EMPLOYMENT TRIBUNALS

Claimant
Mr J Court

v

Respondent
The Governing Body of Highfield School

Heard at: Watford

On: 4-7 July 2022 (in person on 4 -5 July, Hybrid hearing 6 July and remote hearing by CVP 7 July 2022; deliberations in chambers 12 August 2022)

Before: Employment Judge George
Mr M Bhatti
Mr A Kapur

Appearances

For the Claimant: Mr R O'Keeffe - Counsel
For the Respondent: Ms G Cheng - Counsel

RESERVED JUDGMENT

1. The respondent had actual or constructive knowledge that the claimant was disabled within the meaning of s.6 of the Equality Act 2010 from May 2019 onwards.

2. The claims of direct and indirect disability discrimination are dismissed on withdrawal.

3. The claim of discrimination arising in consequence of disability is not well founded and is dismissed.

4. The claim of disability related harassment is not well founded and is dismissed.

5. The claim of victimisation is not well founded and is dismissed.

6. For the avoidance of doubt, this means that all claims fail.

REASONS

1. Following a period of conciliation which lasted from the 24 June to 24 July 2020 the claimant presented a claim on 2 September 2020 by which he complained of various strands of disability discrimination and of victimisation and harassment related to disability. The claim arises out of his employment as the Facilities and Contracts Manager (hereafter the 'FCM') with the respondent school. His employment started on 1 November 2008 as a Site Manager and he was promoted to the Contracts and Facilities Manager with effect on the 18 April 2017. The respondent defended the claim and it was case managed by Employment Judge Bloom at a hearing on 21 April 2021. He ordered that the claimant produce certain further particulars of his complaints. Those were presented to the Tribunal and sent to the respondent on 12 May 2021.

2. For the purposes of the final hearing we had the benefit of an agreed bundle of documents which included numbered pages running up to page 680. After the claimant had concluded his evidence he applied to rely upon two payslips which were inserted into the bundle by consent at pages 681 and 682. Since some additional stroke pages had already been added to the file of documents this took the total number of pages in the electronic bundle, including the index, to 702. Pages in that bundle are referred to as pages 1 to 682 in these reasons. Ms Cheng had produced a opening skeleton argument which is referred to as RSA in these reasons. Mr O'Keeffe produced skeleton written submissions in closing which were sent to the Tribunal on the morning of day 4 and which are referred to in these reasons as CSA. A brief chronology was included in the RSA.

3. In addition, the parties relied upon the witness statement and oral evidence respectively of the claimant and, for the respondent, Neil Goddard and Caitlin Macrae. During the relevant period Ms Macrae was first the Deputy Head Teacher and then acting Head Teacher. She no long works for the respondent but had prepared a written witness statement upon which she was cross-examined. Where the respondent's witnesses (and other individuals from whom the Tribunal has not heard) are referred to by their initials in these reasons, no discourtesy is meant thereby.

4. Due to judicial resource the Tribunal was unable to sit in the afternoon of the fourth and final day for which the hearing was scheduled. The claimant is accepted by the respondent to be disabled by reason of anxiety and depression. He needed regular breaks in his evidence. At the start of day 2, he expressed concern at the presence in the CVP hearing of Ms Macrae and asked for her to be excluded. The Tribunal was unwilling to exclude Ms Macrae if that would inhibit the respondent 's ability to take instructions but Ms Macrae volunteered that she would leave and log back into the hearing to give her evidence. It is an unfortunate circumstance that there was at the start of this hearing no agreed list of issues and clarification of the issues took some little time on the morning of day 1.

5. Those matters together meant that it was not possible to deliver oral judgment with reasons during the time available for the hearing and judgment was reserved. There has been an unfortunately delay in production of this reserved judgment due to pressure of work, for which Employment Judge George apologises.

6. As note above, Judge Bloom considered that, in some respects, there were insufficient details of the claim and that further particulars would be desirable. When those were provided they did not in all cases answer the specific questions asked. The respondent took the point that in some cases the claimant sought by the further and better particulars to add to his claim which the respondent argued he should not be permitted to do.

7. Ms Cheng had made an attempt to identify in the RSA the heads of claim and particular complaints which the respondent argued it was able to discern on the face of the original particulars of claim and the further and better particulars. The heads of claim were

   7.1 Direct disability discrimination.

   7.2 Indirect disability discrimination.

   7.3 Discrimination arising in consequence of disability contrary to s.15 of the EqA.

   7.4 Failure to make reasonable adjustments.

   7.5 Harassment related to disability.

   7.6 Victimisation.

8. Mr O'Keeffe had drawn up a draft list of issues for discussion in which he sought to identify those complaints which had been brought and where they were to be found, according to the claimant.

9. Ms Cheng had had little opportunity to consider this prior to the commencement of the hearing. She made the points that, despite the claimant being legally represented throughout, this was a late attempt to codify the complaints and that no written application to amend the original claim had ever been made. Nevertheless, upon further reflection and having taken instructions the respondent took a proportionate approach to negotiating a list of issues.

