EMPLOYMENT TRIBUNALS

BETWEEN

Mr M Asman AND Birmingham Women's and Children's NHS Foundation Trust

Claimant Respondent

HELD AT Birmingham ON 5 – 9 October 2020

EMPLOYMENT JUDGE Self

Mr E Stanley

Ms Ratnayake-Kingsley

Representation

For the Claimant: Mr W Brown - Solicitor

For the Respondent: Ms S Keogh – Counsel

JUDGMENT

1. The Claimant was a disabled person pursuant to the Equality Act 2010 from 8 March 2019.

2. All Disability Discrimination Claims prior to that date are dismissed.

3. All remaining Claims of Disability Discrimination and Race Discrimination and religious Discrimination are dismissed.

WRITTEN REASONS

(Following a request by both parties
subsequent to oral Judgment being given on 9 October 2020)

1. By a Claim Form lodged on 26 August 2019 the Claimant seeks compensation for alleged acts of disability, race, and religious discrimination. The Respondent, by a Response lodged on 18 October 2019, deny those Claims in their entirety.

2. The Claimant was in Early Conciliation between 23 June 2019 and 6 August 2019 and so, subject to any argument about acts continuing over a period, any claim that took place prior to 24 March 2019 would not have been lodged within the statutory time limit set out in the Equality Act 2010 (EqA).

3. We have read witness statements and have heard the oral evidence from the Claimant and Mr Ghivalla on behalf of the Claimant and from Ms Joanna Mason (Band 7 Biomedical Scientist), Mr Phillip Hurley (Band 8 Chemistry Operations Manager) and Mr James Taylor (Head of Blood Science) on behalf of the Respondent. We have considered such documents as we have been directed to by the parties either in their witness statements or during oral evidence. We have had written closing submissions from the Respondent, which were supplemented orally, and we heard oral submissions on behalf of the Claimant.

4. This was a hybrid hearing. The Claimant and his solicitor appeared separately by CVP at their request and the Respondent and their witnesses were present in the Tribunal. The whole hearing could and would have been conducted at the hearing centre but for the request of the Claimant and his representative to appear remotely. The Tribunal, having spoken with the parties at the outset, spent the rest of the first morning reading.

5. Just before evidence was about to start there was an application by the Claimant for some additional disclosure which was opposed by the Respondent. The Tribunal considered the very late application for documents and refused the application for reasons that are not necessary to recite further herein. The parties were informed that if it appeared to the Tribunal that there were deficiencies in disclosure or that specific documents seemed relevant then the Claimant could renew his application during the course of the hearing, or the Tribunal would themselves call for documents. There were no further applications for disclosure during the course of the hearing and the Tribunal did not feel the need to see any additional documents.

6. The rest of the first afternoon was lost when it became clear that the Claimant could not adequately access the trial bundle which meant that his cross examination could not start. The Tribunal was surprised that the Claimant's representative had not ensured that the Claimant was adequately equipped to deal with the hearing especially as the remote nature was at the Claimant's request.

7. We were grateful to the Respondent's solicitors for taking steps to deliver a hard copy of the bundle to the Claimant later that day. The Claimant gave evidence on the second day and the Respondent's evidence was heard on Day Three. We

heard submissions on the morning of the fourth day and having considered our Judgment we delivered it orally on the fifth day. Both parties have made requests for written reasons within the time limit specified within the Tribunal's Rules of Procedure. To the extent that there is any difference in wording between these written reasons and those given orally on the day these written reasons prevail.

8. The Tribunal would wish to express its thanks to the parties, the legal representatives, and the witnesses for the focussed way in which they have approached this case which enabled the original time estimate of five days to be met.

9. As stated above this Claim revolves around three protected characteristics - disability, race, and religion / belief. For disability, the Claimant relies upon a range of physical impairments being a knee, neck, and lower back injury. For the race discrimination the Claimant on his claim form relies upon his "Asian ethnicity" and for the Religion / Belief claim he is of the Islamic faith.

10. Before considering the specific alleged acts of discrimination the Tribunal needs to consider some preliminary matters so as to establish the jurisdictional scope of this Claim.

11. Firstly, the Tribunal needs to resolve the issue of whether or not the Claimant was a disabled person pursuant to section 6 of the EqA at the material times, i.e., when the acts of disability discrimination were taking place. In this case this is a period from 13 July 2017 and 3 April 2018.

12. At the outset of this case the Tribunal asked the parties as to what their respective positions were as to when the Claimant was a disabled person or, indeed, if there was and concession re disability at all. The Claimant's position was 21 May 2018 and the Respondent's position was 21 May 2019. There was some acknowledgement by the Claimant's representative in his closing submissions that 21 May 2018 probably was not the date of disability, but he invited the Tribunal to consider the evidence as a whole and to find the date of disability on that basis.

13. Once we have determined the date of disability, we will apply that to the list of issues and consider which acts come within the disabled period and so fall to be considered on their merits and which claims must automatically fail because of the date of disability.

14. Once those issues have been determined we will then consider whether the claims that remain have been lodged within the time limit set out within section 123 EqA and if not whether time should be extended because it would be just and equitable so to do.

15. We will then consider the issues still to be determined on their substantive merits.

16. <u>Disability</u>

Section 6 of the EqA, so far as is relevant states as follows:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

As per section 6 (6) at Schedule 1 of the EqA further assistance is given and in particular at section 2 thereof in relation to long term effects.

Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

Substantial adverse effects

4.Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

Effect of medical treatment

5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

17. Guidance is also provided in a statutory Code of Practice entitled ***Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)***. Under the EqA the Tribunal must take into account this Guidance. Relevant passages are at:

B1 – The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as limitation going beyond the normal differences in ability that may exist within people. A substantial effect is one that is more than minor or trivial effect as set out at s.212(1) EqA.

B2 and B3 gives examples that the time taken to do an activity and the way in which it is done can affect whether or not the substantial threshold is crossed.

C3 – "Likely" needs to be interpreted that "it could well happen".

C4 – In assessing the likelihood of an effect lasting 12 months account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing the likelihood.

C7 - It is not necessary for the effect to be the same throughout the period.

