Case Number: 2301506/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr. P Powell**

Respondents: **Guy's and St Thomas's NHS Foundation Trust**

Heard at: **London South Hearing Centre**

On **7 December 2021 – 10 December 2021**

Before: **Employment Judge McLaren**
Members: **Mrs. C Beckett**
Mrs. N Beeston

Representation
Claimant: **In Person**
Respondent: **Mr. N Caiden, Counsel**

JUDGMENT

The unanimous decision of the tribunal is that: -

1. **The respondent did not contravene section 15 of the Equality Act, discrimination arising from disability. This means that the complaint does not succeed**
2. **The respondent did not contravene sections 20 and 21 of the Equality Act reasonable adjustments. This means the complaint does not succeed**
3. **The respondent did not contravene section 27 of the Equality Act, victimisation. This means the complaint does not succeed**

REASONS

Background

1. We heard evidence from the claimant on his own account and from three witnesses for the respondent Ms Yetunde Falade, Ms Maggie Roy and Ms Julie Draper.

2. We were provided with a bundle of 611 pages. In reaching our decision we took account of the pages to which we were referred, the witness evidence and the parties' helpful submissions.

Issues

3. The issues in this matter had been agreed at a case management hearing and were further narrowed by the respondent at the start of the hearing. We discussed the issues with the claimant and explained their purpose. The parties agreed that the issues we are to determine are as follows.

EQA, section 15: discrimination arising from disability

4. a) Did the following thing(s) arise in consequence of the claimant's disability:

i) The claimant was exhausted and fatigued?

b) The respondent treated the claimant unfavourably as follows:

i) On 8 Nov 2019, the respondent subjected the claimant to a capability management procedure.

5. a) Did the respondent treat the claimant unfavourably by subjecting him to the capability procedure because of his exhaustion and fatigue?

b) If so, has the respondent shown that subjecting the claimant to a capability procedure was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

The trust's operational needs require the appropriate level of staff to be employed and working to ensure the delivery of the service. The trust needs to ensure that employees are performing and delivering service to the required standard to be able to deliver care to patients and to ensure patient safety.

c) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability? **This is conceded**

Reasonable adjustments: EQA, sections 20 & 21

6. a) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person? The claimant says that he notified the respondent of the medical condition in interviews for the job and the claimant notified the respondent's occupational health of his medical condition prior to starting work. **This is conceded.**

b) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

A requirement for orthotics administrators to work their contractual hours, in the case of the claimant 5 days a week. **This is conceded**

c) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: the claimant did not have time to look after his medical condition and so he became very tired?

d) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage? **This is conceded**

e) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

i) To allow the claimant to work part time further to a request to do so which was declined on 17 July 2019.

ii) To allow the claimant to continue working part time after 2 April 2020.

f) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Equality Act, section 27: victimisation

7. a) Did the claimant do a protected act? The claimant relies upon the following **all of which are conceded**:

i) Verbally to a manager Olabisi or just before 10 May 2019, the claimant said he wanted to have his hours reduced in relation to the Equality Act 2010 or words to that effect.

ii) In writing in a flexible working request form completed on 10 May 2019.

iii) In the claimant's written appeal against the decision to refuse his part time working request of 26 July 2019.

iv) Verbally, in the meeting of 23 September 2019 to consider the claimant's appeal against the decision to refuse his part time working request.

v) To Yetunde, a senior manager, in meetings on dates after the appeal meeting verbally to discuss his health issue and his need to have his hours reduced.

b) Did the respondent subject the claimant to a detriment? The claimant relies on the following:

i) On 8 Nov 2019, the respondent subjected the claimant to a capability management procedure. The claimant says that he believed he was treated detrimentally because he won his appeal against the decision to give him part time working

ii) In meetings with Yetunde in the couple of weeks after this, the claimant asked Yetunde to stop the capability procedure and she refused

iii) On 2 April 2020, the respondent informed the claimant that he could not continue to work part time and that he would be redeployed. The respondent threatened to dismiss the claimant if he could not be redeployed

c) If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Finding of facts

Job description and contract of employment

8. The claimant started work for the respondent on 17 October 2016. The claimant was employed on the terms of a contract which is at page 61 of the bundle. It was agreed that this specified he was employed to work 37½ hours per week excluding meal breaks. It was a full-time role, described by the respondent as a whole time equivalent.

9. The claimant's role was to work in the orthotics department as an orthotic administrator. Orthotics provide a range of artificial devices that support or correct unstable and painful joints such as footwear, knee braces or upper limb orthoses.

10. The claimant worked in the back office team which manages the ordering and receipt of goods and patient delivery and collection of goods. He was a band three level administrator.

11. His job description, which was at page 492 of the bundle, set out in detail his various duties. These included stock control and management and general office duties. This included the sorting, distribution and handling of incoming mail in a timely and efficient manner.

12. It is accepted that the claimant suffers from atopic eczema which causes him extreme discomfort. The itching can cause the skin to bleed and become very sore and he has consequential difficulty sleeping.The need to look after this condition means he takes longer to dress for work in the mornings. The condition makes the claimant very tired.

Workload

13. When the claimant joined the Department there were three full-time orthotic administrators, his line manager, Ms Draper, and another administrator at the same level as the claimant. This individual left about two years after the claimant started and was not replaced. Instead, this role was filled on an interim basis using staff bank. Ms McQueeney worked in the Department for 2 months at the end of 2019. She worked part-time only, 2 to 3 days a week. A candidate was then offered the role on a permanent basis, but withdrew his acceptance. The role was once again filled from staff bank until April 2020 when an individual was seconded into the department.

14. It was common ground that during the period that Ms McQueeney worked in the Department, on the days when it was just the claimant and Ms Draper, both found it difficult to cope with the workload. This coincided with the claimant working part-time.

15. The claimant and Ms Draper agreed that the number of orthotists increased from about 2018 and that the workload increased as the efficiency of the clinical side of work was increased. No more staff were employed to do the administration, despite the fact that the workload got busier. Ms Roy was asked about this and disagreed. She accepted that there had been a lot of recruitment but told us that no additional heads had joined the department, they were all replacements for the staff who left. It was agreed by all that when Mr Cody joined the Department it became more efficient and the workload increased. We accept that no more staff joined the department, it simply became more efficient and generated more work. We find that that the department was busy but manageable when staffed by three full-time people, but was busier and hard to manage when the resources became part time.

