EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
AND	
SIMON PRESTON	**THE GOVERNING BODY OF MOLESLEY SCHOOL**

JUDGMENT AND WRITTEN REASONS

OF THE EMPLOYMENT TRIBUNAL

HELD AT: Birmingham via CVP

ON:11-15 October 2021 & 25,26,27& 31 January 2022

EMPLOYMENT JUDGE Algazy QC

Panel Members: Mr D. Faulconbridge
Mr I. Morrison

Representation

For the Claimant: Ms S.King- Counsel

For the Respondent: Mr J. Gidney- Counsel

J U D G M E N T

The unanimous judgment of the Tribunal is that the claims set out below are not well founded and are dismissed:

- Discrimination arising from disability (section 15 Equality Act 2010)
- Failure to make reasonable adjustments (sections 20 &21 Equality Act 2010)

Oral reasons were given when Judgment was handed down on 31 January 2022. Written reasons were requested at the conclusion of the Hearing and these are set out below.

W R I T T E N R E A S O N S

1. INTRODUCTION

1.1. The Claimant was employed by the respondent school as an Assistant Head Teacher - Head of Faculty. The claimant commenced employment in January 2017 until his resignation on notice on 23 September 2017, effective 31 December 2017.

1.2. The claimant brings claims of disability related discrimination and a failure to make reasonable adjustments.

1.3. The respondent denies all the claims but concedes that he had relevant disabilities, namely cardiomyopathy and dyslexia.

1.4. The claimant was represented by Ms S.King of counsel and he gave evidence on his own behalf and called one other witness. Mr Mark Oley, Union representative. Mr J Gidney of Counsel appeared for the respondent and called two witnesses: Mr R McBrien, Head Teacher and Jenny Thompson, HR Manager.

1.5. There was an agreed bundle of documents and numbers in square brackets in these reasons refer to that bundle. Both sides produced written submissions and there was a joint bundle of. authorities.

1.6. What reasonable adjustments might be required to assist the claimant to fully participate in the proceedings were discussed at the outset. The Tribunal took regular breaks approximately every 40 minutes by agreement.

2. THE ISSUES

2.1 The issues that the Tribunal had to determine were set out in an agreed List of Issues ("LOI") although one aspect of the way the case was put on behalf of the claimant was not pursued. The LOI was established at a Case Management Hearing before EJ Coghlin QC on 30 November 2018 and is set out in the Annex to this judgment.

3. THE FACTS

3.1. On the evidence presented to the Tribunal, We found the following facts and such additional facts as are contained in the conclusion section set out below

3.2. The claimant was born on 5th April 1980 and was 37 years old at his effective date of termination **[5]**. On 21st January 2000 the claimant was diagnosed with dyslexia **[201-203]** and in around 2016 the claimant was diagnosed with dilated cardiomyopathy **[469]**.

3.3. On 12th October 2016 the claimant applied for the post of Assistant Head Teacher / Head of Maths Faculty **[165-166]**. His application form referred to him having a disability **[167-176]** but did not mention dyslexia.

3.4. The claimant was interviewed for the role by the then Head Teacher, Roger McBrien, on 19th October 2016 and on 13th December 2016 he was referred to Occupational Health as he had ticked the disability box in his job application **[33]**. On 14th December 2016 a pre-employment Occupational Health report stated that the claimant suffered from dilated cardiomyopathy **[177]**.

3.5. The report further informed the school of the following matters:

a. That the Claimant was due to have surgery on his right ankle early next year (2017). The Dr assessing him showed him the orthopaedic leg crutch (iWalk) which is an alternative to using elbow crutches and allows the user to be hands free.

b. That the Claimant had dilated cardiomyopathy and is under the care of the professional units in London. He may have sleep apnoea and a referral will be made to the Chest Physicians at Queen Elizabeth Hospital. If he has this condition treatment is available and successful.

c. That the Claimant was fit to carry out the proposed duties, with some adjustments during his reduced mobility after his ankle surgery.

There is no reference to the claimant having dyslexia.

3.6. On 1st January 2017 the claimant commenced employment with the Respondent in the role of Assistant Head Teacher – Head of Mathematics Faculty **[8].** The claimant's first day at school was on 3rd January 2017 .

3.7. On 27th January 2017 the claimant attended a Risk Assessment meeting in respect of the claimant's dilated cardiomyopathy with Hilary Rose. A risk assessment was completed **[180-182]**.

3.8. On 27th February 2017 Jenny Thompson commenced employment with the Respondent in the role of HR Manager.

3.9. In February 2017 the claimant received the date for his ankle surgery which was to take place on 31st March 2017 with an estimated 4-6 weeks recovery time.

3.10. After the school holidays, on 24th April 2017 the Respondent provided training on a new finance system, which the claimant missed as he was recovering from surgery. **[333]**. The claimant completed the training on 29 June 2017 **[207/8]**

3.11. The claimant returned to work on 15th May 2017, commencing a month long phased return **[187]**. The claimant attended a Return to Work meeting with Roger McBrien and Jenny Thompson **[334].** At this meeting, adjustments were discussed and made including having a set base to limit movement, a reduced timetable and continued use of the disabled parking space.