D3 – In general day-to-day activities are things that people do on a day-to-day basis…. Normal day-to-day activities can include general work-related activities…

18. We have considered the authority of ***Richmond Adult Community College v McDougall (2008)*** which makes it quite clear that when deciding on when an individual is disabled one has to make that assessment with the information available at the time the consideration is made and not by utilising what subsequently transpired. That Authority is supportive of the Guidance provided above.

19. When the Claim Form was lodged at the Tribunal on 26 August 2019 it was lodged by the same firm of solicitors as represented the Claimant at this hearing. Paragraph 4 of the Particulars of Claim stated that the Claimant:

> **"experiences ongoing pain in his right knee, neck and back which are disabilities for the purposes of … the Equality Act 2010"**

20. We comment that the fact that the Claimant was experiencing ongoing pain in August 2019 would not have any bearing upon whether the Claimant was disabled at the material time.

21. In the Response at paragraphs 36 to 38 the Respondent denied that the Claimant was a disabled person and indicated that in their view the Claimant had given insufficient detail within the Particulars. They requested that the Claimant provide a disability impact statement and relevant medical records relating to his knee condition.

22. The Claimant partially obliged and on 25 November 2019 an Impact Statement was sent to the Respondent (287). The following matters appear worthy of note from that statement and the paragraph number in which matters appear is placed in square brackets.

    a) ***I continue to suffer from ongoing pain in my right knee, neck and back … [2].***

    b) ***The injuries I sustained (in the road traffic accident) were to my neck, back and right knee. [4]***

    c) ***As a result of the injuries, I now suffer the following impairments on my day-to-day activities (a list is then provided) [5]***

    d) ***The Claimant stated that he struggled with the out of hours work and that there was an effect in respect of his sleep. [6]***

23. We comment that again that the focus within the statement, save for (d) above, appears to be on the Claimant's condition as at the date of document as opposed to the day-to-day activities that were affected at the material time. Subsection (d) relates to the workplace which was within the material time. The bulk of the statement is of limited use.

24. The Claimant filed a witness statement for this hearing. He did so in the knowledge that disability was still in issue. At paragraph 4 of that statement the Claimant refers the Tribunal to the Impact Statement referred to above and pages 293 to 443 of the bundle which is described as being ***"substantial medical evidence"***. No clue is given as to where the Tribunal might find salient documents. The Claimant provides information as to how he was affected in the workplace by his knee injury but fails to mention his back and neck having any impact at all at any time.

25. Within the bundle there is a wealth of medical evidence from a variety of sources. We have looked with care at all of the medical information as the Claimant specifically referred to all of it in his witness statement. Much of it was not relevant to the issue within this case despite the tribunal being specifically enjoined to consider it all.

26. As a general comment it would assist greatly if parties were to take a proportionate view of what medical evidence may be probative of each party's position and reduce the medical notes accordingly. It should be obvious that a letter in 1985 when the Claimant was 4 months old would not assist the Tribunal nor an eye condition in 2002, to give but two of many examples. Parties with legal advisors should easily be able to arrive at a list of documents that may be relevant which would be of far more use than asking the Tribunal to consider a large amount of irrelevant information.

27. At 346 is the report from A & E on the date of the Road Traffic Accident (RTA) on 21 May 2018. The diagnosis is ***"muscle injury - lower back"***. The Claimant attended with back and neck pain. There is no mention of a knee injury at that time and from this document the injuries appeared to be minor and it was noted that the Claimant ***"walked into the department and got out of the car with no help".***

28. On 19 June 2018 there is a medical report from Dr Perera who had been instructed by DLG Legal services (347). This report was to be used in a personal injury action that the Claimant intended to bring after the RTA. That Claim has still not been resolved.

29. So far as is relevant the summary of the report states as follows the paragraph numbers are in square brackets:

    a) ***The physical injuries were to "the neck, right side of knee and lumbar spine" [1.1];***

    b) ***It was anticipated that the knee would resolve itself in 4 months, the neck in 5 months and the lumbar spine in 6 months [1.2 to 1.4];***

    c) ***No future complications were anticipated [1.6];***

    d) ***The injuries had not improved in the month since the accident [6.1]***

    e) ***There was no previous medical history in the areas affected by the accident [8]***

    f) ***The Claimant was asked as to what the effect were on his domestic lifestyle and he stated that "heavy domestic chores / cleaning was restricted for 2 weeks only [10.1].***

30. It is worth pausing at this point to reflect on the Claimant's stated date of when he contended that he was a disabled person because on the basis of this report, his own report, he cannot have been a disabled person from the date of the accident. With the greatest of respect such a contention must be wholly misconceived.

31. At this point the Claimant had a physical impairment but it had not lasted 12 months and the prediction as at this date was that all conditions would resolve well within the twelve-month period. As the Claimant was utilising this report for medico-legal purposes there would be no benefit to him to downplay his injuries and we

accept that the report is an accurate assessment at that time, and we can confidently say that the Claimant was not a disabled person as at this date on the long-term criteria alone.

32. The Claimant states that there is nothing before the road traffic accident in his medical history from which the relevant impairments emanate. The accident date therefore is at best "Day 1" of the 12 months which would constitute a long-term impairment for the purposes of the disability definition. The Claimant can only be deemed to be disabled if there was a substantial effect on his day-to-day activities and it was likely to last 12 months.

33. We have a prognosis from the doctor that the knee would resolve in 4 months and the neck and back in 5 and 6 months, respectively. It should also be noted that this is complete recovery and reasonably it could be expected that the required effect on day-to-day activities would cease before complete resolution.

34. The Claimant was due back to work six weeks after the accident which would also indicate that the effects of the accident would not be long lasting.

35. On the basis of this report alone the Tribunal can say without any hesitation that the Claimant was not a disabled person as of 9 June 2018 and so far as the definition is concerned can go no further than saying that the Claimant had a physical impairment at that point.

