Case No: 3314792/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr B Watkins**

Respondent: **Cannon Moorcroft Ltd**

Heard at: **Reading Employment Tribunal (via CVP)**

On: **6th and 7th December 2021**
(and 7thJanuary 2022 in chambers)

Before: **Employment Judge Eeley**
Ms E Gibson
Ms C Tufts

Representation

Claimant: In person
Respondent: Mr L Davidson, counsel

RESERVED JUDGMENT

The Tribunal's unanimous decision is that:

1. The claimant's claim of direct disability discrimination contrary to section 13 of the Equality Act 2010 fails and is dismissed.

2. The claimant's claim of discrimination because of something arising in consequence of disability contrary to section 15 of the Equality Act 2010 fails and is dismissed.

REASONS

1. By a claim form presented to the Tribunal on 8th May 2019 the claimant brought claims of disability discrimination arising out of his employment with the respondent. The claimant is a chartered accountant by profession and was employed by the respondent as an Assistant Manager from 3rd December 2018 to 27th February 2019. The respondent says it dismissed

the claimant because he essentially failed his probationary period. By contrast, the claimant alleges that this was an act of disability discrimination.

2. The claimant was disabled at the material time by reason of Chronic Kidney Disease ("CKD"). He subsequently underwent a kidney transplant in November 2019. The respondent accepts that the claimant was in fact disabled at the material time but denies that it knew or could reasonably have been expected to know that the claimant was disabled at the material time.

3. The claimant makes two complaints of discrimination. First, he asserts that his dismissal was an act of direct discrimination contrary to section 13 of the Equality Act 2010. He relies on a hypothetical comparator for the purposes of this claim. Second, he asserts that the dismissal was unfavourable treatment because of something arising in consequence of disability contrary to section 15 of the Equality Act 2010. The claimant asserts that the 'something' which arose in consequence of his disability was his alleged poor performance at work which included the impact of the disability on his cognitive function including concentration, memory and fatigue. The respondent denies the claims and says, in relation to the section 15 claim, that dismissal was a proportionate means of achieving its legitimate aims. The legitimate aims relied upon were:
    - Ensuring the service it provided to clients was of a high standard and did not contain serious errors.
    - Ensuring that its staff were efficiently and appropriately managed.
    - Maintaining a professional work environment.
    - Protecting the respondent from liabilities potentially arising from negligence on the part of its employees.

4. During the course of the hearing the Tribunal received written witness statements and heard oral evidence from:

    (a) The claimant
    (b) Douglas Simmen: the Audit and Accountants Director of the respondent;
    (c) James Moorcroft: Managing Director of the respondent.

    In addition, the parties produced an agreed bundle running to 219 pages and we read those pages to which we were referred by the parties. Unless otherwise indicated, any numbers in square brackets within these reasons are references to page numbers within the agreed bundle. We were assisted by oral closing submissions on behalf of both parties.

Findings of fact

5. The claimant started work with the respondent on 3rd December 2018. He was qualified as a Chartered Accountant but was employed as an Assistant Manager. His employment was subject to a 3 month probation period. His offer letter of 20th November 2018 [61] confirmed that his annual salary would be £49,000 and that he was employed to work a 37.5 hour week,

Monday to Friday. It confirmed that there would be an interim review of the probationary period after 6 weeks of his 3 month probation. The contract document itself does not mention the probationary period save to specify that during probation the notice period was one week whereas, after the end of probation and up to two years' service, it was one month.

6. The structure of the respondent business was that there were two directors at the head of the organisation. Reporting directly to them was Claire Moore, the Audit and Accounts Manager. The claimant reported direct to Claire Moore. There was a wider team of accountancy employees underneath the claimant and Claire Moore within the organisation structure. The work undertaken by the team was divided into projects. In respect of each project the team member would report in to whoever 'owned' that project: the claimant or Claire Moore. It was also intended that the claimant should manage a trainee who sat in the same room as him. Beyond the management of specific work projects, the overall line management of the team sat with Claire Moore during the claimant's period of employment. There may well have been a plan that the claimant would take over the overall line management of the team over the longer term but this had not happened prior to his dismissal. Had his appointment as Assistant Manager worked out as intended, he would have been seen as the natural successor to Claire on her retirement from her post.

7. The respondent's office was closed between Christmas and New Year following the start of the claimant's employment. Claire Moore underwent hip surgery and was off work on sick leave for part of December. The operation itself had taken place by 10th January 2019 [111]. From 2nd to 4th January 2019 claimant was himself off work on sick leave. This means that by the time the claimant got to his mid probation review he was several weeks into his employment but the combination of his own and Claire's sickness absence and the Christmas closure period meant that he had actually had less than six weeks working in the office whilst being actively supervised or observed by his managers within the organisation.

8. We were shown the claimant's induction checklist [95]. The induction was done by the Practice Manager Larissa Plumridge. There was no indication that the induction conveyed any particular information about the respondent's specific ways of working or the respondent's particular expectations. There was apparently no indication of the "way things are usually done" within the respondent company.

9. The respondent's normal way of working was that the claimant's work would be given a final check before it was sent out to the respondent's clients. However, it was expected that, generally speaking, the work would have been completed appropriately by the claimant. The check was not intended to duplicate the claimant's work but was just a 'failsafe' to prevent any particular problems 'slipping through the net'. During those final checks the claimant's superiors started to notice errors. Upon noting the errors the approach taken was to address the specific errors with the claimant as they arose rather than compiling them into a dossier of problems to be reviewed

with the claimant at the probation review meeting. Consequently, some errors would already have been brought to the claimant's attention and addressed with him prior to the probation review meeting. They were not 'saved up' for a more formal discussion.

10. The claimant's mid probation review took place on 15th January 2019. The claimant attended the meeting with Claire Moore and Douglas Simmen. We were told (and we accept) that prior to the probation review meeting some other members of the team had given feedback to Claire about the claimant's performance. It was not clear whether they had volunteered this information or were actually asked to provide feedback. There was some suggestion in the evidence before us that the team members had themselves asked for a meeting with James Moorcroft to discuss their concerns about the claimant. The types of concerns raised related to his reliability, the quality of his work, his work ethic, his supervisory skills and a lack of professionalism. No written record or notes of the complaints or feedback was taken from the employees at the time. The evidence was oral together with the handwritten note at [113]. We accept that some concerns were raised and some adverse comments were made by members of the team about the claimant but, in the absence of contemporaneous detailed documents, we cannot go further and assess the gravity of the complaints or the seriousness of the observed problems. In any event we accept as a matter of fact that the respondent is telling the truth when it says that members of the workforce had raised concerns about the claimant prior to his 6 week probationary review.