Policies

16. The claimant told us he was unaware of the existence of the respondent's capability policy and procedure and sickness absence policy and procedure. He told us that these were not drawn to his attention during his employment and he was unaware of how to find them. We find that the letter following the meeting on 8 November 2019 included the capability policy and we conclude that the claimant had this available to him from that point.

17. Nonetheless, we accept that the respondent does have such policies and its management were aware of them. The capability policy, which was at page 118, set out in its introduction the purpose of the policy. It specified it is not designed to cover incapacity due to health which is dealt with by the absence policy, or negligence, unwillingness or lack of effort, which are addressed in the disciplinary policy.

18. It provided that informal discussions should take place regarding unsatisfactory performance and set out that such discussions need to include an opportunity for the employee to understand the role and the expectations of them. It is an oportunity for the manager to provide an understanding of how the employee is not meeting the expected standard with specific examples to support the discussion. It is an opportunity for the employee to inform the manager of any underlying reasons for the shortfall in performance and is a discussion regarding the support the manager can provide to facilitate improvement in performance. It should set an agreed action plan discussing how the employee should seek to improve. It also includes an opportunity to direct the employee to the capability policy and procedure to ensure understanding of the process. We find that the meeting Ms Draper held with the claimant on 8 November met the policy requirements.

Applications for flexible working/protected acts

19. On 12 November 2018 claimant sent a (letter page 301) to management explaining that because of his long-standing health issue it took additional time to get ready in the mornings therefore he would be late arriving for work. He asked for flexibility to stay late to make up the time he lost because of health situation. While the claimant decribes a long standing health condition that in flare up effects his sleep he does not reference the Equality Act or disability. It appears that the claimant was told he had to make this request via the flexible working process (page 519)

20. On 20 February 2019 the claimant submitted a formal application for flexible working. He asked for a variable start window and this was agreed by the assistant service manager. She was not available to give evidence and was referred to throughout by an abbreviation of her first name as Bisi. With effect from 11 March for one year, and then subject to an annual review, the claimant was given a variable start time between 9 and 9.30 AM Monday to Friday with a finishing time of 5.30. PM.

21. Unfortunately, the claimant's medical condition did not improve and he submitted a second application for flexible working on 10 May 2019. The claimant was then off sick from 13 May to 25 June.

22. The flexible working application form at page 306 requested a job share. The commentary in the form explained that a job share would be the ideal solution to handle his health situation.The claimant does not refer to this as a disability or make reference to the Equality Act. However, this is conceded by the respondent as a protected act. Ms Draper confirmed that she saw this document.

23. The respondent also concedes that on or shortly before 10 May the claimant had a conversation with Bisi when he told her he wanted to have his hours reduced in relation to the Equality Act 2010, or words to that effect.

24. The flexible working meeting took place on 4 July 2019. Ms Draper was present as was Bisi. Ms Draper introduced the purpose of the meeting. In her evidence she told us that she was present to give Bisi information about how the Department was run. The notes do not reflect that she was asked about this or made any such contribution. On the balance of probabilities and consistent with how Ms Draper described her part in this procedure, we find that she did at some point discuss with Bisi the impact on the Department of the claimant reducing his hours. She makes reference to this in her witness statement. We find that she was, therefore to some extent involved in the decision-making process

25. The notes say that the claimant had not identified a potential job sharer and accepted that he would need to continue in his role until that job sharer was found. He was also willing to cover if the job sharer was absent. The notes of the meeting ask the question "have you thought of looking for another part-time job share…" The claimant answers that he did look at part-time but has not applied. The claimant explained that he meant by this a role outside the organisation. We accept this is what he meant.

26. The claimant explained that he had a conversation with Bisi before putting in his application and had been told that part-time working would not be accepted. That was what he really wanted and he made the application as a job share because he understood that his real first choice would not be accepted.

27. This question was explored during the subsequent appeal against this decision and the decision maker at the appeal hearing accepted Bisi's account that she had not said this. We prefer the evidence of the claimant on this point. The respondent has conceded that a conversation took place with Bisi just before he put in the application when he told her he wanted to reduce his hours in relation to the Equality Act. On the balance of probabilities we find that this conversation discussed his potential application generally. The claimant has been consistent throughout that he asked for job share because he'd been told he couldn't have part-time working. There is no logical reason why he would have gone down that path if he had not been directed to do so. He has given us evidence in person. While we have heard from those who spoke to Bisi, this is not first hand evidence.

28. We accept therefore that the claimant's flexible working application requesting a job share was made because he had been guided that his real wish, part-time working, would not be an option. We find that this was said to him by Bisi in the conversation that took place just before 10 May. We find therefore that Bisi had predetermined that part-time hours were not appropriate and had decided that any such request would not be granted. On the balance of probabilities, while it is not in her witness statement, we find that this conversation would have been shared with Ms Draper because it directly affected an individual that she line managed and impacted on the Department that she directly managed. To let Ms Draper know about this would prepare for the flexible working application that was expected. There is no reason for the conversation not to have been shared.

29. On 17 July 2019 the application was refused in a letter signed by Bisi. Ms Roy told us that she had been supporting Bisi throughout the process and they had discussed the potential outcome together. We find that she was therefore involved in the decision to refuse the job share request. It was agreed that the claimant should be referred to occupational health and he was told of his right to appeal against the decision. On the balance of probabilities, we find that Ms Draper would have been aware of this and therefore the claimant's protected act as she was his line manager and had been involved in the original flexible working request.

30. The claimant exercised his right to appeal in a letter to Ms Roy on 26 July 2019. In this letter he raised the fact that he felt the respondent had failed to make a reasonable adjustment to prevent him suffering disadvantage from his disability. It was conceded by the respondent that this was a protected act. On the balance of probabilities we find it likely that Ms Draper was made aware of his appeal and therefore of the protected act.