36. There is a further medical report from Mr Mifsud on 11 March 2019 (366) – just under ten months after the accident. He examined the Claimant and conducted a full review of his relevant medical records. So far as is relevant the summary of the report (with our comments) states as follows. The paragraph numbers are in square brackets:

    a) ***In this report the Claimant reported that having a bath and going to the toilet were uncomfortable and his social and sex life was blighted for a while immediately after the accident and sleep. Household chores and driving were also difficult. Whilst still relatively modest this is an extension from the first report and apparently is contradictory with his first report. It is evidence, we have to consider in respect of the effect on his day-to-day activities. [9.1]***

    b) ***His lumbar symptoms were described as having been resolved in 6 months, there was nuisance value only in his neck and that the main issue was his right knee. [9.2]***

    c) ***He described that he had some difficulty at work, whilst driving, that there were problems with football and gym and sleep. The extent of these disruptions have not been detailed in the report nor have they appeared (save for work) in any of the evidence given by the Claimant [9.2].***

    d) ***On physical examination Mr Mifsud reported no limitations on the knee or the neck or back [10].***

    e) ***The level of disability as at the date of the report suggests that "the sum total of symptoms made life rather uncomfortable for Mr Asman.***

There has been improvement, but symptoms linger in the cervical spine and right knee" [13.2]

f) The prognosis states that the lumbar had resolved fully in 6 months. The neck, in the event of an MRI scan showing nothing untoward would resolve itself totally within 4-6 months of the report. There is no date given for the knee [13.3].

37. On 26 June 2019 Mr Mifsud produced a supplementary report following MRI scans being undertaken (388). There does not appear to be too much wrong with the neck and knee save that there is a mild disc bulge in the neck and a prominent Bakers Cyst in the knee. He recommended physiotherapy and that in 4-6 months both should be back to a pre accident state. Again, that is for a complete resolution as opposed to ceasing to have a substantial effect on day-to- day activities.

38. The Claimant's GP notes are between 424 and 436. They had been considered by Mr Mifsud when he completed his report. There are numerous occasions where it is mentioned that the Claimant has a good range of movement and occasionally tenderness or swelling of the knee is noted. There is no mention of back or neck pain or restriction after 25 May 2018 – 4 days after the accident (429- 427). Whilst the Claimant complains about pain in his knee there is no reference at all to anything relating to its effect on his day-to-day activities, save on one occasion that long shifts cause him to struggle.

39. Finally, the Claimant also visited Occupational Health over the period following his return to work. The following is considered material from each of those reports so far as the question of disability is concerned:

a) 23 July 2018 (95)

i) The Claimant only mentions his knee injury and describes it as having not improved materially since the accident two months earlier;

ii) Soft tissue injuries to the knee of the type the Claimant was thought to have usually take 4-6 weeks to heal but can take months depending on the structure of the injury. Full recovery was expected but with an unknown time span;

iii) The Claimant would experience knee pain for some time yet and amended work duties were recommended.

iv) There is no mention of any restrictions to day-to-day activities.

b) 23 October 2018 (105)

i) Again, only the knee is mentioned.

ii) There is said to be an impact on his sleep pattern and "walking at pace".

iii) With appropriate treatment knee symptoms will improve and potentially resolve

iv) The Claimant is fit to go onto normal shifts over the next 4 weeks.

v) Recovery was likely to take "a while" but no precise timetable was possible

c) 2 January 2019 (109)

i) Again, only the knee is mentioned.

ii) There is said to be an impact on his sleep pattern and "walking very far and twisting or turning on it".

iii) The Claimant appeared to be walking normally but did not have to bend down too far before the knee became painful.

iv) The knee symptoms would improve and potentially resolve in time.

v) The proposed adjustment of avoiding long shifts would be needed for "12 weeks or may be less".

vi) If knee problems continued at that time, then a musculo-skeletal management referral assessment would be required.

vii) The Claimant was said to be fit for work undertaking his normal duties.

d) 8 March 2019 (112)

i) There had been no improvement since the previous OH report.

ii) There is said to be an impact on his sleep pattern (intermittently) and "walking for prolonged periods and twisting or turning on it".

iii) He should not work for more than 8 hours over the next 8 weeks but could do night duty.

iv) It was unlikely that the Claimant would make progress until he had been assessed by the Orthopaedic Specialist for treatment to be determined and commenced. It was still anticipated that his symptoms would improve and resolve in time.

40. The Respondent accepted that following this report on 8 March 2019 the Claimant was suffering a substantial effect on his day- to- day activities as required but did not consider that this had been the case before that date.

41. Conclusions on Disability

The evidential burden to show whether or not the Claimant is a disabled person falls upon the Claimant. He has had every opportunity to do so. The threshold which the Claimant has to cross are set at a relatively low level. Substantial equates to ***"more than minor or trivial"*** and so far as likelihood is concerned, we need to consider whether ***"it could well happen"***.

42. We have considered all the evidence carefully and have concluded that the Claimant, on the evidence, can be deemed to be a disabled person pursuant to section 6 of the EqA from 8 March 2019 or some 10 months after his accident. We

record that the Claimant has satisfied us of this by a very narrow margin due to the paucity of the information that he has provided and the medical reports.

43. We are not satisfied that the Claimant's neck and back injuries have contributed to the Claimant's disability at all. We accept from the medical evidence that he suffered from these physical impairments but the lower back resolved within 6 months and at 10 months the neck injury was of nuisance value only. More importantly there is not one piece of evidence that suggests that the back or neck led to any effect on the Claimant's day to day activities. These conditions are not even mentioned in the Claimant's most recent statement. Further in the OH reports those conditions are not mentioned at all as a cause for the limitations to the Claimant.

44. So far as the knee is concerned, we do find that the Claimant's day to day activities were substantially affected by his knee injury in the sense we are satisfied that from the date of the accident onwards there was more than a minor or trivial effect. We are satisfied that the Claimant's mobility was affected both in terms of the distance he could achieve and the speed at which he moved throughout the period. We accept, on balance, that there were the restrictions set out by Mr Mifsud even having noted the contradictions in the medico legal reports. The restrictions at work in respect of mobility and the effects of walking are well noted within the documentation.

45. We move to the long-term element. Where there is a new injury as there was in this case in May 2018, then on day 1 of what would appear to be an injury from a minor road traffic accident when the question is asked whether or not it could well happen that the substantial adverse effects will last a year the answer is certainly going to be a resounding "No". As time goes by and the effects remain, and resolution is not reached the likelihood will increase that it will last a year.