3.12. At a phased return to work review with Jenny Thompson on 19 May 2017, the claimant made reference to the fact that he suffered from dyslexia. The claimant indicated that he would inform the school about software he had previously used to assist

with his dyslexia and which he had found helpful. This was the first occasion that the claimant had raised the issue of his dyslexia. We accept Ms Thompson's evidence that no names of aids were provided at the meeting but that the claimant indicated he would provide a list of aids that he had used at his previous place of work. No details were provided at the meeting itself. We prefer Ms Thompson's recollection of this meeting. There was no follow up or chase from the claimant which might have been expected and no surprise expressed when Ms Thompson chased him for details in September.

3.13. The claimant was absent for two days on 21 and 22 June 2017 with heat or sun related problems in connection with his cardiomyopathy. He was also absent on 7 and 19 July 2017 with chest problems

3.14. On 24 August 2017 GCSE results were published nationally. Mr McBrien told the Tribunal that the progress for the school was good (in the second quintile nationally) despite the progress in Maths being significantly below national and in the bottom quintile. On that day, he spoke with the Claimant in his office regarding the results for Maths. It is this occasion which is the basis for the first S15 EqA allegation at § 1.1.1. in the LOI albeit wrongly referred to as 19 August 2017.

3.15. The claimants account of that meeting records Mr McBrien as saying "*You weren't there for three months and it certainly showed. When you are there it is better and very noticeable when you are not - I do not want a part time head of maths".* The claimant says that the head teacher went on to say that if absence was an issue then they needed to have an open and frank conversation.

3.16. Mr McBrien' s witness statement at § 25 deals with that meeting:

> "…. *I do not recollect the exact words I used at this meeting, but in essence I was affirming to the Claimant that I believed in his ability to make a difference when present but that we were failing the students because of the lack of leadership in maths, his absence from his classes and the lack of his influence on raising standards amongst his team. Our purpose at Moseley is to overturn the disadvantages faced by our students and enable them to achieve success in examinations that will open doors for their future. We were clearly failing to achieve this in maths. I was flagging up to the Claimant that we would have to find a different way of managing the situation to enable the students to achieve their potential in maths."*
>
> We accept Mr McBrien's evidence about the thrust of that meeting.

3.17. On 8th September 2017 the claimant attended an exam scrutiny meeting with the Head Teacher and others. Mr McBrien had asked each of the heads to complete a results analysis document. The claimant had prepared a written report into the results and what went wrong. The Head Teacher was not happy with the quality of the written report and said so at that meeting. He was of the view that the report provided by the claimant and his head of KS4 failed to provide an adequate analysis of the outcomes and failed to identify causes and remedies. He was of the view that the report gave him no confidence they understood what needed to change.

3.18. In his witness statement at paragraph 22, the claimant says that Mr McBrien told him "*You have given me absolute tosh. You've shown in this document that you do not have a handle on what went wrong at all."* Later in the meeting, the claimant told us that Mr McBrien said *"Through talking this through today, I'm reassured that you do actually know what the problems are as*

opposed to what this shite was telling me". The claimant was asked to prepare a presentation to the Governors in respect of the results titled "Why we let down Year 11". No allegation of discrimination is made in respect of that meeting.

3.19. After the exam scrutiny meeting on 8 September 2017, the claimant went to see Ms Thompson and he asked for a referral to Occupational Health. A referral was not made at the time. Ms Thompson's evidence was that the claimant discussed that he had had a challenging meeting earlier that day regarding Maths examination results. The claimant appeared upset emotionally and so the Employee Assistance Service was offered, which is a 24-7 free confidential support and helpline for all employees. The decision to not refer him to Occupational Health was based on how the claimant was presenting at that time, which was emotionally upset. She went on to say this at § 24 of her witness statement:

> *"The Claimant in his grievance stated that he was having heavy palpitations as a result of the exam scrutiny meeting hence the request to be referred to Occupational Health. If this was the case the required action that I would have taken and knowing his medical condition was to call 999 for the emergency services, and not refer to Occupational Health. School first aiders were not contacted to assist this meeting as there was no evidence to suggest that the Claimant was having palpitations"*

Ms Thompson denied saying all that OH would do is write a report at the time. We accept that evidence and regard it inherently unlikely that such a remark was made.

3.20. On 14th September 2017, Ms Thompson wrote to the claimant chasing the claimant for details of proposed software to assist with the claimant's dyslexia. The claimant responded with suggestions **[230-231]. I**n her evidence to the Tribunal, Ms Thompson told us that she got in touch with the HR administrator

to order the appropriate software. This was paused as a result of the claimant's absence and for Ms Thompson to have further liaison with the claimant after his resignation letter.

3.21. On 19th September 2017 the claimant gave the presentation to the Governors in respect of Year 11.

3.22. On 22 September 2017, the claimant met with the head teacher in a meeting described by Mr McBrien as a return to work meeting following his absence the previous day.

3.23. Whilst there is some measure of agreement, the claimants account of that meeting differs from that of Mr McBrien in a number of material aspects. According to the claimant, he was asked "*Can you cope"* by the head teacher, he went on to say "*We then need to think carefully about how we move forward because I do not want a part time head of maths".* The claimant says that Mr McBrien also said *"I'm close to losing my job and I will undermine you if I have to in order to get the job done. Even Dave will undermine you if he has to*." Dave was the claimant's line manager.

