EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Fymruk	**v**	**London Borough of Islington**

Heard at: Watford

On: 25 and 29 April 2022
In chambers on 11 May 2022

Before: Employment Judge George
Members: Ms E Davey
Mr T Chapman

Appearances

For the Claimant: Ms I Smith, Lay representative
For the Respondent: Mr L Davidson, Counsel
Lip speakers: Mr P Reese, Mrs C Attfield

RESERVED JUDGMENT

1. The respondent was in breach of the duty to make reasonable adjustments by,

   1.1. not providing a scribe to read the questions to him and record his answers in the written part of the application process for the supervisor's role on 26 January 2018; and

   1.2. their conduct of the disciplinary meeting on 22 March 2018.

2. The two breaches of the duty to make reasonable adjustments are so linked that they should be regarded as a continuing act which ended on 22 March 2018.

3. Subject to the issue of whether the Tribunal has jurisdiction to hear the complaint, the respondent directly discriminated against the claimant on grounds of disability contrary to s.13 of the Equality Act 2010 by failing to deal with his verbal complaint of discrimination against a manager in around November 2017;

4. The act of direct discrimination dating from November 2017 is not linked to the breaches of the duty to make reasonable adjustments and does not form part of the same continuing act.

5. Although the claim of breach of the duty to make reasonable adjustments was not presented within three months of that date, it is just and equitable to extend time for presentation of that claim to 31 October 2018.

6. The claim of direct disability discrimination was not presented within three months of the act complained of and it is not just & equitable to extend the time limit. That claim dismissed because the Employment Tribunal does not have jurisdiction to consider it.

7. All other claims are dismissed.

8. The amount of compensation to be awarded for the successful claims of breach of the duty to make reasonable adjustments shall be considered at a remedy hearing on **15 and 16 September 2022** at Watford Employment Tribunal.

REASONS

1. Following early conciliation, which took place on 31 October 2018, the claimant presented a claim form on the same date bringing claims of unfair dismissal, disability discrimination and a failure to pay holiday pay due on termination of employment. The claims arise out of his employment by the respondent which ended with his dismissal with effect on 12 July 2018. His continuous employment started on 1 April 2003.

2. The case was case managed at a number of preliminary hearings. The claims of unfair dismissal and failure to pay holiday pay were dismissed on the basis that the employment tribunal did not have jurisdiction to hear them by Employment Judge Manley at the preliminary hearing conducted on 27 September 2019 (page 30). She concluded that those claims not been presented within the primary time limit and that it had been reasonably practicable to do so. The issues were confirmed as recently as the preliminary hearing conducted by Judge Manley on 5 November 2021 as being those set out in the earlier record of preliminary hearing conducted by Employment Judge Alliott on 8 January 2021 (page 39). The issues appear at page 40 of the bundle and are replicated below. Judge Manley recorded that, although there was a reference to a complaint based upon perceived sexuality in the further and better particulars, that was not in the original claim form and that the claimant should apply to amend his claim if he wished to pursue it. No application to amend the claim has been made.

3. In the course of this hearing we have had the benefit of a bundle of documents running to 419 pages and a supplementary bundle of documents of 21 pages which is explained by the claimant at paragraph 143 of his witness statement to be the bundle that he used throughout the disciplinary process, bearing contemporaneous highlighting to enable him to follow what was happening as best he could and to try to put across his point of view. The claimant also played two short video clips in evidence.

4. The claimant gave evidence and was cross examined upon a witness statement that he adopted in evidence. He also called three supporting witnesses: his partner, Imogen Smith, who also ably acted as his representative in the hearing; Henry Fymruk, his father, who is still employed by the respondent and Mark Meadows, who was formerly the manager of a section of the Grounds Maintenance Department with the respondent, namely St Pancras and Islington and Hampstead Cemeteries. Mr Meadows ceased his employment with the respondent in September 2017 to relocate to Dorset.

5. The respondent called two witnesses: Barry Emmerson, Parks and Open Spaces Manager of Parks Management in the Environment and Regeneration Department of the respondent - who investigated certain allegations made against the claimant - and Andrew Bedford, the Head of Green Space and Leisure Services in the same department. All witnesses had prepared witness statements which they adopted in evidence and they were cross examined upon them.

6. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

   “Time limits/limitation issues

   4.1 Were all of the claimant’s complaints presented within the time limits set out in the Equality Act 2010 (“EQA”)? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a “just and equitable” basis.

   Disability

   4.2 It is accepted by the respondent that the claimant was at all relevant times disabled for the purposes of the Equality Act 2010 by reason of hearing loss and learning difficulties. Further, it is accepted by the respondent that at all relevant times it knew of the claimant’s disabilities.

   EQA, section 13: direct discrimination because of disability

   4.3 Did the respondent subject the claimant to the following treatment:

   4.3.1 The respondent’s failure to deal with his verbal complaint of discrimination in November 2017 made to his managers in which he complained of being subject to disability discrimination by his colleagues.

   4.3.2 The respondent’s failure to deal with his formal grievance of 1 February 2018 sent to his line manager (Barry Emmerson) and […] (the respondent’s head of HR). In that grievance the claimant complained of being subject to discrimination because of his disability.

   4.3.3 The respondent’s failure to deal with his formal grievance on 1 February 2018 within a reasonable timeframe.

4.3.4 The respondent's failure to uphold his formal grievance of 1 February 2018.

4.3.5 The respondent's decision to suspend him on 22 January 2018.

4.3.6 The respondent's decision to summarily dismiss the claimant on 12 July 2018.

4.3.7 The respondent's failure to hear the claimant's appeal against the decision to dismiss him (appeal dated 16 July 2018) in a reasonable timeframe.

4.4 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators, namely [AN] and/or a hypothetical comparator, namely someone who was not disabled.

4.5 If so, was this because of the claimant's disabilities?

<u>EQA, section 15: discrimination arising from disability</u>

4.6 Did the following things arise in consequence of the claimant's disability:

4.6.1 Lack of hearing;

4.6.2 Communication difficulties;

4.6.3 Difficulties reading and spelling.

4.7 Did the respondent treat the claimant unfavourably as follows:

4.7.1 The claimant relies on the treatment particulars in 4.3 above.

4.7.2 The respondent's decision to suspend him on 22 January 2018.

4.7.3 The respondent's decision to summarily dismiss the claimant on 12 July 2018.

4.8 Did the respondent treat the claimant unfavourably in any of those ways because of those things?

4.9 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

<u>Reasonable adjustments: EQA, sections 20 & 21</u>

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

4.10.1 On interview for the supervisor position, a requirement to fill in a written test form?

4.10.2 A requirement to attend grievance/disciplinary hearings and answer oral questions?

4.11 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

4.11.1 The claimant's difficulties in reading and spelling meant that filling in the test form was difficult;

4.11.2 If people conducting the interviews talked too quickly or did not look at the claimant then he had difficulty in understanding them.

4.12 If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

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

4.13.1 Providing someone to read to him the test questions and record his answers;

4.13.2 Talking slowly and looking at the claimant whilst doing so.

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

Equality Act, section 27: victimisation

4.15 Did the claimant do a protected act? The claimant relies upon the following:

4.15.1 Making a verbal complaint of discrimination to his managers in November 2017;

4.15.2 Issuing a formal complaint of discrimination on 1 February 2018.

4.16 Did the respondent subject the claimant to any detriments as follows:

4.16.1 The claimant repeats the allegations of treatment as set out under the direct discrimination claim.

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

Remedy

4.18 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

The law relevant to the issues

Direct discrimination

7. The claimant alleges that he was the victim of a number of acts of disability discrimination contrary to s.13 EQA which prohibits direct discrimination. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting him to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of disability and does so because of A's disability.

8. All claims under the EQA (including direct discrimination, discrimination for a reason arising in consequence of discrimination and victimisation) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of the antecedent legislation but the following guidance is still applicable to the equivalent provision of the EQA.

9. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of disability.

10. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

11. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance if there are considerations of subconscious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

12. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

13. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

Discrimination arising from disability

14. Section 15 EQA provides as follows:

"15 Discrimination arising from disability

(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."

15. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

"In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not

necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."

EHRC Employment Code paragraph 5.6.

16. The importance of breaking down the different elements of this cause of action was emphasised by Simler J, as she then was, in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

"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 […].

(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. [...]

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) 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.

(g)[…].

(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. […]

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

17. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

    17.1 On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

    17.2 The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".

    17.3 The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".

    17.4 Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

    17.5 The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565, paras 31–32, and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704, paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

Breach of the duty to make reasonable adjustments

18. The obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EqA 2010.

18.1 By s.39(5) the duty to make reasonable adjustments is applied to employers;

18.2 By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

18.3 When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP (or, if applicable the physical feature of the premises or auxiliary aid); the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

18.4 By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

18.5 By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the Disability Discrimination Act 1995 (DDA 1995), which was repealed with effect from 1 October 2010 upon the coming into force of the EQA 2010, was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made and which had a prospect of alleviating the disadvantage. The Tribunal should then go on to decide whether it was reasonable in all the circumstances for the respondent to have to take that step.