46. In this case the Tribunal are greatly assisted by the regular medical evidence from physicians effectively assessing the Claimant as at the date of their report and assessing when he would recover. This is an odd case in that the original injuries were comparatively mild and so the view throughout from those medical practitioners was that a recovery was relatively imminent and that is why the balance tips, in our Judgment, comparatively late in the twelve-month period.

47. We have carefully considered each of those reports and have concluded that it is only at the OH report of 8 March 2019 (112) that the point is reached where it could genuinely be said that it could well extend to 12 months and beyond. There had been no improvement since the January report and the symptoms appeared to be worsening and it was assessed that the Claimant would not improve until he had been assessed further and appropriate treatment was determined and commenced. At the end of 8 weeks from the report further treatment was advised.

48. In our view a proper reading of the report would enable a reader to conclude that it could well happen that the Claimant would still be suffering in the same way two and a half months later and so the long-term criteria is met at that time. Our reading of Mr Mifsud's report which was also produced in March 2019 supports the OH view and provides us with further evidence that 8 March is the correct point at which the balance tips to indicating that it will last longer than 12 months.

49. We are also of the view that so far as knowledge of disability is concerned that the OH report of 8 March should have put the Respondent on clear notice that it could well happen that the Claimant was still suffering the effects on his day-to-day activities and that that was more than minor or trivial on 8 March.

50. The effect of our decision on disability is that any reasonable adjustment claim founded on requiring the Claimant to work out of hours at evenings nights and weekends prior to 8 March 2019 are dismissed because the Claimant was not a disabled person at that time.

51. Further the head of claim based upon the requirement for the Claimant to work in the General Paediatric laboratory between 13 July 2018 and October 2018 is also dismissed because the Claimant was not a disabled person at that time.

52. Time Limits

Having established the heads of claim that remain the Tribunal now turns to consider the remaining claims to consider whether or not they have been brought within the statutory time limit pursuant to section 123 EqA. During the course of the hearing the Claimant withdrew an allegation of race and religious discrimination against Mr Taylor that he had threatened the Claimant with redeployment. This withdrawal was inevitable as the Claimant when asked directly by counsel for the Respondent stated that he did not consider that to be on account of the protected characteristics cited. In fact, he seemed surprised that was even being suggested to him. It is unfortunate that this allegation against Mr Taylor was permitted to be live in this case for as long as it did taking into account the Claimant's unequivocal response to questions posed about it. We will return to this matter in due course.

53. The remaining Claims are as follows:

Race and /or Religious Discrimination – Direct and Harassment

1) On 3 January 2019 Mr Hurley told the Claimant that if he could not do nights the Claimant could not do his job;

2) On 3 January 2019 Mr Hurley told the Claimant that if he could do 8 hours during the day, he could do 8 hours during the night

3) Mr Hurley insisted on / placed the Claimant on night shifts on 3 April 2019.

Disability Discrimination

4) A PCP that the Claimant was required to work evenings, weekends, and night shifts

5) A PCP that the Claimant had to work a night shift without carrying out an ergonomic work-station assessment;

6) A PCP that the Claimant had to work out of hours without a Lone Working assessment

For the Reasonable adjustment Claims it is asserted that each of the PCPs caused the Claimant pain and restriction and the reasonable adjustments would have been for the Claimant not to work those times and Nights in particular and for the assessments to have been done.

54. It is apparent that there are only 2 dates which are relevant for these acts:

    a) 3 January 2019 for Claims 1 and 2;

    b) 3 April 2019 for Claims 3,4,5 and 6.

55. The Claims at 54(b) are in time as it is any claim that pre-dates 24 March that is out of time. The question for the Tribunal is to consider whether the matters amount to conduct extending over a period pursuant to section 123 of the EqA. We form the view that they are and so should be deemed in time. They are all part of a sequence of discussions with Mr Hurley and Mr Taylor that is discussing the Claimant's capacity to fulfil his contractual duty of assisting with night duties and follow OH Reports. It would be highly artificial not to say that it is conduct extending over a period when although different protected characteristics are at play, they are all discussions arising from OH reports about the Claimant's capacity to work nights and assist the urgent needs of the business.

56. If we are wrong in that view and the January claims were deemed out of time, then we would not have extended time for them because we would not have considered it just and equitable to do so. There is nothing in the Claimant's witness evidence either oral or written that suggests why it would be just and equitable for time to be extended. In submissions it was suggested that the raising of the grievance somehow was sufficient to extend time. It does not do so automatically, and we were not told why it was that it should in this case. The Claimant had advice from a solicitor as early as 28 March 2019 who would have understood the prudence of putting in a protective Early Conciliation request and if necessary, a claim.

57. The Tribunal is satisfied that we have jurisdiction from a time limit perspective to consider all of the claims detailed at paragraph 53 above.

The Facts

58. The Respondent is an NHS Trust based in Birmingham. Mr Taylor is the Head of Blood Science and oversees that area which includes the Chemistry Department which is also known as the General Paediatric Laboratory and Haematology.

59. The Chemistry department itself is managed by Mr Hurley. That department is split in two, namely Chemistry (Blood Science) and New-born Screening (NBS). Ms. Mason is based in the Inherited Metabolic Disorder Department which falls under the NBS area.

60. The Claimant is a biomedical scientist and has been employed by the Respondent since February 2008. There has been no suggestion at all that the Claimant was anything other than capable at his job and was an asset for the Respondent when he was at work.

61. The Claimant is at Band 6 and his role was deemed rotational which meant that he would move between various departments within the Chemistry department of the Respondent. He would normally have six-month rotations between the two areas described above but could be called upon to go to either area depending on need.

62. Both departments play a vital role in providing timely results from tests which have been requested by medical staff. We accept the Respondent's representations

about the importance of keeping the operation fully functional 24 hours a day and 7 days per week. These tests are important and could at times be vital to maintaining life. The laboratories are highly regulated, and standards must be kept at all times. The stakes are high.

63. We further accept that staffing the department may not be an easy task as the skills required need substantial training and there needs to be absolute confidence in any new employee. We have been told and we accept that recruitment for any role takes a substantial period of time and temporary shortages of staff are not easily plugged with temporary, bank staff or locums from the outside as can more readily be done with nurses, as an example.

