EMPLOYMENT TRIBUNALS

Claimant: Mr Jonathan Morley

Respondent: The Renewal Trust Ltd

Heard at: Midlands (East) Region by Cloud Video Platform
On: 2 to 10 June 2021, 26 July 2021, 29 July 2021

Before: Employment Judge P Britton
Members: Mr R Jones
Mr J Hill

Representation
Claimant: In person
Respondent: Mr K Ali of Counsel

JUDGMENT

1. The claims are all dismissed.

2. The Respondent makes no application for costs.

REASONS

Introduction and first observations: also what was abandoned

1. This claim has something by now of a long history, which we will endeavour to take short. Thus, the Claimant presented to the tribunal his claim, which he had prepared himself, on 7 February 2019. This tribunal has before it a very extensive bundle of documentation which has within it at part 1 so to speak that pleading, commencing at page 2. The Respondent at that stage presented its response on 24 May 2019 (Bp[1] 64).

2. Encapsulated, what then happened is that there was a first case management

[1] Bp= bundle page.

hearing before Employment Judge Brewer on 24 July 2019. The Claimant represented himself (as he has done throughout) the Respondent was represented by Mr Ali, which has also been the case throughout. Judge Brewer went through that which he considered to be the claims which would go forward for adjudication.

3. It is important to stress that within the published record of his hearing, as is these days standard, that there was the statement therein that if either party disagreed with his record of that hearing, then they had the right to write in to that effect. Neither party did and in particular the Claimant.

4. Employment Judge Brewer determined that the first issue that the tribunal was dealing with was under section 13 of the Equality Act 2010 (the EqA), which is about direct discrimination. So, at Bp 65, which is page 2 of his adjudication, he first of all stated that the Claimant relied in terms of his protected characteristic on "colour" and the Claimant has confirmed to us that he would describe himself as being of mixed race.

5. The first claim of direct race discrimination related to "making deductions from his wages from 2009 to date". The second limb was failing to give him a pay rise on his promotion from Sport in the Community Development Officer to Sports Strategy Director in 2014.

6. Of course, for the purposes of a claim of section 13, there has to be reliance upon a comparator. So, let us at this stage simply bring in the definition, which in fact the Claimant is very conversant with as can been seen from the articularity of the further and better particulars that he provided in this case in due course. So, the definition reads:

> *"**13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *…"*

7. The comparators that the Claimant relied upon at the at that stage were:
   - The current Community Director, white.
   - Ben Vallance, ditto
   - Non White/ non BME Hypothetical comparators; this was in relation to the deduction from wages limb of this particular claim.

8. Stopping there, as this case has progressed before us, the Claimant has abandoned reliance upon the Community Director or Ben Vallance as comparators. The reasons for that are that the person in post by the time this case came to be before Judge Brewer, and thence thereafter when it came before us, was not a Community Director and in fact the person who gave evidence before us in that respect, Mr Nic Williams, white, who undertakes the equivalent of that role was never made a Director. Thus, he was not more

favourably treated than the Claimant. As to Ben Valance, and this is under limb 2, he in fact did not get a pay rise. Thus, he was also not more favourably treated. He has not advanced an hypothetical comparator argument before us.

9. What we did do was to allow the Claimant to amend that claim, which will dovetail in with his equal pay claim, to instead deploy as his comparator Suzannah Bedford (SB), white English, who was the Creative Director for the Respondent at the time of material events, commencing circa 2014.

10. The next limb of his claim was also one of direct discrimination relying on the protected characteristic of sex, namely him being a male. The rationale behind that at that stage was:

    a) giving female employees pay rises but not giving the Claimant such pay rises from 2015 to date;

    b) overlooking the Claimant for the Community Director role that was filled without telling the Claimant.

12. As to his comparators, at that stage as to a) he relied upon the current Community Director, who he named as being Emma Lucas; Suzannah Bedford (SB); and Colleen Francis, who it turned out long since departed the employment. As to b) again the current Community Director.

13. Stopping there, during the course of this hearing, the Claimant abandoned this direct sex discrimination claim. It therefore does not need to be addressed any further by us.

14. The next limb of his claim relates to disability discrimination. The disability he relied upon was dyslexia, and reliance was placed upon the duty to make reasonable adjustments as per sections 20 – 21 of the EqA. Thus:

> "***20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *…)"*

And this is the crucial part:

> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice[2] of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with* ***persons*** (our emphasis) *who are not*

[2] Hereinafter referred to as a PCP.

disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with ***persons*** (our emphasis) *who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with ***persons*** *(our emphasis) who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

…"

15. Against that background, the Claimant defines four PCPs that he said were engaged. They are:

    (a) that the Claimant could not have his own desk space, storage and IT system;

    (b) that the Claimant would not be given extra time to plan effectively for projects;

    (c) that the Claimant would not be given extra time to undertake certain tasks;

    (d) that the Claimant was subjected to criticism in August 2018 for not meeting deadlines which the Claimant says were unrealistic.

16. Of course, the point then becomes if there are such PCPs, did they place this Claimant at a substantial disadvantage as per the definition to which we have referred.

17. The core point then becomes, as Judge Brewer put it, if so, did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be place at any such disadvantage.

18. The third remaining limb relates to harassment; and Judge Brewer set out what was relied upon by the Claimant in relation thereto. Before setting that out the definition as per section 26 of the EqA is:

    "*26 Harassment*

    (1) A person (A) harasses another (B) if—

> *(a) A engages in unwanted conduct **related to a relevant protected characteristic**[3]* (our emphasis)*, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *…*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*
>
> *…*"

19. In that respect in relation to those three factors, which we will explore, the context is vital. See ***Richmond Pharmacology v Dhaliwal [2009] IRLR 326 EAT*** per Mr Justice Underhill (as he then was).

20. Going back to Judge Brewer and page 4 of what he set out, it can be seen that primarily the first limb of events relied upon as harassment relates to that which occurred on 6 and 18 August 2018 and which centres upon, and which has become much clearer before us, in fact to a wider spread of events which starts circa 25 June 2018 in relation to an event that we shall call NG3 followed by the summer camp, as to which concerns began to develop on 8 August 2018.

21. The second limb relates to whether or not the Claimant was harassed because the Chief Executive Officer at the Trust (Cherry Underwood (CU)) recruited without his knowledge or consent an additional female person into his small team of sports workers. Her name is Lisa Churchill.

22. Stopping there, as this case developed before us, that issue does not really engage. The Claimant knew who Lisa Churchill was; he had wanted an extra member of his team and he clearly did know that she was going to be appointed. He did not complain about that appointment at the time.

[3] All elements that have been highlighted are by the tribunal to focus on the core elements of the relevant legislation.

23. Third that he was not being allowed by the Asset Director and/or the CEO to manage his budget. The Asset Director at the material time was Darren Pickering (DP).