10. Mr O'Keeffe's list was the subject of discussion and compromise between the representatives on behalf of their respective clients and we are extremely grateful for the constructive approach that the parties and their representatives took. They agreed a list of issues prior to the commencement of oral evidence. It was agreed between the parties that the agreed list of issues represented complaints which were either made on the face of the original particulars of claim or on the face of the further and better particulars. The respondent either accepted that any further detail was in the nature of

the permissible particularisation of an existing claim or did not object to any necessary amendment.

11. In the course of negotiating that list of issues the claimant agreed to withdraw the direct disability complaint and the indirect disability complaint and those are dismissed on withdrawal by this judgment. That left four heads of complaint of the 6 set out in para.7 above.

12. There was a further reduction of issues following evidence and in closing submissions. Of the nine alleged unlawful acts which were argued both to be s.15 discrimination arising from disability and disability related harassment, one was not pursued as was confirmed in closing submissions. Furthermore, in paragraph 31 of the CSA, prepared after evidence had been completed, it was confirmed on behalf of the claimant that the only detriment claim relied on under the victimisation complaint was that originally numbered issue 16.2 so the victimisation detriment claim was reduced from an original four to one.

13. It was also confirmed by the claimant on day 3 of the hearing that he was no longer relying upon an alleged PCP in relation to his reasonable adjustments claim that the respondents required employees to maintain a certain level of attendance. That had originally been the first PCP relied on. Furthermore, in closing submissions it was confirmed that two of the matters which the claimant had originally argued would have been steps that it was reasonable for the respondent to have to take to alleviate the substantial disadvantage were not being pursued.

14. We set out the agreed list of issues after removal of the matters which were confirmed either on day 3 or on day 4 as no longer being pursued but have retained the original numbering (and used a different font) for ease of reference.

List of issues

1. The respondent concedes that the claimant was disabled by reason of his anxiety and depression from May 2018.

2. What was the respondent's state of knowledge in respect of the claimant's disability prior to 18 May 2020 from which time the respondent concedes knowledge? We have reformulated this question as "Did the respondent have actual or constructive knowledge of disability prior to 18 March 2020? If so, from when?"

3. Did the following occur?

   3.1 …

   3.2 When the claimant returned to work in September 2018, his role was reduced to responsibility for health and safety, which amounted to a demotion, and Mr Goddard was given

responsibility for the contracts, and was no longer subject to the claimant's line management on a permanent basis. *Legitimate aim – it was agreed that the claimant's role was focused on the contracts management, and health and safety side of things whilst Mr Goddard would have the responsibility for the day-to-day management of the site in order to manager the claimants return to work to both alleviate as much stress as possible for him, and to ensure the smooth running of the school.*

3.3 In January 2020 Ms King deducted one or more days of pay from the claimant's salary for sickness absence despite knowing that this was disability related absence. *Legitimate aim – the respondent has a policy which is applied consistently towards employees that they may apply to have five extra paid days for absences due to disability.*

3.4 On 5 May 2020 Ms Macrae required work to be completed by strict deadlines stating that the claimant was a "*High H grade, and that's what is expected. To be brutal that is the job*" and that *"You've had a staggered return, that's good enough according to HR. Have you even told Neil that you are back to work? What do you expect to get done then?"* That showed a lack of sympathy and concern for the claimant. *Legitimate aim – the respondents concern was always to ensure that the claimants return to work would be managed in such a way as to both alleviate as much stress as possible for him, and to ensure the smooth running of the school.*

3.5 On 20 May 2020 the claimant was contacted by Ms Macrae and asked for his altered hours, when he indicated he was waiting for advice, she pressured him into providing an immediate response. *Legitimate aim – the respondents concern was always to ensure that the claimants return to work would be managed in such a way as to both alleviate as much stress as possible for him, and to ensure the smooth running of the school.*

3.6 On 2 June 2020 Ms Macrae gave the claimant a two-page document of tasks to be completed by the following week, which was unrealistic given the claimants altered hours. She said "*Ultimately the role is the role. You will need to attend weekly site team meetings. I don't think you're capable of doing your job. As soon as your altered hours end on 10 June, I will be following the health and attendance protocol.*" She handed the claimant a copy of the policy and said "*I suggest you read that.*" The claimant understood this was a threat of dismissal.

Legitimate aim – the respondents concern was always to ensure that the claimants return to work would be managed in such a way as to both alleviate as much stress as possible for him, and to ensure the smooth running of the school.

3.7 On or around 4 June 2020 the claimant was informed of the intended new management structure from September 2020 onwards, under which the claimant would report to Ms King rather than the Head Teacher and Mr Goddard would be promoted to equivalent seniority to the claimant. *Legitimate aim – the respondents concern was always to ensure that the claimants return to work would be managed in such a way as to both alleviate as much stress as possible for him, and to ensure the smooth running of the school.*

3.8 On 1 July 2020 Ms Macrae offered the claimant an alternative role which amounted to a substantial demotion from his current position. *Legitimate aim – the respondents concern was always to ensure that the claimants return to work would be managed in such a way as to both alleviate as much stress as possible for him, and to ensure the smooth running of the school.*

3.9 In July 2020 Ms King deducted one or more days of pay from the claimant's salary for sickness absence despite knowing that this was disability related absence. *Legitimate aim – the respondent has a policy which is applied consistently towards employees that they may apply to have five extra paid days for absences due to disability.*

Discrimination arising from disability (s.15 EqA)

4. Insofar as they are found to have occurred, were the matter described at paragraph 3 examples of the respondent treating the claimant unfavourably?