11. At the probationary review the respondent went through a list of tasks which the respondent wanted the claimant to focus on. The respondent clearly saw these as areas of concern. The review was by no means wholly positive although the claimant apparently did not see it this way. Claire made handwritten notes [113]. At the top of the note is a summary of complaints and comments from other members of the team which were not raised with the claimant during the review meeting. This was because the respondent had not had the opportunity to look into the complaints and substantiate them. It was therefore felt that it would be unfair to discuss such complaints with the claimant without at least some preliminary investigation into the substance of them.

12. Lower down the page there was a list of concerns (not bracketed together) which were discussed with the claimant at the meeting (as confirmed in his email at [119]). The Claimant accepts that he was told:
    - That he was personable and 'getting on' with everyone.
    - That there was a list of tasks for him to focus on.
    - That the respondent highlighted issues with the claimant failing to complete timesheets. He was reminded to make sure that timesheets were completed.
    - He was told he needed to monitor a fellow employee's performance.

- He was told that he should review the work done by the trainee before it was sent to anyone else at the respondent company.
- It was explained to the claimant that, as Assistant Manager, he needed to make sure that he knew what was going on with clients even if he was not personally preparing their accounts.
- It was also pointed out that he had not focused on the management elements of his role up until that point in his employment.
- He was specifically told that he should copy his seniors into his emails so that they could see what he was sending out. Incidentally, this appears to have been an ongoing problem from the respondent's point of view as even by 20th February Claire Moore still had to send the claimant a message to get him to 'copy her in'. She said: *"Please, please copy me in on your emails. I have asked several times- please now do so! Whilst you are new to the firm, we need to be kept in the loop as to what is going on and until we say otherwise, this is what we want. This week is a classic in which now knowing you won't be in,…I have no idea what might be happening. At least if cc'd, I'll frequently be cc'd in client's responses and I can try and help."*[123]

13. At the meeting there was a discussion of some examples of the problems identified by the respondent. The claimant was told that he was not updating timesheets or keeping job stages up to date. He was advised that he must do this. He was advised that he needed to improve the level of his liaison with management over work. The respondent raised concerns about the claimant passing tricky jobs on to others to do. For example, it had come to light that in relation to one client he had passed work to another colleague who did not have the requisite skills or experience to carry out the work. He was reminded to think before he passed work to other colleagues. The same colleague had also asked the claimant for assistance on another matter and instead of explaining how to transfer the Trial Balance on the accounts the claimant had taken over the job. In other instances colleagues had felt that the claimant was over explaining what needed doing which they found frustrating. The claimant was told that it had been brought to their attention that he had been wandering around the office asking the team what he had been doing so that he could record the time on his timesheet. They also raised the concern that he appeared to be recording more time than they would expect on certain tasks. This meant that time would be written off and not charged to clients, at a loss to the respondent. It was also pointed out that he had made some Personal Tax errors which had already been addressed with him.

14. We accept that the summary of topics discussed at [119] is broadly accurate and complete. The respondent never replied and questioned it at the time or said that something had been missed off the list. Although the email is very much a summary, the language the claimant chooses to use indicates

that this was a list of things he was not doing or that he needed to make sure that he did do in the future. So, despite what he says to the Tribunal, the claimant must have realised that this a list of corrections or areas for improvement rather than a straightforward 'to do list' or list of projects to get involved in. So, although it is not necessarily being spelt out explicitly that there are performance concerns, it would have been the obvious conclusion for him to have drawn from the substance of the corrections made that he was not considered to be working to the appropriate standard and completing all the relevant parts of his job role. He was not told that he was on course to fail his probation at that stage if he failed to improve. It was by no means a warning that the claimant was at imminent risk of dismissal but it was an indication that he was not working at the appropriate level for the long term.

15. On 6th February 2019 Claire asked the claimant to write up the notes of his own probation review meeting. The claimant wrote an email summary of the review meeting and sent it to Claire and Doug on 7th February. He asked them to let him know if there was anything missing from the record [119]. Neither of them responded to him to point out any omissions.

16. On 18th February 2019 there was a management meeting where the claimant's performance was discussed [122]. The record of the meeting noted in particular: *"2(iii) ability/progress of some members of acs team: BW (errors, omissions, non-communication, others staff members complaints; DS unsure; CLM suggests LP will have diff thoughts)…2(iv) attitude of some staff: BW (v prompt timekeeping)."* Lots of topics were discussed but they included problems with the claimant's performance. It is apparent that Claire Moore and James Moorcroft wanted to dismiss the claimant by this stage but Doug Simmen was still unsure. Whilst there were clearly issues and dismissal was likely on their minds, they decided to wait until the next meeting before they discussed it again. The quotation in the note *"DS unsure"* is, we find, probably a reference to the fact that Doug Simmen was not sure that he wanted to dismiss the claimant but the other two participants at the meeting had already made up their minds.

17. On 20th February 2019 the claimant underwent surgery to remove an abscess and spent six days in hospital. The claimant had planned to take annual leave from 25th to 27th February and then intended to work from home from 28th February.

18. The claimant was diagnosed with advanced Chronic Kidney Disease ("CKD"), also known as renal failure, during his hospital stay. This was unexpected. The claimant was told that his kidney function was 8 and that he was in the final stage of CKD. He was also suffering with hypertension and secondary hyperthyroidism. A comparator of the claimant's age without CKD would have typical kidney function of 85% to 90%. Apparently treatment through dialysis would typically start when kidney function dropped to 15%. The claimant was told that if he had continued undiagnosed he would be likely to have collapsed in three months' time and

would have had a potentially fatal heart attack. The claimant was told that he would need to go on drugs and needed an urgent kidney transplant.

19. The above is what the claimant was told about his condition at around the time when he was in hospital. It is not necessarily, however, what he communicated to the respondent (see below).

20. On 21st February the claimant exchanged a series of text messages with Claire Moore [133]:

Claire: *Byron how are you? James mentioned you were in hospital- I hope op has happened/gone ok and you're home? Unfortunately I need to follow up on work: could you remind me which files you have at home- I think you said Brydon and one other? Let me know if you'll be able to sort Brydon, if not, we may need to collect….*

Claimant: *Grl is the other file. Both are done as far as work is concerned I just took them home to put the files together.*

Claire: *Thanks. Any idea if you'll be in on Monday/can get files to me to review?*

Claimant: *I believe in likely to be released at some point over the weekend. The operation was successful. Sadly that is the simpler issue. I have from the sounds of a potential chronic kidney disease. Will be moving up to the kidney ward later to see if I need a biopsy, dialysis etx. Cos of the surgery I will likely need to work from home for a couple of weeks but in sure I can get my wife of family member to drop the files up to the office*

Claire: *Oh dear! People have been asking after you- what can I say? (If possible to get files here that would be good, otherwise we could collect?)*

Claimant: *We will sort something with the files. I will speak to people later when they come in and visit. U can tell people the truth. I'm in hospital. How much details about where the surgery was I will leave you! And that im still here cos I have a serious kidney issue.*

Claire: *Sorry to hear all this but hope the kidney issue is a temporary thing. Please keep us informed of progress and take care.*

21. Looking at this text exchange we find that the reference to dialysis, biopsies and serious kidney disease would, on their own, ring alarm bells with the objective reader. However, these pieces of information are sandwiched between discussions about work arrangements in the next couple of days, what to do with work files etc. This perhaps underplays the seriousness of the diagnosis and gives the impression it is perhaps not as serious as one might think at first. This is perhaps evidenced by the tone of Claire's response. It is quite casual and indicates that she perhaps did not realise that they were in fact discussing a potentially life threatening illness. She says that she hopes it is a 'temporary thing'. The claimant does not say

anything at that point to correct this or suggest that it is in fact more serious or long term.