24. Stopping there, the evidence as it emerged before this tribunal could be encapsulated in that the Claimant, although in his job description as updated circa 24 December 2016 (Bp 230) stated was that he had responsibility for creating and managing a 12 month budget, the appraisals show (the latest of which is January 2018: see Bp825-831)) the Claimant had considerable support from DP and also the Accountant in relation to budgetary matters. There is no evidence before this tribunal that he actually on his own ever created a budget; furthermore, the documentation does not show that. What it does show is that the Claimant relied extensively on DP; a reason may well be that this was because the Claimant was not particularly numerate and had expressed that he was not on occasions to such as the witness Emma Feeley, who gave evidence before us.

25. Fourth: from 2015 to date being required to generate an income of £130,000 per annum. The evidence thereto from the bundle, and to include again the last appraisal with DP, is that that simply was not the case. The appraisal discussion with Mr Pickering in the context that the Respondent is a very fund driven organisation dependent as it was on monies from donors, it being a charitable enterprise, is that the last **expectation** (our emphasis) was for the Claimant to generate circa £60. So, that one drops away.

26. Fifth and which links to the disability, failure to make reasonable adjustments claim, is from 4 December 2017 removing the Claimant and his team's office space and requiring hot desking.

27. Sixth is 17 August 2018, not properly recording the income the Claimant had generated from his projects. That one really has not been addressed before us at all in the evidence, save that cross referencing to Emma Feeley, who is the grant administrator, concerns arose once the Claimant went off sick on 3 October 2018, essentially with work related stress, never to return prior to his resignation on 17 December 2020, that he had not properly recorded monies generated by daily fees from users at the Sports Centre, only having done it for about a month having been told previously thereto that he needed to do this. The tribunal cannot see how that can be an act of harassment given its limited compass.

28 The last one relates to June 2017: "*The CEO acted to prevent the Claimant's facility extension by removing access to a planning consultant"*. That has to do with the fact that there was discussion about the Claimant using Amanda Chambers to assist him in his work, but events were overtaken by budgetary restrictions so it was decided not to use her. The tribunal fails to see how that can come remotely within the definition of harassment.

29. So as to harassment, this essentially leave us with the events over NG3 and the

summer camp and the hot desking issue.

30. So, those were the limbs of the claim as defined by Judge Brewer. What is to be noted at that stage is that it was not clear if the Claimant was actually bringing an equal pay claim, but he provided further and better particulars. These can be seen in the bundle commencing at Bp116.

31. In the interim, and following the case management hearing before Judge Brewer and what he had defined with the consent of the Claimant as being his claims, on 24 July 2019 he therefore issued a judgment which reflected therefore that the following claims were dismissed upon withdrawal:

    1. indirect race discrimination (s.19 Equality Act 2010);

    2. victimisation (s.27 Equality Act 2010);

32. Stopping there, that was an important withdrawal by Mr Morley because it cuts out an element of the case that he was in effect trying to bring before the tribunal and which the Judge had actually thought at one stage to assist him was engaged. This related to whether or not the events on the pay front, particularly commencing at the beginning of 2017 and more important post his grievance at the end of September 2018 and , what then happened up to and including the decision in March 2019, was because he had raised his grievance. But he cannot bring it. As Mr Ali pointed out to me, he had withdrawn his claim of victimisation. So, the tribunal has not remit to explore it.

33. The third element of his claim that he also withdrew was direct disability discrimination viz section 13. Also, disability discrimination by reason of unfavourable treatment under section 15 of the EqA and finally a claim that he had brought viz whistleblowing under section 47B of the Employment Rights Act 1996.

34. What then happened is that there was a further case management discussion before Employment Judge Hutchinson because now engaged was equal pay. This was on 21 January 2020 (Bp 11).

35. There are three limbs to an equal pay claim. One might think that this was possibly a claim for like work. But, before Employment Judge Hutchinson, the Claimant clarified that be was bringing a claim based upon equal value. Now, in that respect, an approach frequently taken in those circumstances is to go down what is known as the stage 2 process under the specific rules of procedure relating to equal page claims. This means therefore engaging the services of an evaluation expert in relation to assessing whether work is of equal value or should be rated as equivalent. With the consent, particularly of the Claimant, the Judge took the view that this did not need to go down that route.

36. This then came up before Judge Heap because there were issues that needed a third case management hearing. That took place before her on 31 March 2020

(Bp 165). It was confirmed that this was an equal value claim. She rehearsed what we have just said about it was not going to go down the stage 2 expert report approach.

37. There was at that stage an issue about whether or not the then scheduled hearing, which was to take place between 22 and 30 June 2020, would be able to take place because of the impact of the Coronavirus pandemic. Suffice it to say, it did not take place and had to be taken out and therefore finally in terms of the procedural matters in this case, the case came before Regional Employment Judge Swann on 22 June 2020 (Bp180) and which was of course intended to be the first day of the main hearing. He explained how it had had to be which I have referred and the way it would be taken. taken out; he explored issues that we do not need to rehearse and confirmed that the case included the equal pay claim.

38. Against that background, we are therefore going to deal with the remaining issues. For reasons that will become clear, we do not need to get into a lot of the issues viz credibility or tensions between the community, possibly, and the Respondent Trust for the purposes of our adjudications and because of the now narrower compass of events and the claims and the way in which we can address them.

Evidence received; further observations; credibility

39. The tribunal heard from the following witnesses, as to which there are written witness statements which were confirmed as being correct under oath.

40. First, it heard from the Claimant who had provided an extensive witness statement and a supplementary bundle, the particularisation to which we have referred. He was extensively, but fairly, cross-examined.

41. We thence commenced to hear the Respondent's evidence, namely that of Cherry Underwood, the Chief Executive of the Respondent, because of the timetabling of additional witnesses for the Claimant.

42. Interposed during that evidence, therefore, we heard from Cynthia James for the Claimant, who is English born Afro Caribbean (Jamaican heritage), as to which see her witness statement in the witness bundle at page 39 (WBp). Obviously, Ms James has played an extensive role in the affairs of the local community in St Ann's, which is an area of Nottingham which has a significant Afro Caribbean population of long standing and is, in some quarters, considered to be deprived. As to whether it is or not is not really a matter for us. The important bit is that in terms of the ethos of the Respondent, to which we shall come, it clearly played a major role in the community in St Ann's and it is one of the reasons why such as the Claimant or, for that matter, Sean and Ryan, who gave evidence for the Respondent, may well have been recruited from that community.

43. Amongst her various roles, she was for a time on the Board of Trustees of the

Respondent. She seems to have stopped being on the Board circa 2015 and it may be that she was voted off at the AGM.

44. What her statement was all about was her concerns that she did not think that the Board reflected the BME diversity of those that it was intended to provide its services for. What she did not deal with is issues relating to Mr Morley's employment or, for that matter, any other BME employee. That was her statement. She endeavoured to widen it. The Respondent opposed that because of the limited compass of said statement and against a background of extensive case management and clear directions having been given.. Suffice to say that the tribunal ruled that further evidence departing from the scope of the statement was therefore not admissible.