5. Were any or all of the following matters something arising in consequence of the claimant's disability?

5.1 The claimant's inability to cope with the full responsibilities of the Facilities and Contracts Manager role from April 2017 until July 2020.

5.2 The claimant's sickness absence between May and September 2018 and/or between January and April 2020 and in July 2020.

6. Was the claimant subjected to that treatment because of those matters?

7. If so, was that treatment a proportionate means of achieving a legitimate aim? The respondent's position with regards to any legitimate aim in relation to the various matters are set out in italics in paragraphs 3 of the list of issues above.

Harassment (s.26 EqA)

8. Was the respondent's conduct described at paragraphs 3 unwanted conduct?

9. Was it related to that claimant's disability?

10. Did it reasonably violate the claimant's dignity and/or create the prescribed environment for the claimant?

Failure to make a reasonable adjustment (s.20 EqA)

11. If such PCPs are found to exist did the respondent apply the following PCPs?

    11.1 …

    11.2 Requiring employees to be able to do all aspects of their roles at all times in order to retain those duties on a permanent basis.

12. Did those PCPs put the claimant at a substantial disadvantage in comparison with persons not sharing his disability? The substantial disadvantage alleged by the claimant is that compared with persons not sharing his disability the claimant was less likely to be able to comply with the requirement that he do all aspects of his role and more likely to have those duties removed on a permanent basis.

13. Did the respondent know, or could the respondent reasonably be expected to know that the claimant was likely to be placed at that disadvantage by their PCP?

14. Did the respondent take such steps as it was reasonable to have to take to avoid the disadvantage? The claimant alleges that the respondent should have taken the following steps:

14.1 Reallocating the claimant's duties from September 2018 on a temporary basis.

14.2 …

14.3 …

14.4 Enrolling the claimant onto the EAP at an early stage, for therapy/support.

14.5 Ms Macrae continuing to line manage the claimant.

14.6 Whilst the claimant was working altered hours, the claimant being given longer to complete tasks.

Victimisation (s.27 EqA)

15. Did the claimant do the following protected acts?

15.1 On 8 October 2019 the claimant telling Ms Macrae that he believed he had a case to sue the respondent under the Equality Act 2010 in that Mr Goddard had been given the claimant's job following the claimant's sickness absence.

16. Was the claimant subjected to the following detriments because he had done that protected act?

16.1 …

16.2 The claimant's role being diminished following his absence and transferred to Mr Goddard.

16.3 …

Limitation

17. Insofar as the allegations upheld took place or are deemed to have taken place prior to 4 May 2020, were they part of conduct extending over a period within the meaning of s.123 EqA and if not, should time be extended on just and equitable grounds?

Findings of Fact

15. We make our findings of fact on the balance of probabilities taking into account all of the evidence both documentary and oral which was admitted at the hearing. We do not set out in this judgment all of the evidence which we

heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

16. The claimant was initially employed at The Highfield School as a Site Manager. He states that his employment started on 1 November 2008 although a letter dated 19 January 2009 (page 72) sets out his details of employment and sets a start date of 1 January 2009 and the subsequent occupational health referral states that the employment started on 24 November 2008 (page 244). As a condition of that employment he was required to occupy the accommodation in the school's caretaker's house.

17. He was appointed to his present role of FCM on a six months' trial on 18 April 2017 (page 200). The position was to be reviewed after three months. The role was to be paid at H8 (point 30) on the Hertfordshire County Council pay scale "… plus occupation of the School House at HCC rental rates". The job description is at page 96 and it also states the Title and grade of post to be "Facilities and Contracts Manager; H8 + rental of The School House". It states that the post is responsible to the Headteacher. We have heard about the particular circumstances in which the claimant received this promotion; in brief they were that the school business manager at the school had left, the post was deleted and her responsibilities had been divided between 3 individuals at a time when the school was executing a significant building project.

18. Among the general professional responsibilities, it is specified that the post holder will work professionally alongside the HR Manager and Finance manager and work with minimum direct supervision. It is clear that the post holder will be expected to share with the caretaking team the (paid) tasks of attending at the school premises during sessions in evenings or weekends when the school is used for extended school activities or let to outside users.

19. In about May 2017, Mr Goddard (NG) was appointed Assistant Facilities and Contracts Manager in order to support the claimant. It seems to have been accepted that the FCM role was too much for one individual. The Assistant FCM job description is at page 195. It requires the post holder to "support" the FCM; to "work under the direction of" the FCM and to agree attendance in the evenings and at weekends for extended school activities or lettings.

20. The claimant passed the three month review on 13 September 2017 (page 209) and successfully completed probation in the FCM role on 16 November 2017 (page 214).