22. Later on 21st February Claire emailed the team at work about the claimant's kidney condition [127]: *"Several of you have been asking about Byron. He has been in hospital having an op, hopes to be released over the weekend, but had a serious kidney issue that they are investigating, meaning he is being moved to the kidney ward for tests. He is likely to have to work from home for a week or two."* It is notable that she mentions it being a serious kidney issue so it has obviously registered with her that it is actually quite significant.

23. On 25th February there was a further text message from Claire to the claimant [134]:

    Claire: *Morning! How are things- were you let out on good behaviour at the weekend? Let me know your plans- Doug can pick up the files if necessary. C….*

    Later that same day the claimant had a telephone conversation with Doug Simmen. He informed Doug that he had been diagnosed with CKD, had been referred to a renal specialist and was awaiting a treatment plan. Doug subsequently thanked the claimant for the update [129] and said that Claire would liaise with the claimant if necessary regarding any client files which needed to be collected or delivered.

24. After the phone call there was a further text message exchange between the claimant and Claire:

    Claire: *Glad to hear you're feeling fine! Is the kidney issue being understood? James is going to look at Brydon and we can get Tine to send out if all ok C*.

    Claire: *Hi Byron- are you working on the WFS VAT return? I'll need to get this sorted out if not. Ta!*

    Claimant: *Hadn't got round to it. Was going to be something I did on Monday last week before obviously all this happened.*

    Claire: *Understandable!! Is this something you can/will do this week or should I ask Tine?*

    Claimant: *So I've agreed with Doug to start working from home from Thursday. Happy to look at it then.*

    Claire: OK, thanks I'll stop bugging you now!

    Claimant: *Haha not a problem.*

25. The overall tone of the exchange indicates that the claimant had explained his diagnosis in fairly neutral terms but had not gone into detail about what this meant for him. If anything, he had downplayed the impact of the

condition at this stage, either because he did not know himself, or because he was aware that he was nearing the end of probation and did not want to unnecessarily jeopardise his position.

26. Also on 25th February there were emails regarding the claimant's meeting with Xero being postponed for his return [135-137]. During this period (21st to 25th February) the respondent was certainly indicating to the outside world that the claimant was expected to return to work in due course. Hence the meeting was postponed for his return. The respondent also sent the claimant a get well card.

27. On 26th February there was a further management meeting [122]. The record of the meeting states in particular:

*" Ability/progress of some members of acs team: BW (in absence, error and omissions have become quite obvious- ***; ***; file for **** confusing at client meeting despite request to show audit trail ; timesheets not complete, no cc in emails, so not sure what's been going on; LP queried approach on ***. No option: not working at level of asst mgr and won't pass probation. Dreadful timing given ill-health. **** need plan of action."*

28. The respondent took the decision to dismiss the claimant at this meeting. This is implicit from the wording of the note. The respondent noted similar concerns as those identified at the previous meeting but some client examples are recorded. By this stage it appears that all are unanimous about the decision to dismiss.

29. On 26th February the claimant was on annual leave as part of his recovery from surgery. He was asked to bring an accounts file into the office (which he had taken home to work on). The respondent had initially offered to collect it from the claimant's house but the claimant preferred to drop it off at work as he had to go to hospital appointments and could not be sure that he would be at home when the respondent tried to make the collection.

30. On 27th February Claire contacted the claimant by text [134] asking what time he would be in the office. When the claimant arrived he was asked to go to a meeting room with Doug Simmen and Claire. Doug stated that he wasn't going to 'mince his words' and that the claimant's employment was due to be terminated due to poor performance. He felt that the issues mentioned in the 6 week review had not been addressed. Doug apologised and said it was a 'double blow' given the claimant's health. Doug said that the dismissal was effective immediately. The claimant emailed his sister with a summary of what was said at the meeting [143]. Doug offered to give examples of the poor performance but the claimant said, "it is what it is." He did not ask for details of the reason for dismissal. It was a very short meeting.

31. The dismissal was confirmed in writing in a letter dated 1st March [146]. The respondent confirmed that termination was due to the claimant's performance not being of the required standard. The letter confirmed that

there had been instances (amongst other matters) of incorrect filings to HMRC, sending incomplete accounts to clients for approval and shortfalls in the claimant's preparation of client records. The claimant was offered the right to appeal the decision in writing within 5 working days of the letter.

32. On 1st March the claimant made a Subject Access Request to obtain further information from the respondent. He also indicated that he would be lodging an appeal against the dismissal. James Moorcroft responded to say that he felt that the request was excessive and he would not be providing the information until the end of April. He continued: *"What possible grounds could you have for an appeal? You did not pass your probation period on grounds of performance. Bizarrely you refused the offer of going through those performance issues. When we provide the information you have requested you'll find out all the errors you have made in dealing with clients' affairs. I don't think it will do your confidence any good at all. But if that's what you want and you're prepared to make us waste our time proving it then fine. In the circumstances I wouldn't suggest you give us as a reference anytime soon."* The claimant responded to say: *"I am only asking for what I am entitled to…..The request is not excessive and actually fairly specific. As you are deliberately withholding this information, which by law you have 1 month to release to me, you will give me no other option than to escalate the matter with the Information Commissioner's Office. Your threat to now not provide me with an employment reference as a result of my subject access request is disappointing and clearly a deliberate attempt to hinder my future employment prospects. As you are aware, I am going through the most difficult time of my life having just been told my kidneys have stopped functioning and will need lifesaving treatment and a transplant. Your aggression towards me is totally unnecessary."*

33. The Tribunal notes that the claimant is clearly mentioning his need for a transplant at this point, before his appeal against dismissal has been addressed, although his dismissal had already taken effect. It is also apparent from the tone of the communications that the relationship between the individuals was increasingly strained and difficult. The tone of the relationship seems to change at this point.