45. The extensive cross examination of CU by the Claimant then continued and completed.

46. The Claimant then called Coleen Francis (WBp51). She is BME. cross examination Essentially, she explained how she had been the Community Involvement Director in 2015 and she referred essentially to the equal pay claim. That is relating to the Claimant and Suzannah Bedford's roles. Her view was that they should have been paid at the same rate. In essence, that is what she has to say.

47. His next witness was, Dawn Munroe, who is also BME, her statement is at WBp 38. It was limited and really dealt with the reasonable adjustment issue.

46. Stopping there, we find that when the Claimant took up his initial post with the Respondent as a Sports Development Worker on 6 October 2008, he disclosed to Dawn during the induction interview that he was dyslexic. He may well have told her that in the course of his university studies (he inter alia got a first at Manchester Metropolitan in sports, development and coaching) that he had obtained a report, we assume from a dyslexia specialist, as a result of which he was given dispensation by way of adjustments when he was undertaking his studies and examinations.

47. He accepted that he had not put that in his application form but, on the other hand, we accept the evidence of Dawn Munroe (and there is nothing to contradict her) that the Claimant did disclose his dyslexia when she was inducting him into his role. To put it simply, during the period of her employment up until 2011, the Claimant was having what is described as reasonable adjustments in terms of his work station, which was at the Sycamore Millennium Centre.

48. That really is the end of the evidence that she was permitted to give because, again, as with Collen Francis, she then wished to go off on a wider dimension and the tribunal ruled as per Cynthia James that that was not admissible for the same reasons.

49. Then we heard from the remainder of the Respondent witnesses. First from Shaun Cook and then on the same theme, from his colleague, Ryan Johnson. They are the only two sports coaches until the recruitment of Lisa Churchill, and they reported to the Claimant. In the past there had a been a bigger complement but it had been reduced because of austerity led cut backs in grants and charitable income.

50. These two are important because the Claimant hoped that he could rely upon them as supporting his contention that the environment in which they worked was in fact institutionally racist so to speak in terms of the culture and the way in which it was run by, in particular, CU. But they made it absolutely clear that they did not agree with him, the crucial point being that he had been to see them and he had asked them to provide him with statements to that effect which he would type for them. All they would then need to do was sign. They were both adamant that they did not agree with him and they were not prepared to make those statements. What is of relevance is that we found those two witnesses to be credible, honest and thus compelling. We note that Ryan is of mixed race.

51. The point being that there is a theme here because also what emerged from the evidence before us is that another worker, Dalton Stephens (see Bp 141), had provided to the Claimant it seemed a statement in support of him. However, when it was disclosed to the Respondent, CU was concerned that to her it would be most unlikely that Mr Stephens would ever want to give a statement. To put it at its simplest, Mr Stephens (who is again Afro Caribbean) has a difficult past which had meant that he was adverse to matters to do with courts, police etc. Also, she did not think it was likely that he would have had the necessary computer skills to write such a statement, which appeared to have a very faint electronic signature. So she saw him about it.

52. We have in corroboration of her evidence, Emma Feeley who was a witness to that conversation. What emerged is that Mr Stephens had never ever agreed to any such statement. He thought he had been giving a character reference to Mr Morley. He made plain that he could not have typed it because he does not have the skills and that he had not signed it. What is more, he would never have agreed to any statement if it meant that he was going to be a witness. There is a WhatsApp trail in the bundle on this issue between Mr Morley and Mr Stephens which corroborates what he told CU and Emma. Faced with this the Claimant was unconvincing as he was in his denials viz Ryan and Shaun.

53. The weight of the evidence is sufficiently strong for the tribunal to conclude that Mr Morley was improperly seeking to enlist the evidence of Mr Stephens by misleading him and to a lesser extent Ryan and Shaun. All that needs to be said that if we therefore have to evaluate credibility, and we are with Mr Ali's closing written submissions starting at paragraph 6, that there is regrettably a question mark over the credibility of the Claimant in relation to those matters which inevitably impacts upon his wider credibility and when dealing with conflicts on the evidence.

54. There are other serious issues relating to a BLM protest in St Ann's in

September 2020, which is of course after exchange of witness statements and when the first trial had to be aborted. The placards which are in the bundle before us are, on the face of it, offensive. They purport to suggest that CU is fa racist. The word "slavery" is used. KKK and its symbolic mask is daubed on at least one of the placards There are suggestions of financial and sexual impropriety. The Claimant pursued the matter before us. Questions were put to CU about whether she had had sexual relationships with Mr Brown, who held the grievance hearing, or Mr Jon Collins, who gave evidence before us and who heard the appeal. CU denied any intimate relationship with Mr Brown. She became clearly distressed at this line of questioning and refused to say anything further when it came to Mr Collins.

55. We heard the evidence of Jon Collins, who was the leader of the Nottingham City Council for some 22 years and a highly prominent figure in the Nottingham political establishment and also Chair for many years of this Trust. He told us that he of course had a close professional relationship with CU over many years. But then, as she had had a distressing time when as he put it she became a single parent, his wife and himself further befriended her and what he then did was to provide additional comfort such as take her out for a meal every so often or assist her in terms of babysitting duties.

56. The Claimant provided no evidence at all by way of these very serious allegations other than to accuse Mr Collins of having had an intimate relationship with CU, to which the answer was clear from the evidence we have just rehearsed.

57. It then spreads further into the three witnesses that we have referred to that he called to give evidence. The fact that there is a video of the BLM demonstration and there are the placards to which we have referred. Those witnesses in their evidence before us denied, particularly Cynthia, any involvement in the orchestration of the utilisation of BLM to in fact bring up this agenda relating to CU and the Trust. We will not dispute what she says; she came across as an honourable lady; but suffice it to say that somebody close to home in these matters used that BLM meeting/protest to bring into it these very serious accusations for all the world to see so to speak. It is an undercurrent to this case; we say no more.

58. As to the rest of the Respondent witnesses, we have already referred to Nic Williams (WBp134) and Emma Feely (WBp 99). We also heard from Kylie Watton (WBp124). She is the employee support officer and assisted CU on the pay review and which inter alia goes to the equal pay issue.

Back to findings of fact

59. The Respondent is a regeneration charity working in deprived areas. At the time of the Claimant's claim, it employed six full-time employees, seventeen part-timers and three volunteers. It follows that it is a small organisation and, as with many charitable organisations, it is run in a lean and mean way. CU is the longstanding Chief Executive; she reports to a Board of Trustees, inter alia

sat upon it at the material time was Mr Brown and Mr Collins. The ethos of the Respondent is to bring a range of activities and support into the deprived communities in Nottingham and it focuses on essentially St Ann's, parts of Mapperley and parts of Sneinton. It is dependant upon funding. It has, over the years, doubtless because Councillor Collins sat on its Board and was leader of the Council, been able to have the support of Nottingham City Council and it has, in that respect, received grant funding from time to time.

The non payment; deduction from wages issue

60. That brings us to the first issue in this case, which is the alleged non-payment. The history of that matter can be taken short.