21. Unfortunately, the claimant started a period of sickness absence on 1 May 2018. His MED3 certificates covering the period 1 May 2018 to 5 September 2018 are at pages 111 to 116. They cite "headaches and stress" and then, from 15 May 2018, "anxiety with depression". His medical records (page 138) show that he was diagnosed with mixed anxiety and depressive disorder on

1 May 2018. The GP's record from the surgery on that date is at page 149. Various blood tests appear to have been carried out the previous month but this was the first diagnosis of this problem.

22. Towards the end of the first two weeks' absence, the HR function of the school provided advice to Tracy King about completing an occupational health (hereafter OH) referral form (page 238). The referral itself is at page 244. It is dated 23 May 2018 and the claimant alleged that it contained a factual inaccuracy, specifically that the claimant's absence from 1 May 2018 was the second absence since March. This was originally the subject of Issue 3.1 although no longer pursued as an allegation of unlawful treatment. In fact, the claimant had had a 9 day absence in March 2018 because of colds, ENT problems, headaches and high blood pressure (page 230). The inaccuracy was in referring to this as a period of "long-term" absence which is a term usually restricted to absences of at least 4 weeks.

23. The OH report at page 274 dated 26 June 2018 stated that the claimant was temporarily unfit for work until cleared by his GP and that there was an underlying medical condition which accounted for his absences which was likely to recur. He was reported to be managing his symptoms with prescribed medication and appeared to have improved in sleeping. "there are perceptions the stress/anxiety levels progressively got worse over a period of more than 18 months. Joe perceives that this has been caused by staff shortages mainly." In summary, the OH professional reported that the claimant perceived the stress causing his absence to be entirely work related and recommended a phased return, a meeting to explore the claimant's issues and a work stress risk assessment.

24. In the meantime, NG was told that his pay would be increased so that he would be paid at H8.1 from 1 May 2018 "for the duration of Joe's absence". It was made clear that it was to be paid "during Joe Court's absence in recognition of the work you have undertaken." (page 243a)

25. As indicated in that letter, NG received an amended terms and conditions of employment on 26 June 2018 which took effect from 1 May 2018 and which included the salary being at the bottom of the range applicable for the H8 grade. The contract amendment stated "The appointment is temporary from 01.05.2018, increase in salary to cover ill health of Joe Court for duration of absence only." (page 277)

26. In mid-July 2018, the claimant arranged to meet with Ian Morris (then the Head Teacher), Tracy King. He was accompanied by his Trade Union rep. The letter at page 286 indicates that TK sent the claimant a stress risk assessment form to be completed ahead of the meeting which took place on 20 July 2018. The respondent's minutes of that meeting (which have not been agreed by the claimant) are at page 287. They open with TK explaining that the purpose of the meeting was to look at the completed stress risk assessment form and see whether there were any adjustments or support that the school could offer. The claimant explained that he was sent these minutes some 6 months after the meeting and he was unable to agree that

they were accurate. On the other hand, he did not expressly challenge the accuracy of matters in those minutes which were relied on by the respondent.

27. For example, he accepted that he expressed the view at this meeting that he was happy doing management but found it difficult to cover for people when they were sick. He accepted that, when he was asked whether it would help him if NG was given site management and he was given paperwork he agreed and responded "that how I first imagined the role would be". He agreed in cross-examination that he agreed to that saying that he agreed to NG taking over the more physical aspect but didn't expect him to take over the contracts or the budget.

28. The claimant points to a comment by IM that he needs to ensure that the school kept NG. IM also said "We want you to come back into a role you are comfortable with and ensure we keep Neil to support you." He did not seem to object to the suggestion that NG be made the site manager, although it is fair to say that he does come across as not wanting to discuss NG's role. Our conclusion is that the discussion about NG was entirely in the context of agreeing delineation of roles on the claimant's return to work and, to that extent, could not be avoided. It was agreed that the claimant would return to work in September 2018.

29. There was a return to work meeting between the claimant and IM on 5 September 2018. The respondent's account of this meeting is found in the letter from IM to the claimant of that date (page 290). We have not heard directly from IM but it appears from the letter that the agreement was for the claimant to have a phased return to work over 4 to 6 weeks working whole days starting with 1 day a week then increasing to 2 days a week and so on. The claimant was told that he was only to be paid for the weeks worked, as this was the school policy, and IM asked to meet with the claimant each week to plan the next. The letter reflects a discussion about adjusting the content of the role to avoid what are called "key areas of stress".

> "This looks to be achievable by focussing your role on the contracts management and health & safety side of things, whilst Neil will have the responsibility for the day to day management of the site (e.g. managing the cleaners, staff rotas, day to day organisation etc.). This will be an evolving process but this seems to be a sensible starting point."

30. There is a corresponding letter from IM to NG also dated 5 September 2018 at page 291a. These letters show how careful IM was to show that this was a temporary arrangement to ease the claimant back to work. The claimant wanted an adjustment of the duties which he considered put him under pressure and the headteacher was trying to help him to achieve that. The claimant, by and large, agreed on the division of the responsibilities.

