mr. James’ portfolio. Mr. Humble told the Tribunal that Mr. James was responsible for 12 apprentices at the time. We do not think that it is credible that he could meaningfully form the opinion that Mr. James was underperforming having visited such a small proportion of the apprentices.

36. We think it more probable than not that the purpose of the action plan was simply to agree Mr. James’ phased return to work after his recent sickness absence and not to address his alleged under performance.

37. On 5 February 2019, Mr. James and Mr. Humble had a “1-2-1” meeting. This was recorded in a document which was produced to the Tribunal [75-77]. There is nothing in this document to suggest that Mr. Humble had any issues concerning Mr. James’ performance. In his manager feedback/comments he states:

I am very pleased with Mikes [sic] progress and his work ethic/attitude has shone throughout. There is [sic] areas of development that we have identified and agreed mutually. Keep up the hard work and continue to ask myself and others if you are unsure of any process and we will plan the support.

38. On 11 February 2019, Mr. Humble conducted Mr. James’s appraisal. Mr. Humble told the Tribunal that he had conducted a few appraisals for Optimum and he also had experience of appraisals in his previous retail employment background. Consequently, it is reasonable to conclude that he was experienced in conducting appraisals and understood the process.

39. A copy of Mr. James’s appraisal was produced [78-87]. It is called “Employee Performance Appraisal”. It is a detailed document and covers the following areas:

- a. Employee Self-appraisal
- b. Line Manager Appraisal
- c. Performance Review

40. In the section "Performance Review" there are three categories: red, amber, and green. These are applied to the following required behaviours: adaptability, accountability, attention to detail, communication, customer service (internal and external), team dynamics, time management, core values.

41. Each of the colour codes for performance review have a commentary. Red indicates further development of the particular behaviour is required. Amber indicates that the appraisee has shown effective and consistent application of the particular behaviour. Green indicates that the appraisee has shown to have a particular area of strength for this behaviour.

42. Mr. James received green scores for the following behaviours:

a. Adaptability

adapts quickly to changing situations or priorities

makes plans to accommodate change

adopts a positive attitude to change

Mr. James' overall level for this category was green. Mr. Humble's comments were:

Regards learner end dates, be more aware of frequency of visits and progress alongside the visits. Constantly positive and always questions anything you don't understand.

b. Accountability

understands how mistakes and underperformance can impact on the business

completes tasks/projects correctly and on time

follows instructions, response to management direction

takes responsibility for own actions

Mr. James' overall level for this category was green. Mr. Humble's comments were:

Take accountability for ensuring you develop and improve processes i.e. sign up paperwork is a good example. Encourage yourself to participate and gain understanding of information within team meetings.

c. Attention to Detail

demonstrates a passion for getting it right, first time

Mr. James' overall level for this category was amber. Mr. Humble's comments were:

Mike communicates effectively verbally and through emails. He communicates learner concerns and asks for support when needed. He also replies to emails timely and meets deadlines for reports.

d. Communication

communicates in a clear, jargon free manner

makes effective use of non-verbal communication

ensure all communication is professional

uses constructive language to overcome obstacles

Mr. James' overall level for this category was green. Mr. Humble's comments were:

Mike communicates effectively verbally and through emails. He communicates learner concerns and asks for support when needed. He also replies to emails timely and meets deadlines for reports.

e. Customer Service (internal and external)

resolves issues in a courteous, positive manner

Mr. James' overall level for this category was amber. Mr. Humble's comments were:

Look at reviewing relationships with employers. Encourage participation from decision makers and gain support from CRM for that employer on reviews. Good progress and rebuild of relationships evident over the last month.

f. Team Dynamics

works with others to achieve Optimum Skills objectives

supports and encourages colleagues

demonstrates trust and respect for others

considers the needs and interests of colleagues

Mr. James' overall level for this category was green. Mr. Humble's comments were:

Nice, friendly and great to have in the office working environment. Get more involved with team discussions in CPD.

g. Time management

prioritises tasks to meet the needs of the business

effective planning and itinerary management

flexible approach to workload completion

able to deliver agreed deadlines and targets

Mr. James' overall level for this category was green. Mr. Humble's comments were:

Calendar management improved a lot and using effectively. Planning visits with employers at end of visits which is good practice. Time management will be more relevant as go through the year and progress with new apprentices.

h. Core Values

understands and promotes the mission and vision of Optimum Skills Limited

shows motivation and support to colleagues and clients

supports the promotion and embedding of E & D, safeguarding and health and safety

actively maintains continuing professional development

Mr. James' overall level for this category was green. Mr. Humble's comments were:

Good example of looking at well-being and health and safety is Mike managing a situation in an employer's premises where he confronted an issue in the warehouse with the apprentice's manager. Correct procedures though cause of concern were completed. Encouraged to suggest possible leads for apprenticeships and current businesses or businesses and current learner locations. Well done for sharing facebook/website posts.

43. Mr. James did not receive any red categorisations in any of the performance behaviours in his appraisal.

44. In his summary, at the end of the appraisal, Mr. Humble stated:

I am very happy with the progress Mike has made since he joined my team in December. We have seen clear improvement in his portfolios, organisation, assessment methods/decisions and communication between me, employers and the rest of the team. I would like to continue building the relationships with the employers and get their faith in optimum skills. We need to start progressing with his assessor's award

as I feel Mike has improved and could further improve with the support of Lynsey Watson's guidance. I would also like Mike to be more vocal and take part in discussions and ask questions to gain more understanding of areas he does not understand in CPD. Mike is a great team member and I am very happy to have him on my team. He is continuously improving and feel he will be a great asset in support in the improvement of Optimum Skills.

45. In his summary, at the end of the appraisal, Mr. James stated:

I have really enjoyed the transition from short courses to apprenticeships, I feel I have developed a range of new skills and I am looking forward to becoming an accomplished assessor. I know what I need to do to develop going forward and I am determined to get it right first time to deliver an outstanding experience for my learners. I am looking to working with Chris this year and developing a great working relationship.