18.6 Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

19. It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include “any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.”

20. The duty imposed on an employer to make reasonable adjustments was considered at the highest level in the case of Archibald v Fife Council [2004] IRLR 651 HL where it was described as being "triggered" when the employee becomes so disabled that he or she can no longer meet the requirements of their job description. In Mrs Archibald's case her inability, physically, to carry out the demands of her job description exposed her to the implied condition of her employment that if she was not physically fit she was liable to be dismissed. That put her at a substantial disadvantage when compared with others who, not being disabled, were not at risk of being dismissed for incapacity. Thus the duty to make reasonable adjustments arose.

21. Lord Rodgers made the point, as appears from paragraph 38 of the report of Archibald v Fife Council, in relation to the comparative part of the test that the comparison need not be with fit people who are in exactly the same situation as the disabled employee. This was relied upon in Fareham College Corporation v Walters [2009] IRLR 991 EAT where it was explained that the identity of the non-disabled comparators can in many cases be worked out from the PCP. So there the PCP had been a refusal to allow a phased return to work and the comparator group was other employees who were not disabled and were therefore forthwith able to attend work and carry out their essential tasks; the comparators were not liable to be dismissed whereas the disabled employee who could not do her job, was.

22. In Archibald v Fife Council, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained ([2004] IRLRL 651 at page 654 para.15) that,

   "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies"

23. Furthermore (at para.19);

   "The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

24. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

Victimisation

25. Victimisation is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.

26. If we are satisfied that the claimant did a protected act by either of the two acts relied on in the present case, we need then to consider whether the claimant suffered a detriment or detriments as he alleges. This requires us both to consider whether the core facts alleged are made out and whether they amounted to a detriment in law. We then must consider, what, subjectively, was the reason that the respondents acted as they did. We bear in mind that s.136 of the Equality Act 2010 applies to victimisation cases.

Time Limits

27. The tribunal may not consider a complaint under ss.39 or 40 of the Equality Act 2010 which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so. This is a broad discretion and the factors which are relevant for us to take into account depend on the facts of the particular case.

28. The discretion in s.123(2) to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. The burden is on the claimant to persuade the Tribunal that the discretion should be extended in his favour: Robertson v Bexley Community Services: [2003] I.R.L.R. 434 CA. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial was still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

29. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider, in particular, the following factors:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

30. This was reiterated more recently by the Court of Appeal in Southwark London Borough Council v Afolabi [2003] I.R.L.R. 220 CA. However, the factors to be taken into account depend upon the facts of a particular case. It is not necessary that the Tribunal should be satisfied that there is a good reason for the delay before finding that it is just and equitable to extend time although the explanation will always be relevant: Abertawe Bro Morgannwg

University v Morgan [2018] I.C.R. 1194 CA. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). In Baynton v South West Trains Ltd [2005] ICR 1730 EAT, it was observed that a tribunal will err if, when refusing to exercise its discretion to extend time, it fails to recognise the absence of any real prejudice to an employer. This is part of considering the balance of prejudice and in doing so, the Tribunal may have regard to the potential merits of the claim: Rathakrishman v Pizza Express (Restaurants) Ltd [2016] I.R.L.R. 278. In the present case, depending on our conclusions, we may be considering whether to exercise our discretion under s.123(2) after having made a judgment on the merits which will then be relevant to the balance of prejudice.

Findings of Fact

31. The claimant is deaf with, he explains, 95% hearing loss. He is accepted by the respondent to have disabilities of deafness and learning difficulties (para.4.2 of the order of Judge Alliot at page 40). The claimant was assisted by lip speakers during the hearing. He expressed his satisfaction with his ability to communicate with the lipspeakers and was content that those them individuals should be booked for the provisional remedies hearing which was scheduled when judgment was reserved. In other words, he appeared satisfied with the ease of communication. Ms Smith, who knows Mr Fymruk very well, assisted the Tribunal by alerting us when she thought, from her knowledge of him, that he wasn't able to understand the questions. She explained that Mr Fymruk was making deductions from what he could hear, from the context, from lipreading the person asking questions and what he could read from the lipspeaker in order to process what was requested of him. She asked that counsel's questions be shorter.

32. Mr Davidson adjusted his style of questioning where possible and, on occasions the Employment Judge rephrased them –verifying that counsel was satisfied that the rephrasing accurately reflected the questions he asked. Mr Fymruk still had difficulties with longer questions. Mrs Attfield suggested that where she (or her colleague) considered the question was not understood by the claimant that they change the wording of the questions to use phrases or words which they knew would be more easily understood (for example because of the particular consonants in the word). Similarly, they checked with counsel that he was satisfied that the sense of his questions were accurately interpreted. Nevertheless, it was clear that the process of giving evidence was very tiring for the claimant and we had regular breaks to accommodate this.

33. Ms Smith carried out the questioning on behalf of Mr Fymruk. There was one line of questioning which she found too upsetting to articulate. The Employment Judge suggested that she write down the question she wished to ask so that the Judge could ask it. Alternatively, the Judge suggested that she might share the question with Mr Davidson - whose conduct in balancing his duty to his client with his duty to assist the Tribunal and behave fairly to the claimant as a litigant in person was in the best traditions

of the Bar – in case it was about an issue which did not need to be explored at the liability stage or which was not actively contested. By that cooperation between the Tribunal, counsel and Ms Smith it was possible to formulate a question which addressed the presently relevant issue so that the claimant's case could be put to the witness.

34. In addition to Mr Davidson's closing remarks on behalf of the respondent and Ms Smith's on behalf of the claimant, Mr Fymruk himself said that he wished to make a closing speech and the Tribunal was content for him to do so. He asked Ms Smith to read out the speech he had written but she did not feel able to do so and the lipspeaker read the speech out for him.

35. We are very grateful to all participants for the proactive and flexible approach taken to the proceedings in this case.

36. The claimant's employment was transferred to the respondent under a relevant transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 with effect from 1 April 2017. Prior to that he had been employed by the outgoing contractor, OCS Limited. It appears from Mr Emmerson and Mr Bedford's evidence that the outgoing contractor did not provide Islington with any information about the disability that Mr Fymruk has.

37. After the relevant transfer, Mr Fymruk reported to Mark Meadows and when Mr Meadows left the respondent's employment MK took over the position of Cemetery Manager in approximately September 2017.

38. There is a Staff Equalities Checklist at page 75 which the claimant appears to have signed on 6 September 2017 to indicate that he accepted that he had to follow a number of "responsibilities" which amount to a requirement to adhere to a respectful and anti-discriminatory way of working. MM's evidence was that this was a standard checklist from the council but we think that he may have been confused about the timing of it. It appears from page 77 that equalities checklist training was carried out on that date by a number of individuals including the claimant. The date is some 5 months after the transfer to Islington and we think that it makes more sense if it were carried out in response to a complaint than as a matter of routine.

39. It is common ground that no workplace assessment of the claimant's needs at work was carried out once MM, as his manager, knew that the claimant was significantly deaf. There appears to have been no formal consideration given to how his deafness impacted on his work or on workplace communication. MM's evidence was also that it was clear to him that the claimant had learning difficulties as well as hearing difficulties and we accept his evidence that he saw that the claimant had difficulty in executing work plans which MM put down to learning difficulties.

40. According to the claimant, in about November 2017, although it may have been slightly earlier which would potentially coincide with the Staff Equalities Checklist, he texted Mr Emmerson to complain about MK's behaviour in his management of the claimant. He describes the treatment he complained

about in paras.46 to 68 of his statement where he also states that he texted BE about it who then came to the park the following day to talk to all of the operatives including the claimant's father, HF. The latter's account of the incident which appears to have triggered the complaint about MK is at HF para.20 to 24. On father and son's account, MK had spoken to the claimant and turned his back but the claimant had not answered because he had not heard MK who then shouted at the claimant to listen when he and/or his father asked him to repeat what he had said and tried to explain about the claimant's deafness.

41. According to the oral evidence of BE, he himself now has no recollection of this complaint but has spoken to MK since the claimant's claim arose. This is not covered in BE's written statement but he related in oral evidence that MK did recall there being a complaint about the way in which he was managing the claimant and said that he had not been told or had not appreciated the extent of the claimant's needs.

42. BE's evidence about the claimant's complaint of Autumn 2017 (and therefore the respondent's) is therefore hearsay evidence of a recent conversation with MK who was not called to give evidence and who recounted a recollection which was not contemporaneous with the complaint. These two matters cause us to view the respondent's evidence about the Autumn 2017 complaint with caution. This is not to say that BE was being untruthful in his account of the conversation with MK, rather that it is a second hand account of the complaint from a witness who has no independent recollection of it.

43. It was argued by the respondent that the incident may have been embellished over time by the claimant. However, BE's oral evidence confirmed that some incident did occur and that the claimant complained about it. This is quite distinct from the complaint referred to in the respondent's pleaded case (para.9 of the grounds of response on page 25) when the claimant reported difficulties managing the team after he started acting up as supervisor.

