EMPLOYMENT TRIBUNALS

Claimant: Dr Z Fitzgerald

Respondent: Greater Manchester Mental Health NHS Foundation Trust

Heard at: Manchester **On:** 4-8, and 11 July and (in chambers) 13 July 2022

Before: Employment Judge Phil Allen
Mr B Rowen
Mr WK Partington

REPRESENTATION:

Claimant: In person
Respondent: Mr N Caiden, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondent did not subject the claimant to unfavourable treatment because of something arising in consequence of his disability or, where it did so, the treatment was a proportionate means of achieving legitimate aim. The claims for discrimination arising from disability contrary to section 15 of the Equality Act 2010 do not succeed and are dismissed.

2. The respondent did not breach the duty to make reasonable adjustments. The claim for breach of the duty to make reasonable adjustments contrary to sections 21 and 22 of the Equality Act 2010 does not succeed and is dismissed.

3. The respondent did not treat the claimant less favourably because of his disability. The claims for direct disability discrimination contrary to section 13 of the Equality Act 2010 do not succeed and are dismissed.

4. The claimant was not subjected to unlawful harassment related to disability by the respondent. The claims for unlawful harassment contrary to section 26 of the Equality Act 2010 do not succeed and are dismissed.

5. Other than the claims relating to the relocation of the claimant's office, the letter of 26 November 2019, and organising a meeting on 5 December 2019, the

claimant's claims were not brought within the time required by section 123 of the Equality Act 2010, they were not part of a continuing act with claims brought in time and found, and it was not just and equitable to extend time. Accordingly, the Tribunal does not have jurisdiction to determine those claims.

6. The claimant's claims that he was subjected to a detriment because he had done a protected act contrary to section 27 of the Equality Act 2010 (victimisation) are dismissed on withdrawal.

REASONS

Introduction

1. The claimant was employed by the respondent with continuity of employment from 2007 or 2008, as a Consultant Psychiatrist. From 1 August 2012 until 2017 he was also Inpatient Lead Consultant for Manchester. The claimant has bipolar disorder, which was accepted as being a disability. The claimant brought claims of direct disability discrimination, discrimination arising from disability, breach of the duty to make reasonable adjustments, harassment and victimisation arising from his treatment from 2017 to the date when the claim was entered at the Tribunal on 6 May 2020.

Claims and Issues

2. Preliminary hearings (case management) were conducted in this case on 29 October 2020 and 27 January 2021. An agreed list of issues was included in the bundle of documents (97). At the start of the hearing, with one minor amendment explained by the respondent's representative, the list was agreed by both parties as containing the issues which the Tribunal needed to decide.

3. It was recorded in the previous case management order and was confirmed at the start of the hearing, that only liability issues would be determined at the hearing. The remedy issues were left to be determined later, only if the claimant succeeded in any of his claims.

4. During the second day of the hearing and before he gave evidence, the claimant confirmed that he was only relying upon one of the two protected acts recorded in the list of issues, which was the grievance he submitted on 2 October 2017. Later that morning, while he was being cross-examined, it also became clear that the claimant was not genuinely asserting that the matters recorded as detriments for his victimisation claim were genuinely things which he alleged had occurred because he had raised his grievance. The claimant was asked to consider whether he was pursuing his complaints of victimisation during the lunch break on the second day. After lunch and following a brief discussion about the victimisation allegations, the claimant confirmed that he was not pursuing his victimisation claims. He asserted that the detriments upon which he had relied had occurred and were detriments, but he was no longer asking the Tribunal to decide whether those detriments were as a result of him having raised a grievance. The claimant confirmed that he was withdrawing his victimisation claims and he was happy for

them be dismissed on withdrawal. The issues which had previously been identified for the victimisation claim are not re-produced in the list of issues below.

5. The issues identified were as follows (it not being necessary to reproduce issues 1, 2 or 5-7):

3. The claimant's disability is bipolar disorder and the respondent admits that such is a disability at the relevant time of the alleged discrimination and further that it had requisite knowledge of such disability.

Time limits

4. ACAS Early Conciliation took place between 24 February 2020 – 7 April 2020. Accordingly, all acts complained of before 25 November 2019 are on the face of it out of time unless:

   a. it is part of a continuing act with something that was in time; or

   b. time is extended on 'just and equitable' basis.

Arising from disability discrimination

8. Whether contrary to s. 15(1) Equality Act 2010 and s. 39(2)(c)-(d) Equality Act 2010 the claimant was subjected to discrimination arising from disability, having regard to:

   i. Did the respondent treat the claimant unfavourably;

   ii. If so, was this because of something arising in consequence of his disability;

   iii. If so was the treatment a proportionate means of achieving a legitimate aim?

9. In terms of the "unfavourable treatment", 8(1) above, the claimant alleges:

   i. he was excluded from monthly departmental consultant meeting throughout 2017 and onwards;

   ii. termination of his contract on 20 June 2017 and exclusion from being reappointed;

   iii. reallocating the claimant's office to one on the other side of the building which was shared by the on call consultant upon his return from sick leave on 30 January 2020;

   iv. organising a sickness absence meeting for 5 December 2019.

10. The claimant asserts that each of the 4 unfavourable treatments above are said to be because of something that arose from his bipolar disorder, in that:

i. he was excluded from meetings because he required adjustments and/or because of his difficulty being able to undertake the workload implemented by the respondent;

ii. there is a causal link between excessive workload and stress induced relapse and/or maintenance of a pre-existing disability. In terminating the claimant's leadership role, Dr Daly failed to consider alternatives to terminating the role and failed to address the claimant's concerns that his core job plan was in excess of 10 PAs, meaning that the claimant would struggle to pursue an ongoing leadership role within the organisation;

iii. the claimant asserts that his bipolar disorder causes problems with attention and concentration and that moving his office caused him considerable difficulties. However, the claimant's case in relation to causation in respect of 9(iii) remains unclear to the respondent;

iv. the claimant was due to attend a mediation meeting with a colleague on 17 January 2020. When organising the sickness absence meeting for 5 December 2019, the respondent placed no emphasis on the claimant's relationship with that colleague, which was causing him distress.

11. The respondent has set out its legitimate and proportionate aims in paragraphs 31.1 onwards of the amended grounds of response (namely: termination of lead consultant role was in pursuance of the legitimate aim of removing alleged excessive workload and in line with OH advice, reallocation was in pursuance of the legitimate aim of health and following OH advice requiring a window and ensuring offices were adequately occupied; organising a sickness absence meeting was in pursuance of the legitimate aim of managing sickness absence and having regard to health of employees).

Failure to make reasonable adjustments

12. Whether as defined by ss. 20-21 Equality Act 2010, the respondent failed in its duties to make reasonable adjustment (contrary to s. 39(5) Equality Act 2010), having regard to the following:

i. Did the respondent apply a 'provision, criterion, or practice' ("PCP");

ii. If so, did this PCP put the claimant at a substantial disadvantage;

iii. If so, did the respondent have knowledge that the claimant was likely to be placed at this disadvantage (schedule 8 at paragraph 20 of Equality Act 2010);

iv. If so, has the respondent taken such steps as were reasonable to avoid the disadvantage?

13. With respect to the alleged PCPs, 12(i) above, it is the workload of the claimant namely 10 PICU and 10 acute patients and the requirement to cover absent colleagues.

14 Whilst the duty is on the respondent to make adjustments, for the purposes of ensuring appropriate evidence the claimant relies upon the adjustment being a reduction of his workload, namely to 10 PICU patients.

Direct disability discrimination

15. Whether, as defined by 13(1) Equality Act 2010 and contrary to s.39(2)(c)-(d) Equality Act 2010, the respondent directly discriminated against the claimant having regard to the following:

    i. Did the respondent treat the claimant less favourably by (a) providing him a greater workload (which the claimant viewed as 'excessive') (b) terminating his employment on 20 June 2017 [clarified as being a reference to the termination of the Lead Consultant role];

    ii. If so, was this because of his disability?

16. In terms of comparator, the claimant relies upon Dr Richard Jones as an actual comparator, and industry benchmark data as a hypothetical comparator, within the meaning of s.23 Equality Act 2010.

Harassment

17. Whether, as defined by 26(1) Equality Act 2010 and contrary to s. 40(1) Equality Act 2010, the respondent harassed the claimant on the grounds of disability, having regard to the following:

    i. has the claimant shown that he has been subjected by the respondent to unwanted conduct;

    ii. If so, in respect of each of these that has been found to have occurred, was such related to the relevant protected characteristic of disability;

    iii. If so, did such unwanted conduct have as it's (a) purpose or (b) effect, violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant (taking into account the perception of the claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect)?

18. The alleged unwanted conduct relied upon, 17(1) above:

    i. on 11 July 2017, Mr Daly indicating that he regarded the claimant's performance as deficient, stating "*Manchester had been in a grim state when we* [sic] *took over, that's why we took over*";

    ii. Dr Kazmi making threats of disciplinary proceedings and referral of NCAS throughout 2017;

iii. on 7 August 2018, Dr Kazmi shouting at the claimant in a meeting and calling him "*unprofessional*";

iv. the letter of 26 November 2019 which invited him to a meeting on 5 December 2019 at which "*the contract of employment may be terminated*";

v. reallocating the claimant's office to one on the other side of the building which was shared by the on call consultant upon his return from sick leave on 30 January 2020.

6. In the list of issues for victimisation, the claimant had relied upon detriments which included: the delay in dealing with his grievance; and removing his nameplate from the office he held prior to his sick leave. Those issues were not expressly referred to in the list of issues for any of the other allegations (which were not withdrawn).

7. In respect of issue 11, the list of issues referred to the amended grounds of response for the detail of the legitimate aims relied upon. For the decision to give notice to cease the claimant's role as Lead Consultant the amended grounds of response (74) stated that this was a proportionate means of achieving a legitimate aim: "*In that the respondent was taking steps to implement Occupational Health advice to remove excessive work pressure on the claimant, and to protect the health and wellbeing of the claimant. Dr Daly's overriding concern was for the claimant's health and responding to the Occupational Health report of 9 May 2017 to reduce any additional burden and stress to the claimant*".

8. In his original claim form the claimant had claimed unfair dismissal. That particular claim related to the cessation of his role as Lead Consultant in 2017, rather than to his later dismissal from his substantive role as a Consultant which occurred in 2021 (long after this claim was entered at the Tribunal). That unfair dismissal claim had been previously formally withdrawn by the claimant and subsequently dismissed.

9. In the case management order made following the hearing on 27 January 2021 the claimant was ordered to confirm in respect of each of the four examples of unfavourable treatment relied upon what was the "something arising" from his disability which had caused the unfavourable treatment (85). Those further and better particulars were provided in a two page document (95) which set out in some detail the something arising relied upon for each allegation of unfavourable treatment, the content of which was reflected in the list of issues.

Procedure

10. The claimant represented himself at the hearing. Mr Caiden, counsel, represented the respondent.

11. The hearing was conducted in-person, with both parties and all witnesses attending Manchester Employment Tribunal.

12. The respondent provided a bundle of documents which ran to 1229 pages, together with a bundle titled "the claimant's supplemental bundle" which ran to a

further 1032 pages. Where a number is referred to in brackets in this Judgment it is a reference to the page in the core bundle (it not being necessary to refer to pages in the supplemental bundle). The supplemental bundle duplicated in part the content of the main bundle. During the hearing the claimant also provided two additional job descriptions which were added to the bundles. In his witness statement the claimant had also referred to and appended certain documents, one of which was not included elsewhere in the bundle but was treated as an additional document. At the end of the hearing the claimant provided an additional page which related to one of the appended pages.

13. A chronology and list of key people were provided by the respondent. The claimant was asked to identify any dates in the chronology with which he disagreed. The claimant did not do so, but he did provide an additional page with dates on it which was considered as part of the chronology.

14. On the first morning of the hearing the Tribunal convened and considered matters with the parties including the list of issues, the pages to be read, and the timetable for the hearing. The Tribunal then adjourned for the remainder of the first day to read the witness statements and the pages referred to in them. The Tribunal read only the documents in the bundles which were referred to by the parties either in their witness statements or in the course of the hearing. Within the bundles provided were a very significant number of pages to which no reference whatsoever was made by either party and which accordingly remained unread by the Tribunal.

15. The Tribunal panel on the first morning initially included Ms Worthington rather than Mr Partington. She attended for the short period of hearing on the first morning. However, as a result of a health issue which was identified immediately after the adjournment on the first day, Mr Partington replaced Ms Worthington on the panel. Mr Partington undertook reading over the rest of the first day, as did the other member of the panel and the Employment Judge. This change was explained to the parties on the second day (and no issue was raised by either of them).

16. The claimant has brought a second claim at the Tribunal which has been registered with case number 2415375/2021. In summary, that claim arises from the termination of the claimant's employment with the respondent which occurred on 28 September 2021. That claim was stayed pending the outcome of these proceedings. Both parties confirmed on the first day of this hearing that they wanted this hearing to go ahead and determine the issues which had been identified; they were not applying for this case to be adjourned and joined with the later proceedings. The Tribunal confirmed that it would be careful to ensure it did not make findings of fact about matters which post-dated issues in this claim unless necessary for the determination of the identified issues.

17. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal.

18. The following witnesses gave evidence for the respondent, were cross examined by the claimant and were asked questions by the Tribunal panel: Dr Tazeer Kazmi, Consultant and at the relevant time Associate Medical Director; Dr Richard Jones, Consultant Psychiatrist and for some of the relevant time Lead Consultant for Inpatient services; Dr Chris Daly, Consultant and Medical Director at

the relevant time; Dr Sesan Ajayi, Consultant Psychiatrist and at the relevant time Lead Consultant for North Community and Urgent Care; and Dr Alice Seabourne, Consultant Psychiatrist and Medical Director from October 2019.

19. After the evidence was heard, each of the parties was given the opportunity to make submissions. Each party provided written submissions and, after they had been exchanged and read by the Tribunal panel, supplemented them with oral submissions. Submissions were read and heard on the morning of the sixth day of hearing (Monday 11 July 2022).

20. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

21. The claimant had continuity of employment with the respondent from 2007 or 2008 (the claimant's witness statement stated that he had worked with the employer since 2 July 2007 and the contracts provided recorded the date as 1 May 2008, but nothing material turned upon it). The claimant was employed as a Consultant. He was an experienced Consultant in Psychiatry. The claimant's role transferred through various NHS Trusts as a result of the changes in services and NHS structures, transferring to the respondent from 1 January 2017. In this Judgment where references are made to the respondent, that includes the claimant's employer at the time, even though that may not have been the respondent itself (with its current title and structure). The transfer and integration of services on 1 January 2017 formed part of the background to the evidence heard (and was directly relevant to one of the harassment allegations), but otherwise nothing material arose from the identity of the particular employing organisation at any time.

22. The claimant placed no particular reliance upon any term of his contract with the respondent, save for the general emphasis which he placed upon job planning. There was no dispute that the claimant was employed on the standard terms which apply nationally to Consultants employed by NHS Trusts and that the terms of his employment provided for him to undertake a job as a Consultant Psychiatrist which included at least ten Programmed Activities per week.

23. The claimant emphasised the documents provided to the Tribunal regarding job planning, including a guide produced jointly by the BMA and NHS Employers (858). The procedures as they apply to job planning are complex and do not need to be re-produced in this Judgment. The guide says that the job planning process should be undertaken annually and should result in an individual job plan which records the work which a Consultant will undertake. It also provides for the Consultant to be paid based upon Programmed Activities (PAs). Those PAs will consist of Direct Clinical Care (DCCs), Supporting Professional Activities (SPAs), and other duties. Procedurally, where there is a dispute about a job plan, there is a formal grievance/mediation stage and an appeal stage. It was common ground that the claimant never raised a formal challenge to his job plan nor did he appeal against his job plan. When asked about his knowledge of the process for challenging a job plan, the claimant confirmed that he was aware of the process as a doctor he had managed had previously gone through it and it had taken up to nine months to complete.