31. The referral to occupational health took place and the report was sent to Bisi on 29 August 2019. It identified that in the opinion of the occupational health specialist, the claimant's condition was likely to be a disability under the Equality Act. It identified that the claimant's sleep had been affected by the symptoms and he was experiencing fatigue. The report suggested that management should consider whether it was operationally feasible to provide a three month trial period of adjusted/reduced hours, this would enable him to see a specialist to discuss further treatment and also to assess the impact of reduced hours on his condition.

32. It appears that following this occupational health report, management then agreed to offer the claimant a reduced work hours of 30 hours, that is a four-day week. This is referred to in the appeal transcript and the appeal outcome letter. We accept that this offer was made to the claimant sometime between 29 August and 23 September.

33. Ms Roy confirmed that she was aware of the occupational health advice. She thought it highly likely that as his line manager Ms Draper was also made aware. Ms Draper in her witness statement stated that she was not aware that the claimant's eczema amounted to disability by 8 November. Ms Roy explained that Ms Draper was being supported throughout her interactions with the claimant either by Bisi or by herself. Both of these individuals were clearly aware of the occupational health report. We do not accept Ms Draper's account that she was unaware that the claimant was disabled and we find that on the balance of probabilities all members of the claimant's line management were aware of the occupational health opinion that he was disabled from the date of receipt of this report. It seems very unlikely to us this information would not have been shared with Ms Draper at the time as it was highly relevant. We have already found that Ms Draper was asked for information about the Department and gave input around part-time working and was involved in the decision-making. We also find, on the balance of probabilities, that, as she had been part of the process, as the claimant's line manager Ms Draper would have been told the reason for his part-time working request having been agreed.

34. The flexible working appeal was heard on 23 September 2019 by Ms Falade. It is conceded by the respondent that during this meeting the claimant raised the Equality Act and discrimination issues and this was a protected act. Again, on the balance of probabilities, we find that not only the outcome of the flexible working appeal would have been shared with Ms Draper as the direct line manager, but also that the details of what was said by the claimant about the Equality Act would have been shared with her. We find that she was therefore aware of the protected act raised by the claimant during the meeting itself. It was the claimant's disability that was the reason and justification for the reduction in hours which Ms Draper then had to manage.

35. The outcome letter at page 348 – 351 partially upheld the appeal. It noted that, as referred to above, management had offered the claimant part-time working of 30 hours a week which, the claimant agreed would

give him time to see a specialist, but which he declined because he felt it would not make sufficient difference to his condition.

36. The letter concluded that a job share would not be appropriate but part-time working at 22.5 hours a week over three days for a three month period was granted. After that time the claimant would be be referred to occupational health and part-time working would be reviewed. It is unclear when the part-time working began but it seems likely that it was from the beginning of October 2019 as the three month review was in January 2020. The claimant was certainly on this part time arrangement before 8 November.

Events leading up to the informal capability hearing

37. Ms Draper's account was confused. She was unable to recall many details about which she was asked. For example she could not recall exactly what she had raised with the claimant in the capability meeting. She was unable to explain some discrepancies between her statement and the documents, for example the different descriptions she gives of the claimant's behaviour on 20 December in the Reply and in her witness statement. We also found that Ms Draper contradicted herself on occasion. For example she told us that she had not seen the claimant's application for flexible working but then agreed that she had in fact seen this. She told us that Bisi did not tell her to carry out the capability process with the claimant but then told us that Bisi had expressly told her to raise timekeeping with the claimant as an issue. For these reasons, where there is a conflict of evidence we prefer that of other witnesses or contemporaneous documents over that of Ms Draper.

38. We were taken to a number of items in the bundle. Page 505 was an email from Richard Umakha dated 14 May 2019 complaining about the claimant and referring to an incident that occurred that day when the claimant had not come out of his office to help the front office team find an item in the store. If also referred to a similar incident which had occurred two weeks previously when it was said the patient left without the item, having had to wait for the claimant who did not assist.

39. Following this, on 15 May 2019 Bisi met with the claimant and then emailed the claimant as a follow-up to meet in morning. This is characterised by the respondent as an informal warning, but the claimant did not understand it in this way. We find that the claimant was taken to task over this incident and advised he needed to effect a change. We find that the claimant had been told about this incident and the matter had been addressed. The email at page 506 concluded by thanking the claimant for all his support during the time the Department were short of staff and also thanks him for keeping on top of his ever increasing workload. We find that the respondent accepted in May 2019 that the claimant had an increased workload and there were no issues with his keeping up-to-date. The incident reported by Richard had been addressed.

40. Page 515 was an email from Christian Pankhurst dated 26 July 2019 making a complaint that the claimant had not dealt with two separate

incidents of posting items out to clients. The claimant said that he was made aware of the first complaint, but that the second was never raised him and he had never seen this document before.

41. Page 516 is a note from a one-to-one with a colleague dated 9 August 2019 in which the colleague complains about the claimant and said he would rather not deal with him. The claimant was unaware of this complaint and did not recall any discussions about these allegations at all. We find that these allegations were never put to him and were not raised with him by Ms Draper.

42. On 13 August 2019 Ms Draper confirmed that she did have a one-to-one with Mr Powell when she brought up the email from Christian Pankhurst of 25 July. The claimant's evidence was that he gave a full explanation at the time which was accepted by Ms Draper. For the reasons set out above,we prefer the claimant's evidence to that of Ms Draper who could not recall what had been said and we find that that was the case and that the matter had been fully discussed with Ms Draper who had accepted that it was not the claimant's error.

43. Page 518 is an email from Christian Pankhurst to Ms Roy of 4 September 2019 raising concerns about the way the claimant spoke to clients on the telephone the day before. Ms Roy asked Mr Pankhurst to produce this note.

44. Page 517 was a note made by Ms Draper about an incident she described occurring on 3 September 2019. The note records that she noticed that the boxes she had retrieved from the front office that morning were still sitting on the shelf while the claimant was sitting doing nothing at his desk. He told Ms Draper that he was not able to do the boxes because the system was down so he could not check the names. In her witness evidence before us Ms Draper suggested that she was upset because the claimant was doing nothing and he could have amended his process in order to use the time he had. The note, however, also suggests that she was angry and upset by what she describes as the claimant's complaints about management not agreeing to his work request and blaming her for that. The claimant did not recollect this incident.