44. The lack of further complaint by the claimant (despite the subsequent events) and the apparent lack of any further incident referred to by him suggests to us that MK did not behave in similar way again.

45. It seems to us that it is quite possible that the claimant's feelings about the behaviour of MK which lead to his complaint have strengthened with the passage of time and that causes us to find that there is some embellishment in the claimant's account. However the fact that BE dismissed the complaint so completely from his mind – even not recalling that the complaint had happened at all – we think telling. We also take into account that when MM was succeeded as Cemetries Manager by MK there appears to have been an failure to handover sufficient detailed information relevant to managing the claimant which would have had the prospect of avoiding the incident which, on the claimant's account, involves ignorance by MK. This suggests a lack of imagination on part of the respondent about the impact of the claimant's disability at work. It suggests that no consideration

was given to what the impact of the claimant being deaf might have on the day to day management of the claimant of and his ability to do his work. We think that probably the incident happened broadly as the claimant alleges and as set out above but that it didn't leave a lasting impact on him to the degree the claimant now suggests. Had it done so, there would have inclusion of this complaint against MK in his later complaints. There is no reliable evidence of further problems specifically between MK and the claimant.

46. The claimant started to act up as acting Grounds Maintenance Supervisor with effect from 1 December 2017 while the role was being recruited to. His father was not at work in this period because he was on sick leave due to a foot injury. It was MK who decided that the claimant should be offered this opportunity and it was offered without interview of competition. It is common ground that the claimant was both an extremely hard worker and someone whose stamina made him invaluable his role. We accept the claimant's evidence that, in the absence of his father and his brothers (who worked at other sites), he felt very vulnerable and his father appears to have warned him that the other operatives would not want to work for him.

47. In paras.75 to 80 of the claimant's statement, he alleges that some of those whom he supervised would talk to him with their heads down so that he was unable to lipread and he thought that was on purpose. He also alleges that they laughed at him, called him "FA Cup ears" and, on one occasion, put a picture of a naked man in his locker which the claimant took to be an insinuation that he is gay which he attributes to his love of going to the gym (see claimant's statement para.11).

48. Although paras.75 to 80 set out what the claimant says now about what happened when he was acting supervisor, his evidence to us about the details he provided to the council when he complained at the time about his colleagues was not in those terms. The council provided some support to the claimant in his role from an experienced supervisor, TF, to mentor him. So it is clear that the respondent's response to the claimant's complaints about, in particular AN and MG want to try to support the claimant as a supervisor of operatives who appeared not to be taking direction from him rather than to investigate complaints of bullying. In order to be able to compare their actions in response to the claimant's complaints with their actions in response to AN's subsequent complaints about racially offensive language we consider with care the claimant's evidence about the exact terms of his complaints.

49. When asked in oral evidence to do the best he could to explain what he had told MK his evidence was as follows,

> "I said, "Martin, these boys are not taking any notice of what I say … They are not following instructions, they are taking drugs, they drink alcohol at lunchtime. I can't control them. At lunchtime as they go home." Sometimes they finished at 2:30 PM and Martin arrived at 2:15 PM and asked where they were. I said they gone home at 1 PM. Nothing was being done. MK said he would have a word but it wasn't being said. [One operative] smashed the window on the van by

> being silly and jumping on the vehicle. Smashing the windscreen for nothing. I reported it. They didn't like it because I was the supervisor and I took it seriously and I had to report it. Everything they did I have to report it. Even on the weekly chat like I have to give the folders and the timesheets."

50. Similarly, when the claimant was asked what it was that he had said to BE about his experiences his answer in oral evidence was,

> "Barry came out one day to have a chat with everyone and see how everyone is working. I found out that Barry was coming and said to the boys that he was coming. They rushed out of the tea hut and started working harder. [TF] was there and I said to [TF] "see what I mean. The boys mess around but we've got work to do. When Barry comes, they are working hard. When you go they go back to what they did" Barry didn't do nothing about it. I felt I had no help from him. I felt discriminated by him. I wanted help had no help from MK and PE"

51. It is true that IS, in her witness statement (para.4 and following) states that the claimant did complain contemporaneously about discrimination but that is hearsay; it is her recollection of what the claimant told her. The claimant's own evidence does not amount to a contemporaneous complaint of discriminatory behaviour by his co-workers.

52. On the strength of this we accept the respondent's evidence that the gravamen of the claimant's complaint were about his difficulty in managing the team. This means that when the respondent responded by supporting him as a new manager they were not treating him less favourably than they subsequently treated those who complained about the claimant.

53. As set out above, the claimant states in his statement that some colleagues called him his FA Cup ears. If that had been mentioned at the time then that would be something we would expect the respondent to pick up on as potentially connected to the claimant's hearing problem, certain at the very least something that a deaf person would be sensitive to.

54. There is further evidence about the claimant's allegations in the investigation meeting BE held with MK on 27 March 2018 (page 246). From line 5 onwards he states to BE that the claimant complained that he was being whispered about, that the staff were lazy and didn't like him. MK states that he would meet the claimant every Friday and he told him (line 14 page 246) that he needed to treat the others with respect to get respect. He also reported that one of the operatives had complained that they were being pushed to work without any breathers (line 28 page 247) which MK dated from as early as the 2nd week he had been there.

55. With the benefit of hindsight, this appears to be a weak way for MK to deal with what the claimant said. He was not apparently alert to the effect on a deaf manager of colleagues whispering. We infer from this a lack of understanding of the claimant's condition. The claimant's complaints required more of the respondent's managers than they did even if they did not necessarily require suspension of co-worker. However, we are not satisfied that the specific complaint about being called "FA Cup ears" was made by the claimant before a complaint was raised against him. It is in the

January 2018 statement (page 89 at 90), given after AN's own complaints, where he says it was said by AN and MG on several occasions and that they also mimicked the way he talks. There is no evidence that the claimant told management about this complaint prior to the complaints being made against him.

56. On Friday, 19 January 2018 the claimant asked MK if he could leave work early. He had found the paperwork that he had prepared in his role as acting supervisor, ready for his meeting with MK, strewn all over the welfare hut and had become upset. In his oral evidence he expanded on that to say that he had asked who had done it and someone present had looked at him and at AN. He explains in his para 77 that he complained to MK about this and the latter confirmed in his interview that the claimant had said that he had had enough. After the claimant left, according to MK (see page 247, line 34), the team made a complaint about racial language being used by the claimant.

57. According to BE's oral evidence, he had first been made aware of racial allegations the previous day, on Thursday 18 January 2018, when TF relayed to him informal complaints that he had apparently received from some of the workers who the claimant was supervising about the use of racist language by the claimant. TF does refer to this in his email (page 266 answer 5) and says that he reported that to MK although MK's statement (page 246) does not refer to TF coming to him. We take into account this discrepancy and also the discrepancy between that oral evidence from BE and his statement evidence (BE para.6) which suggests that he received information about the complaints on the Friday. Overall, the respondent's evidence of a complaint against the claimant prior to him leaving the site is not reliable. We were not told of any particular reason why MK or TF were not called.

58. For the purposes of this reserved judgment the only details which we need to record of the complaints against the claimant are that he was accused of making racist comments towards one colleague, AN, and of inappropriate and aggressive physical contact with another co-worker, MG. This hearing was not concerned in any way with deciding whether or not those allegations were well founded and the claimant strongly denies them. He described them as clearly false and regards the allegations as having been made up because they team did not want to work with him.

59. The claimant was contacted by MK on Sunday, 21 January 2018 and told not to attend for work the following day but to come to a meeting with BE. On Monday, 22 January the claimant attended for that meeting and told us that he thought the purpose would be for his complaints about his co-workers not following his instructions were to be dealt with. He was suspended on full pay while an investigation took place into the allegations made by AN and MG. The suspension letter at page 78 is signed by AB, the letter explains the general nature of the allegations and invited the claimant to an investigation meeting to take place on 24 January 2018.

60. The claimant provided a statement to AB on 22 January 2018. The email by which he sent it is at page 122 and his statement is at page 89. Among other things the claimant refers to advice in the suspension letter that he should telephone the EAP. He pointed out that he could not hear on the phone and asked for another way of making contact (page 89). In response, the claimant was directed to the website (page 120) and, after initial problems, he managed to get access to the online EAP materials (page 124) but we do not have any information about the form this EAP support took. We think that the dispute about access to EAP is not so much about whether the claimant was deprived of access to EAP at all. He may not have found it useful but he managed to access it. However this incident demonstrates that the suspension letter wasn't read through with the needs of the recipient in mind. Providing an EAP with a telephone number to an employee who is deaf is clearly inappropriate; not only does it not provide help but it is, understandably, likely to dent the employee's trust in the process. AB readily accepted that.