34. On 6th March 2019 Guardian Support submitted a letter of appeal on the claimant's behalf [153]. As well as summarising the claimant's account of the dismissal meeting, the letter asserts that he first advised Claire about his kidney issues on 21st February but her response lacked any empathy or understanding. It asserts that the claimant told Doug Simmen on 25th February about the Chronic Kidney Disease and that the claimant was awaiting a treatment plan. The letter goes on to assert that the claimant has been advised that renal failure is classed as a disability under the Equality Act 2010 and that he is protected from being discriminated against as a result of this as well as the respondent being under a positive duty to implement reasonable adjustments. The letter asserts the claimant's belief that he had been dismissed due to his disability and that his dismissal was not for poor performance, as the respondent asserted.

35. The claimant's appeal was initially due to be dealt with by Larissa Plumridge. The claimant objected to this on the basis that she was

subordinate to the Directors who had made the decision to dismiss and he felt that she would not be able to challenge the original decision. The respondent had chosen Larissa out of a desire to find someone as independent as possible to hear the appeal given that the Directors had made the initial decision. They had arranged for Larissa to be provided with external HR support.

36. In an effort to assuage the claimant's concerns the appeal was heard by James Moorcroft. The claimant requested that it be dealt with in writing without an oral hearing.

37. On 11th April the claimant set out his grounds for appeal in writing [167]. Amongst other things, the claimant questioned the timing of the decision to dismiss given what he had told the respondent about his health a short time earlier. He did not understand the urgency of the decision to dismiss. He denied having been informed, prior to the dismissal meeting, that his performance was inadequate or a problem. He confirmed that he had never been told that failure to improve in any area might result in his dismissal. He set out his account of the probationary review meeting and asserted that his performance was not criticised or brought into question during the review. Nor was his probationary period extended at that point. He asked why, given the absence of specific/measurable objectives during his probationary review meeting, the company did not wish to extend the probationary period. He felt that it would be reasonable to expect that if his performance were an issue but this had not been communicated to him, the probationary period would be extended and he would be provided with the opportunity to respond/improve in the areas that the respondent had concerns about. The letter also gave (what the claimant asserted were) examples of his good performance in the post. He also pointed out that, in his view, if there were performance concerns these should have been handled under the respondent's formal performance procedure. The claimant also provided his response to the allegations that he had made incorrect filings to HMRC, had sent incomplete accounts to clients and that there were shortfalls in the preparation of client records. He concluded by reaffirming his belief that he had been dismissed for reasons in connection with his medical condition rather than purely for performance related reasons.

38. On 16th March Larissa Plumridge emailed the detailed evidence of the claimant's performance issues to James, Doug and Claire [156-160]. As well as a general overview of how the problems had come to light (particularly whilst the claimant's work was covered by others in his absence), Larissa provided a review of various client files setting out the specific problems identified on each of them. Whatever the relative seriousness of the problems identified, the Tribunal has no reason to conclude that this was anything other than a genuine list of problems on the client files. There is nothing to suggest that they were fabricated rather than being a genuine summary of concerns identified following a file review.

39. On 12th April, in response to a request, the claimant emailed further details of his medical condition [165]. He confirmed that he was not permitted to exercise as a result of his condition, his kidney function was 8%, he was on medication for the condition and was awaiting a 'fairly urgent' kidney transplant. Regarding prognosis, the claimant confirmed that his condition was life threatening, lifelong and incurable. He said that the transplant was necessary but would not cure him.

40. On 16th April James interviewed Doug Simmen who also provided a detailed breakdown of the errors and omissions discovered in the claimant's work [186-188, 219, 191-192]. It appears that, as well as issues with errors on client work, there were other problems such as time management, management of workload, inability to manage others, poor and incomplete record keeping, poor decisions regarding delegation of work, time spent on idle chatter with others and an attitude of 'just doing his strict hours of work' and nothing more, even when others were doing overtime. Doug Simmen characterised him as lazy. He also noted that the claimant repeatedly failed to copy the directors into his emails as he had been requested to do.

41. James Moorcroft compiled an Appeal Investigation Report [215]. In that report Mr Moorcroft confirmed that he had reviewed all of the evidence and had interviewed staff and reviewed written notes of interviews. There had also been a review of client files. Claire Moore had received oral feedback from three members of the accounts team prior to the mid probation review and they had expressed concerns. He set out the timeline of events, including the chronology of management meetings where the claimant's performance was discussed. He did not dispute that the claimant had told Doug on 25th February of his chronic kidney failure diagnosis. He confirmed that he could find no evidence whatsoever that health was taken into account or discussed to any degree whatever in the meetings at which it was decided that the claimant should not pass his probation. Mr Moorcroft concluded that, contrary to the claimant's assertion, the respondent's Performance Management Process was not relevant or applicable to a 3 month probationary period. The mistakes on the files which had been identified were not, in Mr Moorcroft's view, the sorts of errors a qualified Chartered Accountant should make, especially one employed at the claimant's level. He gave evidence to the Tribunal that, had the accounts been sent as prepared by the claimant, the respondent would have faced: considerable embarrassment; rejection of the accounts if filed at Companies House; incorrect statement of profit and hence Corporation Tax due; filing of incorrect Tax Returns and informing clients of incorrect tax liabilities. Mr Moorcroft came to the conclusion that the evidence of poor performance in the areas of client work, of following procedures and of staff management was overwhelming and he had no doubt that it was on this basis that the decision was reached not to retain the claimant in the position. He could find no evidence whatever that the health condition was either mentioned or taken into account in any way, however small, in any of the considerations made with regard to the claimant's probation.

42. Mr Moorcroft also noted in his evidence to us that the claimant did not claim anywhere that his health issue was a hinderance to his work or a contributory factor to his poor performance. The respondent had previous experience of a staff member with CKD and had employed her for 23 years, including through the period where she required a kidney transplant. The respondent had observed no ill-effects of the medical condition on that employee's work performance. So the respondent did not automatically assume that CKD would have any adverse impact on the claimant's ability to perform to the required standard in his job role.