3.24. Mr McBrien's evidence was that he did not recollect the exact words used at the meeting but that one of the purposes of a return to work meeting was to ascertain the reasons for absence and the employees fitness for work. He told us that he was inquiring how the claimant was coping in the new term with strategies that had been agreed upon and it was reasonable to remind the claimant of the schools purpose to enable the students to achieve their potential. To achieve that end, Mr McBrien said he had a responsibility to ensure effective leadership of maths teaching. In his witness statement, he stated that if he recalled correctly, he had said to the claimant that he did not want to undermine the claimant but if it was necessary to ask others to do aspects of his role to get the job done then he will have to do this.

We accept Mr McBrien's evidence of that meeting. The first 2 quotes attributed to Mr McBrien by the claimant are not inconsistent with his account.

3.25. In cross examination, he denied being under particular pressure from the governing body on a number of occasions. It is unlikely that he would have said he was close to losing his job in those circumstances. We regard his explanation in his witness statement as to how the word “undermine” was used at that meeting as more likely than the threat he is said to have made by the claimant. Though we note that he was unsure if he did use the word “undermine” in cross examination. We accept his evidence that this was a return to work meeting about understanding absence, checking on the employee’s welfare and seeing what could be done to prevent further absences. He did not accept the claimant’s account of that meeting when it was put to him in cross examination and rejected the suggestion that he conveyed the notion that the claimant was not up to the job. Indeed, he had told the claimant that he had every confidence that the claimant could “turn it around”. He also denied that, at that meeting, matters such as the claimant’s heart condition hospital appointments and his requests for OH intervention were weighing on his mind. He rejected the suggestion that the purpose of the meeting was to get the claimant to resign promptly “or else” or that the meeting was to ventilate his frustration at the claimant’s absences. Again, we accept that evidence.

3.26. The claimant resigned by email on 23 September 2017 **[235].** Mr MCBrien acknowledged receipt by a letter dated 29 September 2017 **[239].**

3.27. The claimant was then signed off work until his termination date and his last day of employment was 31 December 2017.

3.28. On 10 November 2017 the claimant was offered the opportunity to meet with the HR manager or have an OH assessment. On 8 December 2017, a stress risk assessment was undertaken **[248-255]**

3.29. On 11 December 2017 the claimant filed a formal grievance alleging disability discrimination, a failure to make reasonable adjustments and discrimination arising from disability and harassment **[269-272].** By a letter dated 15 May 2018 the grievance was dismissed **[332-337].** The claimant lodged an appeal against the dismissal of his grievance which was rejected by letter dated 9th October 2018 **[437-440].**

3.30. On 1 January 2018 the claimant commenced employment with the Woodfield Academy. On 5 March 2018, an occupational health report was prepared at the behest of the claimant's new employer **[314-316].**

3.31. The claimant issued proceedings on 20 February 2018

4. THE LAW

The Parties submitted Closing Skeleton Arguments and a bundle of authorities. Few actual references were made to the case law in closing submissions. We, of course, carefully considered the written and oral submissions in the course of our deliberations and no discourtesy is intended to the industry of Counsel by not specifically referencing every submission made, or authority relied on, by the parties.

Jurisdiction

4.1 The relevant provisions of the Equality Act 2010 are:

"123 Time limits

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable

…

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it"

"Continuing Act"

4.2 We considered **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548, CA and **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530, CA in respect of the correct approach to continuing acts. The Tribunal should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.

"Just and equitable"

4.3 The tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b), EqA 2010). A tribunal has a wide discretion when considering whether it is just and equitable to extend time, and an appeal against a tribunal's

decision should only be allowed if it had made an error of law or its decision was perverse.

4.4 The Tribunal also had regard to the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 cautioned against over-reliance on the "Keeble factors" at § 37:

"37. The first concerns the continuing influence in this field of the decision in Keeble. This originated in a short concluding observation at the end of Holland J's judgment in the first of the two Keeble appeals, in which the limitation issue was remitted to the industrial tribunal. He said, at para. 10:

> **"We add observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which starts by inviting consideration of all the circumstances including the length of, and the reasons for, the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised."**

The industrial tribunal followed that suggestion and, as we have seen, when there was a further appeal Smith J as part of her analysis of its reasoning helpfully summarised the requirements of section 33 (so far as applicable). It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the

factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

4.5 **Adedji** also serves a reminder that time limits are applied strictly in ETs at § 24:

"24. At para. 35 she says that there is a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals. The former point is unexceptionable. The latter reflects a statement made by Auld LJ at para. 25 of his judgment in Robertson. That statement was the subject of some discussion in the later decision of this Court in Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327 (per Wall LJ at paras. 24-25 and Sedley LJ at para. 31), but it is not a ground of appeal that the Judge's reference to that statement constituted a misdirection, and in any event I do not think that it did."

<u>Discrimination arising from disability</u>

4.6 Section 15 of the EqA 2010 provides:

" **(1) A person (A) discriminates against a disabled person (B) if**

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

4.7 No comparator is required. Section 15 discrimination requires only that the disabled person shows that they have experienced unfavourable treatment because of something connected with a disability.