61. The Claimant commenced employment with the Respondent as a Sports Development Worker on 6 October 2018. It seems that prior thereto he may have been a non-established worker so to speak. To turn it around another way, he was actively engaged in getting the necessary funding to support the role and in that respect, what emerged was a Service Level Agreement with Nottingham City Council which is before us commencing at Bp 181A.

62. Stopping there, throughout this hearing, we have regrettably realised from time to time that crucial documents were missing from the bundle and these had to be provided. This is one of them. It can be seen from that document that the grant was in order that activities could be undertaken centring upon sport and focussing in particular on the priority areas to which we have referred and BME groups and that there would be monitoring arrangements in terms of the funding. This was signed off for the Respondent by Mr Morley and CU on 30 June and 1 July 2019 respectively. The funding was £31,325 per annum. The Claimant's contention is that this therefore ought to have been his salary because there is the money as specified.

63. The tribunal is fortunate that on its panel it has a member who has knowledge of SLAs in particular. We are quite satisfied, and it speaks to the document anyway and the evidence of CU and JC, that the Service Level Agreement is not the salary, it is the funding for the budget for the role and what the role will do. Therefore, it will include such as on costs related thereto.

64. The proof of the pudding is then in the fact that the Claimant signed a contract of employment on 15 June 2009, which is at Bp183. This set out that his salary would be £23,340.

65. The Claim is thus hopeless. The Claimant, by his own signing of that contract, having been engaged in the negotiations and having signed off the Service Level Agreement, is estopped so to speak. Therefore, it is an end of the claim and it cannot engage race discrimination, particularly as the Claimant himself signed that contract and there is absolutely no evidence that he did it under duress. That is the end of that issue.

Summer Camp; NG 3 event: interface to harassment allegations

67. The Claimant as the Sports Director was based, in terms of the core functions, at the Brenda Lawrence Sports Centre delivering, as is self-evident, essentially the work that we can see in the Service Level Agreement but which built up and that is to his credit. In the context thereof, the sports team ran events, one event is a summer camp, and which speaks for itself. Somewhere where children could go during the summer to give respite to their parents or because they were working and to also mean that they could interact with other children and engage in a range of activities.

68. It is self-evident, as the tribunal is well aware, that these activities have to be the subject of risk assessments; a good example being that if the children, many of whom will be young, are going to go outside the Sports Centre for instance for a day activity to say a park nearby, there has to be in place a risk assessment. The world in which we live is such that if there was not and something went wrong, then the Respondent would be in serious problems because of the duty of care.

69. The second point obviously is to organise and plan properly the summer camp; have a range of activities that will engage the children and make sure there are sufficient staff to do it and that there are supplies on board, such as water or treats, and that the activity has been well publicised, ie leafleting.

70. Also by so doing, and which will also a engage on the equal pay issue, this will factor in a fundamental in terms of the success and thus survival of the Respondent, which is to promote the activities of the Respondent; to get out there in the community; to take part in new projects that might widen the remit of the Trust; engender more interest from communities and thus build upon its fund base or preserve its grant allocation from such as Nottingham City Council.

71. It follows that there has to be an element of proactivity; working with the others. In the past there is no doubt that Mr Morley had performed those functions very well, bringing in Nottingham Forest for instance to engage in the sports activities; but we are now at 2018.

72. So, we have an email trail starting 6 August 2018 at Bp 571 in which CU is asking the Claimant to ensure that he has got an up to date risk assessment in place that will deal with these types of issues in terms of as a first instance, and the core one, the summer camp. Suffice it to say that the email trial on that matter can be seen as a theme very shortly before the start of this summer camp. The Claimant had a holiday starting in the middle of June for 13 days. It is clear he had done nothing on this matter beforehand.

73. On an aside, there seemed to be an issue as to whether or not the Claimant was treated unfairly in terms of the leave requirements. We have seen those emails and that is simply not the case. He had effectively said to Cherry at somewhat short notice that he needed to take his leave and he understood he had to get consent because there was a new change in policy; and she had

corrected him saying that it was a long-standing policy and he would have to get consent for such leave times. As it is, it goes nowhere because the email trial is very friendly and CU having reminded him of the contractual provision, granted him his leave. So that is just on an aside.

74. But, we can see at the eleventh hour so to speak, CU having wanted to see that there was in place the correct risk assessment, was in fact being delayed by the Claimant and her e-mail at that stage on 11 August 2018 to the Claimant is not aggressive or intimidating or hostile. It is a reasonable management request that the risk assessment must be completed and sent to DP and herself by the following Monday. When she did then get it, it still was not adequate and her email of 15 August (Bp 593) is not oppressive, it is again a reasonable request based upon the fact that this is a pressing issue:

> "*I do not feel reassured that adequate assessments are taking place before or after such sessions and as such I feel that we are compromising the safety of users. I have discussed this with Darren*[4] *and he is preparing suitable RA for some of your some of your sessions but you will require to complete the others*".

75. Is that harassment within the definition? The answer to that, as per the context, is no. How can it relate to the Claimant being of mixed race? It is a request being made in a context which would be perfectly reasonable by any Chief Executive Officer having to deal with such an event. The intriguing point is that the Claimant in fact was seeking to suggest that this was DP's job (as it which see his grievance and to which we shall come) and that he had not been trained on it[5]. The answer to that one from CU in her evidence is that this was not rocket science and he could be expected to undertake such risk assessments given his long-standing employment and the support he had received over the years.

76. The tribunal comes away from that part of this exercise coming to the conclusion, and of course with the burden of proof upon the Claimant to show that this is harassment and also in terms of the interface to equal pay, that it would be reasonable to expect, if his role was on a par with that of SB, that he would have the necessary competence to be able to write such a risk assessment and would not need to rely upon DP.

79. Before we go to NG3, we come then to what actually happened in terms of the summer camp and that is because on 6 August, CU went there because her son was taking part. She raised a whole list of concerns, an example being her email of 6 August at Bp573-574 although it appears at other places in the bundle. These included that children were being taken out into the park (which brings us back to the risk assessment point) and her concern that parents had not given permission for that. She referenced again the risk assessment, which we have now dealt with. She was now going to delegate that task off also to

[4] DP

[5] Of course if it was not in his remit that becomes relevant to the equal pay clam when we address it

Emma Feeney. There was little or no effort having been made to tell parents as to what activities were available for their child on the day; there appeared to be no staffing rota; there appeared to be an emphasis on such as football and not much for the girls; not enough fluid for the children, it being hot and children sitting around doing nothing.

80. And so, she raised what she wanted to see for the future: "

- *Revised and robust RA for the summer camp and additional ones for any trips out and for individual sessions we run in the BLSC*
- *A full break-down of the programme that is in a format that can be shared with parents*
- *A revised consent form to reflect outings.*
- *Sessional feedback forms that staff complete at the end of EVERY session*
- *a questionnaire that we send to parents at the end of every week asking for feedback*
- *a mystery shopper.*

Those in grey I expect to have a copy of by Friday.
Thanks Cherry "

81. Because she had her concerns, there was in effect an immediate post-mortem viz the summer camp shortcomings and Kylie Walton interviewed staff who had been present, including the Claimant. Those interviews start at Bp 581.5.