43. By email dated 18th April Mr Moorcroft sent the claimant the full report of his investigation together with the evidence referred to in the report. The last paragraph of the document states: *"I note that Byron does not claim anywhere in any way that this health issue was a hinderance to his work, or a contributory factor to his poor performance. Having employed someone for the last 22 years with very serious kidney failure from the start, leading to a transplant, we have observed no ill-effects on performance and are always prepared to make adjustments if necessary. However, this has not been necessary for the individual concerned, who is quite capable of carrying out day to day activities. I need to point out that my decision is final and there is no further tight to appeal."*

44. Page 219 and the other review documents in the hearing bundle show significant performance failures, whatever the cause of those failures is. The Tribunal is unable to say that there was no genuine performance problem on the claimant's part. The real issue was what caused the performance issues. There is also some evidence of attitudinal difficulties. It is not clear why the claimant did not copy the appropriate people in to his emails. There seems to be no health related reason for this. Likewise, there seems to be no health related reason for the claimant walking around the office chatting to staff and asking them what he has been doing so that he can complete his own records. Furthermore, it does not look as though the claimant himself had realised that his health was adversely affecting his actions at work. He had not raised this with his employer or indicated that he was acting out of character due to medical problems. Why not, if he realised at the time that there was a health connection? Even on the claimant's own account it is really only after the diagnosis that he 'puts 2 and 2 together' and attributes it to the health problem. The claimant says that he realised that this was why he had: felt exhausted, slept excessively, struggled to focus and concentrate on anything and why felt so lethargic every day.

45. The claimant gave evidence to the Tribunal about the impact of his medical condition upon him. He stated that: *"throughout my employment at Cannon Moorcroft, I was suffering from exhaustion to the point I struggled to get through the working day. When I got home after work I would often fall asleep on the sofa. I was sleeping for excessively long periods yet felt un-rested, weak and had little energy. I was forgetful and had trouble remembering things. I found it really hard to concentrate on anything for any lengthy period of time and struggled to focus. I had frequent episodes of brain fog and feeling spaced out. Everything took far longer than it used to. Upon diagnosis I found out that these were common symptoms of advanced renal failure. My kidneys were unable to filter the toxins*

and impurities in my blood which resulted in fatigue, less energy and concentration difficulties. These get more pronounced as the disease progresses."

46. In the course of the Employment Tribunal hearing we were presented with a letter from the claimant's treating doctor Dr Flossman, Consultant Nephrologist. [34]. The letter is dated 8th October 2019 and so post-dates the claimant's dismissal by several months. However, there is nothing to suggest that the evidence it contains would not have been available at the time of the dismissal, had the respondent requested further medical evidence either from the claimant's treating doctors or from an occupational health provider. It provides the Tribunal with the best available medical evidence as to the nature and impact of the claimant's condition. It confirms that the claimant was first seen by the medical service in February 2019 when he presented with urological abscess. He was found to have advanced renal impairment. It noted that since presentation his kidney function had continued to decline slowly. At the time of diagnosis his creatinine level was 688. By the time of the letter in October it had gone up to 715. It was confirmed that the claimant was approaching end-stage renal failure and was scheduled to receive a kidney transplant in November. If that were not feasible, he would require to start renal replacement therapy via peritoneal dialysis, requiring insertion of an indwelling tube into the peritoneal cavity. The patient typically needs to exchange dialysis fluids four times a day each taking 20 minutes or via an automated machine exchanging dialysis fluid during the night. The letter also confirmed that the claimant was then on treatment for hypertension. It confirmed that hypertension is an extremely common finding in patients with advanced renal failure and blood pressure control helps to slow progression. In addition, he was receiving treatment for secondary hyperparathyroidism. The letter confirms that advanced renal failure has a significant impact on quality-of-life, in particular fatigue, which can be disabling. For example, comprehensive data from United States Renal Data System showed that six months before end-stage renal failure, 37-38% of 18 to 54-year-olds were in gainful employment compared to 81-85% of age-matched general population. This fell to a rate of 23-24% at the time of initiation of dialysis. The quoted figures are slightly higher for patients starting peritoneal dialysis than haemodialysis. A recent Swedish study showed that the chances of gainful employment after successful kidney transplantation are 21 percentage points higher in the first year after treatment, rising to 38% after five years. This is mostly due to overall better outcomes with transplantation compared to dialysis.

47. The claimant also provided a disability impact statement for the Tribunal on 2nd November 2019. He confirmed that he had received his diagnosis in February 2019 and that in February 2019 his kidney function was just 8%. He confirmed that he had previously been suffering from fatigue and was at times unable to focus but was unaware of anything wrong with him and that these were symptoms of an illness until his diagnosis. He confirmed that since his diagnosis he had been forced to change several aspects of his lifestyle including diet and working habits. The diagnosis also brought a lot of things to light that he had put down to the daily grind of working life. The

inability to focus and lapses in memory were, he said, clearly examples of what is commonly called "brain fog", where studies have shown that decreased kidney function has a direct correlation with decreased global cognitive function, abstract reasoning and verbal memory as well as a general lack of focus and mental clarity. At times he felt like his body simply failed him. He had started having bouts of gout on a regular basis which meant that walking around was difficult and sometimes impossible. On top of this he had issues with sleeping i.e. insomnia and shortness of breath on what would normally seem like menial tasks such as walking up a flight of stairs. All of this meant that working regular hours had been incredibly difficult and he was fortunate (as of November 2019) to have a boss that was so understanding of his situation. He also described the emotional impact of his diagnosis upon him. He described how it had been stressful trying to maintain his health, process everything that had happened as well as what was to come, all whilst trying to support himself and his wife with the mortgage, bills etc. His heart had been beating so hard that the muscle itself had strained. This was a result of his kidney failure.

48. The claimant's sister also provided a statement to the Tribunal. This largely confirmed the contents of the claimant's own statement. She said that at the point of diagnosis the claimant was excessively tired on a daily basis. He was lethargic and seemed to lack energy despite getting plenty of sleep. He would take regular naps, including after coming home from work in the evening. He would need to sit down whilst out for a walk or after climbing a flight of stairs. He would become exhausted after doing routine, simple activities like going to the supermarket. In addition to his physical fatigue, the claimant's concentration and focus was poor, especially when compared to how he was just a year or two earlier. His mental sharpness seemed to be affected, he took longer to think about things and was forgetful. She noted that she would ask him to do things for her and he would forget so he she repeatedly had to remind him. She noted that when the claimant got his diagnosis it explained many of her observations and the disease affected him both physically and mentally. She confirmed that she was identified as a match for the transplant and the operation was due to take place in mid-November 2019 she also noted that the claimant had continued to work part-time as a chartered accountant following his dismissal by the respondent.