61. There were two specific adjustments that the claimant asked for at the investigation meeting. Those were that he be accompanied by an independent colleague and for "written correspondence rather than answering questions in an open room due to my limited hearing" (page 89). He goes on to make specific allegations of discrimination against team members in this statement – he refers to the image of a naked man, to being called "FA Cup ears" and alleges that the team "mimicked the way that I talk, which is unclear due to my disability". He describes there being a "culture of laddish behaviour within our work environment and so I would not have considered reporting his as inappropriate behaviour, however on reflection it is." As we have already said, this is the first time that that allegations expressly linked to discrimination are made and he asks how to make a formal complaint. He also complains about a lack of support from the council apart from shadowing TF which was arranged by MK. He denied the allegations of racist language and said that any physical contact with MG was reciprocal, not aggressive and normal for the culture within the cemetery.

62. Questions were raised by the claimant of Mr Emmerson about the process which he answered on 23 January 2018 (page 120). BE agreed to providing questions in writing and postponed the meeting for that to happen and for a representative to be arranged. The claimant's response is at page 125. Among other things, he says that the prohibition on contacting staff means that he cannot and asks for statements from "the other officers based at Islington Council cemetery". BE says to let him know on Friday if there are specific people that he needs to talk to and the claimant agrees to this.

63. Coincidentally the substantive supervisors job that the claimant had been acting up into was advertised online on 23 January 2018.

64. Also on the same day BE carried out interviews with AN (page 102) BW (page 112) and MG (page 92). The claimant has pointed out that there are some discrepancies between these statements – for example about the

date on which the incident is said to have occurred. On the other hand there is consistency about who was said to be present during the incident. It is undoubtedly true that there had been considerable passage of time between the date of alleged incidents and the complaint. The allegedly racist comments were not said to have happened when the claimant was acting supervisor but, at the latest, in November 2017 since the dates suggested range from October, October/November to between July and November. Those colleagues also stand by their allegation that there had been aggressive physical contact.

65. The claimant's statement (page 89) had been directed to AB. It included questions in 5 bullet points at the top of page 89 and these must have been forward to BE because he answered them (page 120). He then interviewed the claimant on 26 January using questions which the claimant was provided with and which were set out on screen in large font for him to read in the interview. Those questions are at page 138 and the notes of the interview are at page 126. The claimant was supported by MHO who was independent of the Park Department as requested by the claimant. The claimant accepted that he had been happy with the choice of MHO as a companion.

66. BE argues that the emails at page 89 and between pages 120 and 125 caused him to have no reason to think that claimant has any difficult reading and writing or with long words. However he accepted that he should have picked up on the claimant's explanation about his reading and writing difficulties (line 145 on page129). We note that, in that exchange, BE asked the claimant whether he was aware of AN's learning difficulties. The claimant answers "yes" before explaining his own difficulties. BE's response is "I was asking if you were aware of AN's learning difficulties". He sought to re-focus on the question he wanted to ask but, in doing so, was dismissive of something he should have realised was important to understanding how to communicate with the claimant, particularly given that he believed that written communication was the claimant's desired form of communication. The claimant has explained to us that the written correspondence sent to BE had been completed with the assistance of his sister-in-law and the respondent relied on that as a reasonable basis for lack of knowledge of the claimant's specific learning difficulties. However, we do not think that this satisfactorily excuses the failure to take this opportunity to understand the nature of the claimant's learning difficulties.

67. The minutes at page 126 were sent to the claimant on 30 January 2018 (page 151). This email also details the arrangements which were made to provide "key questions and summary of the allegations" on a screen in the room so that he could read them if he could not hear them correctly. By an email on page 153 dated 1 February 2018, the claimant confirmed that he had been comfortable with the adjustments made. We can see from the minutes that the questions were read out and the claimant told us in oral evidence that this gave him the opportunity to think about his response in advance but that wasn't a reason for the written question that he had expressed in advance. BE would not have known that it was useful to the

claimant to be think about his response in advance because that is to do with reading ability and understanding not with the claimant's hearing.

68. The 1 February 2018 email also enclosed a copy of a grievance against AN and MG (page 154) in which the claimant repeated the earlier allegations against them. He did not raise a grievance or any complaint against MK about the November 2017 incident. He stated that HF, BW and LDG had witnessed the behaviour of AN and MG and requested that they be spoken to.

69. Apart from LDG, who was on sick leave, those people were spoken to by BE. BE investigated the grievance within the disciplinary policy which provides for that to be done where the grievance arises out of the accusations. The claimant did undoubtedly make his accusation of discrimination after the disciplinary was started and also pointed to jealousy as a possible reason for the actions he complained about as well as for the false allegations against him. Consequently, his grievance could reasonably be taken as arising out of the accusation.

70. Nevertheless there is a responsibility on the investigator to be even handed. On the one hand he had to consideration that the claimant had made counter allegations potentially to deflect attention from original allegations but, on the other hand, if true they potentially provided a reason for a conspiracy by the complainants AN and MG. It was not possible to investigated the claimant's defence without properly investigating the claimant's allegations. To judge by the non-verbatim minutes, BE did not investigate the allegation about the picture of a naked man particularly thoroughly in that he asked AN (for example) whether he had taken part or heard about it but did not follow up the single question, for example by asking about the claimant's evidence that he had challenged his colleagues about it.

71. BE carried out further interviews on 8 February of RF (the claimant's brother) and HF (the claimant's father) the notes of which are at pages 163 and 172 respectively. He also interviewed NE (page 179) as a result of a statement made by MG (line 40 page 93) and further interviews were held on 22 February 2018 as set out on page 197 in the original management report for the disciplinary investigation.

72. It was on 27 February 2018 that the test and/or interview for the supervisor's role took place. The questions for the supervisor's role are at page 181. BE told the claimant that he had not been successful by email dated 1 March 2018 (page 191) and the claimant asked for feedback. BE said that he was happy to do so but that it would be difficult to do so over email and that he wanted to do so face to face.

73. There was conflicting evidence about the arrangements for and conversation during the recruitment process. BE was adamant that the claimant had failed both the test and the interview but the claimant's evidence was that he wasn't interviewed and was only given the written test. The questions (page 181) were not provided in advance but were provided

in writing because the respondent believed that they were making a suitable adjustment by doing so. The respondent didn't ask in advance what adjustments the claimant needed for the recruitment process but presumed that the arrangements in place for the disciplinary process would suffice. Some of the conflicts in evidence were surprising; the claimant appeared to believe that he was not, in fact, asked the questions which are set out in writing at page 181, for example. Apart from the questions, there is no documentary evidence from the selection process: no notes of the interview or scoring, for example.

74. We do not think that the respondent can transfer adjustments made in the disciplinary investigation to a selection process and simply rely upon them being agreed with in the former to mean that they are sufficient for the latter. In the former hearing the claimant had support of a companion, someone outside the process but he did not have such a companion in the interview. He has not suggested a companion in the interview to ensure that he understand the question as a potentially reasonable adjustment in this element of his claim of breach of the duty to make reasonable adjustments. However one of the adjustments suggested is for an amanuensis or scribe to read the written test questions and record his answers.

75. According to the claimant (C's statement at paras.98 to 100) he told BE on the day of the interview when he was presented with a written test paper that he would difficulty with the written test paper because of his disability. That is a difficulty linked to the learning difficulties aspect of his disability but we accept that these learning difficulties of being unable to read big words and finding it hard to read and write are a consequence of the struggles he faced in the education system as a deaf child.

76. It was suggested to the claimant in cross-examination that the respondent didn't know that the format of the written test would disadvantage him. We accept the claimant's oral evidence that he told BE on the 27 February 2018, when he was presented with the test, that he was "going to struggle with that" and BE told him to do the best he could and walked away. BE had been told a few weeks earlier that the claimant was unable to read big words and had limitations with reading and writing. His response should been to ask "What do you need?". We think it likely that the claimant would have asked for a person to read out the questions and note his answers; what he now says he would have needed. However, he also says that he doesn't know the names of the flowers and a scribe would not have assisted him with that. Furthermore, we were not presented with evidence that the outcome at the interview, which we accept also took place on that day, would have been any different had the claimant had a scribe for the written test.

77. The claimant was unsuccessful in his application and was told so on 1 March 2018.

78. Meanwhile, the disciplinary investigation continued, and Mr Emmerson interviewed SH on 6 March (page 192). He compiled a management report into his investigations which is dated 13 March 2018 and is at page 196.

The claimant responded to that report on 18 March asking for more people to be interviewed and expressing dissatisfaction with grievance not being investigated separately to the disciplinary process. Page 209 is not only that response but contains, in blue, BE's answers to the points raised. In response to the claimant's argument that MM and LDG should have been interviewed, pointing out that he understands LDG now to have returned from sick leave, BE says that he is satisfied that the number and variety of people provided sufficient evidence for him to reach a conclusion and told the claimant that he could arrange for MM, LDG and one other colleague (TW) to attend.