82. From the interviews it emerged that Ryan and Sean, for instance, were saying that there had been no leaflets supplied for the purposes of the event until the eleventh hour. However, this was contradicted by the fact that they had been delivered to the Sport Centre base at least three weeks previously but then not distributed ie by the Claimant as the Sports director. In other words, there is a bit of a theme here. We have the risk assessment neglect; we have possibly the leaflet neglect and we have the lack of organisation. But is it bullying and harassment, and this is the important bit, to want to have those interviews to find out what went wrong in order to address what needs to be done in the future? It may be that Mr Pickering (DP), who the tribunal does not think was a particularly impressive Director and line manager of the Claimant, may have been trying to cover his own back so to speak, and that can be seen in highlights put in red in the various documentation on this issue where he is raising with the Claimant in particular as to why things may have gone wrong.

83. This leads us to the NG3 event. The history of that matter has become a lot clearer than it might have been at the start of this case because, again, of additional documentation coming in and in particular the email to the Claimant, which Emma Feeley was quite clear she had sent, and which turned out to be correct. It is dated 25 June 2018 timed at 13:09 and is now in the bundle at page 560A.

86. What is this about? It is that around that time an employee of Nottingham City Homes (NCH) (which is the housing division so to speak of Nottingham City Council but which operates at arms length) Jonathon Cass had a discussion with Emma as a result of which the Respondent was informed that there was going to be an event called a "Fun Day" on 18 August 2018 in the Mapperley area to celebrate the opening of a new housing association complex, it seems developed by NCH in partnership with the Metropolitan Housing Association, with a garden etc and so the aim was to bring in the Trust if it was interested in promoting what it had to offer.

87. The Claimant's contention before us was that he knew nothing about that there had been an ensuing agreement that the Respondent would participate and provide someone from the sports team until he was at an events meeting on 14 August when he found out from Nasam, who works it seems for NCH. Thus, he had not been consulted at all about the matter; he had no knowledge of it and the agreement that a sports representative from his team would be at this event between 1 and 3pm (the initial proposal had been 12 – 3). Thus, when he was informed about all this, put simply he could not provide the cover.

88. But, the email of 25 June 2018 at 13:09 most definitely shows that the Claimant was engaged. He was being asked by Mr Pickering (DP) could he organise "someone attending this to deliver footie starz and promote the session".

89. The Claimant initially told us he did not get said email. He then said he might have but he might not have read it! The point then becomes that DP may very well have taken his eye off the ball on this matter in not keeping the Claimant in the loop. Of course when we come to the equal pay issue it somewhat undermines the case for the Claimant if as Sports Director he is not seen, including by himself, as having direct responsibility for arranging participation for such an event. Be that as it may for the time being, thereafter, all Emma Feeley's emails on the event are in fact to DP. That is because she told us he is the Claimant's line manager and in his role as Asset Director in effect is also the overall Director in that respect of the Sports Centre arm.

90. What matters is that Emma Feeley was of course highly embarrassed having agreed that they would provide someone from the sports team, when nobody turned up at the event. We know that one of the Claimant's three person team was on holiday, but that of course left the Claimant and the other member of the team. If the latter was for some reason unavailable, then why did the Claimant himself not go given his role and his repeatedly stated desire before us to promote sports within the Respondent Trust whenever the opportunity arose? Essentially what he has told us is that he had his own commitments; he was already overstretched. But he was vague as to what they were. But why did he not tell Emma that he would not be sending anybody because, giving him the benefit of the doubt that he did not read the first e-mail, he did know at the eleventh hour from the last emails in this trail from DP.

91. Suffice it to say that on this issue, was Emma therefore raising her concerns at the no show to the Claimant on 3 September 2018 (Bp) 604:

"Jonathan

I was on annual leave for the Love NG 3 event but have seen an e-mail from Tom at Metropolitan saying that you had contacted him to say you were unable to attend the event! I am wondering why the sport department backed out of the event?

I will be seeing all the people who organised the event at the Mapperley NAT meeting so would like to offer some explanation I have already apologised!!

Emma".

92. Circa 13 September, the email trail shows that the Claimant went off sick. It may have been shortly prior thereto. What we do know from looking across to the evidence of Kylie, Emma Feeley, Ryan and Sean, cross-referenced to that of of CU, is that in the run up thereto there had been a meeting of all those involved to first address the summer camp issues and second probably the NG3 no show. The Claimant did not say anything. It may be that this was because he was by now beginning to suffer from the work place stress in due course certified for his absence, and which led to his prolonged absence from the end of September, him never to return up to his resignation from this employment in December 2019.

93. But, is it harassment to hold a meeting about these matters or would it be a dereliction by management function not to? The answer is the latter. And there is no evidence other than the perception of the Claimant that it was conducted by CU in an intimidating or hostile way. Furthermore, the assertion by the Claimant, and which is an essential to the definition at s26 of the EqA, insofar that he has made it, that the alleged harassment relates to his being BME simply is not there. The overwhelming weight of the evidence is to the contrary. His being of mixed race had nothing to do with it.

94. Reverting to Emma's e-mail, the Claimant did not reply. The short e-mail trail thereafter between CU and DP, and prior to his raising his grievance on 26 September 2018 (Bp 607-614), is that on 11 September he reported for the second day running that he was off sick with a fever. It had been planned that he would have an interim appraisal with DP that d. CU replied to DP:

"…I am a little concerned there may be a stress issue evolving. He wasn't in great shape on Tuesday[6] and I wasn't sure if that was nervousness. Need to treat carefully on this one."

95. That approach is not hostile and it does not lend weight to support harassment.

[6] This we conclude is a reference to the meeting viz summer camp and NG3.

Conclusion on this chapter

96. May be there was poor supervisory management of the Claimant by DP. He was by the end of that year to leave under a cloud. In due course he was convicted of fraud against the Respondent and was sentenced to a period of imprisonment in 2020. That is irrelevant. The core issue as to Summer Camp and NG3 is was the treatment of the Claimant harassment as per the definition at section 26?

97. First of all, it simply does not meet the test within the context, apropos ***Dhaliwal***. As to is being related to a protected characteristic, there is no evidence that the Claimant can put forward that it was. The mishandling of these two events needed to be addressed. There is no evidence that this was because the Claimant is of mixed race.

98. What is significant is that the Claimant was not placed under any form of disciplinary or capability process over these matters. It may be that this Respondent is rather weak in the way it deals with such performance issues, but that is not a matter for us.

99 What it means is that the tribunal dismisses the claim of harassment for the reasons we have now comprehensively rehearsed.