46. There is disagreement between the parties about this appraisal. Mr. James' position is that this was a glowing report which did not highlight any performance issues whatsoever. Mr. Humble's position is different. In his witness statement he acknowledges that Mr. James was demonstrating strong performance in some of his duties, but he would not consider the appraisal to be a glowing report. He goes on to say that the appraisal

clearly sets out the development areas, which is something that would not be present in a "glowing report". By this time, with my assistance, the Claimant had developed some of his assessment methods and re-engaged with employers but there were still a lot of development needed with the learners' files and progression. In particular, the files were not reflective of the progress stated on the apprenticeship tracker... Evidence was missing from the files, reviews were outstanding and Outlook diary entries for visits were not in the file... I identify the likely cause of this was his high workload, which presented challenges for an unqualified assessor. Despite the fact that I wanted to support the Claimant in his career aspirations, this would not be to the detriment of the Respondent and its clients. Having said that, as part of the appraisal process, I recognised that the appraisal should contain an element of positivity to motivate the Claimant and push into development in areas stated in the Appraisal Form. Upon reflection, these concerns should have documented in his appraisal, but I was trying to act in a supportive manager and help the Claimant through a difficult time. The Claimant was a good classroom tutor, and it was clear that he had taken on too much. I thought that building his confidence was the best way to proceed and genuinely thought that my actions were in the Claimant's best interest. I had no desire to lose him as an employee.

47. We prefer Mr. James' characterisation of his appraisal for the following reasons:

a. When he was cross examined, Mr. Humble gave a different interpretation of the colour coding categories. He said that amber indicated an area of development. He said that red was a risk area needing urgent action or support and that green meant that the

appraisee was doing their job to the right standard. He also accepted that these colour codes were key to the performance review. However, his understanding was completely at variance with what is stated in the key to each of the colour codes. When this was put to him, he accepted that amber meant effective and consistent application of behaviour. In other words, the appraisee would be operating at the required standard. He also accepted that green meant that the appraisee was operating over and beyond what was expected of them. He accepted that he had made a mistake concerning his interpretation of the amber code when he was cross-examined. We do not think that this is a mistake because Mr. Humble had experience in appraising employees at Optimum and he would have known what each of the colour codes meant at the time when he was appraising Mr. James. The form is very clear, and it is difficult to see how anybody could interpret the colour codes in the way that Mr. Humble suggested under cross-examination. He was retrospectively attempting to create performance issues which did not exist. This undermines his credibility.

- b. Whilst it is perhaps admirable to have encouraged Mr James, as claimed, looking at the appraisal as a whole it contains more than “an element of positivity to motivate the Claimant”. It is overwhelmingly positive
- c. Mr. Humble accepted, under cross-examination that there were no red categories in Mr. James’ appraisal. He accepted that Mr. James could reasonably conclude that he was on track.
- d. We also note the fact that most overall levels of achievement were green. There were no reds and only a handful of ambers. Overall, it is fair to conclude that Mr. Humble regarded Mr. James’ performance as having particular areas of strength in the specified behaviours. In other words, he was going over and beyond what was expected of him. In those areas where he was awarded an amber, this indicates that Mr. James had shown effective and consistent application of the particular behaviour. In other words, he was on target. There are no areas of concern that would warrant a red category.
- e. It was put to Mr. Humble that if there were any performance issues they had not been properly raised in the appraisal. At this juncture, I had to intervene to remind him to answer the question and he eventually agreed that if there were any performance issues they should have been raised. We did not find Mr. Humble to be a reliable witness in respect of that line of evidence.

48. We believe that it is more probable than not that there were no performance issues with Mr. James at the time of his appraisal. Indeed, he had every reason to be proud of the appraisal and to characterise it as “glowing”. It is, by any measure, very good. As at the date of his appraisal, it is reasonable to infer that Mr. James was performing more than adequately as a trainee assessor and it is, frankly, disingenuous of Mr. Humble to say, under cross-examination, “he was not performing really badly and that is why we had action plans”. That seems to be damning with faint praise. For the reasons already given, there were no performance issues at the time of the action

plan in December 2018. There were no performance issues in the 1-2-1. There were no performance issues at the time of the appraisal in February 2019.

49. Mr. James went on a second period of sick leave from 13 March 2019 to 1 May 2019. This was to enable him to undergo post-thyroid treatment. His sick note was produced in evidence [89]. He kept in touch with Mr. Kirsopp during his second period of absence and told him during a telephone call that it was likely that he would require further treatment for his cancer. Mr. James was paid Statutory Sick Pay during his second period of absence.
50. During Mr. James' second period of absence Mr. Humble reviewed Mr. James' files. In his witness statement, he states that he visited and reviewed a couple of the learners and spoke to the employers. He then says that he spoke to Mr. Kirsopp to express concerns about the files. He refers to the fact that Mr. Kirsopp was auditing files in preparation for a monitoring visit by Ofsted. He does not specify when that visit was expected.
51. Mr. Humble identifies two employers, Shred Centre and Beaumont, who had reported that Mr. James had disengaged with them. He states, "this had led to my identifying employer engagement is an area for concern in the 11 February 2019 appraisal". He cross refers to pages 84 and 85 in the bundle (i.e. part of Mr. James' appraisal). There is nothing to suggest in his evaluation of Mr. James' appointment, on those pages, that there were any concerns. Furthermore, the two employers are not named in the appraisal.
52. In the light of the review, Mr. Humble states that Mr. Kirsopp decided to take time to review all of Optimum's files and concluded that learners were not being visited, there was a lack of progress from the visits and that employers were not being engaged with and were reporting that Mr. James had cancelled visits and had only stayed for a short period of time. It is then stated that Mr. Humble and Mr. Kirsopp that if Mr. James was allowed to carry on with those learners this would constitute a risk to the business because they would not achieve their target achievement dates and Optimum would lose business with the employers. Consequently, they recruited Claire Mather who had the requisite expertise and experience to rectify the problem. At that time, Mr. James was responsible for 11 apprentices. Mr. Kirsopp decided to transfer 9 to Ms. Mather which left Mr. James with 2 manufacturing apprentices. One of the apprentices was located 50 miles from where Mr. James lived. Mr. James had to drive to the apprentice and entailed a 100-mile round trip.
53. Mr. James returned to work on 1 May 2019. There was a return to work interview. The completed return to work interview notes [90] indicate in paragraph 5 that it was likely that there will be a recurrence of Mr. James' absence because of his health. In paragraph 11, in response to the question "are there any underlying problems relating to the absence (personal, work or domestic) Yes/No", "No" has been circled. In response to paragraph 12 where it is asked "Can we give any assistance to the employee? Yes/No", "Yes" has been circled and a manuscript note states "limit driving and to be aware that I will be tired on some days". It was also noted in response to paragraph 13 concerning further action that Mr. James required "support from Chris" (i.e. Mr. Humble).