79. There was further communication between the claimant and Mr Emmerson on 21 March 2018 about adjustments for the forthcoming disciplinary meeting (page 216). The claimant states that he wants MHO and his partner as companions "to make sure I understand everything that is being said and relay back to me any information of what is being said should I need help". He would like contact to be made with LDG and TW and would arrange for a statement from MM. He states that he wants to refer to video recording which are the identical recordings as those shown at the Tribunal hearing before us.

80. The disciplinary meeting was conducted by AB on 22 March 2018 the notes are at page 227. It is clear that there must be some omissions from the hearing notes. For example, although they note that there were breaks (see line 27 and line 147), it seems to be common ground that there were more frequent breaks than that. Ms Smith said the breaks were necessary to enable her to explain to the claimant what had been said. The length of notes compared with the time period covered by the meeting also suggests that these are not verbatim notes. There are some inaccuracies, for example line 48 on page 238 is attributed to IS but the statement was accepted to be that of BE.

81. The claimant was supported at the 22 March hearing by Ms Smith and MHO. Mr Emmerson presented the management case. The respondent relies on the note on page 227 that "IS confirmed that DF understood everything that had been said" (just above where the notes of questioning starts) and argues that the fact that she is not recorded as saying that the claimant did not understand meant that AB and BE could be confident that the claimant did understand. We think that is too much to read into that statement made right at the start of the meeting.

82. The claimant's allegations about the conduct of the hearing are that everyone talked at once and put their heads down which meant that he could not distinguish the words of one speaker and could not supplement what he could hear together with lipreading. The respondent's witness acknowledge that it is likely that they did not remember 100% of the time to make those adjustments to their way of conducting the meeting which had been agreed for the claimant. Line 18 records the claimant saying "I would like a break as there is too much information and I cannot think straight".

83. Given the other circumstances in which members of the management failed to put themselves in his shoes (here we think of BE in relation to the learning difficulties and format of the written test and MK in managing the claimant as set out above) we don't have confidence that AB and BE remembered sufficiently often in the disciplinary hearing to keep their speech slow, to not talk at the same time as each other and to avoid looking down rather than at the claimant. The respondent seeks to excuse any limited lapses as them being merely human and argue that this as not deliberate conduct.

84. The claimant had prepared questions in advance as a way of challenging the information in the management report. He did (though Ms Smith) refer to be only being told one day before the hearing that his suspension did not preclude him contacting the witnesses (page 215). It is fair to say that the original suspension letter does not make clear that to do so would not be regarded as a disciplinary offence). Subject to that, the claimant had sufficient time to work out what he wanted to say in response to the information in the management report.

85. Ms Smith did genuinely believe that the notetaker was a typist who would provide the facility for the claimant to read the notes of the hearing contemporaneously. She believed that that adjustment had been abandoned and we accept both that was her genuine belief and that she believes that the ability to read the words would have been an additional source of information to the claimant. She herself was unable to give him contemporaneous interpretation within the hearing but needed breaks to recount events to him. The claimant relied upon her in that hearing to tell him information about what had just transpired in order to have the best prospects of understanding what was being asked and discussed so that he could have a fair opportunity to participate in the disciplinary hearing. There is no suggestion in correspondence that an adjustment of a transcript which could be read instantaneously was arranged. We accept the respondent's evidence that, despite IS's belief otherwise, the person taken notes was doing so as a record not as contemporaneous aid to the claimant. This was a presumption by the claimant based upon the provision of key questions in writing at the investigation stage. The parties completely misunderstood each other on this point.

86. We remind ourselves that the respondent's managers can only be expected to know what reasonably ought to have known about the claimant's condition. This means there is some responsibility on the claimant to explain the challenges his deafness causes him. We think that his demeanour in the tribunal hearing might be expected to be similar to his demeanour under pressure in the investigation interviews and disciplinary hearing - a similarly formal setting where he is having to concentrate to understand and to communicate. There is evidence in the notes that the claimant said that he was struggling to understand and we think that AB and BE did not respond appropriately.

87. Our view is that AB and BE relied too much on the claimant and IS to flag up problems and did not rely enough upon their own observation. Our view is

that the reasonable expectation on managers engaged in disciplinary action involving a disabled person at risk of losing their job is not to be merely human but to make the adjustments needed by someone who has difficulties above those encountered by the population as a whole. They needed to approach the hearing with the mindset that they could not conduct the hearing as they would have conducted any other hearing and, in the case of a deaf person – or anyone else with communication needs, that those adjustments need to be sustained throughout the hearing.

88. The outcome of that meeting was that Mr Bedford decided that further investigations needed to take place and that the suspension of the claimant should be lifted. BE was due to be on annual leave and this was to cause a four week delay to progress of the investigations.

89. We have considered IS's evidence (her para.111) that the four week gap caused BE to comment loudly "What paid!". Although we do not think that IS was deliberately seeking to mislead in what she said, equally, in general, we thought that BE was an honest witness and when we have rejected his evidence is has been because we do not consider his recollection to be accurate. He frequently accepted things which were against his interest when he had, in all conscience, to do so. He was frank when he couldn't remember things. For him to have said that does not make sense in context because, as an experienced manager, BE would know that suspension is always paid so whether the suspension was lifted or not the claimant would be paid.

90. The most that we can read into this is that BE would have preferred the claimant to go back to work than remain on paid suspension. Part of the claimant's argument is that BE disliked him because he's on a different contract to those who did not come into the employment of the council by the same route. However BE's evidence was that the cost of the service provided by the claimant and his team was covered by a contract so the different terms were immaterial to BE's budget. If the words were said, they were not said with the malice with which they have been interpreted by IS and the claimant but in the context of a discussion about whether the service would have the claimant available to work or not available to work when being paid.

91. The suspension was formally lifted on 26 March 2018 (page 244) but the claimant was by this time unwell due to work related stress and did not attend work. He sent the respondent a medical certificate on 9 April 2018 (page 252).

92. The further investigations that were requested by Mr Bedford were conducted on 27 March 2018 (MK at page 246) and 3 May 2019 (LDG page 259). These investigations were incorporated into an amended management report dated 8 May 2019 (page 268) and the claimant was invited to a second meeting on 10 May 2018 (page 277). This was due to take place on 18 May but was postponed due to the claimant's ill health. He was referred to Occupational Health although we have seen neither the referral nor the Occupational Heath report. The 8th June invite to the

postponed second meeting included reference to GP's recommendations (page 283). These were,

> "1. You can be accompanied by an external person for support at the meeting
> 2. You will be allowed extra time for reading information
> 3. You will be allowed regular breaks"

93. There was no separate outcome to the grievance. The response was included in the amended management report (page 271). Other than that provided by members of the claimant's family, BE did not find evidence to support the claimant's allegations. This was even when considering th evidence of those outside the core group of alleged perpetrators and those whom the claimant specifically asked to be interviewed.

94. We accept that AB and BE made their decisions on whether or not the allegations both by and against the claimant were made out because they genuinely believed the information provided. By the time of the second hearing this included evidence from the people whom the claimant had asked BE to interview. In particular, LDG not only did not provide evidence to support the claimant's allegations against co-workers but supported the allegations that the claimant had engaged in physical behaviour which was inappropriate in the workplace which BE decided supported the key allegations. We accept that these decisions were made in good faith.

95. So far as BE was concerned, the allegations by the claimant against his co-workers were made later which affects his view of their credibility. Whether we agree with that view of the claimant's credibility or not and whether those allegations against AN and MG were true or not, we are satisfied that BE had grounds for his conclusion about the timing of the claimant's allegations of discrimination compared with the timing of AN's allegations, in particular. Those grounds included the email from TF (page 266) so he had a non-discriminatory basis for reaching this conclusion.

96. We see from 18 June letter (page 283) that the second meeting was due to take place on 3 July and that considerable notice was given of that. However, on 2 July the claimant contacted Mr Bedford to say that there had been a family bereavement which meant that neither he nor IS were able to attend on 3 July. This is what has been recorded in the eventual meeting notes at page 292 and seemed to be accepted by the claimant and Ms Smith. So, the 3 July meeting was postponed.

97. The correspondence about arranging the final date of 9 July is incomplete. It starts at page 287 with an email from AB to the claimant about a new date which says that MHO was only going to be available until 3 o' clock. "I am not able to change the date as there are no others everyone is available." (see page 288). We say that the correspondence is incomplete because the initial email proposing the 9 July does not appear in the bundle. However, it appears from the eventual minutes that the hearing was due to start at 2 o' clock and therefore if MHO was only available until 3 o' clock

then he would only have been available for an hour of the proposed upcoming meeting.

98. On 6 July 2018 the claimant emailed Mr Bedford saying that he would not attend the hearing as Ms Smith was not available due to work commitments which she could not change one week before the meeting and MHO was unable to attend for the whole of the scheduled meeting (page 287). He added,

> "As you are aware from the previous meeting it is extremely hard for me to understand what is happening in the meeting and any conversation being held as stated in my disability I am completely deaf, therefore I am able to lip read only and it's very hard with the amount of people in the room and to concentrate and understand everything that is being said when I am not regularly familiar with the voices and tones.
>
> Imogen understands my disability and is able to relay everything being said back to me in a way in which I can understand as you would have seen in our first meeting, everything said she repeated every part of the conversation and explained to me. Not only that it is herself that I trust in this situation to ensure that everything is out [sic] across on my behalf correctly and that I'm having a fair chance in this investigation."