24. The respondent applied a sickness absence policy to which reference was made during the proceedings and in various letters to which the Tribunal was referred. It appeared to be common ground that on each occasion in the proceedings when an absence trigger was stated as having been met (or exceeded), the claimant had met the level of absence in the relevant period required for the next stage to be implemented. The claimant did not raise any objection or point to any evidence which suggested otherwise. It was also common ground that the respondent operated a three-stage process, with there being the potential for dismissal at the third stage, following a first and second formal monitoring of absence notification. Each stage had a right of appeal. Neither party directly referred the Tribunal to any specific provision of the policy or detail within it. Similarly, reference was made to the respondent's grievance policy generally in the evidence, but the Tribunal was not asked to consider the detailed terms of that policy or procedure.

25. In 2011 the claimant obtained the substantive job which he undertook at the time of the relevant issues. He accepted, when answering questions, that the job he accepted at the time required him to cover both the ten patient Juniper ward and the ten patient Laurel ward. The Juniper ward was a Psychiatry Intensive Care Unit, known as a PICU. The Laurel ward was an acute ward. The claimant accepted that whoever had been successful in being appointed to the role would have worked to the job plan requiring them to cover both ten patient wards, as that was the job for which they had applied, and he also accepted that the plan itself had nothing to do with his disability.

26. The job for which the claimant applied was a ten PA job (7.5 DCC and 2.5 SPA). It was the claimant's submission that the person who had designed the job had misunderstood the nature of covering a ten bed PICU ward and "*made a mistake*", and that the job plan was out of kilter with the job plans of other similar roles responsible for similar units. He asserted that being the Consultant Psychiatrist responsible for a ten bedded PICU ward would, in most cases, be an eight PA job. In his witness statement the claimant asserted that he estimated that the core job was probably a job which should have been determined as being a 13.75 PA role, consisting of 11.25 DCC and 2.5 SPA. In his evidence the claimant referred to numerous documents which he asserted supported his contention that the ten PAs for which he was allocated and paid for his core role, fell some way short of the time it took to undertake the role and the amount which he should have been paid for it.

27. In August 2012 the claimant was appointed to the post of Lead Consultant for Inpatients (described as City-wide in the claimant's witness statement and for Manchester in other places). At the time in that post, the claimant managed eight Consultant Psychiatrists. The responsibilities of the role were to provide clinical leadership. The Lead Consultant reported to the Associate Medical Director or the Medical Director. It was not in dispute that the claimant was accorded two additional PAs for undertaking the role and was paid accordingly. The role was in addition to the claimant's core responsibilities as a Psychiatry Consultant. Neither party referred the Tribunal to the contractual terms which applied when the post was offered and accepted.

28. In his witness statement the claimant said that looking back he was quite proud of the achievements of the inpatient division during the time when he was Lead Consultant. He emphasised that the division he led was the only mental health

organisation shortlisted for a national innovation award (Health Service Journal in 2014) and it was also shortlisted for a British Medical Journal award in 2015 (together with another division). In January 2015 it was announced that the Trust in which the claimant worked was to be acquired by another Trust. The claimant ascribed this decision to the need to become a Foundation Trust and the relevant Trust's size and financial resources. The acquisition took place on 1 January 2017 and the claimant's witness statement recorded some of the challenges which preceded that date, particularly around staff recruitment.

29. As part of the job planning process, the claimant's job plan was signed off on 4 August 2015 (205). At that time, he agreed the job plan which applied. The job plan involved the claimant covering ten patients in the Juniper ward and ten in the Laurel ward. Whilst this was the workload which the claimant asserted was excessive and stated was outside of the national standard, there was no evidence that the claimant objected to it prior to late 2016. The job plan signed by the claimant in August 2015 recorded the job as being one with a total of 12 PAs made up of: 7.5 Direct Clinical Care (DCC); 2.5 Supporting Professional Activities (SPA); and 2 other NHS responsibilities. The latter was as a result of the claimant undertaking the Lead Consultant role. No job planning meeting took place in 2016. There was no evidence about why that had not happened, although the claimant referred to the change in Trusts as being a possible reason.

30. The Tribunal heard some evidence about an issue which had arisen in 2015 when there was a dispute between some Consultants and the Trust (at the time) about discharge practices. A letter was signed by a group of Consultants (186). One of the signatories was Dr Jones. It was not necessary for the Tribunal to make any findings about what occurred in 2015; however, the fact that Dr Jones had signed the letter was clearly the background to the difficult meeting between the claimant and Dr Jones, when Dr Jones briefly line managed the claimant in 2017.

31. There was no dispute that the claimant has bipolar disorder and has had it for a long period of time. A relapse was recorded (in an occupational health report) as having started in October 2015 (426).

32. In late 2016 the claimant was line managed by Professor Damien Longson. Following the claimant being absent due to ill health on some occasions, an Occupational Health report was obtained dated 29 November 2016 (240). That report recorded that the absences had primarily been due to stress which the claimant attributed to work. The report recorded that the claimant was fit for his normal duties "*with support*" and he needed no specific adjustments to the role "*but is likely to benefit with a review of the stress risk assessment and likely actions would include avoiding excessive pressures with workload, ensuring his duties and responsibilities and workload are contusive to his job plan*".

33. A stress risk assessment was prepared by the claimant dated 13 December 2016 (242), and it was his evidence that it was discussed with Professor Longson and the Professor's comments were included in an email but not the core document. In summary and as relevant, a high risk was identified regarding the claimant's contact with patients and insufficient time to do the job well, and a medium risk identified for (amongst other things) too much work and unreasonable objectives/targets. A document dated 13 December 2016 signed by Professor

Longson recorded that it had been agreed that it would be appropriate to review the claimant's workload in the context of a job plan review which would take place in early 2017 (255).

34. The claimant recorded in his witness statement that he had been advised that he was expected to attend weekly bed management meetings, which he believed would involve an additional four hours per week. The claimant stated that this additional work proved too much, and he commenced a period of absence on sick leave. The claimant was absent from work for a long period of ill health absence from January 2017, until his return on 22 May 2017. The need to attend weekly bed management meetings arose because the claimant was Lead Consultant (and when he ceased to be Lead Consultant he no longer needed to attend).

35. The Tribunal saw a letter from Professor Longson to the claimant summarising a meeting on 13 April 2017 (that is during the period of absence) (262), in which it was recorded that the claimant had informed Professor Longson that he felt his current workload was excessive, and that he had made it explicit that he was no longer willing to provide long term cross-cover for absent colleagues.

36. The claimant's evidence was that, as Lead Consultant, he was responsible for covering the work of other Consultants during long term absence. It was his evidence that having to do so had added significantly to his workload (he measured it as being equivalent to 17-21 weeks of one PA per week from September 2012 onwards). He was not paid anything additional for undertaking this work (although the claimant's witness statement referred to being offered two PAs for one particular cover, which he had never claimed).

37. When questioned, the claimant accepted that, following the commencement of ill health absence on 14 January 2017, the requirement to undertake cross-cover had ceased to apply to him. As he did not return to work fulfilling the role of Lead Consultant, he ceased to be responsible for ensuring that cover for absence was in place, or to undertake such cover.

38. Dr Daly's evidence that it was not the Lead Consultant's responsibility to cover the work of colleagues who were absent (at least beyond the requirement to provide cover during the first two weeks of absence, which applied to all Consultants); the responsibility was to arrange cover such as by using Locum Consultants or the other resources which might be available. It was clear that the claimant and Dr Daly differed in their views about the way in which this worked in practice.

39. The letter from Professor Longson to the claimant summarising the meeting on 13 April also referred to the claimant having identified another NHS Trust with a ten bedded Psychiatry Intensive Care Unit which specified that it was an eight PA job to cover that ward. A return to work plan was also identified including: a gradual return to work plan; Locum Consultants providing cover for some of the claimant's duties; and a review of workload. Professor Longson ceased to be the claimant's line manager at some time shortly after that meeting.

40. An occupational health report was obtained dated 9 May 2017 (271). The report referred back to the October 2016 report and stated that the claimant had

confirmed that the excessive work demands had continued. The report confirmed that the claimant was fit to return to work on a phased basis. A number of recommendations were made, including a phased return, and:

> "*Re-iteration of previous advice including avoiding excessive pressures with workload, ensuring his duties and responsibilities and workload are contusive to his job plan…Specific restriction from covering for absent colleagues...Review of job plan*".

41. The claimant stated, in answers to questions put during the hearing, that it was absolutely entirely reasonable for someone else to be appointed to cover the role of Lead Consultant while he was absent on ill health grounds and he also confirmed that it was reasonable for that cover to remain while he was undertaking a phased return to work.

42. Dr Daly, as the Medical Director, took responsibility for addressing the claimant's role and return to work in May 2017, albeit he never line managed the claimant. His evidence was that he considered the recommendations made by Occupational Health and considered how they could be implemented. He reached his decisions prior to meeting with the claimant, based upon what he decided was best. He emphasised that he was focussed on acting upon the occupational health recommendations.

43. Dr Daly decided that the claimant should cease undertaking the Lead Consultant role and that Dr Jones should instead act in that role. Dr Daly's evidence was that in taking away the Lead Consultant role, he also removed the issue of the claimant needing to arrange cover for other roles as part of the Lead Consultant role (which the claimant had raised). Dr Daly's evidence was that a decision about the clinical responsibilities which the claimant undertook and the PAs he worked, needed to be addressed as part of the job planning process. He felt that was not a decision he was able to make outside that process. However, he had reviewed the claimant's roles to see which elements could be removed to reduce pressure on him. He said the most important thing was getting the claimant back to his core job. As the Lead Consultant role was in addition to his core job, and given the pressures associated with it and the time required, Dr Daly felt it was most appropriate to remove the claimant's responsibility to fulfil the Lead Consultant role. That role was additional to the claimant's core responsibilities and could be taken away with the least disruption. It was very clear from the evidence that Dr Daly gave the Tribunal, that the decision to take the Lead Consultant role and responsibilities away from the claimant, was a unilateral decision which Dr Daly made in advance of meeting with the claimant.

44. Dr Daly's evidence was that taking away the responsibilities of being a Lead Consultant was not a demotion. The claimant clearly perceived that it was, emphasising in evidence how few such roles there were and how long he had worked to get there. Dr Seabourne's evidence was that a Lead Consultant role was not permanent and that the duties could be taken away on three months notice as the core role was the Consultant role. She explained the Lead Consultant role as being one in which managerial responsibility was undertaken and she did not consider ceasing those managerial responsibilities to be a demotion where the core Consultant duties continued.

45. A relevant factor which Dr Daly considered at the time, was that the posts of Lead Consultant across the Trust were being reviewed and were proposed for change for reasons he explained. The roles were proposed to be changed to take on more responsibilities for working alongside, and with, managers. That change took place in autumn 2017. The Lead Consultant role, which the claimant had previously filled, was split between south and north, with each Lead Consultant having responsibility for line managing fewer Consultants. Accordingly, Dr Daly's decision to place Dr Jones in the role on an interim basis was for a limited time, as the new role would be advertised and recruited following open competition. It was clear to the Tribunal form the evidence given by Dr Daly, that he expected Dr Jones to succeed in obtaining the permanent role, but Dr Daly's evidence was that he was not part of the panel which undertook the subsequent interviews and made the decision. In answers to questions from the claimant, Dr Daly confirmed that he would have been concerned had the claimant succeeded in being appointed to the Lead Consultant role later in 2017 as that would have again increased the claimant's workload (which the decision to end the role had been taken to address), but Dr Daly did not stop him from applying.

46. Dr Daly also emphasised that he made other decisions in the light of the occupational health report including to provide additional staff to support the claimant in his return to work. A full time Locum Consultant was to be retained. A Speciality Doctor was also appointed to work alongside the claimant. There was some dispute about the additional support staff being appointed and provided and how much they assisted the claimant in reducing his workload in practice. The respondent's position was that a Speciality Doctor was appointed to partly address the claimant's workload issues. The claimant's evidence was that the appointments made did not increase the junior doctors available and he asserted that a Speciality Doctor was not (necessarily) more helpful than a Core Trainee.

47. Dr Jones was approached to take on the role of Lead Consultant for Inpatient Services in April or May 2017. Dr Daly's evidence was that he was not entirely sure when it had taken place, but his evidence was that he had looked back and identified that he was paid the additional PAs which applied to the Lead Consultant role from mid-May 2017. His understanding, when initially approached, was that it was a temporary role and Dr Jones' evidence was that he did not know about the proposed wider review and subsequent appointment process at the time.

48. The claimant met with Dr Daly on 19 May 2017. Mr Brown, an HR Business Partner, was also present. Notes were taken (274). It was agreed that a job plan meeting would need to happen as soon as possible, and that the claimant would return on a graded return. It was explained that Dr Jones was the current Lead Consultant on an acting arrangement. The future plans for Lead Consultants were briefly outlined. It was said that, in the initial period, Dr Daly did not want the claimant to be expected to pick the Lead work back up while he was phasing back to work, and the claimant confirmed that he thought it seemed sensible. Dr Daly believed that he had explained to the claimant that the Lead Consultant role was being taken away from the claimant permanently, which is what he had already decided. The claimant did not understand that to have been what he was told at the time.

49. An email was sent to the claimant by Dr Daly following the meeting on 19 May 2017 (286). That confirmed the details of the phased return to work which was to be

completed by the week commencing 19 June 2017. It confirmed the other staff who were being retained and appointed as support. It said:

> "*Not to take on lead consultant work. I explained that we have appointed Richard Jones to act as Lead Consultant until end Sept when I am reviewing the lead consultant job roles*".

50. The 19 May email also recorded the claimant's contention which had been made at the meeting, that his core job was a higher PA job than was acknowledged (the email referring to it being an 11.25 session job, although during cross-examination from the claimant Dr Daly accepted the maths was wrong and he should have recorded 11.75). It went on to say that Dr Daly would ask Drs Jones and Kazmi to formally job plan the claimant, when he had returned to work.

51. The claimant commenced a phased return to work on 22 May 2017. A fit note recorded a further period of extended absence which commenced on 29 June 2017 (322). It was not entirely clear from either the documents or the witnesses' evidence what occurred during the four and a half weeks following the claimant's return. The occupational health report of 14 August 2017 (319) recorded that the claimant could not maintain his return to work. The claimant was asked about this return to work. He could not entirely recall what had occurred. As far as he could recall, he had returned for a period of half days and for two to three days per week. He did not attend all the days which were arranged for him to attend. His evidence was that he did not think he had completed the phased return to work, and he had not completed all the days arranged during that phased return. The claimant could not remember whether he ever returned to covering both ten patient wards at any time after the start of his relevant absences in January 2017. The claimant's recollection about what had occurred in detail on each occasion when he returned to work was, understandably, limited, for which he apologised when giving evidence. He did, however, accept that he never competed the return to work plan put in place by Dr Daly, as a result of further absences.

52. On 20 June 2017 the Dr Daly emailed the claimant checking how he was getting on. He explained that he was happy with the arrangement regarding the Lead Consultant and expressed the hope that it had reduced the pressure on the claimant on his return (288). He referred to the need to look again at the stress risk assessment and for the job plan review to take place. The email concluded with a reference to having made changes to the relevant system to record the cessation of the Lead Consultant work. The claimant responded on the same day and explained that he was happy to return to the Lead Consultant role which he said he had "*ably undertaken since August 2012*". He sought clarification about what had been said in the email about stopping payments for it, and said he understood three months notice was required. Dr Daly arranged for a further meeting to take place as he wished to address what appeared to be a misunderstanding about the cessation of the Lead Consultant job (that meeting took place on 11 July). He also responded on 20 June by email emphasising that his primary concern was the claimant's health and not wanting to burden him with additional stress (289).