54. After Mr. James signed the return to work interview sheet, he was informed about the changes to his workload. Mr. Humble and Mr. Kirsopp told him that this was because of performance issues. He would be responsible for 2 (warehouse) manufacturing apprentices and he would resume his classroom teaching. He was told that nine of the apprentices were transferred to Ms. Mathers. These were warehouse and facilities apprentices. The remaining two were manufacturing apprentices.
55. Nothing is recorded about the review of Mr. James's files or the decision to remove 9 of his apprentices and to put him back to classroom teaching. There is no minute of the meeting to record these important decisions and there is no indication that there was any dialogue with Mr. James about this.
56. There is disagreement about whether there were issues with Mr. James' performance as suggested by Mr. Humble and Mr. Kirsopp. Mr. James' position is that there were no problems with his performance as evidenced by the action plan, the 1-2-1 and his appraisal. If there were issues with clients, this was attributed to the fact that they had been previously managed by the assessor who had left Optimum whose files had been transferred to Mr. James.
57. We prefer Mr. James' version for the following reasons:
- a. Mr. Humble and Mr. Kirsopp's evidence was conflicting. Mr. Humble says that he raised his concerns with Mr. Kirsopp. However, when Mr. Kirsopp was cross examined on this it was put to him that the review was conducted because of those concerns. Mr. Kirsopp denied this and said that he had reviewed a sample of portfolios across the business and as he was reviewing, Mr. Humble may have mentioned concerns. He claimed that he was sampling files in preparation for an Ofsted visit. However, there is no documentary evidence in the bundle about any forthcoming visit from Ofsted.
 - b. When Mr. Kirsopp was asked what files he had reviewed, he said that he could not recall and spoke vaguely about a sample of Mr. James' files he was unable to say how many he had reviewed. We found Mr. Kirsopp unreliable in respect of this line of evidence.
 - c. In his witness statement, Mr. Kirsopp suggested that Mr. James had not been visiting apprentices and yet there was a mileage summary produced [142] indicating that Mr. James had driven 5245.5 miles between April 2018 and June 2019. It was also noteworthy that Optimum had not provided the relevant and applicable apprentice tracker documentation for the period which would have shown progress being made with the apprentices. They had produced other examples of the tracker and we regard this omission as significant.
 - d. If, as Mr. Humble claims, he was regularly reviewing Mr. James performance, he would have picked up on these issues sooner. After all, he had only just completed Mr. James' positive appraisal on 11 February 2019.

- e. Mr. Kirsopp admitted that there no formal complaints from clients concerning Mr. James. He told the Tribunal that at most, it was an informal expression of being “disgruntled”. Furthermore, Mr. Kirsopp did not know when these clients had complained. It also contradicts Mr. Humble’s assessment of Mr. James where he said, in his appraisal “He is continuously improving and feel he will be a great asset in support in the improvement of Optimum Skills”.
- f. Mr. Humble admitted that before the apprentices’ files were transferred to Mr. James, he had not reviewed them for any issues. Under cross-examination, Mr. Kirsopp admitted that the predecessor assessor had not been doing a good job and he had to smooth things over with the client(s). We find it surprising that, given that there had been problems with the assessor who had resigned, it was only after the transfer that there had been a review. From this, it is reasonable to infer that the problems that associated with these apprentices were inherited by Mr. James. He was not the cause of the dissatisfaction. Mr. Kirsopp told the Tribunal that there was a positive impact on the business when the assessor had resigned. That points to problems with Mr. James’ predecessor; problems that he inherited rather than caused.
- g. Mr. Humble claimed that Mr. James’ workload of 11 apprentices was too heavy for him to manage and this posed a high risk to the business. However, he told the Tribunal that when he discussed the number of apprentices to be transferred to Ms. Mathers, he thought that it would be appropriate for him to keep five or six apprentices rather than reducing it to two. He contradicted himself because he clearly did not think that managing five or six apprentices constituted a serious risk to the business. Furthermore, the suggestion that Mr. James’ workload was too heavy is not consistent with what Mr. Humble told the Tribunal about the typical number of files that a trainee assessor would have. We were told that a trainee assessor would typically have between 25 and 30 apprentices. Mr. James was responsible for 11 apprentices which is significantly lower than the workload normally given to a trainee assessor. It is difficult to see why it was necessary to reduce his workload to two apprentices. That was a drastic measure.
- h. No performance issues were recorded in the action plan, the 1-2-1 and the appraisal.
- i. We were taken to a printout of Optimum’s website page entitled “Warehousing Level 2-Lewis” [124]. This refers to the experience of an apprentice called Lewis at one of Optimum’s clients called Glenn Office Supplies. There is a quote from a manager at that organisation which refers to Mr. James. It says, amongst other things:

Mike really promotes this experience and supports Lewis very well in his continuous development.

Mr. Kirsopp accepted that this was contemporaneous evidence of a client praising Mr. James’ work.

- j. It is noteworthy that nothing was produced by way of emails or other correspondence from the “disgruntled” clients to support Mr. Humble’s claim that Mr. James was underperforming and that if he continued with his existing workload, this would jeopardise Optimum’s business. The only evidence was what Mr. Kirsopp told the Tribunal which was general and vague.
- k. If there was an issue with Mr. James’ performance, we think it would have been reasonable to have consulted him when he returned to work. This is particularly the case given the quality of his appraisal. Objectively, what is being suggested is that between 11 February 2019 and 13 March 2019 (i.e. the date on which Mr. James’ second period of sickness absence started) there had been a significant deterioration in his performance and, if he continued to be responsible for 11 apprentices, this posed a serious risk of the business. There was no consultation about this whatsoever. Mr. Kirsopp had made his mind up and Mr. James was presented with a fait accompli when he returned to work on 1 May 2019.

58. Mr. James was unhappy with the change to his workload and his role. In his witness statement, he denies that his performance had anything to do with these changes and he was not given an opportunity to improve or address any of the alleged concerns in his return. He believed that the decision to recruit Ms. Mathers during his absence was not because of any alleged performance issues but because of the inconvenience caused by his disability and the likelihood of further treatment. He did not feel supported and questioned why Optimum recruited a permanent member of staff purely to cover his period of absence and his phased return to work.

59. On 10 June 2018, Mr. James raised a formal grievance setting out his concerns in a letter [61-64]. In summary he complained about the following:

- a. He believed that he was being discriminated against because of his cancer which is a disability. The decision to change his role and to remove a large part of his duties which, in turn, affected his future progression was taken without any consultation and was clearly stated to be as a result of perceived performance issues linked to his disability. He regarded that treatment as less favourable and discriminatory. He believed that his absence from work was a problem for Optimum and he was being penalised for taking time off work for his cancer treatment.
- b. The issues regarding his performance were vague and unfounded and were used as a pretext to justify changing his role without any performance procedure being followed. He narrated the fact that during his employment he had, at no point, been told that his performance was not at the required standard. There were no formal meetings where his performance was raised as a concern and he had never been told that if he did not improve his performance, his apprentices would be removed. He had not been given any warning or opportunity to improve to avoid the removal of his warehouse and

facilities apprentices. He referred to the positive feedback in his 1-2-1 from Mr. Humble together and the website feedback from Glen Office Supplies. He believed that the decision to remove his apprentices was also motivated by the fact that it might be possible that he would be absent in future. He believed that in normal circumstances, employees would be told about alleged poor performance promptly, given the opportunity to comment and the chance to improve before any action is taken. No procedure was followed in his case which he believed was further evidence that there were no genuine performance concerns. Even if his performance was in issue, his illness should have been considered as a factor in affecting it. Failing to give him the opportunity to improve or to introduce any reasonable adjustments to accommodate his disability was unfavourable treatment arising from his disability and a failure to make reasonable adjustments.