The disability discrimination claim

100. We are dealing with failure to make reasonable adjustments pursuant to s20-22 of the EqA. Thus:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criteria or practice[7] 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 is reasonable to have to take to avoid the disadvantage.*
>
> *(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, to take such steps as is reasonable to have to take to avoid that disadvantage.*

[7] PCP

> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 tqke to provide the auxiliary aid.*
>
> …"

101. The Tribunal has already pointed out that the Respondent would have had the collective knowledge of the Claimant's dyslexia following his induction with Dawn Munroe (DM) and provision of a report it seems obtained for the purposes of adjustments when at University. As to what happened to the report, we are none the wiser. The Claimant has not been able to get another copy, and DM could not tell us if she kept the report or where it went.

102. There was not an issue late 2017/ early 2018. The Claimant was working out of the Brenda Lawrence Sports Centre (BLSC) but also had the use of the Respondent's adjacent premises in the John Folman Business Centre (JFBC). He very rarely had to undertake his administrative work at the main hub of the Respondent, which is in Carlton. He did go there to attend such as meetings. The evidence is that he was able to do his job, using it seems most of the time a hard drive computer, either based in JFBC or BLSC. He never raised any problems in relation to his dyslexia and the need for any reasonable adjustments, let us assume because he had that working environment. He has been far more articulate in the last round of this hearing, ie submissions yesterday, about the impact of his dyslexia. We have no reason to disbelieve him. He needs a quiet place in which to do his administrative paperwork; write up such as reports and attend to emails. He uses to assist him in terms of his dyslexia lots of notes and in the office from which he was attending this Hearing via CVP, we can see that. He needs the necessary time to undertake work without interruption. He found the usage of the hard drive computer with its big screen much easier for him that say using a laptop.

103. The position becomes as follows.

104. In December 2017, the Respondent sublet JFBC. Therefore, the workstation of the Claimant thereat was in effect removed to the Carlton HQ whereat he was provided with a laptop. The Claimant says that he did not get a designated desk and that he had difficulties using a laptop. An additional problem was the disruption of working in a busy environment alongside colleagues. Examples in this case being that in that area closely working next to him (we heard there evidence) was Kylie Walton, who is the Employee Support Officer and in that sense performs a limited HR function, and Emma Feeley, who we have already referred to as being the Grants Administrator. Also next to the Claimant would have been DP and, from time to time, Ryan Johnson and Sean Cook would pop in.

105 So, the Claimant's position is he did not have those crucial adjustments which

he had in effect enjoyed prior to this move to enable him to overcome the substantial disadvantage he was otherwise put to as a disabled person by way of dyslexia in terms of the PCP of being required to now work in the Carlton HQ.

105. However, there is no evidence that the Claimant raised any problems to, for instance, EF or KW. In fact their evidence was that he did not appear to have any difficulties and indeed EF had discussed with the Claimant in conversation that she had a dyslexic son and the Claimant had been very reassuring to her, informing her that he had dyslexia but it was not insurmountable in terms of being able to undertake work or learning. Furthermore, he did nor raise any difficulties post the move in any emails to CU or in his appraisal with DP on 2 April 2018 (Bp548).

106. However, coming out of the summer camp/ NG3 issues, the Claimant raised the grievance previously touched upon on 26 September 2018 which coincided with him going off on long-term sickness by reason of work related stress. On the subject of the disability, he now raised it (see Bp page 613) and along the lines that we have now explored. The person who heard that grievance at a hearing on 30 October 2018 (at which the Claimant had a trade union representative Andy Shaw (AS)) was Mr Joe Brown, who was a Trustee of the Respondent. The minutes of the meeting are at Bp 646 – 650.

107. There is a brief discussion on this point at 647, the crucial bit being that the evidence is that the Respondent had no knowledge that the move to Carlton Road required reasonable adjustments until the grievance, and then what we get is that in his outcome letter to the Claimant dated 28 November 2018 at Bp 643 – 645, that although Mr Brown in effect found that the Claimant was not disadvantaged , nevertheless he did conclude that the matter could have been handled better by the Respondent and, most important of all, he made three recommendations which are at Bp 645.

> "*1. A proposal to make a dedicated area for the sports team within the Carlton Road office.*
>
> *2. A proposal to make available dedicated IT equipment to the sports development department at Carlton Road, and*
>
> … (not engaged on this topic).

108. The Claimant appealed that decision and it was then heard by Cllr Jon Collins (JC) who gave evidence before us: evidence in chief by witness statement[8]. The appeal letter is at Bp 652. The minutes of the meeting at which AS was again present and which took place on 14 January 2019 commence at Bp 680. The important bit is JC's outcome letter at Bp 676. Of importance is that on this topic, he recommended that there be obtained an occupational health assessment. That would of course be good practice in order to assess the impact upon the Claimant viz the workstation issues, if there were any, and then

[8] The statements of all the witnesses are in the combined indexed statement bundle which was before us.

to make any recommendations for such as adjustments.

109. The Claimant submits that there is no obligation on him to identify reasonable adjustments but, on the other hand, the jurisprudence is clear, and indeed the guidance, that reasonable adjustments is a two-way dialogue. The first fundamental is the employer has to know that there is a need for reasonable adjustments. The second issue is then to discuss it with the affected employee and to work out how to address the issues.

110. This is what the employer was trying to do. But the Claimant, because of the issues that we have now touched upon and his own deep-seated feeling (long-standing by now) that he was being underpaid in, was no longer engaged. He had lost trust and confidence. He stopped communicating with the Respondent until his resignation with immediate effect on 17 December 2019 (Bp1000). Therefore the commissioning of the OH report and thereafter consideration of reasonable adjustments if applicable, never occurred. It is fundamental to point out that he has never brought a claim for constructive unfair dismissal, including in that respect relying upon discrimination under the Equality Act 2010 as being part of why he resigned. It is of course now far too late.

112. We then bring in further findings on the facts post the placement at the Carlton HQ. Despite his assertion to the contrary, the weight of the evidence via KW; EF and also Sean and Ryan and thus collectively corroborative of CU, is that first the Claimant did have his own designated desk. Second, he even had a designated 'phone for the purposes of calls coming in viz the sports department. The removal of laptops from Ryan and Sean is irrelevant; it did not matter a jot to them; they very rarely used them because they are sports coaches. As to the Claimant using a laptop, KW and EF saw nothing in terms of what the Claimant said or did in their presence to indicate that he had a problem. In fact, it is the other way around. From what they observed, which is supported by Ryan and Sean, he was always peripatetic in terms of where he worked. He might work from home; he might work from the BLSC because there was a large underused area upstairs; he might work at Carlton. So, in terms of did Carlton HQ as a location put him at a substantive disadvantage? The weight of the evidence is that it did not. As to whether the use of the laptop may have caused him problems, we will accept on his evidence that it may have done. The problem is that he did not raise it and when it was addressed by Mr Brown and thence by Mr Collins, he did not take their offers up.

Conclusion this issue

113. It follows that there has therefore not been within the definition a failure to make reasonable adjustments. Accordingly this head of claim is dismissed.