53. The claimant re-commenced ill health absence on 27 or 28 June 2017. He was then absent until he returned to work for a few days at the end of August 2017. A detailed table included in the bundle recorded all of the claimant's attendances and

absences from 26 June 2017 to 6 March 2020 (655), which the claimant confirmed in evidence was 95% accurate. In summary, whilst the claimant endeavoured to return to work on a number of occasions and attended work on a number of days, he did not succeed in returning for any consistent period of time. When he did return, there were occasions when he arrived later than he was due to on the relevant day. There was no dispute that the reason for the absences was the claimant's disability.

54. Dr Jones, as the acting Lead Consultant, had taken on responsibility for line managing the claimant following his return to work. Dr Jones and the claimant met on 28 June 2017 to discuss the return to work. What occurred was recorded in an email from Dr Jones to the claimant of the same date (291). It was clear that the meeting did not go well. As part of the meeting, the claimant highlighted the issues he had with his job plan, and Dr Jones emphasised that the meeting was not a job planning meeting. In the follow up email it was confirmed that the job planning meeting would be arranged with Dr Kazmi and another individual. In the meeting the claimant raised the 2015 letter and dispute. He expressed his views about Dr Jones' involvement. The result of the meeting was that Dr Jones decided that he could not effectively manage the claimant (and he ceased to undertake the claimant's line management).

55. The Tribunal heard evidence about the monthly departmental Consultant meetings. When the claimant was Lead Consultant, they had taken place on a Wednesday. Dr Jones evidence was that, after he became Lead Consultant, he re-evaluated the time for the meeting and decided that scheduling it for Friday lunchtime would result in fairly good attendance taking account of when Consultants were likely to attend. Dr Jones could not recall when he had done so, but it must have been after mid-May 2017 when he became Lead Consultant (on a temporary basis). It was common ground that the claimant told Dr Jones that Friday lunchtime was not suitable for him as he had a Friday morning ward round which finished at 1.30 pm. Dr Jones discussed with the claimant moving his ward round earlier in the day, or making alternative arrangements (once a month), and he agreed that the claimant could attend the meeting late if he needed to when he had finished his ward round. Dr Jones' evidence was that it was not possible to arrange a meeting for approximately fifteen Consultants when all would be able to attend on a regular basis, and the changed time was his attempt to identify a time when more would be able to attend regularly. There was no evidence that the claimant was excluded from the meeting. The claimant would, in any event, have been unable to attend many of the monthly meetings in practice because he was absent from work on ill health grounds.

56. Minutes of the monthly departmental Consultant meetings were taken by a secretary who attended. The minutes were checked by the Lead Consultants, but the evidence was that they checked the content, not the list of attendees. If someone attended, their name was recorded as an attendee. If someone provided apologies, they would be recorded within the apologies section. If someone did not attend without apologising, they would not appear in the minutes. There was no adverse consequence to not appearing in the minutes. Minutes were circulated to an email list, which would have been the same irrespective of who attended the meetings. At some point it appeared that there may have been a change of secretary and the minutes may not have been circulated (either at all or to all, the evidence was not clear). The claimant's evidence was that he stopped receiving the minutes by email

and found them later in a folder to which he had access; when he noted that his name was not recorded either as an attendee or someone who had given their apologies. There was no evidence that the claimant had ever sent his apologies when he had not attended. There was no evidence that the claimant raised this issue at any time, save for the evidence about the verbal discussions between the claimant and Dr Jones about the difficulties the claimant had in attending when they were arranged for a Friday lunchtime.

57. Dr Daly and the claimant met on 11 July 2017. There was a transcript which had been prepared by the claimant (but was not disputed by the respondent) (755). The claimant accepted that he had recorded the meeting covertly and that he was aware it was being recorded when he spoke, whereas others would not have been. Some notes had also been taken of the meeting by the respondent (301). The transcript was far more detailed than the notes and some things recorded in the transcript appeared to have been inaccurately recorded in the notes. The claimant was particularly critical of the number of occasions on which Dr Daly referred to proposed transformation, something which was omitted from the notes. In general terms, the meeting was arranged so that Dr Daly could explain to the claimant about the proposed changes to the approach to medical leadership and to clarify what he thought he had explained to the claimant previously, that is that the claimant was no longer undertaking the Lead Consultant role following the Occupational Health recommendations. Dr Daly provided the claimant with a copy of the stress risk assessment in the meeting. The meeting concluded with Dr Daly reiterating that the job planning meeting needed to take place.

58. The transcript of the 11 July 2017 meeting recorded (770) that, during a discussion about the proposed changes in services and in response to the claimant's assertion that "*we were always transforming the service*", Dr Daly said to the claimant "*Zac – let's be honest. Manchester was in a grim state when we took it over. It wouldn't have been acquired if that hadn't been the case*".

59. In its grounds of response, the respondent had denied that the statement had been said by Dr Daly (before the transcript was provided by the claimant). In his evidence to the Tribunal, Dr Daly accepted that the transcript recorded what he had said (he asserted that he had mis-remembered when the grounds of response were being prepared). Dr Daly's evidence was that it was not a comment directed at the claimant or which described his personal performance (Dr Daly emphasised that there had been no criticism of the claimant's performance as Lead Consultant). Dr Daly said it was a comment about the services more generally. The respondent's position was that the acquisition of the one Trust by the other had occurred because there were matters which required addressing (something the claimant did not accept, he believed in broad terms that the acquisition related to the requirements of size and financial resources).

60. On 12 July 2017 a return to work meeting was conducted with the claimant by Dr Kazmi. A further occupational health report dated the 14 August 2017 was obtained (319). That report recorded that the claimant had been absent from work since January 2017 due to a relapse of his disability, which was not entirely accurate (as he had returned by that date). However, it also recorded that "*He indicates that he attempted to return to work in May 2017 but could not maintain this*". The failure to return was recorded by the Occupational Health Consultant as having been

attributed by the claimant to colleagues who were hostile towards him, and other work pressures namely that he had to work in the unit with violent patients. It was recommended that there should be a phased return to work over a four week period, and that for the first week of his return the claimant should not undertake clinical duties. The claimant was described as fit to carry out his normal duties. It was stated that he should not undertake on call duties for the four week period. The report also said "*Reducing any pressure in the work place will undoubtedly improve his general health and wellbeing and therefore help his attendance. Pressure/stress from any source can lead to deterioration in cases with bi-polar disorder*". The report did not otherwise recommend any other adjustments and it did not recommend that the claimant's workload should be reduced, or his responsibilities limited to a single ten bedded ward.

61. The notes of the 11 July 2017 meeting were provided on 17 August in an email from Ms Chrzaszcz, the HR Advisor who had been present at the meeting (317). Provision of the notes was delayed by annual leave of Dr Daly and Ms Chrzaszcz (which apparently crossed over). In the emails exchanged, the claimant (in an email of 11 August 2017) described that at the meeting he had been dismissed from his leadership role, and Ms Chrzaszcz responded to say that she was sorry that the claimant felt that way and emphasised that "*We have accommodated the recent OH recommendations to avoid excessive pressures with workload and to support you in improving your attendance*".

62. A letter dated 17 August 2017 (323) sent from Dr Daly confirmed the cessation of the claimant's two additional PAs per week as Lead Consultant. The letter stated "*This is to accommodate the Occupational Health recommendations outlined in the report dated 9th May 2017*". The letter confirmed that the claimant would continue to receive payment for the sessions for three months until 10 October 2017. There was no dispute that three months was the required notice period for cessation of payment for the sessions. When the claimant challenged Dr Daly in questioning as to why the notification did not happen until 17 August and why the notice did not run from 19 May; Dr Daly explained the delay in terms of being busy in the Medical Director role.

63. An email of 23 August 2017 was sent to the claimant (along with all of the relevant Consultants) informing him of the recruitment process for the Inpatient Lead Consultant role on a permanent basis (327). The appointment was stated to be for eighteen months in the first instance. The interview panel was confirmed and a provisional interview date of 2 October was given.

64. The Tribunal was provided with a number of the documents which contained the referrals to occupational health. Of particular note was Dr Kazmi's referral of 12 September 2017 (360) which recounted what had been agreed about the claimant's phased return to work at a meeting on 28 August 2017 and what had in fact occurred. The claimant had been absent on ill health grounds on three occasions during the phased return to work, the required length of attendance time had been reduced, and the phased return had been extended. The report explained that Dr Kazmi had put to the claimant that the Trust could look at temporary or permanent redeployment to another post to one with a lower risk of violence and away from the colleagues he perceived as hostile, but the claimant did not want to consider this option and so remained in post.

65. On 15 September 2017 the claimant was invited to a first formal attendance meeting (364). The meeting was conducted by Dr Kazmi on 25 September. The claimant was issued with a First Formal Monitoring of Absence Notification, which was confirmed in a letter of 5 October 2017 (369). The warning lasted for twelve months and the letter made clear that absences in excess of the Trust's trigger levels during that period would result in escalation of the process. The outcome letter recorded that the claimant had declined to consider redeployment (which had been proposed). Reference was made to: referral to Occupational Health; the upcoming job plan review; and ensuring that there was adequate junior Doctor support.

66. The claimant expressed an interest in the Lead Consultant role and, on 27 September 2017 (359), was invited to interview on 2 October 2017. Candidates were required to prepare a presentation as part of the interview. Dr Daly was not part of the panel. The panel consisted of people not otherwise involved in the claimant's claim. They appointed Dr Jones and not the claimant. The claimant provided no evidence whatsoever in his witness statement about the interview process or any reasons why he should have been offered the role. It was clarified during his evidence whether the claimant was complaining about the process undertaken or the outcome. The claimant confirmed that he was not doing so, but he did assert that the incumbent in the role (on an interim basis) was much more likely to be appointed, as he asserted was often the case in the NHS. The Tribunal heard no other evidence about the appointment process.

67. In his evidence, Dr Daly explained that, as a result of his review, the Lead Consultant role had been increased from a two PA role to a three PA role. He explained why he believed that to be appropriate and the additional duties which he wished the Lead Consultants to undertake. The claimant disputed that the role was more onerous than the role he fulfilled, particularly emphasising the reduced number of Consultants for whom the Lead Consultant was managerially responsible. It was Dr Daly's evidence that had the claimant carried out the role after the review he would have been paid for it based upon three PAs rather than two. While Dr Jones covered the Lead Consultant role on a temporary basis in 2017 he had also been paid two PAs, but he was paid three PAs after being appointed following the competitive interview.

68. The claimant entered a grievance on 2 October 2017 (367). The grievance form recorded that the claimant was represented by his BMA representative. The grievance document said:

> "*I met with Dr Chris Daly (Medical Director) and Marta Chrzaszcz (Medical Staffing) on 11 July 2017. I am alleging that during the meeting I was subject to discrimination under the Equality Act 2010 because I have a mental health disability"*

69. An Occupational Health report dated 9 October 2017 (372) recorded that the claimant appeared to have completed his rehabilitation return to work and said "*Although he finds some aspects of his current role pressured he indicates that he is happy in work and keen to continue in his current role*". In answer to a question about whether anything could be done to improve the claimant's attendance record, the Occupational Health Consultant recorded that he did not think there was

anything else which could be done (saying that "*Only time will tell*"). He also recorded

> "*Dr Fitzgerald is happy in his current work place and re-deployment is not indicated in my view. In face* [sic] *I think a re-deployment would be counterproductive and actually result in a deterioration in his health*".

70. In his final submissions, the claimant asserted that Dr Daly could have offered him a return to Redwood Ward as there was a vacancy in that ward during May 2017. No evidence whatsoever was led in relation to that suggestion and none of the respondent's witnesses (including Dr Daly) were cross-examined on that basis. In any event, however, the Tribunal found the evidence to be clear, that the claimant's position in 2017 was that he did not want to be redeployed to another ward. The 9 October 2017 Occupational Health report advised that redeployment would have been counterproductive.

71. A job plan meeting arranged for 18 October 2017 was cancelled due to the claimant being on sick leave.

72. Dr Kazmi met with the claimant on various occasions to discuss his return to work. In his allegations, the claimant contended that Dr Kazmi made threats of dismissal and referral to NCAS (the National Clinical Assessment Service, now known as Practitioner Performance Advice) throughout 2017. There was no positive evidence that supported the allegation that Dr Kazmi made such threats throughout 2017. Dr Kazmi only first undertook line management of the claimant in June 2017 and therefore he would have had no reason to raise any such issues prior to that in 2017. Dr Kazmi denied that he did so. What Dr Kazmi did acknowledge, was that a note of a return to work meeting on 3 November 2017 (378) made reference to the claimant stating that threats of disciplinary action or referral to NCAS were not helpful. In his witness statement Dr Kazmi confirmed that the notes indicated that he raised those issues at that meeting. He acknowledged that he had referred to the possibility of the claimant's late attendance at work being a potential disciplinary issue, which followed the claimant being late for work on more than one occasion (as was reflected in the table at 659). Dr Kazmi's evidence was that it was right to raise the issue, as without timely attendance at work the service was impacted (and he confirmed that he would have raised this with any other member of staff). It was also Dr Kazmi's evidence that the reference to NCAS was intended to be a signpost to a source of potential support. NCAS is an independent body which is available to provide impartial advice to managing and resolving concerns related to Consultants. The claimant asserted that it was a part of the NHS which was perceived as being more supportive for employers. In any event, the claimant was not subjected to any disciplinary action for lateness or non-attendance (save for the sickness absence procedure which was followed). No reference to NCAS was ever made. The only record shown to the Tribunal which recorded either matter was the note of the meeting on 3 November 2017.

73. On 28 November 2017 Dr Daly prepared the management response to the claimant's grievance (384). In his conclusion Dr Daly recorded:

"*I am sorry that ZF was not in support of my decision to cease the Lead Consultant additional responsibility, however, I have a duty of care to ensure the work pressures*

are not having a detrimental impact on his health. It appeared from the Occupational health position and ZF's high level of absence that work was having an impact and I needed to address this. I also have responsibility to ensure consistent medical leadership is in place. I therefore took the decision to cease the lead consultant role".

74. In his referral to Occupational Health of 30 November 2017, Dr Kazmi recorded what the position had been during autumn 2017 and at the time of the referral (389):

"*He had a phased return throughout September 2017 through to early October 2017. He had a planned job planning meeting in October which was cancelled due to absence, a further meeting has not been arranged. He has two full time junior doctors supporting his work. With mutual agreement we have restricted Dr Fitzgerald from on call duties until we have a period of stability and a satisfactory OH report".*

75. A job plan review meeting arranged in December 2017 was cancelled by Dr Kazmi due to work commitments.

76. Dr Kazmi spoke to the claimant on 16 January 2018, which was confirmed in an email of 17 January 2018 (410). That recorded:

"*I also explained to you that the Trust would continue to employ a locum to work alongside you to ensure that there was some stability, so if you do return we would expect you to only manage 10 patients on Laurel ward*".

77. An updated version of the Occupational Health referral was completed by Dr Kazmi on 30 January 2018 (416) in which he added to the passage recorded above:

"*When I last spoke to him we agreed he would return to half his actual caseload (10 inpatient beds only rather than 20), however he remains off sick so this was not implemented"*

78. The table of absence (659) recorded that between Christmas 2017 and the start of September 2019, the claimant was absent except that he attended for: one morning in March 2018; two days in July 2018; eight days in August 2018; five days in September 2018; five days in October 2018; five days in November 2018; and seven days in December 2018.

79. A further Occupational Health report dated 1 March 2018 (426) recorded that the claimant was planning to return to work on 5 March and made recommendations for a phased return to work and a stress risk assessment. The report advised that the claimant was not fit for on-call duties, but, other than restricting on-call duties, the Occupational Health Consultant did not believe that any additional restrictions were necessary at that point in time. The claimant did not return to work in March as envisaged in that report.