49. The evidence from the claimant was generally more focused on his diagnosis than substantive examples of the impact of the condition on day-to-day activities. However, there were references to fatigue and brain fog which can be interpreted as having an obvious impact on cognitive function and the ability to do day-to-day tasks requiring any higher level of thought. The evidence also suggests that, in the period up until November 2019 (when he had the transplant), he could, at most, do part time work. Working regular hours was said to be a problem. According to his witness statement to the Tribunal he was desperate to find work after his dismissal. On 25th March he started a new job as an accountant working part-time. He thought a part-time job, whilst financially incredibly difficult, would give him flexibility to attend frequent and regular hospital appointments. On 14th November

2019 he underwent a live donor transplant. He is now on immune suppressant/anti-rejection medication for the rest of his life. Since his transplant his quality of life has improved vastly. He says that within 24 hours of the transplant he felt a thick brain fog lifted. Everything had clarity and seemed so much clearer. The difference just within 24 hours was amazing. Shortly after, his memory and attention improved. He says that he no longer feels exhausted and is now physically able to work full time with ease. However, owing to what happened to him, he is too nervous to change jobs. He is very happy in the job that he currently has and his employer has been fantastic. He also notes that he has had to shield for most of 2020 and 2021 due to the Covid 19 pandemic as he is in the extremely vulnerable category so he continued to work part-time. He has also recently set up his own accountancy business and helps his wife run her catering and street food business. It is not clear to us that he was ever advised by a doctor that he could not do full time work. However, he appears to have made that decision for himself and applied for part time posts in light of his experience of his medical condition. He also says that since the transplant he would be able to work full time so this suggests that the decision to go part time is based on a mixture of wanting flexibility to go to medical appointments and possibly concerns about his physical ability to manage a full time job prior to the transplant.

The law

Direct discrimination

50. Section 13 Equality Act 2010 states:

(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.

The section therefore requires a comparison between the treatment meted out to the claimant and that which was or would have been received by the comparator. The claimant must have been less favourably treated than the comparator.

51. Section 23 of the Equality Act 2010 provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…

52. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)*

53. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* Lord Nicholls stated: *"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

54. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

Section 15: Discrimination arising from disability

56. Section 15 Equality Act 2010 states:

(1) A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

57. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability'. The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

58. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

59. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of

the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).

(i) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

60. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

61. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

62. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

63. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three-stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

64. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible

way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

65. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

66. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Knowledge of disability (s15(2))

67. As stated above section 15(2) means that an employer will not be liable for section 15 discrimination if it did not know and could not reasonably have been expected to know of the employee's disability. The EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). What is reasonable will depend on the circumstances. This is an objective assessment. It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14.

70. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know if it had

made such an enquiry. *A Ltd v Z 2020 ICR 199* shows that determining whether an employer had constructive knowledge involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that he had a disability, namely that he was suffering a physical or mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. In *A Ltd v Z* the tribunal had failed to apply the correct test, asking itself only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know. Given the tribunal's finding that Z would have concealed her disability, if the employer had taken the additional steps that the tribunal considered would have been reasonable, it could not reasonably have known of the employee's disability. The employer's appeal succeeded. The burden is on the respondent to make reasonable enquiries based on the information given to it. It does not require them to make every possible enquiry even where there is no basis for doing so. The failure by an employee to co-operate with the employer's reasonable attempts to find out whether the employee is disabled could lead to a finding that the employer did not know and 'could not reasonably be expected' to know.

68. The employer must have the requisite knowledge of disability at the time it treats the employee unfavourably. If the treatment complained of is made up of a series of distinct acts occurring over a period, it is necessary to consider not only whether the employer had the requisite knowledge at the outset but also, if it did not, whether it gained that knowledge at any subsequent stage when the treatment was ongoing. In *Baldeh v Churches Housing Association of Dudley and District Ltd EAT 0290/18* the EAT held that a tribunal had erred by rejecting B's claim that her dismissal was discriminatory contrary to section15 on the basis that the employer did not know about her disability when it reached the decision to dismiss her, without also making a finding as to whether the employer had gained actual or constructive knowledge of her disability by the time it rejected her appeal against dismissal. On the facts of the case, B's complaint of unfavourable treatment in her dismissal had to be taken as referring both to the employer's initial decision to dismiss and to its subsequent rejection of her appeal. *Baldeh* was distinguished in *Stott v Ralli Ltd EAT 0223/20*, where the EAT upheld a tribunal's decision that the dismissal of a paralegal for poor performance was not an act of discrimination contrary to section15 because the employer had no knowledge of her disability at the time of dismissal. The employee argued that the tribunal should have regarded the grievance she brought after her dismissal, and her appeal against the outcome of that grievance, as an integral part of the dismissal process. She submitted that her employer had knowledge of her disability by the end of that process. The EAT noted that, for the purposes of an unfair dismissal claim, dismissal is regarded as a process that includes the appeal stage. However the EAT observed that Baldeh did not establish any legal principle to the effect that the same approach invariably applies in a discrimination

claim. Reference was made to *Reynolds v CLFIS (UK) Ltd 2015 ICR 1010, CA*, in which the Court of Appeal held that allegations of discrimination relating to a decision to dismiss and a decision on appeal were distinct claims that must be raised and considered separately. In the EAT's view in Stott, that approach applies equally to claims under section 15 of the Equality Act. It is important to consider whether the employer had the requisite actual or constructive knowledge at the time of the impugned treatment. Knowledge acquired only at a later point is not sufficient. In the Stott case, the employee had not brought a claim of disability discrimination in relation to her grievance. Her claim related solely to dismissal, and the tribunal had been entitled to find that the employer lacked actual or constructive knowledge of her disability at the time of dismissal. It appears that it will be necessary to determine exactly what allegations of discrimination are in play in each case. How is the claim put and how was the evidence presented? Is there anything to indicate that, in alleging that dismissal was an act of discrimination, the claimant in any given case is alleging that the decision in the appeal against dismissal is also part of the discrimination. Are both parts of the process reasonably to be considered as being challenged or put in issue in the discrimination claim?

71. While lack of knowledge of the disability itself is a potential defence to a section 15 claim, lack of knowledge that a known disability caused the 'something' in response to which the employer subjected the employee to unfavourable treatment is not (*City of York Council v Grosset 2018 ICR 1492, CA).*

Burden of Proof

72. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.

73. The wording of section 136 of the Act should remain the touchstone. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

74. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

75. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

    a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
    b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
    c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
    d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
    e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
    f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

76. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage).

If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

77. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation.

78. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

79. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

80. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

81. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself

in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

82. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

Conclusions

Section 13: direct discrimination

83. The Tribunal has to consider how a hypothetical comparator would have been treated by the respondent. Taking into account s23 of the Equality Act there must be no material differences between the comparator and the claimant save for the absence of the protected characteristic. In this case this means that the hypothetical comparator would not have CKD but would have the same performance record in his job role at the respondent. There would be the same issues with his handling of client files, recording keeping and general behaviour in the office etc. The hypothetical comparator would have the same performance record and would present the same risks to the business as the claimant. We have concluded that the evidence presented by the respondent which details the shortcomings in the claimant's work is genuine and a legitimate record of the respondent's concerns. Even though the full review and documentation of the issues only took place during the appeal process there is nothing to suggest that the evidence itself is not genuine and does not accurately record the difficulties that the respondent encountered with the claimant's performance.