99. Ms Smith gave oral evidence that she had a telephone conversation with Mr Bedford between 3 July and 6 July during which she requested a postponement so that the right adaptations could be made. He did not deny in his evidence that such a conversation had taken place but could not remember what had been said. AB accepted in cross-examination that it would be a challenge for the claimant to participate in the second disciplinary hearing without MHO and IS present. He said

> "We would try to make sure that we had whatever reasonable adjustments [agreed] in place. I had made … that was third attempt to arrange that date and only in the last moment [were we told there were availability issues]. I asked in that letter to be notified by 25 June if there were any difficulties."

100. AB also accepted that the email of 6 July sets out that the claimant thinks it necessary in order for it to be a fair hearing for him to have IS with him.

101. Having decided not to attend, the claimant sent a statement to the respondent asking them to take it into account at the second meeting (page 289). The notes of the second disciplinary meeting at page 292 show that the management case was again presented by Mr Emmerson and MK was called as a witness. The outcome was announced orally and is was that the claimant had been guilty of gross misconduct and that he should be dismissed. MHO was present throughout the hearing which started at 1.50 pm and finished at 3.05 pm.

102. The claimant was sent the notification of dismissal on 12 July 2018 (page 302) as he had requested in his email of 6 July.

103. The claimant indicated his intention to appeal against the dismissal by letter dated 16 July which is at page 305 and the grounds of appeal are at page

306. Those included that there was insufficient evidence for AB's decision, the evidence against him was inconsistent, that he was the victim of a conspiracy by those who resented his temporary appointment and his excellent record. He concluded the appeal letter by saying that if the decision is upheld he would be taking the respondent to the employment tribunal, including for disability discrimination.

104. There is very limited correspondence in the bundle about what happened in relation to the appeal after that. According to Mr Bedford, the HR Department acknowledged the appeal on 20 July 2018 and there is, at page 312, an email of 24 July about the appeal. Mr Bedford says in his paragraph 24 that he understands there was some difficulty in setting of the date. The claimant recalls being told that the summer holiday had delayed organising an appeal but that a new date would be provided (claimant's statement para.125). The appeal hearing was finally conducted by NC on 22 January 2019 and the notes are at page 326. Both MHO and IS were in attendance. NC makes a statement recorded on line 42 (page 328) that the delays in holding the appeal were due to a changeover in personnel in HR although we have not heard direct evidence of that. She states that such a delay is not normal practice and apologised for it.

105. The respondent realistically accepts that the failure to hold the appeal in good time is a failing for which they are responsible and for which there is no reasonable explanation. The explanation given by the claimant and Ms Smith to Judge Manley about the reason why there was a delay included that they were waiting for the appeal. It was accepted by both parties that the findings of Judge Manley at paragraphs 5 to 15 of her judgment at page 31 and following of the bundle are binding upon us. Those include that IS contacted the CAB fairly soon after the claimant's suspension and also ACAS. There is also reference to the claimant's poor health and also to some ill health on the part of IS. Ms Smith's evidence, which Judge Manley accepted, was that when she contacted ACAS she was not told about a time limit until she made contact on 31 October 2018 when the EC certificate was issued (see para.14 of Judge Manley's reasons). It was therefore accepted that, as a matter of fact, neither IS nor the claimant were aware of the time limit until that point.

106. As we have already noted, in the present case there are some instances where evidence has not been presented which might have been expected to be presented. We do not know why MK hasn't been called to give direct evidence about the first allegedly discriminatory event in about November 2017. No reason has been relied on as preventing him from being called. Potentially relevant documentation from the interview process appears not to be available. BE wasn't able to say why it wasn't in the bundle. Presumably it has been sought because it would be discoverable. He was not able to say when he had been asked for it. He was asked for feedback from the interview and test in good time and that never was provided; BE said that he would prefer to provide it orally and that appears to have been where it was left. We do not know, therefore, when that documentation became unavailable. This means that, if we accept that there was a

discriminatory act in relation to the interview, the respondent would potentially be at something of disadvantage if they had to argue what the outcome would have been had the claimant had the adjustments requested. On the other hand, the claimant asked for feedback and there is no explanation for lack of feedback. Our view is that the absence of potentially relevant documentation is probably the respondent's own fault – it is not the claimant's fault.

Conclusions on the issues

107. We now set out our conclusions on the questions set out in the list of issues above (hereafter referred to as the LOI), applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

108. We will consider the question of time limits and any limitation issues after setting out our conclusions on the substantive issues.

109. It is accepted by the respondent that the claimant was at all relevant times disabled for the purposes of the EQA by reason of hearing loss and learning difficulties. Further, it is accepted by the respondent that at all relevant times it knew of the claimant's disabilities.

Direct disability discrimination and discrimination arising from disability

110. LOI para.4.3.1 requires us to consider whether the claimant has shown that the respondent failed to deal with his verbal complaint of discrimination in November 2017 made to his managers in which he complained of being subject do disability discrimination by his colleagues.

111. The claimant has shown that he made a verbal complaint at the latest in about November 2017 (and by text) that MK, his newly appointed manager and Cemetery Manager didn't believe that the claimant was deaf and was talking behind him. There was some support from BE for this allegation, albeit second hand. We think that the claimant probably did complaint that MK lacked the necessary consideration of him as a deaf person and this was a complaint about discrimination.

112. Separately, there was a complaint to MK about the actions of the claimant's co-workers after he was appointed acting supervisor with effect on 1 December 2017. The claimant told MK that co-workers were whispering behind his back, being lazy and not respecting him. We have found that the gist of the complaint was that they were not co-operating with him. In the evidence the claimant gave us when trying to recall what he had said to MK and BE at the time, he did not say that he included the name calling or the reference to "FA Cup ears". In the context of the complaints about the lack of cooperation by the co-workers and poor behaviour it is understandable that MK and BE did not view it as a complaint of discrimination. Insofar as LOI 4.3.1 refers to the complaint by the claimant against AN, MG and his

other co-workers, the allegation is not made out because he didn't actually complain in terms about behaviour which could amount to discrimination and the underlying facts are not made out. Alternatively, the reason MK and BE dealt with the complaint as they did was nothing to do with the claimant's disability but entirely to do with their genuine and reasonable belief that the nub his complaint was a failure to cooperate with him. It was not less favourable treatment than AN and MG subsequently received, because it was not a complaint of discrimination.

113. However, insofar as this issue refers to a complaint of discrimination against MK in (at the latest) November 2017 the underlying facts are made out. We have found that the claimant did text BE to complain about MK's behaviour towards him and spoke to him about his complaints orally the next day when BE came to the cemetery.

114. There appears to be no formal or written record of this incident at all so the complaint was not formally investigated. The best evidence that BE could give was that he personally had no recollection of the relevant events but that MK had told him that he'd been spoken to, had adjusted his behaviour and there had been no problem subsequently. There is no evidence of this being communicated to the claimant or of the claimant being given any resolution to his complaint. In this, we consider that it could be said that the respondent treated the claimant less favourably then they treated AN and MG when they complained about the claimant in January 2018. In particular, AN complained about race related harassment and the claimant was suspended.

115. We conclude that these factors are sufficient that an inference of direct disability discrimination could be made in the absence of any other explanation and therefore that the burden of proving a non-discriminatory reason transfers to the respondent. BE has provided no explanation as to why he didn't treat this complaint with any formality because he is unable to remember the incident and there appears to be no relevant evidence. We consider that this allegation of direct disability discrimination is made out to this extent but it occurred in November 2017 at the latest. Our sense is that there were no further difficulties between the claimant and MK; the manager suggested the claimant for the acting supervisor role and the claimant did not include this allegation within his 22 January 2018 statement (which complains about lack of support by MK) or 1 February 2018 grievance against AN and MG. The claimant has not referred to any other incidents involving MK.

116. As to LOI para.4.3.2, we have found that the respondent did deal with the claimant's formal grievance of 1 February 2018 in accordance with their policy. The allegation that their failed to deal with it is therefore not made out. Alternatively, by investigating it within the disciplinary investigation, they acted in accordance with the council's disciplinary policy which provides that grievances which are linked to the disciplinary allegations should be investigated together. That policy is a complete and non-discriminatory reason for the action the respondent took. Both the claim of

s.13 EQA direct discrimination and s.15 discrimination arising in consequence of disability based upon this allegation fail.

117. By LOI para.4.3.3 the claimant complains about a failure to deal with that formal grievance within a reasonable timeframe. The reason that the grievance outcome was delayed was that BE was told by AB to investigate further witnesses. We consider that BE should have spoken to those witnesses in the first instance. They were potentially relevant to the claimant's grievance which, if true, provided the complainants with a reason to conspire.