64. Mr Taylor and more directly, Mr Hurley's role, inter alia, was to ensure that the departments were suitably staffed 24/7. There are day shifts which are deemed to be the core hours. They were between 8 and 5 in rough terms but the out of hours service also had to be covered and this included Lates, Earlies, Weekends and Nights.

65. There has been a dispute as to what the Claimant's job description was and the extent to which he was obliged to work out of hours. He was a band 6 Biomedical Scientist, and we accept that he and others of his Band and those below were contractually obliged to undertake out of hours work which would include nights. We also accept that prior to the Claimant's RTA he would regularly do the shifts and indeed was keen to do so not least for the financial rewards such shifts brought. No other reason apart from the injury has been presented to us for why the Claimant did not do the shifts after the RTA and on the evidence, we have seen the injury caused his reluctance to do the shifts after May 2018.

66. The rotas were complex and to fill them was an imperative. We are sure from the evidence that to do so was a persistent headache for management with various absences and abstractions sometimes at late notice to cater for. We accept that managers - Band 7 and above did step to help from time to time but this in turn would compromise management effectiveness because they would not then be available to discharge management functions during the day shift. In any event, they were not obliged to step in although they often did when the need dictated.

67. It was suggested that there could be a request for more staff and an increased budget for staff. Whilst theoretically that could be done the Tribunal are satisfied that it would be unlikely that such a request would be countenanced when there are general funding issues across the NHS and would not be available as a quick fix and at short notice which was what was so often needed.

68. In conclusion, on these issues, the Tribunal can readily see the weekly and daily challenges that faced Mr Hurley whose job it was to ensure that the ship remained afloat and providing the level of service need by the general public. The Tribunal can also readily understand why it was absolutely vital that Mr Hurley ensured that he got every hour he possibly could from his staff and that in order to do so he would need to think of all possible options to staff the departments. His job was finding solutions to the problems that arose.

69. The Claimant was involved in a road traffic accident on 21 May 2018. The accident itself was not a serious one but had the medical consequences which have been clearly set out earlier in this Judgment. From this point on the Claimant (most of

the time) was medically unable to fulfil his full responsibilities to out of hours work and so moved from being a potential solution to the staffing issues by doing extra out of hours work to being one of the problems causing the lack of staffing.

70. The Claimant was absent on sick leave from 21 May 2018 and then returned on 27 June 2018. Upon his return he remained in the IMD placement that he was on before and it was anticipated that he would return on a phased basis so as to be back full time by the fourth week. He was not required to do any out of hours work over this period. This plan was in keeping with his Fit Note (242).

71. In July, the Claimant moved over to the Blood Sciences department due to the needs of the service. We accept that the trainee that the Claimant cited in his witness statement could not make the move instead of the Claimant because of the training that would be required for her to do so. The Claimant asserts that this was physically harder work which adversely impacted upon his knee. We accept that the work was different, and the likelihood was that there was more walking to be done in that department but overall, we are not persuaded that the work was really physically that much more demanding. There was no medical evidence to support the fact that a move of departments should not be made.

72. The Claimant makes comment of the fact that Mr Hurley would regularly ask him if he could do slightly different shifts when they were needed. It was a contractual obligation of the Claimant to do such shifts and Mr Hurley had a need. We can see no issue at all with Mr Hurley doing his job by trying to get the most from staff, which was entirely reasonable, but we can also see how the Claimant may have perceived it in a more negative light and that he was being pestered to do what he felt he could not do. What is crucial is the manner in which Mr Hurley did it and we will return to our conclusions about that later.

73. In early July, the Claimant was asked in a meeting with Mr Taylor and Mr Hurley whether he could assist the department by working until 7 pm. This was a reasonable management enquiry and the Claimant refused because of his knee. He was not forced to work until 7.

74. We do not accept that at any point in time Mr Hurley stated expressly that the needs of the service come first and note that this allegation only emerged late in the Claimant's witness statement for these proceedings. We can understand however why the Claimant may have perceived that to be Mr Hurley's attitude. In reality there is no evidence that Mr Hurley did place the service above the Claimant's medical needs, and, in fact, the evidence is that Mr Hurley (possibly with a heavy heart) complied with the restrictions that the medics recommended for the Claimant throughout this process.

75. On 23 July, the Claimant was seen by OH and the recommendation was that once he had finished his four-week phased return and was back to full hours he should then be excused late working or weekend working for a further four weeks.

76. Mr Hurley explained that at this point the need particularly on nights was particularly acute. It is important to note that the testing was not only for the Respondent, but it was a testing hub for a number of other hospitals too. Due to sickness, maternity, and a range of other reasons the pool of employees who could cover nights was below 25% of those engaged and those that were covering nights were under great pressure. On Nights, the volume of work was considerably less

but the work that came in could not be delegated. Managers were being called into assist, including Mr Hurley himself, with the knock-on effects to the management of the service that brought as they took their recovery days.

77. The Claimant provided Fit Notes throughout August September and October which stated that he was unable to cover out of hours work although he was working his full shifts. A further OH report was commissioned which arrived on 23 October 2018. That report recommended that out of hours of work could be phased in over 4 weeks and that after that he could also do Nights.

78. The Claimant complains in his statement of being "hounded" by Mr Hurley. We do not agree. Management was entitled to seek advice as to when the Claimant would be medically fit to resume out of hours duties in light of the regular four weekly notes from the GP that the Claimant could not, especially in light of the Claimant being able to work full time during the day. It was not Mr Hurley that made the recommendation he just implemented what he was advised by OH. It was not unreasonable for him to do so especially in light of the critical staffing problems in the department.

79. We do not accept that the Claimant was being singled out either. We accept Mr Taylor's evidence that the situation was such that he was reviewing all those with medical exemptions in order to see whether there had been any changes which would allow wider deployment of those people. The Claimant did not know this, so he perceived that he was being picked on and pestered whereas in actual fact he was part of a department wide review caused by a difficult situation.

80. In accordance with the report the Claimant started to work out of hours and then did Nights on 6 occasions leading up to Christmas 2018. He would have a day off before and a day off after.

81. On 28 December, the Claimant provided a Fit Note suggesting that for three months he should do no night shifts, no long shifts, and no late shifts. There was no real explanation as to why that was deemed necessary save that it was in relation to his right knee which was swollen. From the GP notes the Claimant presented his symptoms to the GP who signed him off. On examination there were "slight reduced movements." The Tribunal consider that on the evidence being signed off for three months would appear at first blush to be excessive and is certainly indicative of the Claimant not wanting to do the shifts either because of his knee or for other reasons which we have not been told about.