31. In terms of what was actually done by the respondent on the claimant's return to work in September 2018 we find that they did not promote NG above the claimant. They were in the situation that an employee had been absent, unfit for work, apparently because of pressure of work and they were attempting to bring him back (hopefully) to full duties in time. To do so they made accommodations to his role by removing aspects which could be done by another employee, at least temporarily. The comment by IM in the letter to

NG that it would be an evolving situation makes sense in that context. The claimant argues (C statement para.14) that NG had a permanent promotion despite the express wording to the contrary but we do not think that there is evidence to support a permanent rather than temporary promotion.

32. In cross examination, the claimant agreed that he thought giving him contracts management and health & safety and NG the day to day running of the site was the best way to go forward. He complained that this put a financial burden upon him but that was because his illness meant that he needed a phased return and the school's policy was only to pay for the hours worked. The claimant subsequently brought a successful grievance about that which we cover below.

33. There was disputed evidence about the extent to which that division between areas of responsibility was maintained in reality and about whether NG encroached on the claimant's role thereafter. The claimant's case is that the extent to which NG carried out roles which had been formerly his was consistent with he himself being, in effect, demoted rather than with the agreement set out in pages 290 and 291a. The claimant was initially on a phased return.

34. The claimant argued that NG carried out tasks relating to contract management which encroached on his own responsibility for contracts. We find that the challenges to the respondent's evidence did not undermine their case that the claimant retained responsibility for ongoing contract *management* even though NG may have contacted contractors from time to time. There seems to us to be a difference between managing a contract which follows a regular pattern and contacting contractors who are needed on site for a particular piece of work. We accept NG's evidence that the examples he was asked about fall into the latter category and are reasonably regarded as day-to-day site management. The challenges of NG' evidence in cross-examination and the examples given in the limited paperwork did not seem to us to go far enough to suggest that NG was taking over the claimant's responsibilities for contract management, or had developed new relationships with new contractors which he kept from the claimant.

35. Similarly, we do not accept that NG refused to engage with the claimant. It is a sad feature of this case that the claimant's perception of the reallocation of work to another employee to support his return to work was that it was in fact done to oust him. The working relationship between NG and the claimant was strained as a result. Later in the chronology, there was a period when the claimant returned to work and did not tell NG for several weeks that he was back. We make no criticism of the claimant but it is a reason why we prefer NG's evidence that the claimant withdrew from him rather than that NG refused to engage with the claimant.

36. The claimant raised a grievance about the deductions from his pay which resulted from the application of the school's policy only to pay for hours worked on a phased return (page 293). This was responded to summarily by IM (page 295). The claimant's pursued this and it was accepted as a formal grievance (page 347). This was investigated by Ms Macrae (see minutes of

meeting with IM on 4 December 2018 at page 357 and meeting with the claimant on page 352). It transpired that the policy had not been consistently applied (see page 322 from TK to IM). The process led to what was called an Appeal Panel Hearing on 12 February 2019 in front of a panel of governors. The outcome letter dated 15 February is at page 373a. The panel upheld the grievance in part; while concluding that there was a policy of only paying for hours worked during a phased return, the governors concluded that there was a failure to inform the claimant sufficiently soon of the terms of the policy and it had not been consistently applied in the past. The decision was to reimburse the claimant so that he was paid his full salary for the period of his phased return. The governors also apologised for the factual inaccuracies in the OH report.

37. In the meantime there were meetings on 27 June 2019 to discuss a proposed changed job description for the claimant's role and a draft was sent to him the same day. He agreed it on 2 July 2019 (see email at page 395). It appears that the claimant was told that when the FCM job description was finalised, then the Assistant FCM's job description would be amended. This would effect a permanent change in the duties of the FCM post.

38. The faired copy was issued on 4 July 2019 (page 397) and shows that the salary is H8 plus the rental of the School House and the post holder remains responsible to the head teacher. If one compares it with the page 96 original, the post holder no longer has line management responsibilities for the site team but that seems to have been a change that was agreed between the claimant and the respondent. At a subsequent meeting between Mr Court and Ms Macrae (page 417) to review the job description, the claimant told CM at that time that he considered that the changes to the job description were a result of coercion by IM and hadn't been agreed to by him but this is not born out by the contemporaneous emails. The original notification of contractual changes dated 21 February 2017 (page 201) showed the salary to be H8 but the claimant was at point 30 which, at the time, was £26,556 per annum.

39. NG had already been notified of an increase in salary grade to H9.1on 4 April 2019 (page 392a). The same month, NG's contract was reissued to take account of this change (page 393) and the post was still described as Assistant FCM. NG's importance to the school in his role was clear because he had shown himself to be very flexible in picking up the slack when the claimant was unwell and recovering. He responded to the headteacher's requests to take on extra work by agreeing to do so and by showing flexibility.

40. The claimant has accommodation with the school which has a substantial financial equivalent benefit to him. The claimant accepted in cross examination that the value to him of the school house was approximately £24,000 meaning that he was effectively hearing a package valued at more than £50,000.

41. Turning back to the July 2019 FCM job description (page 398), we consider what line management duties there were. The original job description (page 97) required the post holder to line manage the site team and cleaners (para.5.6). This was removed from the July 2019 job description. In any

event we have heard that appraisals were optional for non-educational staff. The claimant appears not to have been required to carry out an appraisal of NG at any time. Any change appears to have been concurred in by the claimant.