118. On the day the formal allegations were made against the claimant, he had gone home because he was upset at the mistreatment of the necessary paperwork he had prepared in his role as acting supervisor and had challenged colleagues, including AN, asking who was responsible. BE did not within his investigation pick up on this disrespect of the claimant's paperwork. We have found the respondent's evidence that complaints had been made prior to 19 January 2018 about the claimant using racist language to be unreliable (para.57 above). Therefore the claimant's upset at the mistreatment of the paperwork predates the allegation against him and should have been given more focus in BE's investigation. BE made a judgment about which witnesses it was relevant to interview in the first instance. He did not take a statement initially from MK about the claimant's complaints when managing the team or about MK's own knowledge of AN and/or MG's complaints. He did not interview all those requested by the claimant.

119. It was these choices by BE about whom to interview which extended the timeframe in the first instance. However we have been persuaded that this was because the grievance appeared to him to have been made after the allegations; he treated it as responsible and adjudged that the claimant's credibility was damaged as a result. This led to the grievance not being thoroughly investigated in the first instance which caused delay. The delay was not due to disability itself or to anything arising in consequence of it although it was a detriment to the claimant.

120. The reasons why the formal grievance was not upheld (LOI 4.3.4) was that, other than from members of the claimant's family, BE did not find evidence to support Mr Fymruk's allegations. This remained the case even when he had interviewed the relevant people who were not involved in the core group of alleged perpetrators (or the alleged conspirators against the claimant) and those whom the claimant had asked to be interviewed. The information of those who might be described as more neutral led to further information against the claimant's interest being discovered. These were genuinely the reasons why BE did not uphold the grievance and they were not reasons which had any connection whatever with disability. There is no basis from which to infer that BE would have reached any other conclusion had he been presented with the same evidence upon investigating a comparable complaint by a non-disabled employee. This allegation fails both as a complaint of s.13 and of s.15 discrimination.

121. The claimant would contrast the decision to suspend him (LOI para.4.3.5) with the failure to suspend the individuals about whom he complained, naming AN and MG as actual comparators. We conclude that neither AN nor MG were in comparable positions to the claimant. We have concluded that the complaints made by the claimant about them prior to 22 January 2018 were not complaints of disability discrimination. The claimant's complaint of discrimination or harassment related to disability by AN and MG had not been made prior, in particular, to AN's complaint or racial harassment against the claimant. His previous complaint was that they did not respect him or do as he asked them in his role as acting supervisor (see paras.48 to 55 above). There was a complaint in November 2017 of discrimination against MK but he is not relied on as an actual comparator. In general, the claimant argues that the respondent has not treated alleged disability discrimination as seriously as alleged race discrimination. However, the respondent did react to the allegation of discrimination against MK which appeared to stem from MK's ignorance of the claimant's deafness.

122. We remind ourselves that, when considering LOI 4.3.1, we concluded that the apparent difference between the suspension of the claimant and the informal approach taken to MK when the claimant complained about his new manager was sufficient to transfer the burden of disproving discrimination to the respondent which, in that instance, they were unable to discharge with cogent evidence. Some action appears to have been taken although there is no evidence before us of an outcome or resolution being communicated to the claimant. However, in relation to this allegation, that the decision to suspend the claimant was on grounds of the claimant's deafness, we have cogent evidence from the respondent that the reason for suspension was, solely the serious allegations that he was facing. We are persuaded that the respondent has shown a non-discriminatory reason for the suspension. Furthermore, the reasons for suspension did not arise in consequence of the claimant's disability.

123. As we set out in para.94 and 95 above, the judgment of BE in his management report and AB (at the disciplinary hearings) that the allegations were made out were made in good faith, genuinely preferring the information which supported the allegations against the claimant over his denials of misconduct. Our reserved judgment should not be read as a decision about whether the allegations were, in fact, well founded. We are concerned with whether BE or AB would have reached a different conclusion or treated the claimant more favourably had he not been disabled. We have found that there was a non-discriminatory evidential basis for the conclusions that BE and AB reached and for the decision AB made to dismiss the claimant for the conduct he had found proven. However, as we set out below, we consider that the respondent was in breach of the duty to make reasonable adjustments in relation to the disciplinary hearing on 22 March 2018 and that that caused the claimant to absent himself from the resumed hearing on 9 July 2018. The issue about

what effect, if any, reasonable adjustments to the process would have had on the outcome is to be considered at the remedy hearing.

124. There has been no explanation of substance for the 7 months' delay in concluding the claimant's appeal. This was clearly a detriment and was not a reasonable timeframe. We do the respondent the justice of presuming that this is not usual in the conduct of their disciplinary processes; indeed the appeal officer is recorded as saying as much in the appeal hearing minutes. This suggests that the delay could be regarded as less faovurable treatment than a comparable employee would have received. However there is nothing from which we could infer that the delay was on grounds of or because of disability itself or of anything connected with it. Such information about the reasons for delay as there is (see para.104 above) points to annual leave causing initial delay coupled with a change of personnel in the HR department. We do not infer discrimination in those circumstances when such information as there is suggests incompetence or inattentiveness rather than discrimination.

125. We have dealt with some of the issues arising on the discrimination arising from disability claims within our analysis of the direct discrimination claims. In relation to the things said to arise inconsequence of the claimant's disability, lack of hearing is the disability itself but, subject to that observation, we accept that all of lack of hearing, communication difficulties, and difficulties in reading and spelling arise in consequence of deafness. In relation to the claimant's difficulties in reading and spelling, those arise from deafness because they are a consequence of the challenges the claimant faced in accessing education as a deaf child.

126. To the extent that the claimant has shown that the treatment occurred as alleged, we do not consider there is anything from which to infer that the lack of hearing, communication difficulties and difficulties reading and spelling were any part of the respondent's reasons for the specific actions complained of in LOI 4.3.1 to 4.3.7. To some extent, we have set that out explicitly in our reasoning above. There is one allegation of direct discrimination which we have upheld, that of failing to "deal with" the complaint against MK. We considered the burden of proof had passed to the respondent to disprove discrimination because of the lack of formality with which they dealt with that complaint compared with the formality of the action against the claimant when AN and MG complained and that the respondent was unable to discharge that burden because of a lack of cogent evidence. It does not follow that a different inference that the respondent was motivated by the consequences of the disability needs to be drawn. We do not think it a valid inference to drawn in all the circumstances. All complaints of s.15 discrimination arising in consequence of disability are dismissed.

<u>Breach of the duty to make reasonable adjustments</u>

127. When the claimant was interviewed for the substantive supervisor's position, there was a requirement for him to fill in a written test form (LOI para.4.10.1.

This amounted to a provision, criterion or practice (the first PCP) as it was part of the practice followed in recruitment.

128. Separately, there was a requirement that the claimant attend combined grievance/disciplinary hearings and answer oral questions on 22 March 2018 and 9 July 2018. In the event, the claimant did not attend the later hearing. This was also a PCP (the second PCP). No alternative of written questions that he could respond to was proposed for those meetings so, in order to respond to any questions that AB might have, the claimant was, in effect, required to attend.

129. The first PCP put the claimant at a substantial disadvantage in relation to his employment in comparison with someone who was not deaf with learning difficulties. He has difficulties with reading and spelling which meant that filling in the written part of the test was more difficult for him than it would have been for someone who had not been disadvantaged in their access to education in the way the claimant, as a deaf child was.

130. We have accepted the claimant's version of the conversation between him and BE on 27 February 2018 when the claimant told him that he would struggle with the written test. Putting that together with the information provided to BE by the claimant on the 26 January 2018 (see para.66 above) we are of the view that BE ought to have known that the claimant was disadvantaged by the written test because of his disability and ought to have asked the claimant was he needed to give him a fair opportunity to show his knowledge. We think it likely that, had he been asked, the claimant would have said that he needed someone to read the questions to him (in conjunction with reading them himself) and to write down his answers (to reduce the effects of the claimant's poor spelling).

131. The second PCP put the claimant to a substantial disadvantage in that, as a person with the extent of hearing loss that the claimant has, he understands what is being communicated to him in part through sound but predominantly through lip reading and through repetition, particularly by trained individuals (such as the Tribunal appointed lipspeakers) or by family members (such as IS) whose familiarity with the claimant's methods of communication mean that that choose words and a pace which is more likely to be effective. Provision of information in writing is of assistance as much because it provides thinking time (when the claimant has so much more than a hearing person to process) as because it is visual rather than auditory. Those conducting a formal interview needed to talk slowly, consistently look at the claimant, use visual cues and not change speaker or talk over each other to accommodate the challenges to communication posed by the claimant's deafness.

132. Our findings are that the claimant was put to a substantial disadvantage because of his deafness on 22 March 2018 and would have been on 9 July 2018, had he attended in the absence of IS and MOH. The disadvantage can be summarised as a difficulty in understanding those questioning him and being understood. The respondent had actual knowledge that this

would be a disadvantage which is why the questions were provided in writing.