4.8 The EAT in **Pnaiser v NHS England and another** [2016] IRLR 170 summarised the correct approach at §31:

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

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never

has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* 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) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of *Weerasinghe* as supporting this

approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

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

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

4.9 As regards unfavourable treatment, §5.7 of the Equality and Human Rights Commission's Code of Practice on Employment states that it means that the disabled person '**must have been put at a disadvantage'.**

4.10 The Tribunal also noted §§5.20 and 5.21 of the EHRC Code:

"**5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (see Chapter 6).**

5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …"

Actual and constructive knowledge of Disability

4.11 A respondent must know 3 things for actual knowledge, firstly the nature of the impairment; secondly that the impairment has a substantial adverse effect on day-to-day activities; and thirdly it is long-term or likely to be long-term.

4.12 The EHRC Code provides guidance on the issue of knowledge:

§6.21
"If an employer's agent or employee … knows, in that capacity, of a worker's disability, the employer will not usually be able to claim that they do not know of the disability."

See also §5.14 and §5.15 reproduced in the extract from **Av Z Ltd [2019] IRLR 952 below.**

4.13 The Supreme Court in **A v Z** laid down the following guidance, per Lady Hale:

'23. In determining whether the employer had requisite knowledge for s 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:

(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see… [2018] ICR 1492 CA at para 39.

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see *Donelien v Liberata UK Ltd* (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see *Pnaiser v NHS England* (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see [2018] EWCA Civ 129, [2018] IRLR 535 CA at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see *Herry v Dudley Metropolitan Council* [2017 ICR 1610 per His Honour Judge Richardson, citing *J v DLA Piper UK LLP* … [2010] ICR 1052, and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

> **" 5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.**
>
> **5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making inquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."**

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (*Ridout v T*

***C Group*… [1998 IRLR] 628; *Alam v Secretary of State for the Department for Work and Pensions….* [2010] ICR 665.**

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code"

Objective Justification/Legitimate aim/Proportionality

4.14 The test for objective justification is unlike the band of reasonable responses test - **Hardy & Hansons plc v Lax** [2005] EWCA Civ 846, [2005] IRLR 726.

4.15 The EHRC code provides:

§4.28
"**The concept of 'legitimate aim' is taken from European Union (EU) law and relevant decisions of the Court of Justice of the European Union (CJEU) – formerly the European Court of Justice (ECJ). However, it is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence."**

§4.29
"Although not defined by the Act, the term 'proportionate' is taken from EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."

§4.30
"Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to

achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'

4.16 Whilst the burden is on the respondent to adduce evidence in respect of the legitimate aim it advances, that is subject to this caveat:

"It is an error to think that concrete evidence is always necessary to establish justification… Justification may be established in an appropriate case by reasoned and rational judgement. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions."

Per Chief Constable of West Yorkshire Police and anor v Homer [2009] ICR 223, EAT

4.17 **Hampson v Department of Education and Science** [1989] ICR 179 identifies 3 elements that a respondent must establish, namely

i. the policy alleged to be discriminatory corresponds to a real need on the part of the employer;

ii. that the policy is appropriate with a view to achieving the employer's objective; and

iii. that the policy is 'necessary' for this purpose.

4.18 The respondent who successfully negotiates the "Hampson" test must also objectively justify the legitimate aim and show that the reasons for its imposition are sufficient to overcome any indirectly

discriminatory impact. Is the PCP a proportionate means of achieving a legitimate aim.

4.19 In **MacCulloch v ICI [2008] IRLR 846**,the EAT set out he position as follows:

> **"(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].**
>
> **(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31**
>
> **(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].**
>
> **(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA."**

Reasonable adjustments

4.20 Section 20 EqA 2010 provides insofar as is material:

> **"Duty to make adjustments**
> **(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
> **…**
> **(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

Paragraph 20 of Schedule 8 of the EqA 2010 provides**:**

> **"20(1)A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
> **(a)in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;**
>
> **(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."**

4.21 According to Section 212(1) EqA 'substantial' means more than trivial. This is a question of fact to be assessed on an objective basis and is not a high threshold to satisfy.

4.22 The Claimant is required to establish a prima facie case that the duty to make reasonable adjustments has arisen and that there are

facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has not been complied with.

4.23 An employer has a defence to a claim for breach of the statutory duty (and, in fact, is relieved of any legal obligation to make reasonable adjustments) if it does not know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP.

4.24 That proposition has to considered against the backdrop of §6.19 of the EHRC Employment Code:

> **"For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment."**

BURDEN OF PROOF

4.25 The Tribunal also considered S 23(1) EqA and the correct approach to the burden of proof as set out in **Igen V Wong** [2005] IRLR 258.

4.26 The case law on the reversal of the burden can be seen as an attempt to analyse the formulaic approach of the statute to the timeless question of the "reason why". Underhill J. (as he then was) said this in **A Gay v Sophos plc** UKEAT/0452/10/LA:

27 "It is now very well-established that a tribunal is not obliged to follow the two-stage approach: see Laing v Manchester City Council [2007] ICR 1519 , at paras. 71-77 (pp. 1532–3) (approved in Madarassy). If it makes a positive finding that the acts complained of were motivated by other considerations to the exclusion of the proscribed factor, that necessarily means that the burden of proof, even if it had transferred, has been discharged."

4.27 The then President of the EAT, Simler J. opined in **Pnaiser v. NHS England and another** [2016] IRLR 170:

38 "Although it can be helpful in some cases for tribunals to go through the two stages suggested in Igen v Wong, as the authorities demonstrate, it is not necessarily an error of law not to do so, and in many cases, moving straight to the second stage is sensible"

4.28 Following the guidance given by the EAT in **Barton v. Investec Henderson Crossthwaite Securities Ltd** [2003] IRLR 352, as developed and refined by the Court of Appeal in **Igen Ltd v. Wong and others [2005] IRLR 258 & Madarassy v. Nomura International plc [2007] IRLR 246**, the burden of proof in a discrimination claim falls into two parts.