42. The claimant argues that we should infer that IM was line managing NG from the “catch up” meetings which NG agreed took place (CSA para.6.3). However this does not seem to use to be a proper inference to make. At the start of the academic year, the claimant was not fully back, NG would have needed approval and sign off for things that he was doing. This is not the same as IM assuming formal line management.

43. We think that the appropriate inference is that the respondent was trying to avoid putting pressure on the claimant at a time when he was returning from long term sickness absence caused by an underlying mental health condition. To do otherwise would not have had effect of reducing the workload of the claimant. Furthermore, when NG went to the Finance Manager to seek financial approval for a one off piece of work, such as drains unblocking or work by the gardener, that – it seems to us – is consistent with NG trying to keep day to day site management away from the claimant as he was asked to do rather than with the respondent removing line management of NG from the claimant.

44. Having set out our view of what the evidence objectively shows, we do understand that, from the claimant’s position, he felt vulnerable and undermined. He had become unwell and his perspective is that he had worked very hard to the detriment of his own health prior to and immediately after his promotion to cover for the sickness absence of others and during an earlier period when there had been vacancies in management team. He had seen his assistant become regarded highly for picking up the slack and perceived this as a deliberate undermining of his position. However, we do not think that this was the reality. See, for example, the site team meeting minutes for 19 November 2019 (admittedly sometime later) which show that the claimant is tasked with a large number of action points which are consistent with him remaining responsible for contract management and health and safety.

45. The claimant continued to express his unhappiness with a number of work related matters. There was a meeting between CM and the claimant on 9 October 2019 (page 401) when he told her that he had been advised by a solicitor that a right to claim under the Equality Act 2010 and informed her that he had a disability and had previously told IM that he was on medication for anxiety and depression. She set out her account of the conversation in an email of the same date and encouraged him to take some compassionate leave should he feel that he wanted to. The claimant returned his version of the minutes of that meeting on 23 October 2019 (page 403). By this time CM, the assistant head teacher, had taken over line management of the claimant with effect from 1 September 2019 when IM left his post (CM statement para.12). She also took over line management of TK, the two Deputy Heads and Assistant Heads on the Leadership team and the IT manager.

46. CM had amended NG's job description from "responsible to" the FCM to "overseen by" the FCM which she explains as having been in response to a concern expressed by the claimant about working closely with NG (CM statement para.14). We have not seen a reissued job description for NG's role. Further meetings which involved negotiations about the claimant's own job description too place with CM on 6 November 2019 (page 408) and 4 December 2019 (page 417). The claimant's evidence was that he asked for these changes to remove himself from the people whom he then regarded himself as bullying. That was not, therefore, an acceptance before us that he had agreed to these changes but the fact remains that he did request these items to be removed from his responsibility, whereas CM argued against removal of matters including some which denote line management responsibility for NG (point 5.6). This behaviour by CM is inconsistent with the claimant's primary case.

47. CM put forward the perspective that the changes in job description and roles on the claimant's return to work had been a supportive measure but the claimant's perspective was that it was discrimination and NG had been promoted into his job. The claimant agreed that the FCM role was too much work for one person and it made sense for site management to be a separate role from the FCM. CM asked the claimant to consider removing line management of NG from his job description. It was agreed that his job description would be looked at at the next meeting.

48. Details of the discussion about the claimant's job description on 4 December 2019 were set out by CM in her email to the claimant of that date (page 417). She recorded that the claimant thought that he had been coerced into agreeing the July 2019 job description. He had asked for particular points to be removed. Those removed could be interpreted as those likely to lead to involvement in out of hours work and participation in caretaker's duties as well as the requirement to participate in the monitoring or appraisal of the site manager. CM's perspective was that the removal of 4 of the paragraphs would potentially have an impact on the smooth running of the school where they removed the obligation on the FCM to help flexibly with tasks including those which may be out of hours. The claimant apparently stated that if these items were not removed he would look to take legal action against the school. The claimant expressed the view that his previous line manager had bullied him and that NG and TK were ganging up on him. He claimed in cross-examination that that was why he asked for certain matters to be removed from his job description. CM told us that, ultimately, despite her reservations, she did take some things out of the claimant's job description. She states in the email that, at the claimant's request she amended his obligation to oversee the site manager to working alongside the site manager.

49. Returning to the chronology, the claimant was signed off work between 7 January 2020 and 2 April 2020. The payslips at pages 681 and 682 show that two days' pay were deducted on each of two occasions covered by the February and August 2020 pay slips. The latter covered the first two days' of the claimant's next period of sickness absence. These are the two pages which were added during the course of the hearing and the claimant was recalled and cross-examined upon them.

50. It was accepted by him that two days' pay were deducted on each occasion and these are the days' about which complaint is made within these proceedings. It was also accepted by the claimant that the first two days of any period of sickness absence are specified to be unpaid within the relevant sick pay policy. That policy setting out sick pay entitlement for support staff is at appendix 2 of the school sick pay policy (page 611). It states that the first two days' absence in each period of absence shall receive no pay. However, further down in the table, the policy provies that the additional disability leave allowance is "up to five extra days paid disability leave per year available to those employees who have a disability defined by the Equalities Act 2010". It is common ground that the claimant should have applied for that disability leave had he wanted to benefit from it. He says, and we accept, that he was unaware that it existed and unaware that he needed to claim for it and therefore did not.