45. At page 502 – 503 was a log of the claimant's late arrivals from 14 January 2019 until 6 March 2020. The claimant was unaware that such a log was being kept and had not seen this document. It does not always record the reasons for the claimant's lateness. These are a mixture of traffic, appointments, buses and his skin problems. The claimant explained that he did give more details to Ms Draper when he arrived and he had always made it clear that even the problem with the buses was connected with his skin, because if he was late he got into transport problems. We find that some of the claimant's lateness was not connected with disability, but is an issue with the public transport system namely problems with buses and bus drivers. We do not find that there is any connection between a bus arriving late and the claimant delaying the departure from his house because of his skin conditions.

46. Ms Draper confirmed that she did not keep a log of anybody else's arrival times. She accepted that she may not have always recorded what the claimant told her as the reason for his absence. There is conflicting evidence between the claimant and Ms Draper as to the reasons for the absences that are recorded. For the reasons set out above we generally prefer the claimant's evidence over that of Ms Draper and therefore find that the majority of the claimant's late attendance was for disability related reasons even when no explanation is given on the log.

47. Ms Draper confirmed that while she had been logging the claimant's absence from January 2019, she did not raise this with him or take any action until the one-to-one in November that year. In her witness statement Ms Draper referred to the claimant arriving 10 to 15 minutes late on five occasions in October, particularly on the 2, 4, 8 11 and 15 October as being unacceptable. The entry of 15 October refers to the claimant's sleep problems. That of 7 November refers to an appointment not skin - related. This again confirms that Ms Draper was aware of the claimant's medical condition and its impact on his sleep. From 2-15 October there are 5 entries in the log. We find that three of these are related to the claimant's disability.

48. We heard evidence from Ms Roy that she was also involved in this process. She explained that while she was not directly managing the claimant, she was aware of issues involving him from discussion she had with both Mrs Draper and Bisi. She was personally aware of issues with attendance and performance and of the application for flexible working which stemmed from the claimant's difficulties in managing his role and his condition. She was aware that complaints had been made about the claimant but not addressed and had also heard comments from other members of staff. She was also aware of the claimant's absences and timekeeping issues. Ms Roy was unable to give any details of any of these matters. She felt that the claimant's managers were not managing him in line with the formal policies.

49. Ms Roy therefore had a meeting with a member of the trust HR team on 4 September 2019 to discuss what she said were the three issues that were then live in relation to the claimant. We note that Ms Roy became actively involved in the management of this matter the day after Ms Draper had been upset by the claimant. We also note that the handwritten notes on page 521 referred to potential disciplinary for refusing reasonable management requests. The only action or omission by the claimant that could fall under this heading is deciding not to act on the instructions given by Ms Draper the previous day. We consider it possible that this was the catalyst for more senior management to become involved.

50. Having taken this advice Ms Roy concluded that there were three separate processes to follow, the capability policy to address performance issues, management of his absence under the sickness absence policy and the procedure on dealing with a flexible working request. She discussed with HR whether the issue was a disciplinary issue but agreed with the advice she was given that following the capability process is more supportive as it would enable the claimant's manager to explore the reasons behind any difficulty he was having. This was after the 2 of the

protected acts and she was aware of the occupational health advice that the claimant was suffering from a disability which caused fatigue.

51. On the balance of probabilities we find that Ms Roy instructed Ms Draper to begin the capability procedure. We also find that the only ground which could amounbt to a negative comment about the claimant of which she was aware, was the second complaint from Christian Pankhurst made on 4 September which Ms Roy requested be put in writing by him. Ms Roy was clearly a diligent and thorough manager who took care to take HR advice before acting. We find that had she been aware of any other matters that should have been raised with the claimant, she would have ensured that they were appropriately documented.We find that, although trivial, both Ms Roy and Bisi had a genuine bleif that there were peformance issue to address. Both were personally aware of examples and we find that they belived this to be a genuine process.They did not instruct Ms Draper to start it because of the protected disclosures.

52. The claimant was invited to a meeting with his line manager Ms Draper on 8 November 2019. She told us that she took this action because Bisi had told her in October or November 2019 that she must take a more proactive role in managing staff and gain confidence in dealing with staff issues. It was agreed that at this time she managed two staff. One was going through formal process but Ms Draper was not involved with that because it was complex. We find therefore, any instruction to be more proactive in her management of her staff, can only have applied to the claimant. Ms Draper said she had not been told to deal with the claimant's capability by her line manager but then later told us that she had been instructed to raise his lateness with him. We find that in starting the capability process against the claimant, Ms Draper was acting on instructions from her line manager and Ms Roy. Nonetheless, we find that once she began the process she was the sole decision-maker on any outcome and what was discussed in that meeting.

53. Ms Draper explained that she arranged the meeting with the claimant because of the 4 written complaints. She confirmed that she did not take action if complaints were not in writing. She told us that the complaints she intended to address were the email 14 May, which had already been addressed with the claimant. The email 26 July which had already been addressed by the claimant, and his explanation accepted by Ms Draper that he was not in error, the 4 September complaint from Christian and her own note of 3 September. As set out in more detail below, we find she did not put the 4 September complaint to the claimant.

54. Following the meeting the claimant was issued with an informal review form/action plan (page 352). It specifies that there are two things going well one of which is working with the team in supporting and assisting front office team. It then sets out out eight things that the claimant needed to improve which included a statement of complete adherence with trust values. There is no explanation given as to what this means. It also specifies that he must improve team working, something he has been told is one of the two things going well.

55. The claimant understood that the meeting had been an informal capability meeting, although he understood this because Ms Draper described it to him and not because he had any knowledge of the process in itself. While we have found that the claimant was provided with the copy of the capability policy, this was in the letter sent to him after the meeting.