- c. He stated that Optimum was obliged to make reasonable adjustments to help him carry out his work. There had been no discussion with him about how he could continue to carry out his role as a manufacturing, facilities, and warehouse assessor/tutor even before or during his absence. During his return to work interview on 1 May, the answers to the questions that he was asked related to help and assistance. His answers assumed that he was continuing to work with apprentices full-time. Mr. Kirsopp did not tell him about the changes until afterwards.
- d. During his first period of sickness absence, he received full company sick pay throughout and during his phased return to work. During his second period of absence he only received statutory sick pay. He also complains that Mr. Humble told him on 2 May 2019 that during his phased return to work he would only be paid for the time that he was working. He accepted that he did not have a contractual right to company sick pay but he believed that this behaviour demonstrated a change in attitude by Optimum towards him as exemplified by the way in which the information was communicated to him. He asked Optimum to explain why there had been a sudden change of policy towards him given this absence was in connection with his thyroid cancer. He also asked Optimum to explain why he was not informed how his absence would affect his pay in advance and this placed him in a difficult financial position.
- e. He alleges that Optimum's decision resulted in him suffering discriminatory treatment and detriment in terms of loss of pay, qualifications, and career progression. The decision to remove his warehouse and facilities apprentices from him not only caused damage to his health immediately but also his long-term development and progression. He would no longer be able to complete his assessor training in warehousing and facilities because his apprentices had all been reallocated to a new tutor recruited during his absence to fill what he understood to be a classroom role. He believed that he had been sidelined into classroom teaching without notice or justification.

- f. Mr. James invited Optimum to reconsider their decision to remove his apprentices and to reinstate him to his previous position of a full-time warehouse, facilities, and manufacturing tutor/assessor so that his progression would not be impacted. His letter of appointment stated that he would achieve qualified assessor status within 6 months, along with an increase in salary. That had not happened, and he wanted to plan to ensure that this would be achieved within a reasonable timescale.

60. Optimum instructed Kimberley Ivory, an HR Consultant (Director) at an organisation called Transitional HR Limited, to investigate Mr. James' grievance. Ms. Ivory took statements from Mr. Kirsopp, Mr. Humble, Ms. Roddam-Carty, and Mr. James. She produced a report dated 21 June 2019 [91-98]. In section 2 of the report which is headed "Executive Summary and Findings" Ms. Ivory states, amongst other things, that:

Mike cites three detriments; 1) loss of pay, 2) loss of qualifications and 3) loss of career progression. The evidence collated shows that there has been no loss of pay, in fact Mike was paid more than he was entitled to. His progress with his assessor qualification has been interrupted by his ill health but is still very much available to him and in fact changes have been made with the intention of making this goal as achievable as possible for him. Finally, the loss of career progression is purely speculative perception. There is nothing within the circumstances that will prevent him from progressing within the company should that be his wish.

61. On 27 June 2019, Ms. Diane Shakespeare heard Mr. James' grievance. Mr. James attended the meeting with a representative. Ms. Ivory took notes and gave procedural advice.

62. Ms. Shakespeare rejected Mr. James' grievances setting out her reasons for doing so in a letter dated 27 June 2019 [99-100]. The gist of her reasoning is as follows:

- a. Optimum accepted that Mr. James was a disabled person as defined by EqA.
- b. He was entitled to have reasonable adjustments to accommodate him to enable him to perform his duties, achieve his career aspirations and to prolong his employment.
- c. He had not been treated less favourably or unfairly at any time during the 15 months of his employment.
- d. He had not lost any remuneration.
- e. He had not lost any qualification or opportunity to gain qualification.
- f. He had not lost career progression.
- g. Having reviewed the number of miles that he had done in the last month, she noted that Mr. Humble recognised that this was more than he had anticipated would be necessary. Consequently, action

had already been taken to ensure that he was allocated to local “on-site” visits where possible as part of the ongoing support agreed during his return to work meeting designed to address his ongoing need for reduced driving because of symptoms of fatigue.

Ms. Shakespeare notified Mr. James of his right to appeal.

63. Mr. James appealed Ms. Shakespeare’s decision setting out his grounds of appeal in a letter dated 2 July 2019 [101-102]. The gist of his appeal is as follows:

- a. He disputed Ms. Shakespeare’s conclusion that he had been properly introduced back into his role as facilitated by the return to work meeting. He repeats the fact that during his return to work meeting he was not told that his role was changing, and he believed that he would be returning to his existing role of warehouse, facilities and PMO assessor. Had he known, he would have answered the questions differently in the return to work interview such as highlighting the fact that he would need a phased return because he would be unable to schedule breaks during the day whilst facilitating short courses in the same way as he could have done by managing his own diary whilst working with apprentices. Once he had signed the return to work form, during the same meeting he was told that his roles were changing. He was given no prior notice or opportunity to challenge that decision. The changes were made without consulting him and this was unreasonable.
- b. He challenged Ms. Shakespeare’s conclusion that changes were made in the distribution of his work to enable maximum support to be provided on his return. He claims that if that were the case, he did not understand why he would be expected to travel 1000 miles in June which was his first full month back after sick leave. The change in his role demanded that he travelled almost double the average number of miles that he had been travelling as a warehouse/facilities and PMO assessor. He expected Optimum to make reasonable adjustments to his role to allow him to battle the fatigue caused by his illness (as highlighted in his return to work meeting). In fact, the opposite occurred, and this undermined Ms. Shakespeare’s claim that he was receiving maximum support. He also referred to the fact that he was expected to deliver 3 training courses one of which lasted for a week which he had never previously delivered. This placed him under unnecessary additional pressure during his period of re-adjustment back into the workplace. Had he gone back to his previous role this stress would have been avoided. In November 2018, he had an operation to remove a cancerous tumour from his neck which was far more invasive than the follow-up radiation therapy he received in March 2019. Given that Optimum claimed to be providing him maximum support he asked why the changes to his role were not made during his return to work in January 2019 rather than in May 2019. He maintains that the changes were discriminatory.
- c. He did not accept Ms. Shakespeare’s claim that he had not lost any career progression. His career aspiration was to be a fully competent

assessor in warehousing and facilities services. According to his contract of employment, his qualification should have been gained within six months of commencing employment. By removing learners from him, he was denied the development opportunity to gain that qualification and progress his career. He had returned to full-time duties and had no more scheduled treatment, and he requested the learners to be returned to him so that he could pursue his progression as originally planned.