51. An OH report dated 18 March 2020 (page 434) was discussed at the return to work meeting between CM and the claimant on 3 April 2020 (page 438). CM was to look into a stress risk assessment and investigate whether the school buys into the employee counselling service which was recommended by OH. The school was closed the following week so CM was going to contact the claimant on 14 April to discuss a staggered return to work, clarity about his job role and mediation.

52. Following this return to work, CM had regular meetings with the claimant. That on 14 April 2020 is evidenced in CM's email of that date by which CM forwarded the individual stress assessment form which the claimant was asked to fill in if he found it useful to do so. CM reported that the school did not presently buy into the counselling service and said that she would look into it further. Arrangements were made for a staggered return to work starting with 1 day working from home with a view to being back working full time by the week beginning 11 May. It was proposed to discuss areas which caused the claimant work related stress, clarity around his job role and mediation at the meeting to take place on 20 April.

53. That meeting was the subject of an email sent on 23 April 2020 (page 450). There was apparently progress on the stress risk assessment (ultimately at page 453) and the claimant was working 2 days that week. The fifth bullet point reflects direction given to the claimant for the tasks to be done on those 2 days: looking at emails and deciding on key tasks that remain to be done. She anticipated that, on 27 April, there would be a discussion about working 3 days in the week. This meeting is evidenced in an email of 29 April 2020 (page 452). There was a discussion about the claimant's allegations of bullying and, as the previous week, he was advised that he could use the informal route of mediation as recommended by the OH adviser or a formal investigation. CM continued to looking into the school based counselling service. Contrary to his previous position, the claimant apparently stated that he wished to continue line management of NG and CM said that she would take advice on that "given the 'peer working' nature of the roles and with no mediation having taken place to date". Paragraphs 2.4 and 6.1 were to be removed from the job description. At the next meeting (to take place on 4

May 2020), the claimant was to outline the key tasks he would complete during that week.

54. CM drew the claimant's attention to the online training link available through the staff noticeboard on 1 May 2020 (page 464). At the meeting on 5 May 2020 (page 467) the claimant confirmed tht he would like to engage in mediation. He was told that the school had signed up for the Employment Assistant Program (EAP). The claimant told CM that he had not had any line management meetings with NG in the past year but had had daily meetings when NG was his assistant. He had not make NG aware that he was back at work and no line management meetings had been arranged. This was at least 3 weeks after he had been certified fit to return to work by his GP. There was a discussion about tasks and it is recorded that for the next meeting the claimant would bring the updated contracts register and timelines for various activities which needed to be done annually (such as risk assessments and training).

55. He alleges that at the meeting on 12 May 2020 (para.29 of the claimant's statement), CM required of him that work should be completed by strict deadlines as he was a "high H grade, and that's what is expected. To be brutal that is the job" and also said "you've had a staggered return, that's good enough according to HR. Have you even told Neil that you are back to work? What do you expect to get done then?" Although the dates are slightly different, this is clearly the allegation which is the subject of Issue 3.4.

56. CM's evidence on this point is in her para.31. She stated that she did not recall using the words alleged but may have made a comment about the expections of the claimant's role and continues "my approach has always been one of concern and I have always been willing to make adjustments to support Joe."

57. We find CM's account and explanation to be credible and accept it. It is true there are dates in the record of the meetings in that the claimant is told that he is expected to carry out particular tasks by the next meeting. However, these are clearly rolling dates. For example, the claimant explained on 12 May that he had not completed the timeline which was the objective set on 5 May. This is rolled over again at the meeting on 19 May 2020. CM's response is recorded as "I asked what you felt you would be able to complete during your five workings days this week." This appears to us to be a perfectly relaxed enquiry. CM does not chastise the claimant for missing the deadlines. The evidence of the notes from the meetings and CM's evidence, which we accept, show that the claimant was not being forced or coerced or bullied into doing anything.

58. When this was put to the claimant, his answer was that he should not have been asked to do any of the duties because his GP had recommended that he be on altered duties. We have not seen evidence of a recommendation that particular duties be excluded - there were discussions which led to the claimant asking for altered *hours*. The tasks which he was allocated to fit

within these hours and the supportive way he was encouraged to complete them do not appear to us to have been unreasonable.

59. We accept that the context and essentials of the conversation on 12 May 2020 is set out on pages 478 and 479. Whatever words CM actually used were said in the context that, fundamentally, the claimant was in a senior role in the school and there was a limit to the extent that could be changed and it remain the same role. In general, we think the school, and CM in particular, was very supportive of the claimant which comes across from the notes of meetings. We can accept that there was some reference to the claimant's grade and the expectations of the role, to his having had a phased return and to HR advice that the school had done all that would reasonably be expected of it in those circumstances.