56. Page 353 was a more detailed letter from Ms Draper which set out the matters discussed. It again referred to things that are going well and starts "I also acknowledge that you're working as best you can with the reduced hours you now work". Ms Draper confirmed that this letter was a full summary all the matters that she had raised and it summarised the matters that the claimant had raised. In relation to lateness the claimant confirmed that he had problems with the bus on his journey to work .He did not link this to his skin condition. Efficiency was raised and it was agreed that the workload was excessive, nonetheless the claimant described a new way of working he had put in place to deal with this. Prioritising was addressed as well.

57. The letter also referred to errors and some examples were given; a problem with an item being sent to Kings in error, items missing linked goods, and an error regarding insoles not being linked to an ankle brace which Ms Draper addressed at the time and fixed on the spot. Ms Draper said that she had spoken to the claimant about all of these matters at the time. The letter concluded that his capability would now be managed informally with regular one-to-ones and a final review after six weeks. If there was an improvement it would not proceed further, if the reverse was the case, she may need to take it further.

58. Considering the contents of this letter together with the informal review form, we find that Ms Draper did not raise the complaint made on 4 September. We are supported in this finding as the claimant in his response to this summary (p.377) also makes no reference to it.He concentrates entirely on 25 July email from this individual which he had of course already explained to Ms Draper on 13 August. We find that this capability hearing focused on two matters which had been addressed by management as well as complaints about lateness, his method of working and errors.

59. Ms Draper accepted that all staff, including herself, made errors. She accepted that the error frequency was at least weekly. She accepted that the claimant had spotted errors made by both herself and other members of staff and had corrected these at the time. Ms Draper's evidence was that, despite accepting that errors were relatively common, the claimant made more of these than others. Despite this she relied on only 3 errors in the capabilty meeting. The errors that she referred to all appear to have arisen during the period of the claimant's part time working made as an adjustment to his disability. Similarly, the lateness relied on all occur after the part-time working hours are agreed, the claimant not having been taken to task about this previously.Some of these are linked to his disability.

60. The claimant suggests that any errors he was making were linked to his disability because that caused fatigue. He stated that it was that which

made him irritable and caused him to make more mistakes. The claimant was clear that he had not raised this at the time of the meeting or subsequently in his written responses to this meeting.

61. We have found Ms Draper was aware that he was disabled at this point but that she was not aware that any of the matters that have been raised to her, other than some of the late arrivals, were in any way linked to the claimant's disability. The claimant's position at the time was either that he had not done the things, or had provided a suitable explanation or that his error level was no higher than anybody else.

62. The claimant accepted that he was set a number of things to improve and that the improvement would be reviewed on 20 December 2019.The claimant explained that he felt management were looking for an excuse to get rid of him and therefore he was extremely careful after this to avoid mistakes. He agreed that after the review on 20 December no further action was taken.

63. Ms Draper told us that she intended to take further action. She was going to continue monitoring the claimant's performance and as a justification for doing this, she intended to rely upon the same matters again, that is the emails of 14th May, 25th of July and 4 September. These were all matters that had arisen and been addressed previously. Two of them at least twice before.

64. Ms Draper gave an account of the meeting of 20 December and explained that she had not been able to conclude this meeting because the claimant was agitated and defensive. No notes were taken. In the respondent's Reply Ms Draper is said to have described the claimant as becoming quite imposing. She told us she could not recall having said this.The claimant's account was different. He said that he asked Ms Draper for examples of his continuing failings and that when she was unable to give any she became angry and upset and terminated the meeting. Ms Draper did agree that it was her that ended the meeting and told the claimant to leave. On balance, we prefer the claimant's account of this meeting and concluded that Ms Draper did not proceed with it as she was unable to provide any examples to the claimant about his performance which would justify her continuing to monitor him.

65. Ms Draper confirmed that this monitoring would continue to be informal, but, if there was no improvement it could then lead to a formal process. Given she had expressly called out the claimant was doing the best he could given his part-time hours and in evidence to us Ms Draper confirmed she had no new matters to raise with the claimant we find that there was no justifiable reason to continue this monitoring. The claimant's performance did not merit it. We find, however, that despite there being no need to do so , Ms Draper did continue the monitoring and the capablity procedure continued. We make this finding on the basis of Ms Draper's own evidence which is supported by the evidence of Ms Falade who was asked on 7 January 2020 to intervene to stop the capability process. The claimant would not have raised this request had it not been ongoing.

66. We were referred to the performance review documents that were in the bundle. These were for the years 2017, 2018 and the 2019. The latter document was dated 6 March 2020 (pages 111 – 115.) Ms Draper explained that each review covered a period of June to July and therefore the document for 2019 was for June 2018 to July 2019. That predates the informal capability process, but includes the period in which the claimant makes an application for a job share. Ms Draper told us that Bisi told her not to complete it for the moment. However, by March she felt she had better do it, and it was therefore concluded on that day some nine-months late. She had given the claimant the same rating for all three years, that is satisfactory. Her evidence was that the rating for 2019 was a mistake and the claimant should have been rated lower. She had not raised this at the time either with the claimant or with her line manager.

67. The complaint raised on 14 May, which was followed up by Bisi, fell within the review period but was not referred to. We find that the time the respondent did not consider it sufficiently serious to raise in a review meeting. We find that at the time the respondent had no reason to reduce the claimant's rating from a three, and we do not accept Ms Draper's evidence that she had made a mistake in scoring the claimant as a three.

68. As we have also found that Ms Draper had previously accepted the claimant was not in error in relation to the first Christian complaint, we find that the matters that she put to the claimant in the capability meeting were trivial, and we accept the claimant's evidence that he was not making any more mistakes than anybody else. For the reasons set out above, twe prefer his account over that of Ms Draper's where there is a conflict. The claimant has been consistent in his evidence throughout.

69. We find that the reason Ms Draper had not previously managed the claimant's capability was not because she was a weak manager who had failed to take action, but because there were no performance issues to manage that justified more action.The procedure did not need to be started,let alone continued after the 20 December.It was only when Ms Draper was told to start the capability process by Bisi and Ms Roy that she took some action and she did so on trivial matters. She did so because she had been told to be a more proactive manager. We find that she would not have started this procedure left to herself.

<u>The claimant's grievance</u>

70. On 17 December 2019 the claimant submitted a grievance regarding victimisation against management following the monitoring procedure applied to him. He raised complaints about Ms Draper. She confirmed that she was not made aware of this complaint, nor was she interviewed as part of any investigation.