Stage One

4.29 Firstly, it is for C to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that R has committed an act of discrimination which is unlawful. (The outcome of the analysis by the tribunal at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.)

4.30 If C does not prove such facts, he/she must fail.

Stage Two

4.31 Secondly, where C has proved facts from which it could be inferred that R has treated C less favourably on proscribed grounds, then the burden of proof moves to R.

4.32 It is then for R to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

4.33 To discharge that burden it is necessary for the R to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the proscribed grounds of which complaint is made.

4.34 That requires a tribunal to assess not merely whether R has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not any part of the reasons for the treatment in question. If R can do this, the claim fails.

4.35 Since the facts necessary to prove an explanation would normally be in the possession of R, a tribunal would normally expect cogent evidence to discharge that burden of proof.

4.36 If the burden is not discharged, the tribunal is bound to find that discrimination has taken place.

4.37 As observed by Langstaff J. (EAT President, as he then was) when considering whether "stage one" has been satisfied by a claimant in a discrimination claim:

> "*It has been so well-established as to be trite that the bare facts of a different status and a difference in treatment are insufficient to achieve this; they only indicate a possibility of discrimination".* – *Millin v. Capsticks Solicitors LLP - UKEAT-0093/14 and UKEAT/0094/14.*

5. CONCLUSIONS

5.1 The Tribunal addresses the issues identified in the LOI annexed hereto which are not reproduced in full in this section.

Time limits: Issues 3.1 – 3.3

5.2 Although appearing at the end of the LOI, it is convenient to deal with time jurisdiction points at the outset of our conclusions.

5.3 The first S 15 EqA claim relating to 24 August 2017, Issue 1.1.1 is out of time as the last day any alleged act of discrimination could be in time is 15 September 2017, unless considered to be part of a continuing act or time is extended by the Tribunal.

5.4 We do not accept the submission that this allegation is to be seen as a continuing act with the second S15 EqA allegation on 22 September 2017, which is in time. Both alleged acts of discrimination stand on their own. We decline to extend time on just and equitable grounds for the reasons given below.

5.5 We turn to consider the time points in respect of the reasonable adjustments claims. In so doing, we bear in mind the submissions made by the claimant in respect of time at §§ 20 to 24 of the written closing submissions.

5.6 The Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR1194 said this regarding the correct approach to time in respect of a failure to make reasonable adjustments:

> **" 14. Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20(3) of the Equality Act 2010 , the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the**

relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired. *1200

15. This analysis of the mischief which section 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. This is further supported by the decision of the Court of Appeal in Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170 .

5.7 We also bear in mind the guidance and example in the EHRC code at Chapter 15:

"4.24 Sometimes, however, the unlawful act is an employer's failure to do something. The Act says that a failure to do a thing occurs when the person decides not to do it. In the absence of evidence to the contrary, an employer is treated as deciding not to do a thing when they do an act inconsistent with doing the thing.

4.25 If the employer does not carry out an inconsistent act, they are treated as deciding not to do

a thing on the expiry of the period in which they might reasonably have been expected to do the thing."

5.8 We reminded ourselves of the remarks of Lloyd L.J. in **Matuszowicz** which is a case brought under the DDA**:**

"21. This analysis seems to me to lead clearly to the conclusion that, in the context of this legislation and of the duty to make reasonable adjustments, even if the employer was not deliberately failing to comply with the duty, and the omission to comply with it was due to lack of diligence, or competence, or any reason other than conscious refusal, it is to be treated as having decided upon it at what is in one sense an artificial date. Certainly it may not be a date that is readily apparent either to employer or to employee. The date is imposed for the purposes of starting time running under the enforcement provisions of the 1995 Act. I therefore accept Mr Siddall's submission for the council that the regime created by Schedule 3 paragraph 3 applies not only to that which is objectively a deliberate omission but also to that which is not truly a deliberate omission but is treated as one, as of a given date, for the purposes of this paragraph.

28….It is ironical that, in the context of time limits, it would be in the interests of the council to allege that it might reasonably have been expected to have dealt with the position much earlier than it actually did, whereas it would be in the employee's interests to assert that it would have taken as long as it in reality

did, so as not to give rise to an earlier date as the starting date under Schedule 3 paragraph 3 .

5.9 When then did time start to run in this case? It is the claimant's case that as of 20 May 2017, or a short period thereafter, the respondent had either actual or constructive knowledge of both disability and substantial disadvantage such that it ought to have acted by purchasing equipment to alleviate the disadvantage he suffered. That case was specifically put to Ms Thompson in cross-examination even though she rejected the proposition.

5.10 Applying that logic to all the adjustments advanced by the claimant, we find that the respondent could reasonably have been expected to act in the period after the communication of the claimant's condition and the end of the school year at the latest. No specific date was adduced in evidence but from the material before us, we know that August was vacation and so we take the last day of July 2017 as the cut-off point or the actual date term ended if earlier. We considered and rejected the alternative cut-off date of the beginning of the new school year but even that more favourable approach would still be before 15 September 2017 and still be out of time. We find that all the reasonable adjustment claims are out of time.