82. The Claimant was immediately referred to OH again and the Tribunal considers that to be a perfectly reasonable thing to have done. There was no reasoning behind why the Claimant would be limited for so long and a further OH opinion was wholly justified. The advice given by OH was to not work 11 or 13 hour shifts or to keep them to a minimum for a period of 12 weeks. It was a far narrower restriction than the GP had provided.

83. Mr Hurley met the Claimant on 3 January following the OH report and the Claimant has provided a transcript of that meeting as he covertly recorded it. Mr Hurley asks him what the problem is and whether he would be able to do a shorter night shift or a late if the number of hours are the same. That is consistent with the OH report and a reasonable enquiry. He makes it clear that the Claimant's capabilities are not the only ones being looked at.

84. At one point the Claimant states that he does not understand why these options are being put to him and Mr Hurley replies ***"because I'm trying to man a service that we are 100% struggling on"***. The Tribunal considers that to be an accurate description of everything management were seeking to do during this whole period. Mr Hurley puts forward potential solutions but does not appear to get any real engagement from the Claimant. It seems to the Tribunal that it is a matter of fact that if the Claimant does not get better then he will not be able to do the totality of his contracted job and there is no issue with that truism being mentioned.

85. We have considered the transcript carefully and can see no issue with it objectively. It is the sort of exchange we would expect to see where there is a conflict of medical evidence. Mr Hurley is seeking possible solutions from that evidence that will alleviate the out of hours issues. The Claimant appears to be irritated by that and whilst we can understand why he might feel that way, such a position was unreasonable. In this and other meetings Mr Hurley is temperate in language and approach and we reject the Claimant's suggestion that he was anything different. It is noteworthy that the GP note was complied with after this exchange and took precedence over the OH view. That indicates strongly against the Claimant's view that the Respondent placed operational matters above his welfare.

86. The position re staffing remained and on 22 January the Claimant met with Mr Taylor (465) and we have a covert transcript of that meeting too. There is a discussion at the start about the Claimant's medical condition and then Mr Taylor explains that he is looking at all exemptions and lays out the severe problems the service is having and indicating that it is so serious that staff may have to be redeployed. It seems reasonable to let the Claimant know (and others) that this is a possibility. The Claimant indicates that if that is a route down which it is necessary to travel then so be it. Mr Taylor makes it clear he does not wish to go down that route, but it may be necessary. This meeting comes across as professional, appropriate, and necessary.

87. On 21 February 2019, the Claimant (and others who were on medical limitation) were written letters where the meetings were summarised, and explanations confirmed. Mr Taylor stated that the Claimant would be referred to OH and asked a series of questions about capacity to do night-time duties which was where the biggest and most critical gap was. Those reports would be reviewed, and consideration would then be given as to whether or not redeployment was appropriate.

88. The Tribunal are satisfied that similar letters were sent out by Mr Taylor to others who had medical problems and we have been provided with times when each of these individuals were seen by OH and the outcomes. This is consistent with the Respondent not "picking on" the Claimant but seeking solutions for the good of the service on a wide basis. It is noteworthy also that it was Mr Taylor who was dealing with this review rather than Mr Hurley as the issue and problem had been escalated because of the seriousness.

89. That OH report was done on 8 March and reported that the Claimant needed temporary adjustments in that he should not work more than 8 hours per shift for a period of 8 weeks. It stated that there was no issue over night shifts which he could work but it should not be for more than 8 hours. It stated "that it would be prudent to complete an ergonomic workstation assessment to ensure that ergonomic

factors were not exacerbating his symptoms. It should be noted that one was not mandated but merely prudent and there was no suggestion or finding that the workstation actually was exacerbating his condition. There is no mention in any of the medical evidence about the Claimant's workstation having any effect on his condition at all

90. On 19 March, the Claimant met with Mr Taylor. He was asked for comments on the report and he replied, "***Whatever they say I can't argue with it"***. We find that other staff in a similar situation were more forthcoming than the Claimant in offering varied help where they could. The Claimant was stuck in a negative mind set which was not facilitative of the needs of the employer. The plan was to follow the idea that the Claimant could contribute by working eight-hour nights pursuant to OH guidance and that would be reviewed in eight weeks' time. As throughout, the Respondent were following the most recent medical advice. It is clear that the idea of eight-hour night shifts comes from Mr Taylor and not Mr Hurley. That is clear from the meeting with Mr Taylor and also the subsequent meeting on 20 March with Mr Hurley where Mr Hurley states that he had not been involved in any of the previous meetings /decisions.

91. In fact, Mr Hurley finally decided on a shift with a length of 8.25 hours which is slightly beyond that recommended but the Tribunal have noted the rationale for that and consider such an increase de minimis in the scheme of things in terms of the Claimant's health. There is no evidence before us that speaks of specific risks to the Claimant's condition caused by the extra 15 minutes.

92. The Claimant describes the situation as an ultimatum of either work the night shift or be placed on medical redeployment. All of this is a balance between the needs of the employee and the needs of the employer and there is little wonder that there may be a disconnect between the two views. We do not consider the Respondent's position to be unreasonable or unfair at all. There was a service need to fulfil. The current situation was stretched to its limit and if it broke there would be serious consequences.

93. The Respondent was obliged to consider all solutions. Finding out precisely what staff were capable of is perfectly reasonable. OH, had specifically said that the Claimant could do nights and so it was reasonable to follow that advice especially as it helped the situation. The Respondent paid heed to the fact that it could not be a full shift thereby providing balance to the employee. If it did not work and the Claimant did not have the capability to do what he did then of course he would have to be considered for redeployment if other options were unavailable. To simply accept that the Claimant could not do nights contrary to OH advice and to continue to be overstretched would have been an absurd path to follow.

94. Having said that we recognise that the Claimant genuinely did feel that, from his perspective, he was being harried and pestered. We accept that he felt that way and understand why he did, but it flowed from the Respondent undertaking a reasonable and proportionate and indeed patient course of action. The Tribunal considers the Claimant's communication with the police in respect of attending work at night / his personal safety as an over-reaction and one that was not objectively justifiable. At this point we find that he was clutching at straws so as to avoid doing the night shift because he felt he could not do it. OH viewed it differently and the Respondent was entitled to implement their view.