133. We then go on to consider whether there were there steps that were not taken that could have been taken by the respondent to avoid those disadvantages. It is not for the claimant to prove more than that there were apparently reasonable steps which had a prospect of alleviating the disadvantage.

134. In relation to the first PCP, the claimant has argued that he should have been provided with someone to read the questions to him and record his answers. As we say above, the respondent cannot rely upon not being aware that the claimant needed something if they would have discovered it was necessary had they made such enquiries as it was reasonable for them to have to make. We consider that BE should have made enquiries about what the claimant needed for the written test and that providing someone to read the questions and note the answers had a prospect of alleviating the claimant's difficulties.

135. Would that adjustment have been a reasonable step for the respondent to have to take at that time? We consider that, had the claimant asked for a person to read out the test paper and record his answers that would have been a reasonable step. It would not have interfered with the purpose of the test which was to understand the candidate's knowledge. It is likely, given the resources of the council that someone could be made available although it might cause some delay to the process. BE had actual knowledge that the claimant had difficulties with reading long words and with spelling and that the claimant was deaf. He ought not to have presumed that the provision of questions in writing alone was something the claimant was not disadvantaged by because the combination of written questions and oral face to face questions had been consented to in the disciplinary process.

136. We comment that to the extent that the claimant lacked relevant knowledge, a scribe would not have affected the outcome but would have given the claimant a better chance of displaying the knowledge that he did have. The respondent will, not doubt, argue that the adjustments would not, in fact have affected the outcome of the recruitment process because the claimant also failed the interview. That is a remedy point and not an issue which ie is necessary for us to determine at this stage.

137. In relation to the second PCP, the claimant contends that the respondent should have talked slowly during the disciplinary/grievance hearings and looked at the claimant while doing so. We accept that at the 22 March 2018 disciplinary meeting conducted by AB the respondent's managers did not consistently talk slowly, talk one at a time and look up, facing the claimant to enable him to lipread. The meeting was conducted too fast. The participants talked at the same time and did not consistently look at the C when doing so.

138. His inability to attend the second meeting scheduled for 9 July 2018 was caused by the failure to make reasonable adjustments at the first meeting because he had felt unable to participate fairly in the first meeting even with the presence of MHO and IS. By the time of the 9 July 2018, there were GP recommendations which included that he should have appropriate support. Despite this, the proposal was that the meeting should go ahead despite IS being unavailable and MHO only available for one hour. We are of the view that the claimant would have been completely out of his depth.

139. His expectation that the respondent's managers would not themselves consistently make adjustments to their conduct of the meeting meant that he reasonably considered himself to be unable to face the 9 July 2018 meeting without, in particular, IS's support. The respondent's justification for going ahead despite the claimant making expressly clear in his email of 6 July 2018 (page 287) that he would not have a fair opportunity in the hearing without support was a formulaic approach to the procedure. The meeting had been postponed because of the claimant's ill health and then because of a family bereavement. However IS was unable to attend the next proposed date because of a pre-arranged teacher training commitment which was necessary to her qualification. This was a valid reason for her non-availability. The fact of previous delay due to BE's leave, the claimant's illness and the bereavement was only one consideration.

140. The respondent did not ensure that the resumed meeting took place at a time when IS and MOH could attend throughout. However, that is not an adjustment contended for in the List of Issues. The claimant was not confident that AB and BE would consistently make the adjustments to their normal practice for conducting a hearing because it was only at the beginning of the hearing of 22 March 2018 that they had done so. There was no other commitment made ahead of 9 July 2018 that they understood and would alleviate the disadvantage he would experience at that hearing by providing written questions or frequent breaks. We consider that the disadvantage experienced by the claimant remained and, although it may not be within the scope of the List of Issues to say that the failure to adjourn the hearing to a date convenient to IS and MHO was itself a breach of the duty to make reasonable adjustments, we are very clear that the claimant did not attend because of a breach of that duty in the conduct of the hearing of 22 March 2018. His inability to attend on 9 July 2018 flows from their failure in relation to 22 March 2018.

<u>Victimisation</u>

141. The verbal complaint of discrimination by MK made to BE in, at the latest, November 2017 was a protected act. However we are satisfied that none of the actions of BE or AB had anything to do with that complaint. MK appears to have been spoken to informally and there were no further complaints of that nature against him. BE had so completely moved on from the incident that by the time of the proceedings he had forgotten about it. MK recommended the claimant's promotion to acting supervisor after being

spoken to about poor conduct as a manager which we consider suggests that there were no hard feelings by MK.

142. The difference in handling of the disability discrimination complaint and the race discrimination complaint which led to our conclusions in relation to the single act of direct discrimination is a comparison between reaction to different kinds of protected acts. This does not support an inference of victimisation as an additional or alternative complaint.

143. The formal complaint of discrimination by the claimant on 1 February 2018 (page 154) was a protected act. In it he complains of “daily bullying and discrimination” by AN and MG.

144. However, we do not think that there is evidence from which we can infer that the nature of that complaint was any part of the reason why the respondent did the acts complained of. We have set out above our reasons for concluding that the actions were not discrimination and they equally support a conclusion that the reasons did not include that the claimant had done a protected act.

Time Limits

145. Our conclusions mean that we have found that the claimant has succeeded on a single complaint of direct discrimination which took place, at the latest, in November 2017 and two breaches of the duty to make reasonable adjustments the second of which took place on 22 March 2018. The contact with ACAS was on 31 October 2018 so those claims are, on the face of it, out of time.

146. We are of the view that there is a link between the two reasonable adjustments claims. Self-evidently, both are complaints under s.20/s.21 EQA. The first concerns arrangements for the interview for the substantive supervisor’s post which BE was responsible for. The claimant accepted that the post had to be formally recruited into so the fact of the interview and the test is not contentious. The failing is that of failing to ensure that an individual’s disadvantage is accommodated within a formal process.

147. That is also true of the failure to ensure that the disciplinary meeting accommodates the individual’s disadvantage. It is true that we are concerned with separate processes. Although AB chaired the hearing on 22 March 2018, BE was responsible for the process and for communicating the claimant’s needs so there is some overlap of responsibility. Both instances involve a failure to anticipate what was necessary, a failure of imagination or to enquire into the individual’s needs. Both instances involve a failure to listen to what the employee is saying about their needs in order to be able to take steps to accommodate them.

148. Although the failure to talk slowly and separately at the meeting on 22 March 2018 occurred on that date, the impact of the failure continued

because it affected the claimant's confidence about what would happen at the resumed hearing.

149. However we do not think that the quality of the act in failing to deal more formally with the complaint about MK is the same as the failures to make reasonable adjustments. It is not that they are different types of legal wrong. That is a relevant distinction but it is not a bar to the acts being connected so as to make this a continuing act. It is more that the events concerning the complaint about MK and how it was dealt with appear to us to have been discrete with no obvious consequences. We do not think that that can be regarded as part of a continuing act.

150. The claimant did not complain about the actions of MK within his grievance and did not grieve at the time. MK recommended him for promotion which suggests that the relationship thereafter was not a cause of ongoing concern for the claimant, nor that the failure of the respondent to deal more formally with the complaint was an issue for him. It is not raised in the claimant's correspondence around the disciplinary which meant that the respondent was not forewarned that this was something which the claimant continued to be concerned about. The allegation was only raised in the further and better particulars. BE is clearly unable to recall the detail of the events and we consider that this is a disadvantage to the respondent in having to respond to the allegation brought by a claim presented 11 months after the act in question and therefore 8 months late. Although the claimant may not have known about the time limit he was aware of the right to claim to an employment tribunal about discrimination. In all the circumstances, particularly the prejudice to the respondent in having to respond to such a late claim, we do not think it just and equitable to extend time for the complaint based upon the failure to deal with the complaint against MK despite the fact that the claimant thereby is unable to obtain compensation for this matter.

151. We also need to consider whether it is just and equitable to extend time for presentation of the claim of breach of the duty to make reasonable adjustments. Here the respondent suffered no comparable disadvantage. We accept that there may be some difficulty for the respondent because of the absence of documentation relating to the selection process however the claimant did ask for feedback in good time and, had that been provided, then the documentation would likely have been available. This difficulty appears to be of the respondent's own making.

152. The continuing effects of the breach of the duty on 22 March 2018 meant that the claimant did not participate in the hearing at which his dismissal was determined. This means that the full impact of the breach on the claimant was delayed. The claimant has been found to be unaware of the time limits until 31 October 2018 and, as a matter of fact, was awaiting the outcome of his appeal before proceeding. That appeal outcome was delayed and there is no satisfactory explanation for the delay. The claimant suffered some ill health which was also relevant to his delay in proceeding. The length of delay in this instance is shorter than in relation to the

complaint of direct discrimination and we accept that the reasons for it are reasonable. In all those circumstances, we think it just and equitable to extend time for presentation of the claim of breach of the duty to make reasonable adjustments until 31 October 2018.

J Sarah George

Employment Judge George

Date: …29 August 2022……………..

Sent to the parties on: 31 August 2022

GDJ
For the Tribunal Office