- d. He challenged Ms. Shakespeare's conclusion that learners receive the best possible service. He asserted that this statement was not consistent with the fact that his learners were only reallocated to another member of the team during his second period of absence. He had shared his treatment plan with both directors in October 2018 and it clearly involved 2 distinct periods of absence so he was unclear why a decision was taken "in the best interest of the learners" in April 2019 when he was already planning his return to work. He stated that during his first period of absence, he was aware that some learners did not receive their allocated visits from any member of Optimum's team and many of them were behind programme when he returned at the beginning of December 2018. It would have been in the best interest of the learners to provide continuity of service during his absence, to allow them and Mr. James to pick up without any lost time on his return.

64. Mr. James' grievance appeal was heard on 10 July 2019. It was chaired by Mr. Alan Balmer. Mr. Balmer is a non-executive director at Optimum. Ms. Ivory (who took notes and advised on procedure), Mr. James and Barbara, his representative, also attended.

65. Mr. Balmer dismissed Mr. James' appeal setting out his reasons for doing so in a letter dated 15 July 2019 [104-105]. The gist of his reasoning is as follows:

- a. He accepted that Mr. James was disabled which entitled him to reasonable adjustments to fulfil his work remit. In considering that point, he sought to satisfy himself that Optimum had made adjustments that it was able reasonably to accommodate and enable him to continue in his role as a tutor/assessor. He had read the job description and sought clarification about the type of work that he was required to do. He narrated that he had 2 apprentices and was predominantly delivering short courses which were classroom-based. He was satisfied that the duties he was being asked to perform were within the scope of his job description and did not put him at a particular disadvantage. Optimum had followed the advice given in his Med 3 signed by his treating physician stating that he may be fit for work subject to amended duties.
- b. He found that adjustments were made to his role to enable him to progress his career. The assessor qualification could be achieved with two apprentices and, once achieved, Optimum would consider his pay grade at that time as per usual practice.

- c. He did not find that Mr. James had suffered from any financial detriment. Indeed, he had received more remuneration than he was entitled to according to company policy.

66. On 17 July 2019, Mr. James wrote to Mr. Humble to tender his resignation [106]. He stated that he felt he had no choice but to resign because of his recent experiences which he considered to be disability discrimination. He also stated that there was a fundamental breach of his contract because of his disability as well as a breach of trust and confidence between himself and Optimum.

67. Mr. James has elaborated upon the reasons why he resigned in his witness statement. He states:

33 I believe that changing my role (which denied me the opportunity to complete and assessor award, denied me the opportunity to secure a salary increase and resulted in increased travelling), failing to adequately investigate and consider my grievance and placing me in a position where I believed I had no option but to resign, was unfavourable treatment arising from matters connected to my disability, i.e. sickness absence and a phased return to work. I do not believe that the Respondent's conduct can be justified in the circumstances.

34 I suffered hurt feelings and emotional distress as a result of the Respondent's conduct. I was very hurt by the way I was treated because of reasons relating to my disability. Suffering from cancer is already a difficult position to be in, and the unfair treatment at work added to the distress. I could not believe how I was treated on my return in what was already a difficult time for me. I was visibly upset and distressed at home, despite needing rest this caused me to have many sleepless nights. I was also embarrassed in front of my colleagues as I felt I had been demoted and that everyone in the office knew about my role before I did (as new assessor had been given my learners in my absence. I look forward to returning to the office and trying to get some normality back in my life, but I was left embarrassed, hurt and in disbelief within an hour of my return.

68. He expanded upon this in his oral evidence when he told the Tribunal that he considered himself to be a hard-working person. He said that he was driven, and he always tried his best and wanted to take on additional responsibilities. He had been excited about the prospect of joining Optimum and had really enjoyed working for them in the first few months of his employment. He had seen an opportunity to develop. He also thought that he had helped Optimum out of some difficult situations. It had been a difficult period for him because of his cancer. He felt that he had a good appraisal and there were no issues with his performance. However, on returning to work on 1 May 2020 he was told that his performance was not good enough. At this point in his oral evidence, Mr. James became visibly upset and he needed some time to compose himself before continuing. He said that he was not given an opportunity during the return to work meeting to defend himself and he found the experience very challenging to him as an individual. It had knocked his confidence in his own abilities. He felt that he

had put in a lot of effort to help Optimum and had then been told that he was not good enough. He felt that it simply suited them to push aside. Their behaviour felt like a personal attack. We have no reason to doubt the sincerity of Mr. James' evidence about how he felt he had been treated and we accept what he says about his hurt feelings.

69. We were taken to an undated document [122-123]. Whilst it is unclear who wrote it, Mr. Kirsopp accepted in his oral evidence that it was prepared by Optimum. We believe that it was produced sometime after Mr. James left Optimum as it refers to the fact that he had a "relatively short employment relationship lasting less than 1 year 4 mths". It is illustrative of what was in the mind of the author regarding Mr. James' employment and his illness and we give it weight. We note the following:

MJ absences had a significant detrimental impact on the business...

Following the second absence when MJ informed his employer he was fit to return to work he also indicated that he could become tired more easily and would like to work closer to home both of which were agreed and viewed as reasonable.

MJ behaviour and conduct left much to be desired. He was obnoxious and argumentative. Recognising that he had suffered a serious health issue and that this can impact on a person in many ways the company had not yet addressed these issues with MJ.

We believe that this document supports the proposition that it was Mr. James' absences which was the reason why the changes were made to his role. Optimum believed that they were having a significant detriment on the business. We also note that whilst they acknowledged that he could be tired more easily and wanted to work closer from home, this was not achieved given that he had one apprentice to assess which required a 100 mile round trip. The statement about his conduct and behaviour being obnoxious and argumentative is not borne out by any other evidence provided. Indeed, it seems completely out of place when viewed in relation to what was said about him in his action plan, the 1-2-1 and his appraisal. It suggests that the author was retrospectively constructing an alternative narrative based on alleged poor performance to deflect from Mr. James' absence as the reason for removing the apprentices and putting him back to classroom teaching.