95. On 20 March, the Claimant was sent a letter setting out the possible hours he could work and indicating that he would be asked to do three nights per month and the first would be on 3 April. On 21 March, the Claimant sought justification from Mr Taylor as to why he had to do Nights, and this was provided.

96. The Claimant worked the Night on 3 April and immediately went sick and did not return. Although not part of this case the Claimant has been dismissed for capability reasons. There was no ergonomic assessment done before he returned on his night duty. Mr Taylor accepted that this was his oversight. The Claimant did not ask for one nor suggest that one was needed before he worked the night shift. There is no medical evidence to support the suggestion that any substantial disadvantage was caused to the Claimant because of this omission. Neither party had considered anything in relation to a Lone Working Assessment. We were told that there had been generic considerations of workstations and Lone Working and policies did exist. The Tribunal do not consider that they were given any cogent evidence or indeed any evidence at all that the failure to do a specific lone worker assessment on the Claimant caused the Claimant or was likely to cause the Claimant any substantial disadvantage on account of his disability.

97. It is from this factual background that we come to our findings of fact on the specific claims brought by the Claimant.

98. Race and Religious discrimination

The heads of claim that suggest that the Claimant has been directly discriminated against and /or harassed because of or in relation to these protected characteristics are wholly without foundation and we reject them. They are misconceived in their totality. There is not a shred of evidence that would directly support or from which an inference could be drawn to support these claims.

99. The Respondent has provided evidence of a multi-cultural work force as one would expect in a diverse area such as Birmingham. We note that Mr Ghivalla, the Claimant's witness, had been promoted on secondment within the department and in his evidence (including the opinion evidence he led) he does not provide any evidence supporting the race / religion claim. When the Claimant in his statement deals with the 3 January meeting from which two of his claims arise, he does not even mention race / religion. When he deals with the Night Shift issue, he makes a bare assertion that he was discriminated against and asserts that he can see no reason why Clair Murray (his comparator) was treated differently to him. We can.

100. Firstly, it is a substantial leap to form the view that one other person is perceived to be treated differently and so that must be because of race or religion. A mere difference in protected characteristic (Asian / British or Muslim / Christian is insufficient on its own to be probative let alone as being sufficient to shift the burden of proof.

101. Claire Murray is not an appropriate comparator. She is a grade above the Claimant and whilst she would help out on out of hours work when she could she was not contractually obliged to do so. We are wholly satisfied with the explanations as to why managers would only work nights when there was no other option i.e., it meant they were taken away from their managerial job and in Ms Murray's case she was a specialist on one piece of equipment, and it was bad for the service for her not to work on the two days around any night shift she did.

102. We do not accept that there is any evidence at all to support the position that a hypothetical comparator would have been treated differently. We are satisfied that taking into account the needs of the hospital any action towards the Claimant on 3 January was part of an overarching course of conduct with all staff regardless of race and religion.

103. As well as finding that the actions had nothing to do with race or religion, we do not accept that the Respondent's conduct amounts to harassment as defined at section 26 of EqA. Whilst we accept that the conduct was unwanted and it may have created a hostile and intimidating environment for the Claimant, we do not consider that it was reasonable for the conduct to have that effect pursuant to section 26(4) EqA.

104. The Claimant has put forward no evidence of Mr Hurley and Mr Taylor's attitude to Asian staff and /or Muslim staff generally. In the hearing the Claimant's evidence about these heads of claim was virtually non-existent and the allegations had to be put to the witnesses by the Tribunal because the Claimant's advocate did not do say save in the most general way. In the absence of any evidence the Tribunal actually asked the Claimant why it was that he believed that the conduct alleged was discriminatory because of race or religion and all the Claimant could say was that he thought it was but gave no reason. That did not take us any further.

105. The Claimant has failed to show a prima facie case that would transfer the burden of proof. We have read the transcript of the meeting on 3 January which the Claimant covertly recorded, and we do not consider that the conduct of Mr Hurley is anything but reasonable taking into account the role he had to fulfil. We will speak more of that later in this judgment when dealing with disability issues.

106. Discrimination as alleged in this case is serious. It is serious for victims, but it is also a serious matter for those who are accused of such things. The allegations are potentially career threatening and are an unpleasant thing to having hanging over one's head. There is absolutely no evidential basis to these Claims which have barely been pursued at this hearing. The Claimant's conduct in continuing with these claims up to trial without any evidential basis at all is to be regretted.

107. The Tribunal make it quite clear that there is nothing to support these claims against Mr Hurley and Mr Taylor. They are wholly misconceived and groundless and, in our view, should never have been brought or pursued to the end in the absence of anything supporting them at all.

Disability Discrimination

108. Failure to make Reasonable Adjustments

Section 20 EqA provides as follows:

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.

109. In light of the above definition, an employment tribunal must identify the PCP applied by or on behalf of the employer, the identity of non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant (***Environment Agency v Rowan [2008] IRLR 20***).

110. The Tribunal should not consider whether a PCP has been applied to the claimant. That is not a requirement of the EqA. The PCP need only put the claimant to a disadvantage, irrespective of whether it was actually applied to them: ***Roberts v North West Ambulance Service ([2012] UKEAT/0085/11***).

111. The Tribunal must also make findings identifying any step which it would have been reasonable for the employer to take: ***Secretary of State for Work and Pensions v Higgins [2014] ICR 341***.

112. The PCP, properly construed, has been described as the "base position":

[The PCP] "represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not include the adjustments" (***Finnigan v Chief Constable of Northumbria Police [2014] 1 WLR 445***).

113. As to substantial disadvantage, "substantial" is defined by section 212(1) of the EqA 2010 as "more than minor or trivial". This is a low threshold. A substantial disadvantage is one which must exist in comparison with persons who were not disabled.

114. There must also be a causal connection between the PCP and the substantial disadvantage so identified:

115. ***It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. Section 4A(1) of the Disability Discrimination Act 1995 provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP (Nottingham City Transport Ltd v Harvey UKEAT/0032/12***).