84. In light of that the Tribunal has concluded that a non-disabled comparator in the same circumstances would also have been dismissed by the respondent. Consequently, there was no less favourable treatment of the claimant than of the comparator.

85. Furthermore, we have considered the reason for the dismissal and have considered whether disability was the reason for the respondent's treatment of the claimant. In this particular case this respondent has previous experience of employing someone with the same medical condition as the claimant: CKD. The condition may well have impacted upon that employee in a different way to the claimant. She may have manifested no adverse effect on work performance. Nevertheless, the uncontested evidence is that the respondent continued to employ this individual for over two decades, right through a transplant procedure and in full knowledge of her medical condition. This rather suggests that the respondent has no problem in employing a person with CKD. The disability itself is not an issue for the respondent. Likewise, the disability itself was not the reason for the respondent's treatment of the claimant in this case and the section 13 claim must fail.

86. In the circumstances of this case we were able to make direct findings based on the evidence as to the reasons for the respondent's treatment of the claimant. We have not had to resort to use of the shifting burden of proof under section 136 Equality Act 2010. We find, on the evidence, that the respondent's treatment of the claimant was in no sense whatsoever because of the disability.

87. Our conclusion is further bolstered by the relevant timeline. Although the final decision to dismiss was made and communicated to the claimant after he received his diagnosis, this was the culmination of discussions which predate the discovery of the claimant's medical condition. The respondent was actively considering dismissal from, at the latest, 18th February, the first management meeting described above. Dismissal was already on the agenda at this point. Indeed, discussions were at an advanced stage and two out of the three participants in the meeting had already decided that the claimant should be dismissed. The final decision was merely postponed until the third participant had had chance to consider the matter further. Furthermore, it is relevant to consider the timing of these meetings. The claimant's probationary period was due to come to an end in a matter of days. Rightly or wrongly, the respondent wanted to enact any dismissal inside the probationary period rather than wait a matter of a few weeks or even months to dismiss the claimant when he had accrued a longer notice period. Whilst allowing an employee to extend probation and to obtain a longer notice period may be the nicer or more sympathetic thing for an employer to do from the employee's point of view, the failure to do this does not indicate that the conscious or unconscious reason for the decision has anything to do with disability. Rather, it is the employer protecting its own business interests. No doubt the respondent would have dismissed a non-disabled employee within the probationary period too, indicating both that there was no 'less favourable treatment' of the claimant and also that the treatment was not 'because of' the disability.

Section 15: discrimination because of something arising in consequence of disability.

Knowledge

88. The respondent has conceded that the claimant was disabled within the meaning of the Equality Act 2010 at all material times but has not conceded that it knew or ought to have known about the disability at the relevant time. The issue of actual or constructive knowledge of the disability therefore has to be resolved by the Tribunal.

89. It is apparent from the findings of fact we have made that the respondent knew that the claimant had a significant kidney problem at the time he was dismissed. They knew that tests had been required. They knew that there had been reference to the possibility of taking biopsies and of the potential need for dialysis going forwards. They did not specifically ask the claimant for more information about his condition before dismissing him. Nor did they ask for medical evidence from his treating doctors or from an occupational health provider. They would have known, from their dealings with the other employee with CKD, that kidney problems of this nature might end with the need for a transplant.

90. There was a difference of opinion between the Tribunal members about the respondent's actual or constructive knowledge of disability in this case. Two of us felt that, as at the date of dismissal on 27th February, there was enough information available to the employer to ring alarm bells and put them on enquiry to ask further questions. Any objective reader of the text exchanges when the claimant was in hospital would have realised that there was a real possibility that, depending on the outcome of tests, the claimant would need significant invasive treatment (e.g. dialysis) and that the condition would not resolve in the near future. The majority of the Tribunal found that if the respondent had actually made further enquiries before making the decision to dismiss then the respondent would have been given, at the very least, the formal CKD diagnosis because the claimant was himself made aware of it at around the time he was in hospital. Furthermore, either the doctors or the claimant would have been able to tell the respondent that a transplant might be required and that CKD is technically incurable so that, even with a transplant, the claimant would have the condition for the rest of his life. The claimant is clear that he knew the figures for his kidney function in percentage terms in February 2019. We conclude that, supplied with this information, the respondent would have realised that such low kidney function would have more than a minor or trivial adverse impact on the claimant's ability to carry out normal day to day activities because it was likely to have a significant impact on energy levels, fatigue and cognitive function and memory. Given that the only curative treatment would be a transplant they would also have realised that the adverse effect was likely to last more than 12 months in the sense that it 'could well happen'. The majority of the Tribunal therefore concluded that the respondent knew or ought reasonably to have known of the disability at the time the claimant was dismissed. Furthermore, they knew or ought reasonably to have known that it would have an adverse impact on his performance at work. The respondent had constructive knowledge of all the elements of the definition of disability (in section 6 Equality Act 2010) as they apply in this claimant's case.

91. The Tribunal also considered the respondent's state of knowledge after the dismissal and in the run up to the appeal outcome. Although the dismissal had already taken place by then, the appeal formed an integral part of the dismissal process and it was open to the respondent to reconsider the decision and overturn the decision to dismiss during this period. It was apparent in the way that the case was presented to the Tribunal by the parties that both the initial decision to dismiss and the decision on the appeal were part and parcel of the claim of discrimination. The process was therefore considered holistically. All three members of the Tribunal felt that things moved on during the course of the appeal process. By the appeal stage it was being clearly asserted on the claimant's behalf and communicated to the respondent that the claimant was disabled within the meaning of the Equality Act 2010. We find that the respondent really could not close its ears to this assertion and refuse to make further investigations when faced with the grounds of appeal. Otherwise, the concept of constructive knowledge within the Equality Act would be rendered meaningless. We went on to consider what would be likely to have happened if they had made further enquiries. If they had asked for medical evidence or probed the impact of the condition with the claimant we feel confident that they would have had adequate evidence of an impairment, with a substantial adverse effect on the ability to carry out normal day-to-day activities, with sufficient duration to meet the longevity requirements of the Equality Act test. They would have found out that the diagnosis was of CKD and that the test results indicated that it was at advanced/end stage. They would have been told that long term treatment would be likely to involve dialysis or transplant. Even that information alone would reasonably lead them to conclude that it was an impairment with a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The claimant might not have set out all of the day-to-day activities which were adversely affected to the extent that an employment lawyer would have done, but the overall tone of the evidence would have made it self-evident that fatigue and cognitive function would be significantly impaired. This is not a case where the claimant would have suppressed the nature and extent of the problems caused by his medical condition. There is a limit to the amount of detail that the claimant would have to go into before the respondent would realise the adverse impact of the CKD on the claimant. The respondent knew the demands of the claimant's job and would realise that his performance would be significantly affected, even if there were also additional and underlying capability/competence issues. Furthermore, without a transplant, dialysis was a real possibility. That in itself would significantly interfere with the claimant's normal day-to-day activities given the frequency and duration of dialysis treatments. If a transplant was required, this would be recommended as a lifesaving treatment. Clearly, this would imply the requisite substantial adverse effect on normal day-to-day activities.