Applicable law

70. EqA, section 15(1) provides that 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.

71. EqA, section 15(1) goes on to state that section 15(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.

72. In establishing unfavourable treatment, there is no requirement to have a comparator.

73. We are reminded that in **Secretary of State for Justice and anor v Dunn EAT 0234/16** four elements must be made out for Mr. James to succeed:

- a. There must be unfavourable treatment.
- b. There must be something that arises in consequence of the claimant's disability.
- c. The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and
- d. Optimum cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate end.

74. Unfavourable treatment is what the alleged discriminator does or says, or omits to do or say, which then puts the disabled person at a disadvantage. Dismissal can amount to unfavourable treatment.

75. The discriminatory treatment must be something arising in consequence of Mr. James' disability not his disability itself. There must be something that led to the unfavourable treatment and this "something" must have a connection to Mr. James' disability. In **Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT** Mr. Justice Langstaff, the then President of the EAT, explained that there is a need to identify two separate causative steps in order for a claim under section 15 EqA 2010 to be made out. The first is that the disability had the consequence of 'something'; the second is that the claimant was treated unfavourably because of that 'something'. According to Langstaff P, it does not matter in which order the tribunal approaches these two steps: 'It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability'.

76. In **Dunn** Simler J state:

'[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability... [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an

examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary.

The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

77. We are also reminded that in **Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893, EAT**, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment. A section 15 claim could succeed where the disability had a significant influence on, or was an effective cause of, the unfavourable treatment. The EAT's approach in **Hall** clearly required an influence or cause that operates on the mind of a putative discriminator, whether consciously or subconsciously, to a significant extent and so amounts to an effective cause. Anything less would be insufficient.

78. In **Department for Work and Pensions v Boyers EAT 0282/19** an employee was dismissed for long-term sickness absence. The employment tribunal found the dismissal to be unfair and then went on to find that it was also discrimination arising from disability. Allowing an appeal against the latter finding and remitting the matter of justification to the tribunal, the EAT held that in the tribunal's consideration of proportionality, it had impermissibly focused on the process which led the employer to dismiss, rather than engaging in an objective assessment, balancing the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the decision to dismiss.

79. A failure to consider whether a lesser measure could have achieved the employer's legitimate aim may mean that the tribunal fails to take a relevant factor into account in the proportionality exercise required under section 15(1)(b). In **Ali v Torrosian and ors (t/a Bedford Hill Family Practice) EAT 0029/18**, A had worked as a GP for BHFP before suffering a heart attack and then going on sick leave. His ongoing heart condition was a disability for the purposes of the EqA. A medical report confirmed that it was unlikely that A would ever be able to return to work full time but advised that he could return to part-time work. On the expiry of his last fitness to work certificate, A was dismissed on the ground of capability. He brought claims of unfair dismissal and disability discrimination. The tribunal concluded that the dismissal was procedurally unfair because BHFP failed to consider A's return to work on a part-time basis. However, it rejected his disability discrimination claims, holding that while his dismissal amounted to unfavourable treatment for the purposes of section 15, and arose in consequence of his disability, it was justified by the legitimate aim of ensuring the best possible care was provided to patients.

80. The EAT allowed A's appeal against the rejection of his section 15 claim. While the tribunal had considered the impact of A's absence in terms of BHFP's financial and operational costs and the effect on continuity of patient care, it had failed to consider the possibility of him returning on a part-time basis. A had provided medical evidence in support and part-time work was

a relevant alternative which could mitigate against the discriminatory impact of a dismissal. The absence of that factor from the tribunal's assessment of objective justification undermined its decision. When A was dismissed, his last fitness to work certificate had ended and the medical advice was that he should be able to return on a part-time basis. As noted by the Court of Appeal in the **Bolton St Catherine's Academy v O'Brien EAT 0051/15** case, there is an overlap in the substantive issues relevant to the tribunal's determination of unfair dismissal and section 15 claims. Adopting a 'holistic approach' to the tribunal's reasoning led to the conclusion that it had erred in failing to consider the issue of part-time working as a less discriminatory means of meeting BHFP's legitimate aim. The section 15 claim was remitted to the same tribunal to reconsider the question of proportionality in the light of its finding that it had been possible for BHFP to accommodate part-time working.

81. In **Williams v Ystrad Mynach College ET Case No.1600019/11** —an employment tribunal stated that it was 'not open to the respondent, retrospectively, to proffer a legitimate aim that was not in its mind at the time'. In that particular case the claimant, who suffered from hydrocephalus ('water on the brain'), was employed as a college lecturer under a 'professional academic contract'. Following a substantial period of absence for medical treatment, discussions between the claimant and the College took place regarding the terms for his return to work, including the option of transferring onto a short-term contract. This was resisted by the claimant, who wished to remain on his existing permanent contract but with a 50 per cent reduction in hours. In the event, the College unilaterally imposed the new contract, at which point the claimant brought claims of disability discrimination based on unfavourable treatment arising from his disability contrary to EqA, section 15 and breach of the duty to make reasonable adjustments contrary to section 20. The tribunal upheld both claims.
82. Regarding the section 15 claim, the college conceded that the termination of the claimant's existing contract and imposition of the inferior contract comprised 'unfavourable treatment' and that this arose in consequence of the claimant's disability. However, it contended that the unfavourable treatment was justified as a proportionate means of achieving a legitimate aim — namely, that of ensuring continuity of services to its students. Rejecting this contention, the tribunal ruled that the College was precluded from advancing a legitimate aim that was not in its mind at the time when it subjected the claimant to the unfavourable treatment complained of. In this case the College had imposed the new contract based on an assumption about the claimant's prognosis that was unwarranted, given the available medical evidence. It had not previously explained its actions in terms of the need to provide an unbroken service to students. Additionally, and in any event, the tribunal said that even if such a legitimate aim could be retrospectively relied upon, the College had implemented it in a disproportionate manner. In the tribunal's view, the unfavourable treatment in this case was incapable of justification because there was a less discriminatory means of achieving the same legitimate aim available — namely, the retention of the claimant on his existing contract but with reduced hours — which was the very adjustment he had sought.

83. Although the overall conclusion reached by the employment tribunal in the **Williams** case appears to be sound, its assertion that an employer is unable to rely on a legitimate aim that it did not have in mind at the relevant time or that is different from the aim it did have in mind at that time should be treated with caution. In **Bolton St Catherine's Academy v O'Brien EAT 0051/15** His Honour Judge Serota QC held that, for the purposes of a section 15 claim, there is no rule that justification has to be limited to what was consciously and contemporaneously taken into account in the decision-making process. Even if no consideration had been given at the time the unfavourable treatment occurred and even if the evidence was not available at the time, an employer can still establish justification by reference to the material before the employment tribunal. In HHJ Serota's view, it was an error of law for a tribunal to take the incompetence and failure of an employer to get to grips with the employee's disability as a reason for rejecting a justification defence.