5.11 We turn to consider whether time should be extended on just and equitable grounds. The matter is put thus in the claimant's written submissions:

> *20. By the time of C's resignation, he was very unwell, and extremely concerned his depression would worsen. C was signed off between 26 September and 31 December 2017 as unfit to work as a result of the combination of his heart condition and his stress (fit notes at 236, 241). He engaged his union to assist, and both attempted to actively resolve the issue via an internal grievance process.*
>
> *21. Far from there being any prejudice to R, between December 2017 and April 2018, R engaged in a very*

laborious grievance and appeal process. That process was fatally compromised by JT's role as an informal adviser to the Chair of the Board of Governors, when as principle culprit, she should not have been involved at all, and R's strategy of going on the defensive, including claiming that C had never mentioned his dyslexia before resigning and first mentioned his dyslexia on 19 December 2017 (MO§22), and falsely claiming C had never responded to JT's email of 14 Sept (MO§23) when it must have been obvious from the correspondence that C had replied on the same day (230). However, the fact R was running its own inquiry, and seeking out and preserving documents at the time, mean there is no prejudice to R in hearing the case now. "

5.12 We took those matters into account and gave them such weight as we felt appropriate. We also took into account Mr Oley's evidence in considering this issue. Ultimately we were not persuaded that it would be just and equitable to extend time. The claimant first contacted his Union on 25 October 2017 and he was supported throughout the internal processes. The fact that the claimant and his Union representative were able to devote the time and attention that they did to those processes tells against an extension of time. ACAS were not contacted till 14 December 2017 and the claim not issued until 20 February 2018.

5.13 We take the approach advanced by Underhill LJ in **Adedji** below as well as the reminder that time limits are applied strictly as a matter of public interest**:**

" 37 ….. The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

5.14 In respect of the first s15 EqA allegation on 24 August 2017, there has been no specific explanation as to the delay for the period before ill health became an issue.

5.15 The time for the reasonable adjustments claim began to run from the end of July 2017 on our findings. The passage from the claimant's submission on just and equitable extension only addresses the period from resignation onwards. In any event we have not found the claimant's health looked at in the overall context of the chronology to be such as to displace the usual application of the time limits. We have, of course, taken into account the relative lack of prejudice to the respondent in that it has been able to preserve documentation. However, our conclusion remains unchanged.

Issues 1.1 – 1.5: Disability related discrimination

5.16 Issue 1.1.1:

As above indicated this allegation we have taken to refer to the day of the GCSE results namely 24 August 2017. On balance we accept the evidence of Mr McBrien as to the content of that meeting. We go on to find that whatever words were actually used (even if the words attributed by the claimant to the Head Teacher were used), they expressed a legitimate concern about the lack of leadership in maths and exploring a way of managing the situation. As such we do not find that to be unfavourable treatment. That is enough to dispose of this allegation however we consider the other issues that would have required determination if we had found unfavourable treatment.

5.17 We are not satisfied that the treatment was done because of the claimant's *disability related* absences, past and future. At that stage, of some 30 days of absence, only 5 can be said to relate to any relevant disability with 25 days off in respect of his ankle operation and recovery **[187].** We focus at this stage of the exercise (§31(b) of **Pnaiser**) on the conscious or unconscious

thought process of the Head Teacher (noting that motive is irrelevant) before going on to consider the objective question of causation (§31(f) of **Pnaiser**). We do not find that the "something" that is said to have caused the alleged unfavourable treatment had a significant or more than trivial influence on the facts. No such conversation was likely to have taken place had the claimant not had to take 25 days off in consequence of his ankle difficulty. The substantial bulk of the absences cannot be said to have arisen because of the claimant's disability.

5.18 Further, we would have found that the exchanges on that day were a proportionate means of addressing the respondent's legitimate interest in running an effective and efficient school. In cross examination, the claimant accepted that it was appropriate for the Head Teacher to tell him that he had a duty to the maths students and that he would intervene with the claimant and his team to get that outcome. He also accepted that, if the school identified failings in maths teaching, it was legitimate and the Head Teacher's prerogative to intervene. We agree.

5.19 With regard to the respondent's knowledge of the claimant's disability. This was known to the respondent since 19 May 2017 when he revealed it to Jenny Thompson. Mr McBrien's recollection was that he had not been made aware of the claimant's dyslexia until some time in September 2017. In this regard, we took into account evidence that emerged in the claimant's cross-examination. He accepted that there was nothing in the papers to indicate that he had told the Head Teacher and that he recalled telling him in early September. The claimant was depending on Ms Thompson to have alerted him earlier.

5.20 Issue 1.1.2:

This is the exchange between the claimant and Mr McBrien on 22 September 2017. As above indicated we prefer the account of Mr McBrien of that occasion with particular reference to the use of the word “undermine” in the context of that conversation. We have also found that Mr McBrien was not under any particular pressure and is unlikely to have said anything about losing his job. As with the conversation on 24 August 2017, even if the words ascribed to Mr McBrien regarding coping and thinking about a way to move forward were said, that did not amount to unfavourable treatment and this allegation also fails at the first hurdle.

5.21 Should we be wrong in our conclusion on unfavourable treatment, our reasoning in respect of the other elements of this claim mirrors our findings in respect of the first S 15 EqA allegation. They equally apply albeit that there were a few more disability related absences. In cross examination, the claimant agreed that the bulk of his absences related to his ankle.