92. In light of the above, we have concluded that the respondent did have or ought to have had the requisite knowledge of the disability for the purposes of the section 15 claim.

Something arising in consequence of disability

93. Based on the evidence we have heard we have concluded that the performance problems identified by the respondent were connected with the disability. There may have been other, non-disability related causes as well but we think the disability was a significant and effective cause of the performance problems. Many of the mistakes would be likely attributable to brain fog, fatigue and a diminished level of cognitive function. Organisation of work, record keeping and delegation of tasks to others were all likely to have been affected by his disability. Even if the more attitudinal concerns (laziness, failure to copy people into emails, chatting too much) were not caused by the disability we recognise that the disability need not be the sole cause of the performance issues. We think the performance problems arose at least partially and substantially from the disability. It passes the legal threshold of being a real and effective cause or a significant influence on the performance issues.

A proportionate means of achieving a legitimate aim?

94. The respondent's legitimate aims were identified as:
    a. Ensuring the service it provided to clients was of a high standard and did not contain serious errors.
    b. Ensuring that its staff were efficiently and appropriately managed.
    c. Maintaining a professional work environment.
    d. Protecting the respondent from liabilities potentially arising from negligence on the part of its employees.

95. We consider that these were legitimate aims for a business of the respondent's type. The aims were not in themselves impermissibly tainted by discrimination.

96. We have considered the proportionality of the dismissal as a means of achieving those aims. We have concluded that it was a proportionate response. There was no other adequate way of protecting the legitimate aims in this case. The evidence was that the respondent needed someone in the claimant's position full time and that this was intended to be a managerial post. Even if the claimant had been able to carry on working part time this would not have improved the quality of his work when he was able to attend. The claimant himself says that it was only once he had the transplant that the brain fog 'lifted' and he was able to think clearly again. We find that even part time working would not have removed the cognitive impairment experienced by the claimant whilst carrying out work related tasks. The quality of his work would still have been substantially undermined. Part time working would not have been a more proportionate way of achieving the legitimate aims in this case.

97. Even if the Tribunal were to assume that going part time would have improved the quality of the claimant's work, it still would not have been an adequate response to the difficulties the respondent faced. Given the nature of the

business much of the work was time critical. Furthermore, the claimant would not be able to properly supervise the trainee and other members of the team or allocate work to them appropriately if he was working part time. There was no evidence that all the respondent's business needs in respect of an Assistant Manager could have been met in the available working hours by an employee only working part time hours. The requirement had always been for a full time employee in the claimant's post.

98. Furthermore, if the claimant was working part time and still making errors (as we find he would have been, at least until the transplant took effect) the respondent would still need someone to check his work in detail before it was sent out. This would effectively be a requirement to duplicate the claimant's work. This would not be proportionate or realistic. We find that the respondent was entitled to discount that as a solution. Nothing short of dismissal would adequately protect the respondent's client relationships or reputation or ensure proper, accurate and comprehensive record keeping.

99. In considering proportionality it was also important to examine the impact of the duration of the problem. As at the time the decision to dismiss was made, nobody could have known when the claimant would be able to undergo the transplant, if at all. The successful outcome of the surgery could not be guaranteed either. This is not one of those cases where an employer, by waiting a couple of months before dismissing, would get a definitive prognosis with a set timeline to work to. Even if they had not dismissed in February on the assumption that the claimant would be able to fulfil his duties to the required standard after a transplant, they would not have known how long they would need to wait for the claimant to return to work fully fit and fully functioning. Whilst it might be realistic to expect an employer to cover the claimant's post for a number of weeks or (at most) a month or two before the employee returned to work in a fully fit and fully functioning capacity, it is not realistic for an employer to do this for a longer or indeterminate period of time. As things turned out, in the claimant's case they would have needed to wait at least nine months for him to return to work post-surgery. Nobody knew this in advance, though. It could have taken less time or it could have taken considerably longer to find a donor and arrange the surgery. All of this uncertainty and unpredictability weighs in favour of the respondent's decision to dismiss being a proportionate means of protecting its legitimate aims and interests. It could not be expected to wait for longer before dismissing. This would not sufficiently achieve the legitimate aims and would not be proportionate.

100. We have considered the available evidence and examined whether there was another solution, short of dismissing the claimant, which would protect the respondent's legitimate interests. We could find no more proportionate means of achieving the aims. The claimant would have to be dismissed at some point in order to achieve the legitimate aims. We then considered whether the timing of the dismissal made it a disproportionate response. We concluded that, at most, the respondent could have delayed the decision for a while whilst it obtained medical evidence and further information about the prognosis but the evidence which it would have received would still have led

to the claimant's dismissal. It would not have caused it to reconsider the dismissal. Was the respondent therefore required to delay the dismissal? All the claimant would gain would be a potential increase in the amount of notice pay payable once the probation period had expired. Whilst that would be a benefit to the claimant we asked ourselves whether refusing to delay and thereby pay increased notice pay was disproportionate in the circumstances. Whilst it might have been 'nicer' and more sympathetic of the respondent to do this, were they required to do so by the Equality Act 2010? In the end we concluded that delay would just increase the costs and adverse impact to the business without any associated benefits or legitimate aims being achieved. It would not have helped achieve the legitimate aims and therefore would not have been a more proportionate means of achieving the legitimate aims. Indeed, the claimant's complaint is really that the decision to dismiss was discriminatory, not that the timing of the decision was unlawful. This tacitly suggests that once the dismissal becomes a proportionate response, delay with no associated benefits to the respondent, is not required. All a delay would do would be to prevent the respondent from acting on the normal principles of a probationary period. The whole point of probation is that an employer can 'try out' an employee and then, if it does not work out, dismiss within the probationary period. There is nothing about the facts of this case that requires the respondent to depart from that feature of the probation period in the claimant's contract. Nor is there any more general or freestanding principle in the Equality Act that disabled employees can never be the subject of probation periods and early termination of employment where probation is failed on performance grounds. It is open to an employer to dismiss within the probation period so long as it has complied with its other duties under the Equality Act 2010. We find that, on the facts of this case, this employer has complied with its duties and obligations under the Equality Act 2010. We therefore dismiss both the claimant's claims of discrimination herein.

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Employment Judge Eeley

Date signed: 11th January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26 January 2022

For the Tribunal Office