84. The Court of Appeal subsequently overturned the EAT's decision in the **O'Brien (O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA.)** The problem is that, in so doing, the Court failed to tackle the issue of whether a tribunal is entitled to consider the proportionality issue by reference to legitimate aims that were not articulated by the employer at the time when the unfavourable treatment was imposed. What the Court of Appeal (by a majority) did conclude was that, in the context of a case where the claimant availed herself of an internal appeal against her dismissal, the tribunal was entitled — indeed obliged — to consider the proportionality defence in the light of the medical evidence as it stood at the time of the internal appeal and not at the date of the original dismissal. In this specific case the medical prognosis regarding O's capacity to return to work after a long period of sickness absence had improved by the time of her internal appeal. The Court of Appeal ruled that the tribunal had been fully entitled to take this into account when concluding that dismissal was a disproportionate means of seeking to achieve the Academy's legitimate aims., which were the efficient running of the school, the reduction of costs and the need to provide a good standard of teaching. This conclusion, to some extent at least, can be seen as supporting HHJ Serota's view in the EAT.

85. Further authority for the view that justification under section 15 is not limited to what was in the employer's mind when it carried out the unfavourable treatment can be found in **ICTS (UK) Ltd v Visram [2016] 7 WLUK 664**. There, Her Honour Judge Eady QC stated:

[T]he employment tribunal was left with a pleaded case which contended it was a legitimate aim to remove an employee who was on sick leave and unable to return to work, but who was entitled to received long term disability benefits whilst he remained an employee. So, the aim relied on by the respondent was to remove the claimant in those circumstances and the legitimacy of that aim was to be judged by the employment tribunal on an objective basis (not limited to what was in the respondent's mind at the time)

86. We are reminded that the Code sets out guidance on objective justification that largely reflects existing case law in this area. In short, the aim pursued should be legal, should not be discriminatory in itself and must represent a

real, objective consideration. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

87. Paragraph 4.9 of the Code provides guidance on what is meant by a disadvantage:

“Disadvantage” is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that “detriment”, a similar concept, is something that a reasonable person would complain about-so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently.

88. Paragraph 4.31 of the Code provides guidance on what is proportionate:

Although not defined by the Act, the term “proportionate” is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an “appropriate and necessary” means of achieving a legitimate aim. But “necessary” does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

89. Paragraph 5.7 of the Code provides guidance on what is unfavourable treatment

For discrimination arising from disability to occur, a disabled person must have been treated “unfavourably”. This means that he or she must have been put at a disadvantage. Often the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of the disabled person, they may still treat that person unfavourably

Discussion and conclusions

90. Having considered the evidence, we believe that Mr. James was subjected to unfavourable treatment. In August/September 2018, his role was varied so that he moved from classroom teaching to training to be an apprentice assessor. It also required Mr. James to resume classroom teaching which he had largely stopped when he took on the apprenticeship assessor role. This was done without any consultation with Mr. James and was simply presented to him as a fait accompli when he returned to work on 1 May 2019. The fact that Optimum may have thought that they were acting in Mr. James’ best interests does not detract from this treatment being unfavourable.

91. At the time when Optimum decided to change Mr. James' role it knew that he was disabled. It had known about his cancer prior to the first time that he took time off work to have his surgery.
92. The unfavourable treatment put Mr. James at a disadvantage and was detrimental for the following reasons:
- a. Whilst he did not suffer any financial loss, he was denied an opportunity to broaden his industry base of apprentices. Mr. James had a narrower range of industries to assess when his apprenticeship portfolio was reduced and, whilst we accept, that he could achieve his qualification, the scope of work that he might enjoy thereafter would be more limited than if he had continued with the range of apprentices that he had prior to the change. That reduced his opportunities and potential levels of remuneration.
 - b. Reducing his apprenticeship portfolio to the bare minimum would give less scope for him to practice and to develop his skills.
 - c. There is no doubt that Mr. James felt that he had been demoted in the eyes of his colleagues and was upset by this. Implicitly, he must have felt a sense of rejection and this undermined his confidence. We do not accept, as Mr. Kirsopp stated that this was a step forward for Mr. James and requiring him to take on classroom teaching was part of his job description. We accept that his job description does refer to classroom teaching however, as a matter of fact, he had moved on and his activities largely centred upon assessing apprentices. Focusing on what was written in the job description, is, in our opinion, too narrow and does not reflect the reality of Mr. James' role when he returned to work on 1 May 2019. In his appraisal, he reflects on this when he says "I have really enjoyed the transition from short courses to apprenticeships". Mr. Humble countersigned the appraisal which signifies his agreement that Mr. James' role had changed. Optimum subsequently unilaterally reduced the number of apprentices for whom Mr. James was responsible from 11 to 2 and put him back into the classroom. This was a material change to his contract of employment and, according to clause 29, Optimum should have given him 1 months' notice in writing of that variation before it took effect. It failed to do that and acted in breach of contract
 - d. By significantly reducing the number of apprentices, Mr. James was also required to travel extensively. One of his apprentices was 50 miles away, and this necessitated a 100-mile round trip. He also had to travel to give classroom training. His increased mileage is illustrated by the mileage summary [143]. In May 2019, he drove 350 miles. In June 2019, he drove 940 miles. This increase in mileage was tiring and did not help Mr. James in his recovery. Indeed, he had raised the point in his return to work interview and this was acknowledged but apparently not acted upon.

He had every justification in raising his grievance.

93. There was a link between Mr. James' disability and the unfavourable treatment that he received. The "something" arising from his disability was his sickness absence. The decision to reallocate most of his apprentice assessor work to Ms. Mathers and to put him back into the classroom was taken during his second period of sickness absence. It was not connected with any perceptions regarding his performance. His absence was the causal link to Optimum's decision to make those changes. Indeed, Optimum made an explicit link between his absences and the detrimental impact on its business in the undated note [122].