71. Ms Falade set out in her witness statement that she offered to meet with the claimant at the end of December 2019. This meeting was delayed due to the claimant's annual leave and the two met on 7 January 2020. It was an informal meeting to discuss the grievance and how the claimant wanted it to be dealt with. Both agreed that at this meeting the claimant complained that Ms Draper had victimised him by commencing the

capability management process.Ms Falade recalled that the claimant said he would withdraw his grievance if the capability process was stopped. She explained that if his performance improved, the process would be stopped, but the capability concerns were genuine and the process was to help him improve.

72. We find that Ms Falade had a genuine belief that the process was being carried out fairly and was designed to be supportive. We find it was reasonable for her not to intervene in the process run by another manager. We also find on the balance of probabilities that she had no reason to doubt that Ms Draper was proceeding on the basis of genuine issues and errors that merited such treatment.

73. Ms Falade handed the grievance over to her manager sometime in February 2020 because she concluded it was not appropriate for her to be involved as she had been involved in discussions with Ms Draper. The grievance did not then progress because HR determined that a complaint raising victimisation should be raised under the bullying and harassment policy and not under the grievance policy. HR therefore shut the complaint down on the system. Whatever the reason, regretably the grievance was not progressed under any policy by the time the claimant left the respondent's employment. The allegations of victimisation were never addressed.

Absence management

74. In accordance with the timetable set when the part-time working arrangement was agreed, the claimant was referred to occupational health again on 20 January 2020. The occupational health report was at page 526. It explained that the claimant remained symptomatic and he might benefit from a further reduction in hours. It was suggested that the respondent consider either 2 ½ or two days a week, if that was feasible. It confirmed that the occupational health physician believed the claimant was disabled within the meaning of the Equality Act and making some adjustments should be considered.

75. On the 24 February 2020 the claimant was invited to a sickness meeting. This is set out in writing to him by Ms Falade (p 383) and this indicates that his three-day week part-time working was to be reviewed after three months. On advice from workforce relations the claimant was to be managed in accordance with the trust's sickness absence policy because the claimant had stated he could not work full-time duties because of his condition. A meeting was scheduled to take place on 3 March to discuss the impact of the sickness on his working full-time.

76. The meeting was postponed and the claimant began a period of sickness absence starting on 6 March 2020. He was off until 10 April 2020. During this period he was invited to attend a sickness advisory meeting on 2 April. The details of this meeting are set out in a letter at pages 401 – 403 signed by Ms Falade.

77. At the meeting the claimant was informed that his current working arrangement had an adverse impact on the service and was no longer

sustainable. The post is a full-time post, a member of staff working part-time results in a backlog of work putting undue pressure on other team members. The claimant was also told that recruiting somebody else might not be practical because it would result in an additional cost.

78. In evidence Ms Falade explained that she understood from Ms Draper that the department was not coping with the part-time working and they considered that the role was a full-time one as the department was busy. They had been trying for some time to recruit a permanent position but had not been successful, and so they concluded that trying to hire somebody part-time would also not be success. They did not, however, make any attempt to recruit on a part-time basis because they had reached the view that it was not practical to do the job in that way.

79. Ms Falade also explained the additional cost. She accepted that it was not so much the cost of recruitment, since there would be a cost to find the claimant's replacement in any event, but it was the additional administrative cost and staff management time cost of having an additional employee in the department. She felt that the best solution for both the employer and the claimant was for him to find another part-time role at the same level of pay that was suitable for his skills. She therefore explained in the letter that he would be considered for redeployment within the trust and they would prepare a case to be heard at a capability hearing on the grounds of capability due to ill health. In the interim they would commence a search for another post which would last a minimum of 12 weeks. If another position was not found, the potential outcome of the next hearing was that he could be issued with notice of termination of contract on the grounds of capability due to ill health.

80. The claimant was sent an email by Ms Falade on 9 April which attached a number of part-time jobs. She confirmed that all the jobs that she sent the claimant were suitable for his skills and he would be paid at the same rate and work in the same geographical location as his current role, but that they were permanent part-time roles. The claimant did not engage with any of the part-time roles put forward to him. He explained to us that he did not want another job, but simply wanted to work part-time hours in his own department.

81. The claimant then began a period of absence from 21 April due to Covid 19 and redeployment was suspended during this period. On 24 June the claimant then resigned from his employment as he felt that he could not return to work as his Covid concerns had not been addressed.

82. The claimant accepts that this department was busy. He himself felt that cover was needed to make up for the hours that he was not working because he was part-time. We accept therefore that his role was a full-time role. We also accept that it is reasonable of the respondent to seek to accommodate the claimant's need for a part-time role across the organisation generally which had existing part-time roles, rather than to create a special role for the claimant.

Victimisation

83. The respondent has conceded that the claimant did five protected acts. The first of these is on 10 May 2019. The last of these is on 7 January 2020.

84. We have found that Ms Draper was aware of all of the protected acts that occurred before 8 November. We have also found that the reason she started the capability procedure in November was because she was told to do so and would not have done it on her own volition.She did so to demonstrate proactivity in management as requested.

85. While we have found that Ms Draper was directed to start the capability hearing by others,we have also found that they considered it to be genuine, and she was the sole decision maker as to the outcome of this meeting and any further process. We find that it was her decision to continue monitoring of 20 December when there was no justifiable need to do so whatsoever. We cannot identify her motive in doing this, but we find that, on the balance of possibilities, it is not likely that continuing the process was because of any protected act by the claimant. The protected acts of which she was aware had already occurred before 8 November and we found that they did not play any part in her initial decision to start the process.They are unlikely to play any part in her decision to continue it.

86. We found that Ms Falade in not stopping that process did so from a genuine belief that it was in fact a legitimate process. We have found that she was wrong in that, but we accept that was her view and her failure to intervene in another manager's process was not because of a protected act.

87. We also found that it was reasonable for the claimant's department not to be able to accommodate part-time working. The claimant accepted the role was very busy and respondent had ready made part-time roles available. Its decision to go down the redeployment route, even with the potential threat of dismissal, was not because of the protected acts , but because it could not sustain a part-time worker.