The equal pay claim

114. We touched earlier on this distinction between a claim based upon like work. This clam as defined by Employment Judge Hutchinson and reaffirmed by Employment Judge Heap is one of a claim of equal value. The Claimant has

never disputed the analysis of those two Judges. Like work is defined in Section 65 of the Equality Act 2010:

> "***65 Equal work***
>
> *…*
>
> *(2) A's work is like B's work if –*
> *(a) A's work and B's work are the same or broadly similar, and*
> *(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.*
>
> *…*
>
> *(6) A's work is of equal value to B's work if it is –*
> *(a) neither like B's work nor rated as equivalent to B's work, but*
> *(b) nevertheless equal to B's work in terms of demands made on A by reference to factors such as effort, skill and decision-making.*"

115. On this issue we are grateful for the written submissions of Mr Ali and which accurately set out the approach to determining the exercise and with the burden of proof of course being upon the Claimant to establish that this is work of equal value. If he does, then engaged would be the genuine material factor defence as per s69 and with the burden of proof switching to the Respondent:

114. On an aside, the Claimant says that post him being employed first as a sports development worker, he never got a pay rise. Well, that went out of the window so to speak because we know that his salary was increased, ie on 4 May 2010 to £24,040.20 and thence post his appointment to Sports Strategy Director on 15 March 2017 to £24,280.60.

115. We now come back to the comparator, Suzannah Bedford (SB). She had joined the Respondent as a Community Empowerment Worker on 20 June 2011. She was working 30 hours a week and earning £19.46,000 a year. This appointment is not part of the equal value claim.

116. . The core issue becomes this. From what we can establish from the documentation, on 11 April 2014 the Claimant was promoted to Sports Strategy Director. We have a first job description at Bp 730. His salary did not increase. Cira 14 August 2014, SB became Creative Director (Bp198). She was initially on £24,000 per annum for 30 hours over a 4 day week. So, pro rata, it is not in dispute that this meant that she was being paid the equivalent of £29k so approximately £5,000 per annum more than the Claimant.

117. On 1 August 2016, she reduced her hours to 22.5 and on the salary of £18k, so

pro rata the differential remains. So, the Claimant then refers us to first of all what he was doing in contrast with SB and thence of course the job descriptions. There are two job descriptions for the Claimant and the second one comes into play on 24 December 2016 at Bp 230. He now has two further roles – Create and manage a 12 month budget and Create a 12 month Sporting Strategy.

118. The equivalent job description for SB circa 1 August 2016 is at Bp 268. There is a lot more principal accountability set out than is in the Claimant's job description. The Claimant suggests to us that what the Respondent has done is to unfairly beef up her purported role at his expense by adding subsidiary activities which in reality are the same or similar to those which he performed but which are not in his job description. An example being that he has told us how over the years he had successfully networked to engage with the Respondent such as the two major football clubs in Nottingham; Children in Need; franchised activities things such as Soccer Tots and Brazilian football[9] and cast the net wide in the community by engaging in meeting schools, community associations etc and that he was doing his best to obtain funding, even if it was not at level he suggested initially in this case. In other words, he was fulfilling a role which is wide-ranging in that respect and proactive.

118. We remind ourselves that issues relating to performance concerns are irrelevant in determining equal pay. JC, who clearly knows a lot about these things, agreed in that respect with the tribunal.

119. But what the Respondent says as to the roles not being of equal value is as follows. The Claimant had an established role with a support base and a line manager in DP who was clearly needing to take a proactive role with him. We touched upon that viz the summer camp/ risk assessment and budget issues. He also had the long standing ringfenced funding of the Nottingham City Council and which we dealt with earlier on under the non payment of wages issue. In that he was unique in that otherwise the Respondent was constantly having to seek funding for its activities much of which had been traditionally short term and vulnerable to such as economic downturn and the impact upon charitable donors.. As JC put it to us, the difference with SB is that she had no cushion at all. If she did not bring in the funding, she did not have a job as Creative Director. Second in terms of now adding the Arts to the regeneration activities in the deprived communities it served as well as sport it was in to entirely new territory. There was a whole list of activities on both fronts by SB that we could see from the email trail and the appraisal which CU had with her in early 2018 which go to that. She was out there so to speak, networking furiously. She used her extensive connections in the Arts to bring in projects with such as Birmingham City Ballet and the Royal Ballet. She managed to get a very substantial fund out of the Arts Council in September 2017 of £79,000. The

[9] On that issue and which goes to whether there was in effect institutional racism against BME employees thus blocking their advancement, we note that on starting the employment the Respondent sponsored him to go to Brazil. Further in 2017 it placed him on the Nottingham leadership development programme which is prestigious and aims to further develop the potential of BME employees across Nottingham for advancement to senior leadership roles in such as Nottingham City Council and its echelons. These actions of course contradict this fundamental plank of his case.

Claimant during that period did not obtain anywhere near that level of new funding. The one that we have for him in the spreadsheet of funding that we have got by way of additional discovery is March 2016 at £10,000 from Children in Need.

120. We then look across at all the different things she was having to do. She had set herself up in a small office that the Respondent could use in the Sneinton[10] area where there is a renovated market which is now being used for small businesses and a cultural centre. She had no employees, unlike the Claimant, working under her wing. She had to get volunteers or bring in university graduates during the vacation who were interested in a route into the Arts. She was setting up micro projects. She was in close liaison with all manner of organisations to set up activities such as puppetry and street theatre. Also how to exploit more the use of the largest allotment in Nottingham which was run by the Respondent and centre some activities within it. All endeavours with a high degree of autonomy which might widen the scope of the Respondent and thus of course increase its appeal and thus funding base.

121. Therefore, the Respondent said these are not jobs which are of equal value. The effort, skill and decision making required of SB was demonstrably greater that than of the Claimant. Illustrative, additionally, is that that the Claimant did not report direct to the Chief Executive unlike SB .

122. We want then to bring in another issue, which is of concern to this tribunal and which does not reflect well on the Respondent but the issue becomes does it actually go to the equal pay issue and does it mean that there was in fact direct discrimination viz the Claimant as opposed to SB? This is as follows and through the additional disclosure that we have got, we have got a clearer picture.

Thus the "job evaluation issue"

123. So, there was this pay differential. There were also concerns in terms of CU and the Board of Trustees that there was emerging a pay disparity and that certain workers were being underpaid, a good example was the sports coaches. So, what happened is that circa the beginning of 2017, CU engaged the services of Carol Brooks (CB) who runs an HR support business and which the Respondent has used from time to time. CU had purchased some data from Croner (the well-known employment organisation). This data we can find to start with at Bp770A. What it shows across the tabulation is the grouping in the charity sector of various roles is in effect thus starting off as being equivalent. So we can see Creative Director and Sports Director[11] posts in the same ranking at 3. What it then shows, insofar as data is available, is the average salary for those roles in any given area of the United Kingdom. The information the data provided was more comprehensive for the role of Creative Director but nevertheless it flagged up a potential pay disparity to the detriment of Claimant as to which see Bp758.

[10] Another are with a high level of immigration, primarily Indian sub continent, and social deprivation

[11] However, there is no secondary distinction/tier to factor in for a Sports Strategy Director.