80. An Occupational Health referral completed by Dr Kazmi on 25 June 2018 (431) recorded the following, which was repeated in the updated referral of 1 August 2018 (448):

"*He had a phased return throughout September 2017 through to early October 2017, another phased return in late March 2018 and in July 2018. None have been*

successful so far despite following OH advice. He had a planned job planning meeting on 31 July which was cancelled due to absence, a further meeting has not been arranged. He has two full time junior doctors supporting his work. With mutual agreement we have restricted Dr Fitzgerald from on call duties until we have a period of stability and a satisfactory OH report. We have also arranged a full time locum to cover Dr Fitzgerald and to work with him over a phased return. Once Dr Fitzgerald does it will be to a reduced case load of 10 inpatients (without reducing his PAs) to further support recovery. In that time we plan to review his job plan"

81. In his witness statement the claimant said

"*On 17 July 2018 I met Dr Kazmi and Nicola Clarke (HR) for a return to work meeting. It was during this meeting that I learnt for the first time that I would be returning to a 10 bed ward on a 6 month interim basis*".

82. In his witness statement the claimant also said that he found Dr Kazmi to be rude and confrontational in the meeting of 17 July 2018 and used "*a sarcastic tonality*" when referring to the claimant's sickness absence. No issue was raised by the claimant at the time about the conduct of that meeting.

83. A job plan meeting was arranged for 31 July 2018, but it was cancelled due to a fit note submitted by the claimant. The meeting was re-arranged and took place on 7 August 2018. An issue in dispute between the parties was what happened at that job planning meeting between the claimant and Dr Kazmi (which was also attended by Ms Rooney, the Head of Operations North Manchester). It was common ground that the meeting did not go well and that Dr Kazmi left.

84. The claimant's evidence during cross-examination was that the meeting became "*a shouting match*" with both the claimant and Dr Kazmi shouting at each other. He could not remember who had shouted first. He recalled that he felt that he had needed to ask the same questions on a number of occasions because Dr Kazmi would not answer them. In his witness statement the claimant provided limited detail about the meeting saying that: he found their behaviour to be dreadful; it was clear that Dr Kazmi wanted to bring the meeting to an end as soon as possible; that the relationship was so fractious by this point that even bland questions were met with suspicion; and that the claimant found himself having to ask the same (unspecified) questions over and over again because Dr Kazmi was refusing to answer The claimant described himself as becoming "*rude*", but "*no more rude than him*". The claimant's witness statement did not describe Dr Kazmi as shouting or having shouted at the meeting.

85. Dr Kazmi was very clear in his evidence that neither person shouted at each other. He accepted that he might have spoken firmly. He emphasised that the nature of the roles which they both filled meant that they were experienced in handling difficult conversations without shouting. Dr Kazmi accepted in his witness statement that it was possible that he called the claimant "*unprofessional*" but emphasised that it was due to the claimant's approach to Dr Kazmi in the meeting, it was not due to his disability.

86. Three emails were sent by the attendees shortly after the meeting on 7 August 2018.

87. Ms Rooney (from whom the Tribunal did not hear evidence) sent an email on the day of the meeting at 11.43 am (473). She recorded that:

"*As a supportive measure and as part of the job plan Dr Kazmi and I agreed to reduce his work load and offer him just to work on Laurel Ward for a period of time and review. He did not accept but instead chose Juniper ward which Dr Kazmi was willing to accommodate. Dr ZF was very hostile from the onset of the meeting in particular towards Dr Kazmi he was very argumentative and I would go as far as to say he was threatening in his approach. He accused him of lying … He was directly critical towards Dr Kazmi"*

88. At 14.24 on the same day Dr Kazmi responded to Ms Rooney's email adding his own account (472):

"*I am writing to express my concerns regarding ZF…One of the actions from last year has been to look at the job plan that ZF finds sustainable and adequately supportive. Unfortunately a number of meetings were cancelled last year due to the absence of ZF although I had to cancel a meeting in December due to other work pressures…The job planning meeting this morning was very difficult from the outset as I found ZF aggressive, irritable and obstructive at every juncture. He was bringing up numerous issues which were not particularly relevant to the job plan. We got to the point where we had agreed a work timetable and a return to Juniper ward (10 bedded male PICU) following his six week graded return to Laurel Ward (10 male acute beds). However, we were unable to complete the job plan due to ZF's attitude and behaviour. When I was discussing staff and support for his job plan he wanted me to explicitly outline and document how he felt I had been unsupportive and unhelpful. He made a number of other comments which Annette Rooney has outlined in her email below. His behaviour was very unprofessional and we ended the meeting as it was clear it could not continue"*

89. The claimant's near-contemporaneous account was recorded in an email to an HR Advisor at 11.52 am on the day of the meeting (455). The email recorded that Dr Kazmi had terminated the meeting after an hour. He sought signposting to agreeing a job plan, as he said Dr Kazmi had been on the verge of agreeing a ten PA job plan for Juniper Ward alone. What the claimant said, in reference to the job planning document, was:

"*I advised Dr Kazmi that this table should include information to the effect that he has been very unsupportive towards me as my manager and has repeatedly failed to fulfil his obligations in terms of health and safety legislation, health and safety policy and other matters. Dr Kazmi appeared upset by this. He told me my behaviour was unprofessional. Annette Rooney said she completely agreed with Dr Kazmi. Ms Rooney then threw documents towards me across the table as she left the room. This behaviour occurred outside the eye line of Dr Kazmi who proceeded to slam the door behind him after Ms Rooney left. Suffice to say the job plan has not been completed. I have no reason to believe that Dr Kazmi's or Ms Rooney's recollection of the meeting will be an accurate or fair reflection of what actually happened. I have written a detailed account of what occurred and my perception of behaviour I witnessed during the meeting"*

90. None of the emailed accounts (including the claimant's) recorded that any of the attendees had shouted. Both the emails of Ms Rooney and Dr Kazmi made references to concerns about the claimant's mental health, as a result of his appearance and conduct in the meeting. The claimant's evidence to the Tribunal, was that his behaviour was in response to the behaviour of Dr Kazmi. The claimant did not allege that his conduct in the meeting was affected by his mental health or disability, albeit he did explain in relation to his appearance that it was a hot summer day and that his weight had increased at the time (which accordingly limited what he had available to wear).

91. Dr Ajayi initially took over support for the claimant from Dr Kazmi for a period whilst Dr Kazmi was on annual leave. Dr Ajayi subsequently took over the responsibility on a long-term basis. Dr Kazmi recorded that the transfer in line management was made in response to an Occupational Health report of 31 August 2018 (461). That report stated that the claimant wished to change his line manager for a more supportive one. The report also recorded that the claimant considered a fair job plan to be paramount to facilitate his attendance at work. One other thing included in that report was the statement:

"*In relation to his general health, Dr Fitzgerald reported that his levels of vitamin D are low and he attributed that to having an office with no window. He reported that he would feel happier if he was relocated to an office with window".*

92. There was no evidence which connected the claimant's vitamin D levels to his disability.

93. On 5 October 2018 the claimant did not attend the second formal attendance review meeting. It was conducted by Dr Ajayi. The claimant had been forewarned in the invite to the meeting when it had been rescheduled (483) that, as the meeting had been postponed twice, if he did not attend the meeting would proceed and the decision would be communicated in writing. The decision was recorded in a letter of 12 October 2018 (485). That recorded that since the stage one formal attendance monitoring meeting on 25 September 2017, the claimant had had one hundred and ninety seven days of absence over fifteen episodes. The letter recorded that a job planning meeting arranged for 13 August 2018 had not been able to go ahead as the claimant had been unable to attend. The claimant was issued with the second Formal Monitoring of Absence Notification as he had reached the absence trigger levels. The letter confirmed that absence would be monitored over the subsequent twelve months and, if the claimant had absence in excess of the Trust trigger levels, it could lead to further escalation of his case leading to referral for a Final Stage Hearing.

94. On 7 November 2018 there was a return to work meeting between the claimant and Dr Ajayi, which was also attended by an HR Advisor. Following the meeting the Advisor confirmed what had been discussed in a letter of 9 November (497). That recorded that it had been discussed and agreed that the claimant would return to the Juniper ward "*as requested*". It said the claimant sought that his job plan be agreed with PICU standards, but Dr Ajayi had said that once the claimant was back into work then a job plan could be conducted. The claimant was informed that he had had seventeen days absence since his stage two warning and therefore stage three had been triggered. It also recorded that the claimant had stated that he

would contact the BMA. In that meeting it appeared that there had been an agreement that the claimant would have an additional two PAs of outpatient duties.

95. A further return to work meeting was held on 22 November 2018 at which the claimant asked for a date to be agreed for his job planning meeting. Dr Ajayi's evidence was that the claimant also requested that his office be changed to one with some daylight, because he reported that he suffered from vitamin D deficiency.

96. On 27 November 2018 there was a job planning meeting (503). A job plan was agreed but not signed off. The claimant had expressed a strong preference to cover the ten bed PICU/Juniper ward rather than the acute/Laurel ward (which was considered by the respondent to be less demanding/stressful). Dr Ajayi agreed to this and there appeared to be no dispute that it was clearly communicated to, and agreed by, the claimant at that meeting. The job plan was for 10 PAs consisting of 7.5 DCC and 2.5 SPA. The job plan also recorded that the claimant had requested a change of office to an office with daylight for health reasons. It was the claimant's evidence when questioned, that the November 2018 job plan, which recorded that the claimant would see ten patients on the PICU as ten PAs, was agreed in principle and the document which resulted from it was something that he accepted. Dr Ajayi's evidence was that the claimant requested that the Trust find him another two PA job in addition to his cover for the Juniper/PICU ward (which the claimant equated to being eight PAs).

97. On the day after the job planning meeting, the claimant commenced a further period of absence which continued to 4 December 2018, which was followed by further absence between 10-20 December 2018. Following returning to work for a few days, the claimant had a very lengthy continuous period of extended absence from 3 January to 4 September 2019. The periods of absence meant that the claimant's job plan could not be signed off.

98. As the claimant had hit the relevant trigger points to proceed to the final stage absence management meeting, Dr Ajayi was asked by the respondent's HR team to prepare a management statement of case. A report was first prepared on 20 December 2018 (albeit the claimant did not see the report until some considerable time later). In his conclusion to the report (621), Dr Ajayi recorded that the claimant had been absent for a total of forty-one calendar days from 5 October 2018 (when the second Formal Monitoring of Absence Notification had been issued) until the date the report was (first) prepared. Dr Ajayi's conclusion was:

"*Unfortunately, despite all of the support and adjustments, Dr Fitzgerald is still unable to maintain a good level of attendance and it has become obvious that the Service can no longer sustain this from a staffing and budget perspective, as well as continuity of care for Service Users"*

99. In the Tribunal hearing the claimant challenged Dr Ajayi on his conclusion and why he had not informed the claimant of his view in December 2018, when he had continued to manage the claimant throughout 2019 and discussed with him his potential return to work. Dr Ajayi emphasised that his role in the process was to write the report which contained the facts and was based upon the facts. He provided it to HR as he was required to do. Dr Ajayi's evidence was that whether it was provided to the claimant was a matter for HR. He emphasised that the final decision was not

his own and he continued to support the claimant and hoped he could successfully return to work. The Tribunal found Dr Ajayi to be a genuine and credible witness who appeared to have genuinely endeavoured to support the claimant throughout the time he line-managed him and tried to assist him in returning to work. The Tribunal accepted Dr Ajayi's evidence that his statement in the management statement of case did not pre-determine the issue, but reflected his conclusion at the time based upon the facts at the time it was written.

100. As the report was not in fact relied upon at a third stage meeting at the time, addenda were added to the report by Dr Ajayi on 18 March 2019 and 26 January 2020. The 18 March 2019 addendum recorded that the claimant had had two further periods of sickness absence totalling fifty-four days after the report had first been written. The last addendum contained a more detailed account of the claimant's phased return to work during autumn 2019 and recorded that the claimant had struggled to sustain consistent attendance and had had a total of sixty-six working days of sickness absence over thirteen episodes from 5 September 2019 until 26 January 2020.

101. An occupational health report of 16 September 2019 (569) stated that the claimant was back to work and recommended a phased return to work including: two weeks of non-clinical duties; a refresher programme; and that management may consider facilitating mediation if it was perceived that the option may resolve conflicts in the workplace. It appeared that the recommendations were acted upon by the respondent. The claimant was critical of the delay in mediation meetings taking place after this report, as they only took place in January and February 2020.

102. On 5 October 2019 the claimant attended a Second Formal Attendance Review Meeting with Dr Ajayi. On 8 October 2019 the claimant attended a formal return to work meeting with Dr Ajayi (an HR manager and the claimant's BMA employment advisor also attended). The outcomes were confirmed in a letter of 23 October 2019 (531). It was identified that the claimant had had a total of two hundred and fifteen working days of absence over eight periods from 5 October 2018 to 4 September 2019, with a further seven days of absence since the return to work meeting on 5 September 2019. The need for the job plan to be signed off was identified. A return to work programme involving a phased return to work and periods of observed and supported clinical practice and clinical placement, was also recorded.

103. On 26 November 2019 the claimant was sent an amended invite to what was headed as being "*Final Interview- Sickness Absence*" (591). The meeting was due to take place on 5 December 2019. The letter was sent from and signed by an HR Administrator. The letter included the statement:

"*Please be aware that your contract of employment may be terminated at the meeting. Failure to attend this meeting will mean that decisions regarding your future employment at the Trust are taken in your absence*"

104. Dr Ajayi's evidence was that this paragraph was part of a standard invite letter for such a meeting. The claimant accepted that was the case.

105. The claimant particularly objected to the arrangement of this meeting as he had mediation meetings arranged in January and February 2020 with Dr Kazmi and Dr Jones. He could not understand why a stage three absence management meeting would take place shortly before mediation meetings which were intended to assist the claimant's return to work. The meeting did not in fact proceed on the date arranged. It was postponed. The mediation meetings took place in January and February 2020.

106. An occupational health report of 23 January 2020 (610) stated that the claimant was fit to return to work and recommended a phased return, commencing with non-clinical duties.

107. A return to work meeting was conducted with the claimant by Dr Ajayi on 4 February 2020, which was confirmed in a letter of 25 February 2020 (646). That recorded that the claimant had requested to work two PAs in community health in addition to the eight PAs working on PICU which had been agreed in 2018. Dr Ajayi recorded in the letter (as he confirmed in his evidence) that he had agreed that this could be considered once the claimant had returned to working full-time in his clinical role. The claimant was accompanied at the meeting by his BMA representative and the letter recorded that the representative had advocated for the rearranged "final" sickness meeting to be postponed from 6 March 2020 (to which it appeared it had been re-arranged). A review meeting was conducted by Dr Ajayi on 25 March 2020, confirmed in a letter of 26 March (687), in which it was recorded that the request for the final stage sickness meeting to be paused had been agreed. Further review meetings took place on 21 April 2020 (confirmed in a letter of 23 April), and 19 May 2020.

108. Grievance meetings were arranged for the claimant on: 5 December 2017 (when the claimant did not attend because he had not received the invitation); 8 January 2018 (which had to be re-arranged due to the claimant's sickness absence); 19 February 2019 (which the claimant did not attend); and 23 May 2019 (which the claimant did not attend, having informed the Trust the day before the hearing that he could not do so). Dr Seabourne, as Medical Director at the time, became involved with addressing the grievance in April 2020. Her evidence was that a decision had been taken within the Trust's HR department that the claimant would be advised that his grievance would not be progressed after his last non-attendance at a meeting, but the letter informing the claimant of that had never been sent. A final grievance hearing was arranged, as a result, for 8 April 2020.