94. Optimum have not established that performance was the reason for imposing the changes on Mr. James for following reasons:

- a. Before Mr. James's cancer diagnosis, there had been no issues regarding his performance. After he returned to work from his first period of absence, he agreed an action plan with Mr. Humble. There was no reference to any performance issues in that plan. He then had a positive 1-2-1 meeting with Mr. James during which performance issues were not raised. Shortly afterwards, this was followed up by his appraisal which, by any view can only be seen as positive. At the time when Mr. James started his second period of sickness absence, he had every reason to believe that Optimum were happy with his performance.
- b. There was little evidence about complaints from clients about Mr. James.
- c. Optimum's website material indicated that Mr. James was well regarded. The praise came from clients. It was still live on Optimum's website in July after he left [125].
- d. We accept that Mr. Kirsopp had ostensibly reduced the staff because of the state of the files but no there was direct evidence that this was done because of Mr. James' alleged fault. Indeed, Ms. Nicholls conceded in her closing submissions that Mr. Humble could have done more to support Mr. James.
- e. We have concerns about the Ofsted visit and Optimum's claim that it was influenced Mr. Kirsopp to change Mr. James' workload. For the following reasons:
 - i. Little contemporaneous evidence about the issue with Ofsted was adduced. Although we heard oral evidence that Ofsted would visit, nothing was produced about what criteria Ofsted would follow at such a visit. We were not provided with evidence about what they would be reviewing and, potentially, what areas concerning Mr. James' alleged underperformance would be scrutinised by Ofsted. It is reasonable to expect Optimum to have provided evidence such as any Ofsted Codes of Practice and/or guidance for best practice and the requirements that Optimum had to meet? None was adduced.

- ii. We accept that Mr. Kirsopp's statement, taken by Ms. Ivory in investigating the grievance, contains a passing reference to the anticipated Ofsted visit. However, he stated that his justification for removing the files from Mr. James was twofold:
 - So he could complete the assessor qualification as quickly and as easily as possible.
 - To preserve as much continuity as possible with the tutor that had taken the apprentices whilst Mr. James was on sick leave.
- iii. Paragraph 8 of Mr. James' witness statement refers to the meeting with Mr. Kirsopp and Mr. Humble during which he was informed that his job had changed, and that Ms. Mathers was carrying out his role. There is no suggestion that Ofsted was a factor in making those changes. Furthermore, there are no notes of this meeting setting out the reasons for the decision or, alternatively, if there were such notes, they were not disclosed or no longer exist.
- iv. There is nothing about Ofsted in Ms. Ivory's executive summary or in the grievance outcome letter.
- v. The notes [122] make passing reference to Ofsted, but these were written after Mr. James had resigned and left the company. The Ofsted visit was not communicated to Mr. James as reason for reducing his workload.

95. Did Optimum deploy proportionate means to achieve a legitimate aim? Optimum relies upon the following legitimate aims in their amended grounds of resistance:

- a. Maintaining their high level of service.
- b. Ensuring that their clients, who were students, were not prejudiced by poor service.
- c. Upholding their business during a visit by Ofsted. If it incurred a poor grading it would not be able to take on new clients until it had satisfied Ofsted that it had improved its standard

96. We consider that the first two examples given are in fact different aspects of the same aim and we accept that this is a legitimate aim. Maintaining a high level of service must, by necessity, mean ensuring that clients, who were students, were not prejudiced by poor service. Consequently, there are effectively two legitimate aims:

- a. maintaining high service;

- b. and upholding the business during a visit by Ofsted. Clearly, any organisation that is regulated must ensure that it meets the requirements of its regulator. Nobody can impugn such an aim.

97. However, we believe that Optimum are relying retrospectively on the second legitimate aim because the issue of the Ofsted visit was not an operative reason for changing Mr. James' workload and requiring him to go back to classroom teaching. However, having reviewed the applicable case law, we accept that an employer may retrospectively introduce a legitimate aim or aims.

98. In seeking to achieve those legitimate aims Optimum reduced Mr. James' portfolio from 11 to 2 apprentices and put him back into the classroom. Optimum claimed that it would not be proportionate to allow Mr. James simply to continue training two apprentices. He had to do some more teaching.

99. In considering the proportionality, we must conduct a balancing exercise. On Mr. James' part the impact of the changes was:

- a. He had to drive more. He had a 100-mile round trip to see one apprentice and he had additional driving to deliver his classroom teaching. He made it clear in his return to work interview that he wanted reduced mileage to avoid becoming tired. Optimum knew that his illness made him prone to tiredness. He lodged a grievance, and that aspect was upheld. The driving impacted on his health and made him tired.
- b. He had to teach a course that he had not previously taught and he had to prepare classes which were time consuming. This impacted on his health, which made him tired.
- c. Taking the warehouse and facilities apprentices off him reduced his career prospects although there was no immediate financial loss to him.
- d. Mr. James felt that he had been demoted and he was demoralised. It was a step back for him.

100. From Optimum's perspective, they say that the steps they took were proportionate because they were protecting the reputation of their business and their standing in the eyes of their regulator. They claim that this was necessary to manage the risks to their business. They also maintain that Mr. James would still have achieved his qualification with a minimum number of two apprentices and would then have had the opportunity to diversify his experience and to build back up his numbers of apprentices that he was assessing.

101. We believe that there could have been a less discriminatory approach to achieving one or both legitimate aims for the following reasons:

- a. Mr. Humble regularly reviewed Mr. James' performance and said that he believed that a 50% reduction of apprentices was practicable. Being his line manager and familiar with his work, he was well placed

to make that decision, and arguably in a better position to make that decision than Mr. Kirsopp who was not responsible for managing Mr. James' work.

- b. Mr. Kirsopp was asked why he did not follow Mr. Humble's recommendation and he replied he had decided that there should be 2 apprentices but gave no explanation why that was more appropriate than 4 or 5. We formed the impression from his tenor (was) that he believed that because he was the director of the business, he did not need to talk about Mr. Humble's proposal. He made the decision. Furthermore, there was no evidence of consulting Mr. James about this; it was presented as a fait accompli. This indicates that Mr. Kirsopp had a closed mind. Had he consulted with Mr. James and Mr. Humble he might have been in a better position to assess the proportionality of the decision.

- c. According to Mr. Humble, a qualified trainer would have 40-45 apprentices and a trainee assessor would have 25-30 apprentices. We understand the rationale. Trainee assessors should be given a lighter workload than qualified assessors. They are still learning and should not be overloaded with apprentices. Before the changes were implemented, Mr. James had 11 apprentices. Applying Mr. Humble's rationale, Mr. James under utilised even before the change was implemented on 1 May 2019. Consequently, there was no justification in reducing his portfolio to 2 apprentices in the absence of any objective evidence that he was underperforming. On the hypothesis that a reduction was necessary, this could have been to 4 or 5 apprentices, with a spread across warehouse, manufacturing, and facilities. In this way, he would have the breadth of experience he wanted to progress his career. He already had a background in manufacturing and was gaining experience with warehouse and facilities. The implication was that he had been working in all these areas since December 2018 which was provided by the tracker evidence.

102. Whilst Optimum have identified two legitimate aims, they did not act proportionately and could have used a less discriminatory approach in achieving those aims.

Employment Judge A.M.S. Green

Date 28 October 2020