124. As it is, and we do not know who really initiated it, CB went away and via KW (who was only a collator) she was provided with some additional information. It seems this included the job descriptions and the pay data of the Respondent viz these two roles. We know no more than that because the Respondent has chosen not to call CB. The result of that is that on 22 February out came a further revised spreadsheet, it seems via CB (Bp 770G). SB remained at ranking 3 but the Claimant had been downgraded to a 4. Even so he was still being paid below the average (Bp 770C). Then somebody within or on behalf of the Respondent wrote a remuneration policy. We are none the wiser as to whom, CU says it was not her and so does KW. Also, CU says she had no involvement in CB's new spreadsheet.

125. What we then get is a meeting on 22 March 2017 of the in effect remuneration committee but then no further meeting until almost a year later on 22 January 2018. The issue was not moving forward. There was an HR subgroup which had been setup inter alia to look at the issue of pay review. Some of the Trustees, ie HA, can be noted as being uneasy about whether this might cause frictions. That may just be relating SB and the Claimant; it might be the wider issue of who is going to get a pay increase and who is not in an environment where it seems that pay was always an issue for many of the staff, a good example being Sean and Ryan who thought they were underpaid; but conversely the Respondent was hampered by budgetary restrictions due to austerity and difficulty getting funding.

126. What is then significant is the meeting on 22 January 2018 (Bp 779 – 780), CU is recorded as accepting that "SSD equals below average". The reference to below average means that which is reflected in the data that we have now discussed.

127. But she then opined that "but performance issues". This cannot but be a reference to the Claimant as he is the SSD. In any event the issues as to pay per se were still not moving forward because the Trustees did not want to commit without JC being present, him being the Chair and also still the leader of Nottingham City Council (but with only two or three years to go in that role) doubtless because they needed to be assured there would be some continuity of grant funding if they committed to some pay increases.

128. Then in February 2019 CU prepared a remuneration report (Bp 806-7) She recommended pay increases for the sports coaches to £12ph; increases backdated to reflcted the N MW for the cleaners and otherwise only:

" Suzannah Bedford – from £29,866pa fte to £33,000 for 30hrs pw. To align with sector comparisons…"

129. Continuing to the meeting of the HR subgroup on 27 March 2019 (Bp794) when JC was at last present, and there is a curious entry that appears to read "Put all SLT up to £33,000". SLT is the Senior Leadership Team, of which the Claimant is a member. But above it is to be noted the initials SB and thus the

evidence of JC makes sense to the effect that although that minute is sloppily worded, cross-referenced to the remuneration report of the month before, and it can be read as meaning that SB is the only one of the SLT who is going to get the pay rise.

130. So, where does that take us? These remuneration reviews should be transparent. This was anything but. There was no consultation with the employees whatsoever. If it was supposed to be a job evaluation exercise, it is wholly deficient. The Respondent may be a small organisation but on the other hand it was utilising CB (although just how much expertise did she really have?) but it was doing it on a shoestring. It may be that is because it could not afford to go down ie a job evaluation exercise. CU has told us, backed by JC, that it actually was not such an exercise, it was more a pay review, but the way it was handled is poor and this reference to poor performance the year before is troubling.

131. What we do know is that the Claimant was absent in the summer of 2017 because he had hurt himself having an accident with his lawnmower. Whilst he was away, CU became concerned at what was being revealed in terms of performance issues with the Claimant and those go back to this paperwork issue, not attending to matters, leaving them late etc. She expected, and there is an email trail, that DP was going to deal with it. She did not want DP to allow the appraisal process to be used by the Claimant, or indeed any other employee, to raise pay issues, which as we say was something of a running sore. DP never addressed performance issues at all in his appraisal. So, we are back to where this takes us.

132. Although it was handled badly, does it permit that the inference to be drawn is because of the Claimant protected characteristic of being of mixed race? On that point, the tribunal thought long and hard and our conclusion is as follows. Taking the evidence at its highest, and in fact bringing in what the Claimant said in his grievance, the concern of not just him but others and users of the Resopndent was that CU had become enraptured so to speak with going down the Arts route. As the Claimant put it, in effect catering to the middle classes as opposed to the more deprived so to speak BME community in ie St Ann's or Mapperley. Hence her desire to bring in as perceived in some quarters, establishment institutions such as the Royal Ballet or Birmingham Ballet. We know that SB was very good at this because she went off to a higher-level job as Director of Arts for Nottingham City Council.

133. So, does that mean that CU was racist? Despite opinions expressed ie by the Claimant's witnesses or the BLM protesters, the raison d'être of the Respondent is to assist BME communities in uplifting themselves so to speak through enrichment through community activities. The policies speak for themselves. What we heard from witnesses before us who actually worked for this Trust, and of course the only witness we heard from in that respect for the Claimant left some years ago, does not support the contention that this is an organisation with a racial bias against BME workers, an example being Ryan who is BME himself.

134. We come to the conclusion having heard all the evidence that what this was about was that CU had become persuaded by the modus operandi so to speak that was offered by SB. That is the reason why she believed they had to go down the route of paying her more money because she believed that they otherwise would not be able to retain her services. There may be something in that because of course we know that in any event SB went off to higher paid role with the City Council.

135. It has been a difficult issue for this tribunal, but we have effectively fallen back on the burden of proof. We do find that in terms of the line of authority, including ***Lang***[12], that the burden of proof switched because there was an inference that could be drawn. But what we have concluded is on the evidence that, although there were significant shortcomings which make it unfair in terms of that process, that it was not because the Claimant was BME whereas inter alia SB was white. In that respect, we are reminded of **Bahl**[13]**.** This seminal judgment is to the effect that the tribunal must not fall into the trap of finding that an employer is a discriminator just because it is a bad employer. But the Respondent should not go away thinking on this issue that it should hold its head high. The way in which it dealt with this matter was poor. It was on this issue a bad employer.

Conclusion on interface to race discrimination

136. Accordingly we therefore dismiss that claim.

Finally the remaining claim was the work of equal value?

136. Back to the final issue. Were these jobs of equal value. For reasons that we hope we have now gone to, there is a significant difference between the jobs as they were by then. This role of SB required a considerably wider engagement on a whole range of matters which were in embryo. It required in that respect an entrepreneurial approach and there was no cushion. There was no direct line management of any staff who were established and in post. There was no requirement to report through a line manager, ie such as DP or perhaps in this case it might have been EF, before getting to CU. Whereas, the Claimant not only reported through DP, but it is quite evident in terms of responsibilities he did not have the same level therefore as SB because of issues such as reliance on DP for budget and extensive reliance upon him for such things as risk assessments or organisation of such as summer camps.

[12] Laing v Manchester City Council (2006) IRLR 748 EAT per Elias J as he then was.
[13] Law Society and ors v Bahl 2003 IRLR 640, EAT again per Elias j.

Final Conclusion

137. What it therefore means after a great deal of thought is that this tribunal has concluded that these jobs were not of equal value.

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Employment Judge P Britton

Date: 13 September 2021

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