109. In the invite to the 8 April 2020 grievance hearing, the claimant was advised that he was required to submit a written statement to support his case no later than 2 April 2020. The claimant did not do so. Unfortunately, by the time of the hearing, the first wave of the Covid-19 pandemic was at its height and Dr Seabourne gave evidence about the impact that had upon the demands placed upon her personally, and the Trust's need to focus predominantly on the pandemic and to cease progressing many other matters (which were not Covid related). In the light of the pandemic and the fact that the claimant had not provided any further written information, the decision was taken to consider the grievance on the papers without an in-person hearing.

110. The claimant was notified of this decision in an email of 2 April 2020 (722). The claimant's evidence was that the hearing was only cancelled thirty minutes before he was due to attend. Dr Seabourne's evidence was that on the day when the hearing had been due to take place, she identified that a Teams appointment was still in her calendar and she asked for it to be removed. That may have had the effect of the claimant being informed electronically that the meeting had been cancelled (albeit it had in practice already been cancelled as notified by the email). Dr Seabourne emphasised that the Trust was at that time in the early days of using Teams, having not previously used it for meetings; and the understanding of it and the way appointments were arranged was not what it is now. In any event the last-minute cancellation message was, in Dr Seabourne's evidence, a human error. The claimant had not provided any written information about his grievance.

111. Dr Seabourne considered the grievance based on the documentation made available to her and discussed it with the Trust's Head of Workforce Development. Her evidence was that she decided that Dr Daly's actions at the meeting on 11 July 2017 were appropriate and he appeared to have acted in accordance with the occupational health advice at the time. In her evidence, Dr Seabourne emphasised that the Lead Consultant role is a difficult job and it was not possible to take away the stresses and strains of that job without taking the job away completely. She felt the Manchester Lead Consultant role had proved to be really difficult for those who had undertaken it after the claimant. Her evidence was that she did not consider the Lead Consultant role to be a permanent job, something which she explained when questioned about it. Dr Seabourne, in her evidence, emphasised that Consultants took on different roles and responsibilities and she explained why she believed that ceasing to be Lead Consultant was not a demotion, but rather someone ceasing to take on particular managerial responsibilities.

112. A grievance outcome letter was sent to the claimant by Dr Seabourne dated 5 May 2020 (750). The letter said that the grievance was not upheld:

> "*on the basis that there is insufficient information provided by you in terms of how you believe you have been discriminated against. I am satisfied based on the information available to me, that Chris Daly's actions in 2017 were appropriate with the intention to support you back in to the work place … It is my decision that at the time Chris was acting in accordance with terms and conditions, and occupational health advice. I consider this to have been a reasonable action, and therefore you have not been discriminated against*"

113. Dr Seabourne, in her evidence, accepted that the last sentence quoted from the letter was not well worded and it should have said that there was no evidence the claimant had been discriminated against in the light of the management case that was provided and the complete absence of any detail from the claimant. The grievance was appealed, but only very limited evidence was provided to the Tribunal about the grievance appeal in the claimant's witness statement (he did not think it was satisfactory) and the Tribunal was not referred to or asked to read the documents which related to the grievance appeal (save for one question asked of Dr Seabourne in cross-examination).

114. In his submissions and in his cross-examination of her, the claimant focussed upon a paragraph in Dr Seabourne's witness statement for the Tribunal hearing in

which she provided an account of what she knew about some interactions with the claimant prior to 2004 when they had been working for the same Trust. The evidence related to the claimant's non-attendance at work and concerns expressed by the Medical Director at the time. The claimant was critical of this evidence (which he described as a water cooler conversation) and suggested that it would have influenced Dr Seabourne's thinking about the way she handled the claimant's grievance. Dr Seabourne denied that it did so. The Tribunal found Dr Seabourne to be an entirely truthful and genuine witness and accepted her evidence in this respect. It was clear to the Tribunal that the paragraph had been included in Dr Seabourne's witness statement to provide relevant background information about her previous knowledge of the claimant prior to becoming responsible for addressing his grievance. The inclusion of such information did not mean that it had influenced her in reaching her grievance decision.

115. The claimant entered his claim at the Tribunal on 5 May 2020, following ACAS Early Conciliation between 24 February and 7 April 2020. The Tribunal heard some evidence about events which post-dated the claim being entered. As the claimant has a stayed claim which arises from subsequent events, which will need to be determined by a different Tribunal, this Judgment only records matters post-claim where they were clearly relevant to the issues to be determined.

116. The evidence about the claimant's office move was not entirely clear. As recorded above, there was documentary evidence of the claimant requesting a move to an office with daylight and it appeared that the request had, at some point, been agreed. In his verbal evidence the claimant recounted working from an alternative office away from the other offices of Inpatient Consultants as he described the IT difficulties which arose from finding another Doctor in the office using the computer. It was not clear when exactly that had been or for how long. When he was questioned, the claimant's evidence was that other Doctors had used his office on occasion which had caused issues when he returned to it and needed to log on (which he said took some time). He did not assert in evidence that his office had also been assigned to an on-call Consultant as was alleged in the list of issues.

117. Dr Jones' evidence was that the discussions about offices were only progressed in 2020 due to the claimant's prolonged absences. During the claimant's prolonged absences, his evidence was also that the claimant's office was made available to the Locum Consultants who covered the claimant's role. In July 2020 Dr Jones arranged with another named Doctor that he would swap offices with the claimant, so that the claimant could have an office with a window. Dr Ajayi's evidence was that the office to which the claimant was moved was not to the best of his knowledge shared with a locum Doctor and it was not the on-call room.

118. The Tribunal was provided with an email of 21 July 2020 between Dr Ajayi and Dr Jones (778) in which the claimant's office move was addressed. The email confirmed that the claimant had two options: return to his old office which did not have a window; or have an alternative office with a window. The claimant, when given the two options, informed Dr Ajayi on 27 July 2020 that he preferred to return to his old office in the Inpatients department without a window (there being no alternative office at that location with a window).

119. The Tribunal also heard evidence about the claimant's name plate, which had been removed from the door of his office (that is the office he was assigned prior to absence and to which he returned after being given the options in 2020) at some point and about which the claimant clearly felt aggrieved. Dr Ajayi's evidence was that when the claimant raised concerns about the removal of the name plate he said he would look into this, and Dr Jones later confirmed that the name plate had been put back on the office door. As the removal of the name plate was not part of the issues the Tribunal needed to determine, no further findings needed to be made about the circumstances of its removal.

120. It was the claimant's evidence that he was a member of the BMA and he did consult them. He was accompanied by BMA representatives at a number of meetings throughout the relevant period. He confirmed that he first thought about discrimination and the Equality Act in 2017. He was aware of the statutory time limits, but was a little bit confused about how they related to the grievance process. When asked, during cross-examination, why he did not claim earlier, he referred to being aware of how serious a matter it was to claim against fellow Consultants and he also referred to being reticent to bring a claim because it would place in the public domain details of his disability. When asked by the Tribunal about time limits and the just and equitable extension (particularly with reference to the loss of the Lead Consultant post), the claimant explained, and placed emphasis upon, the fact that in 2017 he had struggled to assimilate what had happened and that there were in his view four different dates when the role being terminated might have occurred. He said that what prompted him to claim was the grievance decision of Dr Seagrove. Save for the matters recorded, there was no evidence given by the claimant which provided an explanation for why the claimant had not entered the claim after it had become clear to him that the Lead Consultant role had ceased (in 2017), or why he did not claim until May 2020. The claimant did not give evidence about, or rely upon, his ill health during that period as being a reason why he did not enter his claim earlier.

121. The claimant relied upon Dr Richard Jones as a comparator. Both the claimant and Dr Jones were employed by the respondent as Consultant Psychiatrists. Both were allocated ten PAs as part of their core job plan. The claimant had a particular interest and expertise in Psychiatric Intensive Care and in his core role covered the PICU and an acute ward. Dr Jones core role was as a Consultant in Inpatient Rehabilitation Psychiatry. In his statement Dr Jones explained why the core roles differed and the patients with whom they worked differed, particularly with reference to the nature of the needs of the patients and the period of time over which the Consultant worked with the patient group. The Tribunal found that the core roles fulfilled by the claimant and Dr Jones were materially different.

122. When Dr Jones undertook the Lead Consultant role on a temporary basis in mid 2017, the role he fulfilled was not materially different to the Lead Consultant role which the claimant had previously fulfilled. After Dr Daly's review of the roles and responsibilities of Lead Consultants and the competitive interview process for the Lead Consultant role in late 2017, the role filled by Dr Jones materially differed from the role the claimant had fulfilled (and Dr Jones himself had previously fulfilled on a temporary basis). The differences in the role were evidenced by Dr Jones and Dr Daly, and can be summarised as the role having been expanded to take on greater

and broader responsibility for medical management. The claimant disputed that the redesigned job was more onerous (particularly emphasising the reduction in Consultants for whom the role was directly responsible); which is not something which the Tribunal needed to determine. The Tribunal found the Lead Consultant role post competitive recruitment in autumn 2017 to be materially different to the Lead Consultant role the claimant had fulfilled.

123. Dr Jones subsequently stepped down as Lead Consultant in late 2020. The role was advertised and filled following competitive interview. The claimant applied for the role, but was unsuccessful. Dr Seabourne's evidence was that she was a member of the interview panel and the claimant's interview was poor, which was why he was not appointed.

124. Shortly before the hearing, the respondent had advertised two new vacancies. The Tribunal was provided with the job descriptions for those vacancies. The respondent accepted that, together, the claimant's previous core role with the Trust had been divided into the two vacancies. The vacancy to cover the Laurel/acute ward was advertised as being for four DCC PAs (and one SPA). The vacancy for the Juniper/PICU ward was advertised as being for 4.5 DCC PAs (and 1.5 SPA). Collectively the advertised roles equated to 8.5 DCC SPAs. If those DCCs had been reflected in the claimant's job plan, which included 2.5 SPAs, it would have equated to an eleven SPA job plan. The Tribunal accepted the claimant's contention that the roles as advertised showed that the core role which the claimant had fulfilled had been under-recognised when it had been recorded as part of the job planning process as being a ten PA job. The material provided by the claimant for other comparable roles at other Trusts for those with PICU responsibility, also supported that finding. It was not necessary (nor indeed possible) for the Tribunal to determine what would have been the correct number of PAs which should have been allocated to the claimant's core role as part of a full job planning process.

The Law

Direct discrimination

125. The claim relies on section 13 of the Equality Act 2010 which provides that:

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.

126. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment.

127. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

128. The respondent's representative submitted that whilst the test is often described in its two stages (namely (i) less favourable treatment and (ii) is the reason

for the treatment the protected characteristic) it is not always necessary nor desirable to approach every case in such a mechanistic fashion, sometimes the issues will need to be taken together and the Tribunal will simply need to decide if the treatment was because of the protected characteristic (**Shamoon v Chief Constable of the RUC [2003] IRLR 285**).

129. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision.

130. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than his comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

131. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

132. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

133. In his verbal submissions, the respondent's representative emphasised the importance of not applying a "but for" test. He submitted that the claimant's case rested upon such an error, being effectively an assertion that but for his disability, the matters would not have occurred. The test the Tribunal must apply is not a "but for" test.

134. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

135. The way in which the burden of proof should be considered has been explained in many authorities, including: **Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332**; **Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Ayodele v Citilink Ltd [2018] IRLR 114;** and **Royal Mail v Efobi [2021] UKSC 33**. Most of these cases were cited in the respondent's closing submissions and relevant passages were cited from some of them.

136. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee (with a disability) has been treated unreasonably that an employee without a disability would have been treated reasonably. The respondent's representative submitted that behaving unreasonably does not amount to a prima facie case or indicate discrimination, relying upon **Bahl v Law Society [2003] IRLR 640** and **Commissioner of Police of the Metropolis v Virdi EAT/0598/07**.

Discrimination arising from disability

137. Section 15 of the Equality Act 2010 provides:

(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.

138. The respondent's representative relied upon **T-Systems Ltd v Lewis UKEAT/0042/15** in submitting that there were five issues which the Tribunal needs to consider and make findings upon, being:

a. A contravention of section 39(2)(d) of the Equality Act 2010 (that is by subjecting the claimant to any other detriment);

b. The contravention relied upon must amount to unfavourable treatment (and he relied upon **T-Systems** in emphasising that it is what places the person with the disability at a disadvantage which is the unfavourable treatment, not

the mental processes which led the alleged discriminator to behave in that way);

c. It must be something arising from disability, giving that phrase its ordinary meaning;

d. The unfavourable treatment must be because of something "*arising in consequence of disability*"; and

e. The justification issue, that is whether the respondent can show that the treatment was a proportionate means of achieving a legitimate aim.

139. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

140. As the respondent's representative submitted, the Employment Appeal Tribunal in **Pnaiser v NHS England [2016] IRLR 170** outlines the correct approach to be taken:

"From these authorities, the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. 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 simply irrelevant: see Nagarajan v London Regional Transport. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises….

(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. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment

and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. 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.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator…..

(h) Moreover, the statutory language of s.15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."

141. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim. The respondent's representative relied upon **Homer v Chief Constable of West Yorkshire [2012] IRLR 601**, **Seldon v Clarkson Wright and Jakes [2012] IRLR 590** and **Kapenova v Department of Health UKEAT/0142/13** in his submissions on the justification defence.

142. From the cases relied upon, the respondent's representative submitted the following:

a. the respondent needs to show that the alleged act of discrimination was a proportionate means of achieving a legitimate aim, however that aim need not have been articulated or even realised at the time which means post event justification is possible;

b. the first issue to consider is whether the respondent has a legitimate aim, which is a question of fact for the Tribunal;

c. the second issue is whether the particular measure is capable of achieving that aim;

d. the third and final issue is whether this measure is a proportionate means of achieving the aim, which requires the Tribunal to balance the discriminatory effect against the legitimate aims being pursued. He submitted (as addressed in more detail below) that it has been clarified in **Kapenova** that there is no rule that if there is a less discriminatory means of achieving the respondent's aim the 'justification' defence must fail; it is a balancing exercise and even in those circumstances justification can be made out;

e. where one is dealing with a general rule, and such is justified, then the existence of the rule will usually justify the treatment that results from it (the claimant relied upon **Seldon** for this proposition); and

f. finally, he stressed that justification may be established in an appropriate case by reasoned and rational judgment, there is no need for specific/concrete evidence in all cases.

143. In advance of the submissions the Tribunal highlighted to the parties the recent helpful Judgment of Barry Clarke J in **DWP v Boyers EA-2020-1050** but the parties did not address that Judgment in submissions. The Employment Appeal Tribunal in that case emphasised that the burden of proof is on the employer to establish justification. When assessing whether unfavourable treatment can be justified as a proportionate means of achieving a legitimate aim, the discriminatory effect of the treatment must be balanced against the reasonable needs of the employer. The treatment must be appropriate and reasonably necessary to achieving the aim. The more serious the impact, the more cogent must be the justification for it. It is for the Tribunal to undertake this task; it must weigh the reasonable needs of the respondent against the discriminatory effect of the treatment and make its own assessment of whether the former outweigh the latter

144. In **Boyers**, the Employment Appeal Tribunal emphasised that the Supreme Court had set out a structured, four-stage approach to that balancing exercise in **Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15**. The enquiry should encompass the following steps: first, whether the aim is sufficiently important to justify the treatment; second, whether there is any rational connection between this aim and the less favourable treatment or disadvantage suffered; third, whether the means chosen are no more than is necessary to accomplish the aim (and whether proportionate alternative measures could have been taken without a discriminatory effect); and, fourth, whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered. The analysis of weighing in the balance the needs of a respondent against the impact of the treatment upon a claimant, must be demonstrated in the Tribunal's reasoning

145. **Boyers** was particularly raised by the Tribunal because it addressed the question of what relevance any failures in process could have, when considering whether a decision made was a proportionate means of achieving a legitimate aim. In the previous appeal decision in the **Boyers** case, DHCJ Gullick QC had said that it was an error for the Tribunal to "*focus on the process by which the outcome was achieved*". In the subsequent appeal the Employment Appeal Tribunal observed that was because it is the outcome of the decision-making process that must be justified, not the process itself. A Tribunal must focus on that which can be established

objectively, and not on subjective matters such as what the decision-maker considered relevant when reaching their decision. However, it explained that did not mean that an employer's procedure thereby assumed irrelevance. It was not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted.