Relevant Law/Submissions

S 15 discrimination arising from disability

88. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:

> A treats B unfavourably because of something arising in consequence of B's disability, andA cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> '[S.15(1)] does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.'

89. We were referred to the EAT decision in T-Systems Ltd v Lewis UKEAT/0042/15 Counsel submitted that "at [21] this made it clear that, in cases where disability and knowledge of disability are not in issue, such as

the present, s.15 EqA contains 5 elements which a Tribunal is well advised to consider separately and make clear findings on. The 5 elements are

- a contravention of s.39(2) EqA – in the present case the route is s.39(2)(d) detriment;
- the contravention relied upon by the employee must amount to unfavourable treatment At [24] it was made clear that 'unfavourable treatment' is "that which the putative discriminator does or says or omits to do or say which places the disabled person at a disadvantage. Here it was the dismissal. Unfavourable treatment is not the mental process which lead the putative discriminator to behave in that way". Accordingly, it is at this stage the action/inaction is relevant and not the mental process;
- It must be "something arising in consequence of disability" and this phrase is given its ordinary meaning, however at [30] it was made clear that this must be part of the "employer's reason for the unfavourable treatment. There is no point in identifying something which played no part in the employer's reasoning"
- The unfavourable treatment must be because of something "arising in consequence of disability". At this stage the mental processes are relevant and the fundamental question being whether the "something arising consequence of the disability operated on the mind of the putative discriminator, consciously or unconsciously, to a significant extent" (at [31]);
- Finally, there is the issue of any 'justification', that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

90. We were also referred to Pnaiser v NHS England which gives further guidance to the approach in s15 claims and the issue of causation. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

91. Any allegation of discrimination arising from disability will only succeed if the employer (or other person against whom the allegation is made) is unable to show that the unfavourable treatment to which the claimant has been subjected is a proportionate means of achieving a legitimate aim.

92. Counsel drew our attention to the following case law which we agreed. He submitted that

"the leading cases on the 'justification' defence of Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15; [2012] IRLR 601 and Seldon v Clarkson Wright and Jakes [2012] UKSC 16; [2012] IRLR 590 (and consideration of these at EAT level in Kapenova v Department of Health UKEAT/0142/13/SM) establish the following:

(1) the employer needs to show that the alleged act of discrimination was a proportionate means of achieving a legitimate aim (**Homer** at [19]), however that aim need not have been articulated or even realised at the time which means post event justification is possible (**Seldon** at [59]-[60]);

(2) the first issue to consider therefore is whether the employer has a legitimate aim, which is a question of fact for the Tribunal, and in the context of arising from discrimination there is no requirement of it amounting to a social policy or other objectives derived from any directive, as is the case in direct age discrimination (**Homer** at [19]-[20]);

(3) the second issue is whether the particular measure is capable of achieving that aim (**Homer** at [20]);

(4) the third and final issue is whether this measure is proportionate means of achieving the aim, which requires the Tribunal to balance the discriminatory effect against the legitimate aims being pursued (**Seldon** [62] and **Homer** at [20] and [24]). It has been clarified in **Kapenova** at [83] that there is no rule that if a less discriminatory means of achieving the employer's aim the 'justification' defence must fail; it is a balancing exercise and even in those circumstances justification can be made out. Equally in approaching this balancing exercise and judging the 'discriminatory effect' it has long been the case that Tribunals approach the issue looking at matters both quantitatively, the numbers or proportion of persons affected, and qualitatively, the impact on those individuals and how lasting it is. Thus, it may be relevant whether the impact suffered by the Claimant is typical of impact suffered by others[1];

(5) notably where one is dealing with a general rule, and such is justified, then the existence of the rule will usually justify the treatment that results from it (**Seldon** at [65]);

(6) finally, it is stressed that justification may be established in an appropriate case by reasoned and rational judgment, there is no need for specific/concrete evidence in all cases (**Homer** in EAT at [48]).

In addition to the above guidance the following principles should be borne in mind following the decision in **Harrod v Chief Constable of West Midlands Police** [2017] EWCA Civ 191; [2017] IRLR 539; and EAT judgment at [2015] IRLR 790 (EAT):

(7) the fact that 'justification' is assessed by the Tribunal objectively, not only allows it to take into account 'post' event justification/evidence but equally means that what has to be justified is the outcome, not the process by which it is achieved (hence it does not matter whether the decision maker considered or failed to consider the 'justification' at all) *per* EAT at [41]-[43];

(8) a business is entitled to make decisions about allocations of its resources and the test of 'real need' in terms of determining if there is any legitimate aim is not to be equated with absolute necessity. Importantly it need not be the only course open to the employer to be legitimate, and it is an employer's decision as to how to allocate its resources which itself amounts to a 'real need' (legitimate aim) *per* CA at [26]-[27];

(9) It is not open to the Tribunal to reject a justification case on the basis that the employer should have pursued a different aim which would have had a less discriminatory impact *per* CA at [47].

Reasonable adjustments

93. In general, the duty to make reasonable adjustments requires the taking of "such steps as it is reasonable to have to take" to avoid a disabled person being put at a "substantial disadvantage" which includes a "provision, criterion or practice".

94. The tribunal must consider 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.

95. The duty is 'reactive', it requires there to be an identified applicant or employee, and for the employer to know, or be reasonably expected to know, that that person is disabled, and that they are likely to be at the substantial disadvantage without the adjustment.

96. Counsel submitted as follows

"In the event that an employee shows a relevant PCP and substantial disadvantage, the issue of whether a sought after adjustment is needed falls to be determined by the Tribunal assessing, objectively, whether practical step/steps (the adjustment) is reasonable: **Smith v Churchill Stairlifts plc** [2005] EWCA Civ 1220; [2006] IRLR 41 at [44]-[45]. Importantly, an employer is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the disabled person; rather the test is an objective one meaning "[s]*o long as the particular adjustment selected by the employer is reasonable it will have discharged its duty*": **Linsley v Revenue and Customs Commissioners** [2019] IRLR 604 at [38]."