116. The making of reasonable adjustments may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce.

117. 'Steps' for the purposes of section 20 encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: ***Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216.***

118. It will be a reasonable adjustment if there is "a prospect" that doing so would prevent the claimant from being at the relevant substantial disadvantage: ***Leeds Teaching Hospitals NHS Trust v Foster [2010] UKEAT/0552/10***.

119. The efficacy of an adjustment is a factor for the tribunal to take into account when considering its reasonableness. However, to uphold a claim, it is not necessary for the tribunal to be satisfied that a proposed adjustment would have been completely effective. As expressed in ***Griffiths "So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty is one of the factors to weigh up when assessing the question of reasonableness"***

120. The tribunal need not be satisfied that the adjustment, if made, would have removed the disadvantage in its entirety. As per ***Noor v Foreign & Commonwealth Office [2011] UKEAT/0470/10: …although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective***.

121. The duty to make adjustments arises by operation of law. It is not essential for the claimant to identify what should have been done, although commonly this will be the basis on which a claim arises: ***Cosgrove v Caesar and Howie [2001] IRLR 653.*** Going further, the EAT held in ***Southampton City College v Randall [2006] IRLR 18*** that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

122. The statutory duty is to take steps which are reasonable and would avoid a substantial disadvantage to which an employee is subject. The duty is not to investigate or consider what steps should be taken: ***Tarbuck v Sainsburys Supermarkets [2006] IRLR 664***. Nonetheless, the EAT in that case issued a warning to employers of the dangers of failing adequately to consider possible adjustments: ***"..it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments."***

123. This is advice echoed in the EHRC Code of Practice on Employment (2011) (CoP) at para 6.32, where it states: ***"It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required".***

124. The two-stage burden of proof contained in s.136 EqA applies equally to reasonable adjustments claims. If the burden shifts at the first stage, a failure by the employer to discharge the burden at the second stage must result in the claim being upheld. Its particular application to reasonable adjustments was discussed by the EAT in ***Project Management Institute v Latif [2007] IRLR 579*** where it held:

125. "…the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made".

126. It has been accepted that the Respondent did apply a PCP to the Claimant that required him to work out of hours, at evenings, nights, and weekends. It was part of his contractual duties. It seems that from time to time the medical advice was that these placed the Claimant at a substantial disadvantage. We never heard any evidence as to why a late shift or a weekend shift would be any different to a day shift but to some extent that is not relevant in respect of this claim as we are only

considering Nights which the Claimant asserted would cause him a substantial disadvantage.

127. On the evidence of OH we are bound to find that working a shorter 8-hour shift would not cause the Claimant a substantial disadvantage because it specifically said he could work it. The Claimant has had every opportunity to explain why the eight-hour night shift would cause such a disadvantage and has not done so to our satisfaction.

128. The GP Note following 3 April shows that the Claimant was off work for work related stress and his knee injury (427). The entry reads "feels work picking on him feels stressed low in mood wants sick note would like to try medication (for mental health issue not the knee) has employed solicitor advised re Dudley talking therapy". It appears to the Tribunal from that entry the main reason for sickness absence was stress at work as opposed to his knee.

129. We find that whilst the Claimant went into do that night shift, he was firmly of the mind that it was not going to work and that the reason why he did not return to work primarily was that he had had enough of what he perceived was the Respondent's attitude towards him as opposed to the effect of his disability upon him. That is the reason why he did not return thereafter. We do not accept that the reason he did not work any further eight-hour night shifts was because of his knee injury

130. We do not find on balance that working that night shift of just over 8 hours did place him at a substantial disadvantage because of his disability.

131. If we are wrong on that we do not consider that to stop him doing night shift altogether would have been a reasonable adjustment taking into account, the needs of the service and the OH advice. An adjustment had been made by asking him to do just over 8 hours. That was the reasonable adjustment that was required in order to facilitate the Claimant's return to his contractual obligations. We find that in light of all of the evidence it was not reasonable to allow him not to work nights altogether and the Respondent has not failed to make a reasonable adjustment in this regard.

132. We do not consider that the matter re ergonomic assessment and /or lone working actually constitutes a PCP. It not being done was a one-off error and there is no evidence that such errors were the norm. Indeed, we formed the view that all of the Respondent's witnesses displayed an air of efficiency and so we find that such an error would rarely occur. We consider that we are in the territory of **Nottingham City Transport v Harvey (2013)** where a procedurally flawed disciplinary process which disadvantage the Claimant was not a practice because it did not normally happen regularly or **Carphone Warehouse v Martin (2013)** where incompetence or a woeful lack of application to stick to time limits could not be characterised as a PCP.

133. If we are wrong in that then we do not consider that the failure to do either caused the Claimant a substantial disadvantage. There is no evidence at all that it did. The Claimant has not led any evidence at all so far as the Tribunal can find. We note again that the ergonomic assessment was prudent not essential and OH did not advise waiting until it was done before nights started which they could have done. There was no advice re a Lone Working Assessment from OH and we are

unable to see any substantial disadvantage which any alleged failure caused the Claimant.

134. It follows from these findings that we dismiss all of the disability claims. We can to some extent understand the Claimant's frustrations because of the ongoing problems that he had with his knee. We understand why he perceived that he was being bullied and harassed but objectively he was not. The Respondent's witnesses were merely doing their jobs and seeking to find solutions to the problems that assailed the staffing in their department. They followed medical advice at all times and were entitled to do so. They probed and cajoled in order to try and see what flexibility if any the Claimant (and others) had and they were obliged to do so. There is clearly a line however where persistent requests to ill staff to do something they believe they cannot do might be deemed to be bullying but that is not the case here despite the Claimant's perception. For the avoidance of doubt, we do not find that any of the behaviour complained of would amount to harassment even without it being linked to a protected characteristic in that it was not reasonable for the conduct we have found to have that effect.

135. We remark that this is a sad case seemingly brought about at the outset by something as mundane as a rear end shunt. We close by wishing the Claimant a full recovery from any remaining ailments and hope that he will soon be able to seek new employment if he has not done so already. It sounds as if his skill set is needed within the NHS generally. Further we wish the Respondent well in their work. It is highly valued and needed by the general public.

Employment Judge Self

07 January 2021