146. The Tribunal highlighted that it would take into account the EHRC Code of Practice on Employment 2011 and, in particular, it considered what the Code said in relation to objective justification contained in paras 5.11-12 and 4.25-4.32. It is for the respondent to justify the practice and it is up to the respondent to produce evidence to support its assertion that it is justified. Treatment will be proportionate if it is 'an appropriate and necessary' means of achieving a legitimate aim. The Code of Practice also says that 'necessary' does not mean that it is the only possible way of achieving the legitimate aim. It goes on to say that "*it is sufficient that the same aim could not be achieved by less discriminatory means*".

147. The respondent's representative relied upon the decision of the Employment Appeal Tribunal in **Kapenova v Department of Health UKEAT/0142/13** in which Slade HJ said:

"*We reject the suggestion made by Mr Rue that in accordance with European law that a defence of justification cannot be made out if there is a less discriminatory means of achieving the Respondent's aim. It is clear from paragraph 78 of* ***Bressol [v Gouveernement de la Communaute Francaise C-73/08]*** *that this factor is to be taken into account in determining whether a discriminatory PCP is a proportionate means of achieving a legitimate aim. However the CJEU did not decide that the existence of an alternative was determinative against establishing that the PCP was justified. Lady Hale in* ***Homer*** *held at paragraph 25 that the answer to the question of whether a discriminatory PCP is reasonably necessary to achieve legitimate aims: "To some extent … depends upon whether there were non-discriminatory alternatives available." The existence of such an alternative is a factor to be taken into account in the overall assessment of whether the PCP is reasonably necessary and a proportionate way of achieving the legitimate aims pursued. In our judgment, neither domestic nor European jurisprudence regard the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy to be determinative against justifying a discriminatory PCP.*"

148. The respondent's representative was asked whether it was his submission that the last line of paragraph 4.32 of the Code (as quoted above) was incorrect in the light of his submission, and he confirmed that it was (at least if it was read to say that an alternative less discriminatory option would always mean that the approach could not be justified). He highlighted that (relying upon **Kapenova**) in a case where an employee was dismissed following long term ill health absence there would always be an alternative option to delay dismissal further, but that possibility would

not render it impossible to justify the dismissal. In the light of what was said in **Kapenova** in the passage cited, the Tribunal accepted the respondent's submission and reached its decision relying upon that authority rather than applying what appeared to be said in the last line of paragraph 4.32 of the Code of Practice.

The duty to make reasonable adjustments

149. Section 20 of the Equality Act 2010 provides:

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

150. Section 21 of the Equality Act 2010 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work. Section 212 provides that "*substantial*" means more than minor or trivial.

151. The respondent relied upon **Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2014] ICR 341** as authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of the respondent;

b. the persons who are not disabled with whom comparison is to be made;

c. the nature and extent of the substantial disadvantage suffered by the claimant (from the PCP found); and

d. any step or steps it would have been reasonable for the respondent to take.

152. The requirement can involve treating disabled people more favourably than those who are not disabled. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely.

153. The respondent's representative also submitted that, in the event that a claimant shows a relevant PCP and substantial disadvantage, the issue of whether a sought after adjustment is needed falls to be determined by the Tribunal assessing, objectively, whether the practical step/steps (the adjustment) is reasonable: **Smith v**

Churchill Stairlifts plc [2006] IRLR 41. He also submitted that a respondent is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the person with a disability; rather the test is an objective one meaning "[s]*o long as the particular adjustment selected by the employer is reasonable it will have discharged its duty*" (**Linsley v Revenue and Customs Commissioners [2019] IRLR 604**).

Harassment

154. Section 26 of the Equality Act 2010 says:

A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

155. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** (an authority cited by the respondent, together with **Pemberton v Inwood [2018] IRLR 542**), stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for him; (c) which is related to the protected characteristic (here disability). Although many cases will involve considerable overlap between the three elements, the Employment Appeal Tribunal held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

156. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

157. In relation to effect, even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

158. It is for the Tribunal to determine whether the claimant was the recipient of unwanted conduct. That assessment is one of fact and degree. The respondent's representative cited **Insitu Cleaning Co Ltd v Heads [1995] IRLR 4**, **General Municipal and Boilermakers Union v Henderson [2015] IRLR 451, Land Registry v Grant [2011] IRLR 748,** and **Dhaliwal** and emphasised that the law should not encourage a culture of hypersensitivity. Whilst there is a subjective element to the test in that the Tribunal is concerned with the feelings of the alleged

victim, in that he must have felt or perceived that his dignity had been violated or an adverse environment created, overall the criterion is objective because the Tribunal is required to consider whether it was reasonable for him to do so. The Tribunal must have regard to all the relevant circumstances. In **Dhaliwal**, Underhill J said:

"*Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by … offensive comments or conduct .., it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase***"**

159. In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225**, the Employment Appeal Tribunal placed particular emphasis on the last element of the question, that is whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, the EAT said it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic. The respondent's representative submitted that **Henderson** and **Unite v Nailard [2018] IRLR 730** were authorities for the proposition that determining whether the conduct is related to the protected characteristic requires consideration of the mental processes of the alleged harasser.

Time limits/jurisdiction

160. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

161. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably.

162. The respondent's representative relied upon **South Western Ambulance Service NHS Foundation Trust v King UKEAT/0056/19** as authority for the proposition that something that is found to have been the relevant discrimination must be in time for it to render the out of time claims justiciable by virtue of 'conduct extending over a period'.

163. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*

164. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Those factors are:

- the length of, and reasons for the delay;

- the extent to which the cogency of the evidence is likely to be affected by the delay;

- the extent to which the relevant respondent has cooperated with any request for information;

- the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and

- the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

165. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**.

166. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** (an authority cited by the respondent) confirms that the exercise of the discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. It says, of a Tribunal exercising the discretion (to extend time), *"There is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule".* The claimant's written submissions also referred to **Newnham v Transco plc EAT/125/00** as further authority for the same point. It is for the claimant to show that the discretion to extend the time limit should be extended.

167. In his submissions, the claimant's representative also stated that:

a. It is always necessary for Tribunals, when exercising their discretion, to identify the cause of the claimant's failure to bring the claim in time: **Accurist Watches Ltd v Wadher EAT/102/09;** and **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT//0305/13**; and

b. as the purpose of time bars is to ensure finality and certainty, it was (in his submission) difficult to see how a claimant can discharge such a burden of showing that it is just and equitable to extend time if either (a) he does not explain the delay or (b) the explanation is disbelieved: **Edomobi v La Retraite RC Girls School UKEAT/0180/16.**

Conclusions – applying the Law to the Facts

168. In his submissions the respondent's representative stated that the Tribunal should start by considering the issues which arose from the factual issues which were potentially in time (the 25 November 2019 invite letter, the 5 December 2019 meeting, and the reallocation of the claimant's office on 30 December 2019), before then determining time limits and the just and equitable test. Whilst the Tribunal understood why this approach was advocated, the Tribunal declined to do so. The Tribunal also did not follow the order of the issues as contained in the agreed list (which included time limits as issue 4, the first issue to be determined). The Tribunal considered each of the allegations on their merits based upon the evidence heard, before addressing the issues of time limits after it had done so.

169. As recorded in the procedure section above, the claimant withdrew his victimisation claims and they were dismissed upon withdrawal. Accordingly, the Tribunal did not need to, and did not, determine issues 5-7. It was clear from the claimant's evidence that he was not genuinely asserting that the treatment about which he complained was because he had raised his grievance on 2 October 2017 (which at the time he withdrew the claims was the only protected act relied upon), and therefore the withdrawal of the claims was appropriate. At the time that the claims were withdrawn, it was confirmed that the claimant could still rely upon the matters listed as detriments, as evidence in support of his other claims (which he was pursuing), but it was not necessary for the Tribunal to determine the facts as they applied to any of the alleged victimisation detriments, save to the extent recorded in this Judgment.

Discrimination arising from disability

170. Issues 8-11 addressed the claims for discrimination arising from disability. Issue 8 correctly listed the matters which needed to be determined, albeit that the more detailed analysis as described in the legal section above resulting from **Pnaiser** and **T-Systems** showed that there were realistically four questions and not just the three included in the list of issues, and the analysis of whether the treatment was a proportionate means of achieving a legitimate aim was also more complicated. The Tribunal considered each of the matters listed as the alleged unfavourable treatment in issue 9 (at (i)-(iv)) applying the relevant tests to each in turn.

Discrimination arising from disability – the Consultant meetings

171. The first alleged unfavourable treatment (issue 9(i)) was that the claimant alleged he was excluded from monthly departmental Consultant meetings throughout 2017 and onwards.

172. As the allegation covered an extended period, the evidence which the Tribunal heard as it related to this allegation varied over the time covered. The meetings were held on a monthly basis. In summary the position was as follows:

a. For the first half of 2017 the claimant was absent on ill health grounds and therefore was not able to attend the meetings;

b. At some point after Dr Jones took on the role of Lead Consultant, but he was not able to say when (albeit as he did not take on the role until May 2017 it could not have been earlier than that date), the meetings were moved to a Friday lunchtime which caused the claimant some difficulty in attending arising from his job plan and work timetable;

c. The claimant was not included in the minutes if he did not attend and did not send in apologies. The minutes were prepared by a secretary and were checked by Drs Ajayi or Jones, but in practice they checked only for errors or corrections in the content not the list of attendees. If someone sent in apologies they would be included as having done so, but otherwise, if someone did not attend, they would not be included in the minutes;

d. There was little evidence about the circulation of the minutes, save that the minutes were intended to be circulated to the relevant Consultants whether or not they attended. At some point there appeared to have been some issue with email circulation and the claimant did not receive some minutes by email. The claimant found the minutes in a folder to which he had access; and

e. It was clear from the evidence that from mid-2017 onwards the claimant would have not attended the meeting on a number of occasions because he was absent on ill health grounds, albeit that he would otherwise have been able to attend at times when he was attending work (subject to the difficulties he had in attending on a Friday).

173. The Tribunal did not find that the claimant was excluded from the Consultant meetings as he alleged. Whilst his non-attendance was not recorded (when he neither attended nor provided apologies), that did not amount to being excluded from the meetings. Any issues with the circulation of minutes also did not amount to exclusion. There was no evidence of the claimant raising the absence of accessible minutes with the respondent or contending that the absence of minutes meant that he was (in some way) no longer able to attend.

174. The Tribunal also did not find that the decision to move the meetings to a Friday amounted to the claimant being excluded. The Tribunal accepted Dr Jones' evidence about why he moved the meetings to Friday lunchtime. That move did not exclude the claimant, albeit it made it harder for him to attend (at least for the whole meeting). Had he wished to be able to attend he could have made other arrangements such as moving his Friday ward round to an earlier start time or an alternative day, or asking the Speciality Grade Doctor to undertake the round (at least in part) once a month when the meeting took place. The Tribunal understood the claimant's evidence about why he did not do so, however it did not find that the

claimant was excluded from the meetings as he alleged where he could attend but chose not to make alternative arrangements to enable him to do so.

175. In any event, the claimant's non-attendance at the meetings when they were arranged for Friday was not because of something arising in consequence of his disability. The difficulties in attending on a Friday arose from his work arrangements on Friday. The move to Friday was to facilitate the attendance of the greatest number of Consultants. That move conflicted with the claimant's preferred working arrangements (or those which he felt best achieved the required care for the relevant patients). Anything arising from the claimant's disability played no part in the reason why Dr Jones moved the meeting. The meeting being moved was not because of something arising in consequence of the claimant's disability.

176. Had it been necessary for the Tribunal to have determined the issue, being excluded from the Consultant meeting would have been found to have been a detriment for the claimant (had he been excluded; not being recorded in minutes for meetings which he did not attend and/or any issues around circulation of minutes would not have been). The Tribunal did not limit itself to consideration of the something(s) arising asserted by the claimant (issue 10(i)). Of those asserted, the Tribunal found that neither any required adjustments nor the claimant's difficulty in being able to undertake the workload implemented were the reasons for the claimant having difficulty in attending the Friday meeting. In the light of the Tribunal's findings on the other issues in this allegation, the Tribunal did not need to determine whether the meeting move was a proportionate means of achieving a legitimate aim.

177. The Tribunal would add that it acknowledged that, following the removal of the Lead Consultant role, the claimant genuinely felt that he was being excluded from things generally and his perception was that he was being pushed out by the Trust. He did not prove that he was, nor did he prove that there was an informal decision made between Drs Jones, Kazmi and Daly at some point in May 2017 as he alleged in his written submissions. However, the Tribunal found that the claimant genuinely felt that he was being moved aside. The claimant was clearly a proud individual who saw himself as a senior figure within the Trust, who felt he should have been treated accordingly. In many of the matters alleged the claimant's view of what occurred was seen through the prism of his overall perception, and that included his perception about the Consultants' meetings, Dr Jones' change of time for the meeting, and when the claimant identified he was not included in the minutes (when he had not attend and hadn't sent apologies).

Discrimination arising from disability – termination of the Lead Consultant contract

178. The alleged unfavourable treatment relied upon as issue 9(ii) was the termination of the claimant's Lead Consultant contract on 20 June 2017 and exclusion from being reappointed. The respondent's representative submitted that the alleged unfavourable treatment had to be read in its entirety as a single allegation. When asked in submissions, the claimant submitted that it should in fact be read separately as being in practice two separate allegations of unfavourable treatment. The Tribunal agreed with the claimant and determined the allegations on that basis; the respondent's contention being one that would involve dealing with the case with unnecessary formality and technicality and would not have recognised the inequality between the parties as the claimant was not legally represented.

179. The second part of the allegation was that the claimant alleged that he was excluded from being reappointed to the Lead Consultant role (after it was terminated in mid 2017). The Tribunal did not find that the claimant was excluded from being reappointed to the role. He was given the same opportunity as all other relevant Consultants to apply for the role and to be competitively interviewed for it. He attended an interview on 2 October 2017 and was unsuccessful. There was no positive evidence before the Tribunal which showed that there was anything unfair about the process followed or which demonstrated that the claimant was excluded from being successful by the panel who conducted the interviews (which importantly did not include Dr Daly). Whilst the claimant expressed his view about the likelihood of success of an incumbent candidate, even if that view were correct, it did not amount to the claimant being excluded from being reappointed. In fact the claimant was given a further opportunity to be competitively interviewed for the Lead Consultant post when it again became vacant in late 2020, when the reason he was not appointed was because of his performance in the interview.

180. For the first part of the allegation, the Tribunal found that having the role of Lead Consultant terminated in May or June 2017 for the claimant was unfavourable treatment. It was very clear from his evidence to the Tribunal that the claimant considered being in a clinical managerial role to be very important to him. The very nature of the job title, “Lead Consultant”, supports the claimant’s position that having that taken away was intrinsically disadvantageous. The claimant was clearly very proud of having been appointed to that role and ceasing to hold it was unfavourable for him.

181. The respondent’s representative, quite appropriately, did not rely upon an argument that the way that the claimant had pleaded the something arising from his disability (see issue 10(ii)) meant that the claimant’s claim could not succeed. The respondent accepted that the reason why Dr Daly terminated the claimant’s role as Lead Consultant in May/June 2017 was because of something arising in consequence of the claimant’s disability, and it was right to do so. Issue 10(ii) did not describe what could have been found to be something arising from the claimant’s disability. However, the occupational health report of 9 May 2017 (271) advised that due to the claimant’s disability there was a need to avoid excessive pressures with workload. That need to avoid excessive pressures with workload was something arising from his disability. As Dr Daly made clear, that was why he made the decision to remove the Lead Consultant role from the claimant.