Victimisation

97. This is defined as follows: -

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

The employee needs to be able to establish a link between any detriment suffered and the doing of the 'protected act'.

98. On the approach to causation for victimisation claims Counsel submitted In dealing with the issue of 'causation', that is whether it was 'because of' the alleged protected act, the approach taken by the House of Lords in Khan v Chief Constable of West Yorkshire [2001] UKHL 48; [2001] IRLR 830 makes clear that the issue is whether in the mind of the alleged discriminator it was the 'protected act' that was the reason for the act (detriment) or not - in effect this is the simply 'reason why' question.

Burden of proof in discrimination

99. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

100. The Supreme Court in Royal Mail Group v Efobi, considering s136(2) of the Equality Act confirmed that at the first stage of the two-stage test, all the evidence should be considered, not only evidence from the claimant.

101. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage. There still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Conclusion

102. Applying the relevant law as we have set it out to our findings of fact we conclude as follows in relation to the issues we were asked to detemine.

EQA, section 15: discrimination arising from disability

103. It was agreed that the respondent was aware of the claimant's disability from 29 August 2019. We have found that the occupational health report referred to symptoms of fatigue and that these were clearly linked to the disability. The respondent was on notice of this link, and indeed we have found that in the absence log fatigue is recorded by the line manager. We found that she was aware of the disability and therefore aware of the fatigue that arose because of it.

104. It is agreed that the claimant was required to attend an informal capability meeting on 8 November 2019. We have found that Ms. Draper was instructed to begin this proceeding by her line manager, Bisi, and by Ms. Roy. They had a genuine belief in the need for this meeting. Ms. Draper began it to show she was proactive. We have found that Ms. Draper was the decision-maker in the meeting itself and it was her decision as to what steps followed from 8 November meeting.

105. We have first considered whether being invited to this meeting and being placed on informal monitoring for a period until 20 December amounts to unfavourable treatment. We have found that following this meeting after the 20 December the claimant was still monitored with no justification, and it was possible that he could have been subjected to a formal capability process ultimately leading to dismissal. We conclude that being called to the start of the process which began with little justification, and which was continued on an unjustified basis, and which could have resulted in dismissal, is unfavourable .This is not an incident that can be considered in isolation but we is a detriment having regard to the events that followed and could have followed.

106. We then considered whether or not the starting of the capability process was because of something arising in consequence of the claimant's disability. As Ms. Draper was the decision-maker it must be something that operated in her mind consciously or unconsciously to a significant extent. We have found that her reason for starting the process was on the instruction of the senior managers and to demonstrate to them that she was taking their feedback on board that she was now a more proactive manager. It was not in consequence of his disability. To the extent any of the matters complained of were more than trivial, the claimant did not suggest they arose in consequence of his exhaustion and fatigue The claim under section 15 does not succeed.

107. As we have made this finding we do not need to consider whether the 8 November meeting was a proportionate means of achieving a legitimate aim. Nonetheless, we would agree generally that holding a capability meeting, where it is justified ,would fall within a legitimate aim. It is difficult to see how it can be a legitimate aim or proportionate where the meeting is not justified on the basis of the claimant's actual capability or behaviour.

<u>Reasonable adjustments: EQA, section 20 and 21</u>

108. It is accepted that the respondent had a requirement for orthotics administrators to work their contractual hours, which in the case the claimant was five days a week, and it is also accepted that the claimant,

given his disability, was placed at a disadvantage by this .The respondent knew, or could reasonably be expected to know, that this was the case

109. We must therefore assess objectively whether the adjustments put in place were reasonable. The claimant suggests that he should have been allowed to work part-time following his request to do so being refused on 17 July 2019. We have found that he was offered part-time working sometime after 29 August, which is the date from which the respondent knew that the claimant was disabled. This was on a four-day week basis not the three days the claimant had asked for, but we conclude that on the basis of the occupational health advice that it had been given, this was a reasonable adjustment.

110. Following the appeal the claimant was then allowed to work part-time for three days a week, albeit on a trial basis. This continued until he began a period of sickness absence on 6 March 2020. The claimant did not in fact return to work prior to his resignation on 24 June. He complains that in the sickness review meeting on 2 April he was advised that he would no longer be able to continue working part-time in his own department, but instead the respondent would actively seek to redeploy him.

111. We have found that he was sent details of part-time jobs within his skill set, at the same type and within the same geographical location. We also accept that the respondent does not have to create a role and that it was not reasonable in the circumstances to turn the claimant's full-time role into a part-time role on a permanent basis. We accept that the Department was struggling to recruit and that, as the claimant agreed, the roles are very busy and required full-time resource. While we understand that the claimant would have preferred to have his own job on part-time hours, on an objective basis the adjustment selected by the employer is sufficiently reasonable to discharge its duty. The claim under this head does not succeed.

Equality act section 27: victimisation

112. It was conceded that the claimant did five protected acts between 10 May 2019 and 7 January 2020. The detriments complained of 8 November 2019 meeting, Ms. Falade not stopping the capability process when she met with him on 7 January, and telling the claimant on 2 April he could not continue to work part-time in his home role. They were looking for redeployment. If that was not successful then he could be dismissed.

113. We have already concluded that the capability meeting in November 2019 is properly classified as a detriment. However, we also found that Ms. Draper did not start this because of the protected acts.

114. We have found that Ms. Falade did not stop the ongoing capability process. We have no evidence to suggest, however, that she was aware that the ongoing monitoring was unjustified. Ms. Draper was responsible for this process. We accepted that Ms. Falade genuinely believed that the process is a supportive one was to assist the claimant. Her refusal to intervene in another manager's decision was not because of a protected act.

115. We have found that the claimant needed to work part-time because of his medical issues. We have accepted that it was reasonable not to permit

him to continue to work part-time in his own department. That was due to pressure of work and difficulty in recruiting. This is in the context of the employer having readily available part-time roles at a comparable pay and skill level. We conclude that the decision to seek redeployment outside the Department was not because of the protected act, but because the claimant's needs could not be achieved within his home department.

116. For these reasons none of the complaints succeed.

Employment Judge McLaren
Date: 13 December 2021