Issue 2: Reasonable adjustments

5.22 Issue 2.1.1:

The 1st PCP relied on was a PCP that the claimant was required to do work which involved him writing and taking notes.

5.23 Ms Thompson accepted that this was an expectation of all teachers.

5.24 The respondent disputed that there was evidence of substantial disadvantage, much less that the respondent knew or could be reasonably be expected to know that the claimant was likely to be put to substantial disadvantage. We accept that submission.

5.25 The claimant was not prevented by his dyslexia from completing those tasks even though others might be quicker. The respondent points to there not having been any such issues between January

and May 2017 as well as his dilatory response to providing a list of aids till prompted in mid-September 2017. The information given to the respondent by the claimant was a 17-year-old Psychological Assessment produced in the specific context of the special arrangements required for the claimant's examinations and future assessments. We do not find that this was enough to establish present substantial disadvantage or knowledge of same by the respondent.

5.26 If we are wrong about that, we consider whether there was a failure to provide the claimant with dictation software and/or a Dictaphone. The failure to provide a scribe was not pursued.

5.27 In terms of chronology, we do not accept that it would have been appropriate for the respondent to have purchased equipment or software until the claimant had indicated what was required. We agree with the submission that it would be an unreasonable adjustment to purchase equipment the claimant either could not or would not use. We have accepted Ms Thompson's evidence that she passed on the request to HR administration once received but that this was paused in light of the claimant's resignation and absence on ill health grounds. This claim is rejected accordingly.

5.28 Issue 2.2.1:

This PCP relates to the allegation that the respondent required the claimant to undertake a heavy workload between August and September 2017.

5.29 In respect of this PCP, the tribunal was not taken to any, or any compelling, evidence in support of the suggestion of a heavy workload during this period. August is a holiday month and staff were free to come in on results day but not obliged to do so. The first week of September was also holiday and the rest of September necessitated no more than the normal workload of the

start of a new school year. The claimant referred to doing reports and dealing with stock cupboards.

5.30 Further, we find that this allegation is unsustainable in light of the evidence given by the claimant in cross-examination. In order that there was no doubt about what the claimant was saying, part of his cross-examination was read back to him for confirmation. He agreed he was not expected to do a heavy workload in August. He further agreed that he could delegate and took ownership to do so in September. He went so far as to accept that he was no longer pursuing that point in consequence. At no point had the claimant indicated that he was struggling or that adjustments were needed or help was required.

5.31 We do not find that this PCP was established and so no question of reasonable adjustments arises. In any event we have already dealt with the issues of delegation/support and the provision of dictation software. Further, the claimant had completed training on the financial system on 29 June 2017. We also accept the submission that the respondent could not have known that adjustments were necessary or that the claimant had been placed at a disadvantage.

5.32 Issue 2.3.1:

This PCP alleges that the claimant was required to work at the weekend or late at night.

5.33 We took note of the claimant's submission at § 7 of the written submissions, namely:

"A PCP includes a practice which amounts to an "expectation or assumption placed upon an employee" including "real world expectations" which reflect the commercial needs of the organisation, it does not require any element of compulsion:

Carreras v United First Partners Research, *EAT, Unreported, 2016. "*

5.34 However, on the evidence before us we were not persuaded that any such PCP was placed on the claimant. We noted the evidence of Mr McBrien (§10 of his witness statement) that the respondent stipulates that colleagues are not expected to send or respond to emails after 6.00pm. This was not challenged though it was put to him that this was not communicated to the claimant.

5.35 One example relied on by the claimant was an email of 17 May 2017 in which the claimant was chased in respect of a reference in these terms *"Can you complete the reference for Jaques by tomorrow please".* We decline to make the inference suggested by the claimant that this meant "first thing tomorrow".

5.36 The claimant also agreed in cross-examination that in respect of another example relied on that there was no expectation that he should answer an email that night. This was in relation to the email from Jenny Thompson of 14 September 2017 chasing the claimant for details of aids which was sent at 21.05.

5.37 The highest the claimant put the position here was that there was no requirement as such from the respondent, no rule, but that it was a decision he made in the interests of the scenario he was in.

5.38 in light of our finding, no question of reasonable adjustments arises. If the PCP had been established, we would have found that there was no evidence that the respondent had knowledge of substantial disadvantage in respect of that requirement.

5.39 Issue 2.4.1:

Here it was alleged that it was a PCP of the respondent that its managers and staff spoke to the claimant and asked him questions

5.40 This PCP was characterised as absurd by the respondent. Whilst perhaps not going that far, we agree that the work of the school involving the claimant could not be carried on in silence and without human interaction. We entertain serious doubt that this can amount to a PCP in law or is a circumstance that the legislation was intended to cover. That said we consider the position on the basis that such a PCP has been established.

5.41 We do not find the evidence placed before us supports the suggestion that such a PCP put the claimant at substantial disadvantage much less that the respondent had knowledge of any such substantial disadvantage. As the respondent points out, the claimant felt able to engage in conversations without telling anyone of his impairment or any difficulty for almost five months. A further four months passed before the claimant directed the respondent to any aids to assist him and he still made no mention of this alleged difficulty.