182. The remaining question was whether taking away the role from the claimant in May/June 2017 was a proportionate means of achieving a legitimate aim? The aim (or aims) relied upon by the respondent was removing alleged excessive workload and acting in line with Occupational Health advice. That was a legitimate aim or aims. The difficult question was whether removing the Lead Consultant role was a proportionate means of achieving that legitimate aim (or aims).

183. The Tribunal accepted Dr Daly’s evidence about why he made the decision to take away the role. There was a clear and identified need to address what was felt to be an excessive workload. The claimant himself had identified two aspects of that role which he felt contributed to the issues with his health: the bed management meetings introduced in January 2017; and the need to undertake or arrange cross-cover for long-term absentees. By removing the role, those responsibilities ceased.

The Lead Consultant role was in addition to the claimant's core role and therefore removing the additional responsibilities involved in undertaking it was both proportionate and sensible. The Tribunal accepted Dr Daly's evidence that it was also the way in which the workload could be reduced with the least disruption. In addition and relevant to the proportionality of the approach, was the fact that the claimant would not be fulfilling the role in any event during his phased return and there was only a limited time available before the review which would mean that the role would be advertised and recruited in an open competition. The time-limited nature of the decision was a relevant factor. The other support put in place for the claimant including the phased return and the other staff recruited/retained, also showed that Dr Daly was generally endeavouring to achieve the legitimate aim, albeit those matters were not directly relevant to the proportionality of removing the Lead Consultant role. The Tribunal found that taking away the Lead Consultant role from the claimant in May/June 2017 (for the period until it was to be re-appointed) was a proportionate means of achieving the legitimate aim relied upon.

184. One matter which the Tribunal considered carefully when assessing proportionality, was the manner in which the decision was taken and the way the claimant was informed about it. As explained in the legal section above, the decision in **Boyers** made it clear that it would be an error to focus on the process by which the outcome was achieved because it is the outcome of the process which must be justified (not the process itself), but it was also not correct that the process assumed irrelevance. The Tribunal found that the way in which the decision was taken was not very good, that is it fell a long way short of best practice. Dr Daly should have had a conversation with the claimant about what he was proposing before he made the decision, so that he could have taken into account the claimant's views and considered any suggestions he had. The unilateral decision which he took and the way he made it without first meeting the claimant, was paternalistic. That failure was exacerbated by the obvious shortcomings in the way that the claimant was informed about the decision in the meeting on 19 May 2017, following which it was clear that the claimant had not understood what Dr Daly had intended to communicate (albeit the decision was made clear in subsequent emails and the 11 July meeting). The claimant was perfectly entitled to be critical of the process followed in reaching the decision and communicating it to him. However, in focussing on the decision itself to remove the Lead Consultant role (as the Tribunal was required to do), the Tribunal found that the decision was a proportionate means of achieving the legitimate aim relied upon even when the process (and its short-comings) were taken into account.

185. The other key issue which the Tribunal considered in particular detail when reaching its decision, was whether there were other means by which the legitimate aim(s) could have been achieved. Primarily this involved considering whether the respondent could have taken away the claimant's responsibility for one of the two ten-bedded wards for which he was responsible instead of taking away his Lead Consultant role. That was something which the respondent ultimately did in addition to the removal of the Lead Consultant role, but at the time of the decision to remove the role in May 2017 it was not a decision the respondent had made. Taking into account what was said in **Kapenova,** the respondent's representative's submissions and what is explained in the section on the law, the Tribunal found that the possibility of taking away responsibility for a ten bedded role instead (or as well) did not mean that removing the role of Lead Consultant which was undertaken in addition to the core role and which could be removed with the least disruption (and outside the job

planning process) was not a proportionate means of removing the excessive workload and acting in line with Occupational Health advice. Whilst in May 2017 there might have been another way of reducing the claimant's workload, the Tribunal did not find that that possibility meant that taking away the Lead Consultant role and the workload which went with it was not a proportionate way of doing so.

Discrimination arising from disability – offices

186. The unfavourable treatment alleged as issue 9(iii) was reallocating the claimant's office to one on the other side of the building which was shared by the on call Consultant on his return from sick leave on 30 January 2020.

187. The Tribunal did not find that the claimant was moved to an office which he had to share with the on call Consultant as there was no evidence that he was required to do so. The Tribunal also did not find that the claimant's office move was unfavourable treatment. The claimant sought to move offices and the Occupational Health report of 31 August 2018 (461) recorded that the claimant would feel happier if he was reallocated to another office (one with a window). Being reallocated an office because he had asked to move, was not unfavourable treatment (even if the claimant subsequently identified issues with the office and asked to move back). When he asked to return to his old office, the respondent facilitated the claimant returning.

188. Even had the Tribunal found the reallocation to have been unfavourable treatment, it would not have found that it was because of something arising in consequence of the claimant's disability. The reason for the reallocation arose from the wish to have an office with a window and the claimant's levels of vitamin D. That was not the claimant's disability and there was no evidence that vitamin D levels were affected by the claimant's disability. As the respondent highlighted in the list of issues, the way the claim was detailed at issue 10(iii) was unclear and did not record something arising from the claimant's disability; issues with attention and concentration were also not the reason why the office was reallocated.

Discrimination arising from disability – organising a sickness absence meeting

189. Issue 9(iv) was that organising a sickness absence meeting on 5 December 2019 was unfavourable treatment. Contrary to the respondent's submission, the Tribunal found that organising such a meeting was unfavourable, in that needing to attend a meeting at which termination of employment will be considered must be intrinsically disadvantageous for the attendee.

190. In his submissions the respondent's representative accepted that the other causation elements were made out. As with issue 9(ii) the way the case was pleaded at 10(iv) would not have led to such a finding, but the respondent was correct to do so. The reason why the meeting was organised was because of the claimant's sickness absence levels, which were because of the claimant's disability.

191. The aim relied upon by the respondent for this issue (at issue 11) was managing sickness absence and having regard to the health of employees. The Tribunal found that to be a legitimate aim.

192. In his submissions on proportionality, the respondent's representative relied upon the case of **Seldon** and contended that what was being justified for this allegation was the general rule arising from the respondent's policy, and therefore if the general rule was justified its application to the claimant should also be. That submission was right. The Tribunal found that inviting somebody to a meeting to consider their absence levels where identified trigger points had been exceeded, was a proportionate means of achieving the legitimate aim identified. Inviting someone to a meeting, as in this case, was proportionate. The letter to the claimant was therefore also a proportionate means of achieving the legitimate aim identified. The Tribunal also observed that the triggers for the claimant had certainly not been followed inflexibly by the time that the letter was sent. In the light of the claimant's considerable record of absence prior to 5 December 2019, sending a letter inviting him to a meeting to consider his absences (which identified that termination was one possibility) was, the Tribunal found, clearly a proportionate means of achieving the aim identified.

The duty to make reasonable adjustments

193. The provision criterion or practice (PCP) upon which the claimant relied (as recorded at issue 13) was the workload of the claimant, namely (the obligation to be responsible for) ten PICU and ten acute patients and the requirement to cover absent colleagues. In his written submissions the respondent's representative recorded that the PCPs were admitted in this case. What was contended was that the claim should fail as the PCPs were not applied at the relevant time. As the issue of when the contended adjustments were made effectively reflected when the PCP ceased to apply, that issue is addressed below.

194. The PCP did place the claimant at a substantial disadvantage in comparison with those without his disability. It was clear from his evidence and the occupational health advice regarding excessive workloads, that the claimant because of his condition was placed at a substantial disadvantage when needing to undertake a considerable workload and pressured work. In his written submissions the respondent's representative raised an argument which related to the fact that the claimant contended that his workload was innately unreasonable/excessive suggesting anyone would struggle with it. However, the respondent's representative accepted during his verbal submissions that even if the workload was excessive for all, the claimant could still be placed at a substantial disadvantage if he found it harder than others to undertake it (and even if most others found it hard).

195. The Tribunal was therefore required to decide whether there were any adjustments which it would have been reasonable for the respondent to have made to offset the disadvantage which the claimant suffered and, if so, whether the respondent breached its duty to make such reasonable adjustments. The adjustment upon which the claimant relied in the list of issues was a reduction in his workload, namely to being responsible for only ten PICU patients (issue 14).

196. The way that the PCP was pleaded highlighted two matters which might have been reasonable adjustments. In the definition of the PCP at issue 13 the claimant made reference to the requirement to cover absent colleagues. There was a dispute between the parties as to whether there was a requirement on the claimant as Lead Consultant to cover the absence of long-term absent colleagues as opposed to

arrange cover, but it was agreed that there was a requirement on all Consultants to provide short-term absence cover. As the claimant was absent from January 2017 he ceased to provide cover for absent colleagues from that time; there was no evidence that he did thereafter. The claimant informed Professor Longson on 13 April 2017 that he was no longer willing to provide long term cross-cover for absent colleagues. In any event, once the claimant ceased to be required to undertake the role of Lead Consultant in May 2017, he no longer did so. If it were a reasonable adjustment to take away the claimant's responsibility to cover absent colleagues, that adjustment was in any event made.

197. The specific adjustment upon which the claimant relied at issue 14 was the workload being reduced to ten PICU patients. It was not ultimately in dispute that an agreed job plan which applied that specific arrangement was agreed on 27 November 2018. However, the respondent had agreed that the claimant would return to work (at least initially) to be responsible for only one of the two ten-bedded wards for which he had previously been responsible, on 16 January 2018 when Dr Kazmi informed the claimant (which was confirmed in the email of 17 January 2018 (410)). That was further confirmed in Dr Kazmi's referrals to occupational health on 30 January 2018 (416) and 25 June 2018 (431). The Tribunal had no reason to doubt Dr Kazmi's evidence and/or that the account recorded in those documents was correct. The claimant's own evidence was that he was informed on 17 July 2018 by Dr Kazmi and Ms Clarke that he would be returning to a ten-bed ward.

198. As is recorded in the section on the law above, the respondent was not under a duty to make the best or most reasonable adjustment available, nor was it required to make the adjustment which the claimant preferred. Accordingly, the Tribunal found that when the respondent had agreed to make the adjustment to the claimant's work of only requiring him to be responsible for one ten-bedded ward, the respondent complied with any obligation to make such an adjustment even if the ward to be covered was not the one which the claimant sought. The respondent appeared to have good and sensible reasons for proposing that the claimant's responsibility on return would be for the Laurel/acute ward only and not the Juniper/PICU ward, as the work would appear to be less intense and demanding. Once the respondent agreed to adjust the claimant's workload to mean that he would return to only one ward, the reasonable adjustment was made (even though some months later the respondent agreed to the claimant returning to be responsible only for the ward of his choice). Accordingly, the Tribunal found that the adjustment was made on 16 January 2018 when Dr Kazmi informed the claimant that he would return with responsibility only for one ten-bedded ward (it also followed from that finding that the PCP relied upon ceased to be applied on that date).

199. In any event, when exactly in the period January to June 2018 the adjustment was made (and the claimant informed), was not material as he was absent from work on ill health grounds for the majority of that period (and for any occasions when he did attend work it would appear that he was undertaking initial phased returns to work, when his full duties would not have applied).

200. The Tribunal did consider carefully whether there had been a breach of the duty to make reasonable adjustments in the period between 22 May 2017 when the claimant first returned to work (or, arguably, from late 2016 when the claimant requested the adjustment in his meeting with Professor Longson) and 16 January

2018. The Tribunal considered that it might have increased the likelihood of the claimant's return to work earlier had a decision been made that he would have returned only to responsibility for a single ten-bedded ward in mid-2017, rather than only in early 2018. The fact that the respondent was able to arrange for him to return with responsibility only for one ten-bedded award also suggested that it was an adjustment which could reasonably have been made earlier. The Tribunal noted that reducing the claimant's core job to be responsible for a single ten-bedded unit was not something which was recommended in any of the relevant occupational health reports. The Tribunal found that, whether or not there might have been a breach of the statutory duty during that period, the obligation to make the adjustment never actually applied/crystallised because throughout that period the claimant never returned to undertaking his full duties. At all times when he attended work, he was either undertaking a phased return or had otherwise not returned to his full obligations. Had the claimant returned to his full duties during that period it is entirely possible that the Tribunal would have found that there had been a breach of the duty to make reasonable adjustments if the claimant had still been required to be entirely responsible for two ten-bedded wards following his return. In any event, the adjustment which it was reasonable to make (which addressed the substantial disadvantage which the claimant suffered) was made on 16 January 2018.

Direct disability discrimination

201. The first allegation of direct disability discrimination upon which the claimant relied was that the respondent treated him less favourably than Dr Jones or a hypothetical comparator without his disability, by providing him with a greater workload (which the claimant viewed as excessive).

202. In terms of the workload which applied to the claimant's core job as a Consultant, the Tribunal found that Dr Jones was not a comparator who was in materially the same circumstances. As addressed at paragraph 121 above, Dr Jones' substantive role was materially different to the claimant's.

203. In determining the claim as it relied upon a hypothetical comparator, the Tribunal took the approach of first deciding if the treatment was because of the protected characteristic (rather than applying the tests in a mechanistic fashion). The reason why the claimant's job plan for his substantive role was what it was (including being only ten PAs) was because of the way the job had been designed when the claimant applied for it, and because it had not been altered throughout the period of the claimant's employment in the role from 2011. The Tribunal found that the reason why the claimant had the workload that he had was not his disability, it was what the job description had set out for the core job and because the claimant had agreed it in the job plan review undertaken in 2015. If the claimant was correct in his assertion, the reason was because the person who had designed the job plan had misunderstood the nature of covering a ten-bedded PICU ward and made a mistake. The Tribunal did not have the evidence to determine whether that assertion was right, but, irrespective of why the job plan had been designed as it was, there was no evidence at all that the reason for its design had been the claimant's disability (there was certainly nothing which showed the something more which would shift the burden of proof).

204. The second allegation of direct disability discrimination upon which the claimant relied was that the respondent treated him less favourably than Dr Jones or a hypothetical comparator without his disability, by terminating the Lead Consultant contract on 20 June 2017.

205. Dr Jones was also not a comparator in materially the same circumstances for this allegation. Whilst it was Dr Jones who replaced the claimant as Lead Consultant (initially on a temporary basis), he was not someone in materially the same circumstances as the claimant in May (or June) 2017. A hypothetical comparator in materially the same circumstances would have been someone (without the claimant's disability) who had been unable to undertake the Lead Consultant role for several months and about whom there had also been advice from an occupational health Consultant that he should avoid excessive pressures with workload and the Trust should ensure that their duties and responsibilities were consistent with their job plan. The Tribunal found that Dr Daly would have treated that hypothetical comparator in exactly the same way as he treated the claimant: he would also have ended their role as Lead Consultant.

206. The Tribunal also found that the reason for the decision to terminate the claimant's role as Lead Consultant was not the claimant's disability. The reason why Dr Daly made the decision which he did was because of the occupational health advice contained in the 9 May 2017 report. Whilst the advise provided was something arising from the claimant's disability and therefore the decision was because of something arising, the reason for the decision was not the claimant's disability itself.

Harassment

207. Issue 17 in the list of issues outlined how the harassment claims needed to be determined. The conduct relied upon as constituting harassment was set out in issues 18(i)-(v). The Tribunal considered each allegation in turn.

Alleged harassment on 11 July 2017

208. Allegation 18(i) was that on 11 July 2017 Dr Daly indicated that he regarded the claimant's performance as deficient, when he stated "*Manchester had been in a grim state when we took over, that's why we took over".*

209. The transcript which the claimant provided of the meeting recorded what had been said. The accuracy of the transcript taken from the claimant's covert recording of the meeting was not in dispute. What it recorded as having been said was not quite the same as was recorded in the list of issues, but was similar, and is recounted in paragraph 58 above. Paragraph 59 addressed the evidence heard about what was said. The Tribunal accepted Dr Daly's evidence that the comment made was about the services generally and was not directed at the claimant or a description of his personal performance. The Tribunal also accepted that the claimant took the comment personally because he had been a Lead Consultant and considered himself to have been in an influential position in the previous Trust for the services which were being described (of which he was proud, having won two awards). Whilst the comment made did not indicate personal responsibility and was not targeted at the claimant, he did take umbrage as a result.

210. The Tribunal found that the comment was unwanted.

211. The Tribunal reminded itself of what is required for statutory harassment. The words' purpose or effect must: violate the claimant's dignity; or create an intimidating, hostile, degrading, humiliating or offensive environment for him. The purpose of the comment was not to have the requisite effect. The Tribunal considered the passage of the transcript which preceded the comment. The purpose of the comments was not to undermine the claimant, it appeared that Dr Daly was making a relatively flippant comment about the previous state of the relevant services whilst trying to move on with the meeting. The Tribunal found that the effect of the comment on the claimant was not that required by section 26 of the Equality Act 2010. Whilst the claimant was clearly disappointed with what was said and felt unhappiness about it, it was not such as to violate his dignity or to create an offensive (etc) environment for him. Had the Tribunal found that it did have such an effect on the claimant, it would not have found it reasonable for it to have had such effect.

212. In any event, the Tribunal found that the conduct relied upon was not related to disability. It was not linked in any way to disability. It was a comment about the state of a part of the Trust in the past.

Alleged harassment by Dr Kazmi throughout 2017

213. Allegation 18(ii) was that Dr Kazmi made threats of disciplinary proceedings and referral of NCAS throughout 2017. The evidence about this allegation is addressed at paragraph 72 above. Dr Kazmi only took on line management responsibility for the claimant in June 2017 and therefore the assertion was not correct as comments would not have been made throughout 2017 as asserted. The only evidence heard by the Tribunal about his raising disciplinary proceedings or referring to NCAS was in a single meeting on 3 November 2017 (378).

214. The Tribunal found that both the matters relied upon were things which were unwanted for the claimant. It was clear from the claimant's evidence that he perceived NCAS to be something which was not supportive to employees and therefore was generally a bad thing, whatever Dr Kazmi's intention in referring to it (and whatever may be its official status). The reference made by Dr Kazmi to potential disciplinary action was also unwanted.

215. The effect of the reference to NCAS during a return to work meeting was not that required for statutory harassment. Indeed, the Tribunal did not find that the effect of the comment based upon the evidence heard even came close to having the requisite effect. Even had it done so, it would not have been reasonable for it to have had that effect taking account of the reason for the meeting, what NCAS is, and the absence of any subsequent reference to NCAS or a any reference to it being raised again.

216. The reason why Dr Kazmi raised the issue of disciplinary action was because of the claimant's late attendances at work and the potential impact which lateness could have on the service. The table provided to the Tribunal (656) evidenced that there was broadly an issue with timely attendance of the claimant in the period prior to the meeting. All that was evidenced as being said was a reference to late attendance being a disciplinary issue, there was no evidence of disciplinary action

being threatened, progressed, or taken. The view might appropriately be taken that raising the possibility of a disciplinary issue in a return to work meeting, particularly in the light of the claimant's long history of difficulty in returning to work, was potentially a little insensitive and, with the benefit of hindsight, it might have been better had it not been raised in that meeting.

217. Irrespective of the effect that the comment had upon the claimant himself, the Tribunal did not find that it was reasonable for the comment made by Dr Kazmi to have the requisite effect upon him. A reference to the possibility of lateness being a disciplinary issue (in the circumstances it was made) did not meet the requirements for the unlawful act of harassment as it was not reasonable for it to have had the required effect. The purpose of the comment was certainly not that required.

218. Had it needed to determine the issue, the Tribunal would have found that a comment about the claimant's lateness would have related to disability in the context of a return to work meeting when the claimant was struggling to return to work following his absence for reasons arising from his disability, albeit it would observe that there was a dearth of evidence which clearly confirmed the link between his lateness and his disability.

Alleged harassment by Dr Kazmi on 7 August 2018

219. Allegation 18(iii) was that on 7 August 2018 Dr Kazmi shouted at the claimant in a meeting and called him "*unprofessional*". The allegation contained two separate allegations about the meeting: that Dr Kazmi shouted at the claimant; and that he called him "*unprofessional*". Factually: the former was denied by the respondent; but for the latter Dr Kazmi admitted that it was possible that he said it.

220. Whether or not Dr Kazmi shouted at the claimant in the meeting on 7 August 2018 was a matter in which the evidence of the claimant and Dr Kazmi directly conflicted. The claimant alleged that Dr Kazmi had shouted. Dr Kazmi denied that he had done so. In determining what occurred the Tribunal considered, in particular, the three near-contemporaneous records of what had occurred. The emails of Ms Rooney, Dr Kazmi, and the claimant, were all written on the day of the meeting. Notably none of the accounts written at the time recorded that Dr Kazmi shouted. Most importantly, the claimant's own account (455) did not record that Dr Kazmi had shouted at him. That was written immediately after the meeting and was described by the claimant himself (within the email) as being a detailed account of what occurred and his perception of behaviour he witnessed during the meeting. The Tribunal accordingly found that Dr Kazmi did not shout at the claimant. It preferred Dr Kazmi's evidence about the meeting, being consistent as it was with the emails sent on the day by the attendees (including the claimant himself).

221. With regard to the allegation that Dr Kazmi called the claimant "*unprofessional*" in the meeting, the Tribunal found that was said. That was the claimant's evidence. Dr Kazmi admitted that it was possible that he had done so. That he had done so was also recorded in the email which the claimant wrote on the day. It was also the term used by Ms Rooney to describe the claimant in her email, albeit she did not record it as having been something which had been said.

222. The Tribunal found that being called "*unprofessional*" was unwanted conduct for the claimant.

223. The Tribunal accepted Dr Kazmi's evidence that the word was used in the meeting to describe his view of the claimant's conduct in the meeting. The Tribunal also found, based upon Dr Kazmi's evidence when considered alongside what the claimant himself said, that the claimant's conduct towards Dr Kazmi in the meeting was argumentative, irritable, and obstructive. In that context, the Tribunal did not find that the use of the word "*unprofessional*" in the meeting to describe that conduct had the requisite effect upon the claimant, even though he would not have welcomed the comment being made. It did not undermine his dignity or have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Even had it been found to have done so, the Tribunal would not have found that it was reasonable for it to have had such an effect in the circumstances. It was not reasonable for the claimant to view an isolated comment that he was being unprofessional, with no disciplinary follow up or any other action taken as a result, as meeting the requirements to be unlawful harassment. The purpose of Dr Kazmi saying so, was also not that which is required for unlawful harassment.

224. The Tribunal also found that the comment was not related to the claimant's disability. Dr Kazmi's evidence was that he would have used the word to describe anyone conducting themselves in such a way in a meeting and it was about the conduct of the claimant in the meeting. The Tribunal accepted that evidence. There was no evidence brought to the attention of the Tribunal which linked the claimant's behaviour in the meeting to his disability. Whilst both Ms Rooney and Dr Kazmi, in the emails they wrote following the meeting, raised concerns about the claimant's mental health as a result of the conduct of the claimant in the meeting, the Tribunal was not shown any evidence that the claimant's conduct was as a result of, or was related to, his bipolar disorder. The claimant did not assert that it was in his own evidence. Accordingly, the claimant did not prove that the comment made was related to his disability.

Alleged harassment in the letter of 26 November 2019

225. Allegation 18(iv) relied upon the letter of 26 November 2019 which invited the claimant to a meeting on 5 December 2019 at which "*the contract of employment may be terminated*".

226. The evidence was that the letter was a standard letter. Whilst the Tribunal did not hear evidence from the writer herself, the Tribunal accepted (what did not appear to be disputed) that the inclusion of the relevant paragraph and the particular words relied upon, was because they were part of the template. Warning an employee that one potential outcome of a meeting at which dismissal may be considered, is termination of their contract of employment, is something which is specifically required by the ACAS code of practice on disciplinary and grievance procedures. It was relevant and necessary for the respondent to do so. Indeed had it not done so, and dismissal had resulted, then the claimant would have had a valid ground of complaint that they had omitted to do so.

227. The Tribunal found that receiving a letter which warned the claimant that he might be dismissed, was unwanted.

228. The Tribunal accepted that in fact the content of the letter had the effect of undermining the claimant's dignity. Being told that his employment might be terminated did, in fact have that effect.

229. However, the Tribunal did not find that it was reasonable in the circumstances of this case for those words in that letter to have the requisite effect. The Tribunal agreed with the respondent's representative's submission that this should not normally be the type of conduct that is deemed to be harassment, otherwise any employer warning an employee of the possibility of dismissal in an ill-health case could otherwise face a meritorious harassment claim. It is notionally possible for such a warning to amount to harassment in some circumstances, but it did not do so where the claimant had such a lengthy absence record and where he had previously received two Formal Monitoring of Absence Notifications. It was perfectly appropriate and legitimate for the respondent to write to the claimant inviting him to the final stage absence meeting and what was said was an essential part of such an invite letter. Therefore, the Tribunal found that it was not reasonable for it to have the requisite effect.

230. The Tribunal found that the inclusion of those words in the meeting invite letter was related to the claimant's disability inasmuch as the potential reason for termination was as a result of the claimant's disability absences (albeit that the specific reason why the paragraph was included in the letter itself was because it was part of the standard template letter and, as such, might be viewed not to be related to disability).

Alleged harassment by reallocating rooms

231. Allegation 18(v) alleged that disability-related harassment arose from reallocating the claimant's office to one on the other side of the building which was shared by the on call Consultant on his return from sick leave on 30 January 2020 (reflecting issue 9(iii), a discrimination arising from disability allegation).

232. As was addressed in reaching a decision in issue 9(iii), the Tribunal did not find that the claimant was moved to an office which he had to share with the on call Consultant as there was no evidence that he was required to do so. The claimant sought to move offices, as was explained in the Occupational Health report of 31 August 2018 (461) which recorded that the claimant would feel happier if he was reallocated to another office (one with a window) and the job plan of 27 November 2018 (506). It was not clear to the Tribunal that the claimant had in fact been moved on 30 January 2020 as the evidence about when any move might have occurred was unclear, but nothing material turned upon the precise date when any move in fact occurred.

233. The Tribunal did not find that having his office re-allocated was unwanted conduct. The claimant sought a move, and one was arranged.

234. The purpose of the office move was to accommodate the claimant's request, it was not the requisite matters required for unlawful harassment. The Tribunal also did not find that being reallocated an office because he had asked to move, had the requisite effect on the claimant. Had it done so, the Tribunal would not have found that it was reasonable for it to have had that effect where: the claimant asked for it;

and when he made it clear that he wanted to return back to his old office the return was facilitated.

235. The office move was also not related to the claimant's disability. Whilst the reason for the request appears to have been related to the claimant's health, there was no evidence whatsoever that it was related to the claimant's disability. There was no evidence that vitamin D levels were affected by the claimant's disability, and vitamin D levels were recorded as the reason for the claimant's request.

Time/jurisdiction

236. Having addressed the issues, the Tribunal finally considered the time/jurisdiction issues (as listed at issue 4). Three of the matters relied upon would have been in time had the allegations been found as they related to matters which occurred on or after 25 November 2019: the 26 November 2019 invite letter (issue 18(iv)); organising a sickness absence meeting for 5 December 2019 (issue 9(iv); and the reallocation of the claimant's office on 30 January 2020 (issues 9(iii) and 18(v)). As those allegations have not been found, none of the other matters alleged can be part of a continuing act with those allegations and therefore all the other allegations were not entered within the primary time limit, were entered out of time, and the Tribunal did not have jurisdiction to consider those complaints.

237. Having found on the merits that none of the other discrimination claims succeeded, it made no material difference to the outcome of the claims whether it would have been found to have been just and equitable to extend time. Nonetheless the Tribunal did consider whether it would be just and equitable to extend time by focussing upon two of the claims brought: the claims arising from the termination of the claimant's Lead Consultant contract which he dated as being on 20 June 2017 (issue 9(ii)) and the claim for the alleged breach of the duty to make reasonable adjustments (issues 12-14).

238. When considering the question of whether it would be just and equitable to extend time the Tribunal considered the matters outlined in the legal section above which, as they applied to those claims, were considered to be as follows:

a. The Lead Consultant claim was entered at the Tribunal almost three years after the act complained of. The claimant was told about the decision in an email in May 2017 and the claim was entered in May 2020. The reasonable adjustment required was made in January 2018 (reduction to being responsible for one ten-bedded award on return to work), but even if the last possible date for the adjustment was taken as being when the precise reasonable adjustment which the claimant sought (being responsible for just the PICU ward) was confirmed and agreed, that occurred in November 2018. The claim was not entered until approximately seventeen months after the reasonable adjustment sought had been made. Those delays were very significant (particularly in the context of considering a statutory time limit which is only three months);

b. There was prejudice to the respondent because the recollection of witnesses had faded over time. It was clear on a number of occasions

during the evidence that the witnesses' recollection (including the claimant's recollection) had faded when they were recalling precisely what had occurred on which occasion, particularly in which meeting something had occurred, or what had happened on each occasion when the claimant had made a return to work. The faded recollection had more impact on the reasonable adjustments claim, as Dr Daly had a clear recollection of his decision to remove the Lead Consultant role;

c. The prejudice to the claimant was potentially significant (albeit not in practice in the light of the findings made) as he would have been unable to have findings of discrimination made (had the discrimination been found);

d. The reasons why the claimant had not brought a claim earlier (as explained at paragraph 120) were: being aware of how serious a matter it was to claim against fellow Consultants; being reticent to bring a claim because it would place in the public domain details of his disability; and the fact that in 2017 he had struggled to assimilate what had happened and that there were in his view four different dates when the role being terminated might have occurred. The latter reason did not explain why the claim was not entered after later 2017 even if it had explained any initial delay. The Tribunal understood the other reasons, but they were not considered to be significant when considering whether the discretion to extend time should be granted. The claimant did not rely upon ill health as being a reason which explained the delay (and in any event throughout the period the claimant had attended a number of meetings and the occupational health advice had been that he had been fit to return to work on a number of occasions);

e. The claimant had not acted promptly once he knew of the facts giving rise to the cause of action;

f. The claimant was a member of the BMA and there was clear evidence that he had access to BMA representatives throughout the relevant period. He had access to the support and advice of a capable trade union who would have been well able to advise him. He was also a very intelligent man who would have been perfectly capable of researching the law and entering a claim within the time required (or, at least, doing so much earlier than he in fact did so);

g. The grievance process whilst lengthy, had no real impact upon why the claim was not entered earlier; and

h. Time limits are there for a good reason and a just and equitable extension of time is the exception and not the rule.

239. Applying and balancing the above factors, the Tribunal did not find that it was just and equitable to extend time. Accordingly, the Tribunal did not have jurisdiction to consider those complaints.

Summary

240. For the reasons explained above, the Tribunal did not find that any of the claimant's claims succeeded. The Tribunal did not find that the claimant was treated less favourably because of his disability nor did it find that he suffered unlawful harassment. The respondent did not breach its duty to make reasonable adjustments (and even had it done so, the Tribunal did not have jurisdiction to consider that claim). For the discrimination arising from disability claims, the claims did not succeed. For the claim that being removed from the Lead Consultant role in 2017 was discrimination arising from disability, the treatment was a proportionate means of achieving a legitimate aim (which in any event the Tribunal did not have jurisdiction to determine).

Employment Judge Phil Allen
19 July 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 19 JULY 2022

FOR THE TRIBUNAL OFFICE