5.42 Nor did the claimant suggest that people should not talk to him or should be patient with him when they do. The tribunal was not taken to any evidence that others were impatient with him in their interactions or any other evidence of substantial disadvantage in comparison to employees without dyslexia.

5.43 We further find that not only was there not a need to make allowances or raise awareness in those circumstances but that it was the claimant's specific instruction to Ms Thompson not to tell anybody of his Dyslexia apart from the Head Teacher. We reject the suggestion that highlighting on notes of a Line Management meeting held with the claimant on 15 September 2017 demonstrate that the claimant told his line manager of his dyslexia. We decline to make that inference.

5.44 In sum, if there was such a PCP, the respondent was not aware of any substantial disadvantage and it would not have been

reasonable to make the adjustments contended for by the claimant based on our findings. This claim fails accordingly.

5.55 The claims all fail and are dismissed.

Employment Judge Algazy QC

Signed on **28 February 2022**

ANNEX

1. Discrimination arising from disability (section 15 Equality Act 2010)

1.1 Did the respondent treat the claimant unfavourably?
The alleged treatment relied on is that

1.1.1 on or around 19 August 2017 Mr Roger O'Brien, the headteacher, made critical comments to the claimant relating to the claimant's absences, some of which absences had been disability related;

1.1.2 in a meeting on 22 September 2017 Mr O'Brien treated the claimant with discourtesy and subjected him to pressure and made the comments "Can you cope?" and "I can't have a part time head of Maths."

1.2 Was such treatment done because of the claimant's disability-related absences, both past and anticipated in the future?

1.3 Did such absences arise in consequence of the claimant's disability?

1.4 Was such treatment a proportionate means of achieving a legitimate aim?3

1.5 Has the respondent shown that at the relevant time it did not know, and could not reasonably be expected to know, that the clamant had the disability in question?

2. Reasonable adjustments (sections 20 and 21 Equality Act 2010)

2.1 **The first PCP**

2.1.1 Was it a provision, criterion or practice ("PCP") of the respondent's that the claimant was required to do work which involved him writing and taking notes?

2.1.2 Did such PCP put the claimant at a substantial disadvantage compared with people who are not disabled? The claimant asserts that his dyslexia causes him difficulty in processing information and writing.

2.1.3 Was it reasonable for the respondent to have to take any or all of the following steps to remove the said disadvantage?

(a) Providing the claimant with dictation software;

(b) providing him with a scribe;

(c) providing him with, or at any rate permitting him to use, a dictaphone to record meetings?

2.1.4 Did the respondent fail to take such steps?

2.2 The second PCP

2.2.1 Was it a PCP of the respondent's that it required the claimant to undertake a heavy workload August to September 2017?

2.2.2 Did such PCP put the claimant at a substantial disadvantage compared with people who are not disabled? The claimant asserts that

(a) his dyslexia causes him difficulty in processing information;

(b) the effects of work-related pressure and stress cause him problems with his heart including palpitations and dizziness;

(c) the effects of items (a) and (b) above interact with and aggravate each other

2.2.3 Was it reasonable for the respondent to have to take any or all of the following steps to remove the said disadvantage?

(a) Delegating part of his workload to others and providing them with training if needed;

(b) otherwise reducing his workload;

(c) providing him with dictation software;

(d) extending his training period for the new financial system which had just been introduced by the respondents;

(e) providing him with extra administrative support.

2.3 The third PCP

2.3.1 Was it a PCP of the respondent's that it required the claimant to work at the weekend or late at night?

2.3.2 Did such PCP put the claimant at a substantial disadvantage compared with people who are not disabled? The claimant asserts that

(a) his dyslexia causes him difficulty in processing information;

(b) weekend or late night working cause him pressure and stress which cause him problems with his heart including palpitations and dizziness.

2.3.3 Was it reasonable for the respondent to have to take the following step to remove the said disadvantage?

(a) Not requiring him to work at the weekend or late at night.

2.4 The fourth PCP

2.4.1 Was it a PCP of the respondent's that its managers and staff spoke to the claimant and asked him questions?

2.4.2 Did such PCP put the claimant at a substantial disadvantage compared with people who are not disabled? The claimant asserts that his condition causes him to be slow in responding to questions which can cause a negative reaction in the people with whom he is speaking.

2.4.3 Was it reasonable for the respondent to have to take any or all of the following steps to remove the said disadvantage?

(a) Making allowances for him, and being patient, when asking questions;

(b) raising awareness of staff and colleagues in relation to the claimant's slowness in responding to questions.

2.5 Did the respondent fail to take the steps referred to in paragraphs 2.1.3, 2.2.3, 2.3.3 and 2.4.3 above?

2.6 At the relevant time did the respondent know, or could it reasonably be expected to know:

2.6.1 that the claimant had a disability; and

2.6.2 that the claimant was likely to be placed at the disadvantage referred to in each of paragraphs 2.1.2, 2.2.2, 2.3.2 and .4.2 above?

3. Time limits (section 123 and 140B Equality Act 2010)

3.1 Does the tribunal have jurisdiction to consider the claimant's claims having regard to the applicable time limit set out in section 123, as adjusted by section 140B, of the Equality Act 2010, having regard to the following questions:

3.1.1 When was the act in question done?

3.1.2 In relation to an omission, when is the omission to be treated as having occurred (s123(3)(b) and (4) Equality Act 2010)

3.1.3 Did the act or omission form part of conduct extending over a period and if so when did that period end?