60. We can accept that CM asked whether the claimant had told NG that he was back at work and was told he hadn't (although that was probably on 5 May 2020 and not 12 May 2020 to judge by the notes). We think that it was surprising that the claimant had not told his direct report that he was back. That is somewhat inconsistent with the claimant having a genuine ground of complaint that he had been deprived of line management. In the first 3 weeks of his return to work, the claimant had not felt able to take basic steps to assert line management of NG.

61. The notes of the meetings are supportive in tone. The claimant has not said that the notes are misleading. They show that CM was taking steps to find the support that was available and it would be inconsistent with that for her to have expressed herself in the way that the claimant alleges. We accept her evidence that she would have expressed herself in a way that, first and foremost, was supportive and attempted to provide clarity and structure.

62. There is a particular compliant about CM's request for the claimant to commit to a particular proposal for altered hours. This was raised at the meeting on 19 May 2020 (page 485). The claimant had been back at work for about 6 weeks at this point (including a period when the school was closed). Within the discussion about wellbeing, there is reference to the claimant having a MED3 which cites altered hours and then "Action: Joe to advise Caitlin on what type of altered hours he feels he can manage, from 14 May to 10 June, by tomorrow".

63. The next day, 20 May 2020 CM asked the claimant which altered hours he would like to work (page 493). She does not give a deadline to that request but clearly the respondent needs to know which hours the claimant considers that he will be able to work. It is not an unreasonable request – particularly when the period during which these hours are due to be worked has already begun. It was not unreasonable for CM to expect the claimant to be able to say what he thinks he will be able to cope with. He is the person best able to answer that question and CM's expressed confusion at the need to consult his union is understandable. We see no coercion or pressure in the exchange of emails between page 491 and 493; it is a straightforward enquiry. The claimant answered on 21 May 2020 saying that he would be able to 10 hours

a week for next 4 weeks and CM responds saying that she would support that.

64. The agenda for meeting 2 June 2020 is at page 495. CM sent him the notes on 3 June 2020 (page 494). There are various action points for the claimant, but they are not particularly onerous, in our view. Some action points had been ongoing for quite some time and had been rolled over previously. It appears that the H&S timeline had been sent to CM the previous day. On the other hand, the action to update the risk assessments had not been done and rolled over to the next meeting. Even within altered hours of 10 hours per week, these seem to us to be achievable actions. Setting targets and recording when they were completed would, we think, be likely to give the claimant a sense of achievement. We accept CM's evidence (her statement para.39) that the claimant did not tell her that the targets were unachievable. We do not think that she has asked him to do anything which was not reasonably achievable.

65. The targets include the request that the claimant provide details of the alleged breach by a member of staff of health and safety rules. It had also been recorded on 19 May that the claimant had decided not to proceed with mediation. The 2 June 2020 notes show that, at the meeting on that date, the claimant repeated that he had decided not to proceed with meditation. Contrary to the claimant's perception, we do not think that he was pressurised into participating. However, neither did the claimant decided to bring a formal complaint against NG or TK.

66. In section 9 in the notes (page 496) it was recorded that CM raised concerns about the claimant's difficulties in undertaking his role "due to his attendance, despite support put in place" but noted that he was due to be working full time from 11 June. CM stated that she may consider whether ill health capability was appropriate if there continued to be concerns thereafter. She gave him a copy of the Health and Attendance policy. In the event, the move to full time working did not happen and we can see from an email dated 12 June 2020 (page 511) that he had been working 5 hours a week since 3 June and this was expected to continue until 30 June 2020.

67. Since we have already found that CM's approach was, first and foremost, to be supportive, we accept her evidence (CM statement para.40) that she did not use a harsh or dismissive tone and that the language she in fact used was similar in tone to that in the note. It was not inappropriate to warn the claimant that the ill health capability process might be needed if concerns about his attendance continued. Indeed, there comes a time when an employer has to warn an employee that formal process might be undertaken. We see nothing wrong in her approach.

68. We have noted that the provision of an EAP was discussed at a number of meetings between CM and the claimant. This had been recommended by OH (page 435) if the school bought into the programme offered by Herts for Learning. Initially it was not a programme which had been subscribed to by the school. CM told the claimant in May 2020 that the school had signed up

for the EAP but in fact it was not available until September 2020. The claimant asked for the contact details on 7 June 2020 (page 508) and was told that the application had been followed up recently. CM told the claimant that she was still awaiting confirmation by her email of 12 July 2020 (page 511). There are periodic references thereafter to the claimant chasing up access to the EAP and to CM repeating that she was waiting for clarification.

69. It was suggested to CM in cross-examination that, when she saw there were delays, she should have funded the programme privately because she would have been able to see there was great urgency about it. Her response was that they looked to buy into the bundle of services offered by Herts for Learning after receiving the OH report.

> "To be clear the EAP is a service offered by Hertfordshire County Council to schools to buy into as part of a bundle. As a foundation school we did buy into the bundle. We hadn't actively sought to apply for it. We applied for it through HCC. Why didn't we privately fund it? We applied for it because it was part of the bundle."

70. Given that the school already subscribed to the programme as part of a bundle which they had purchased, it not reasonable to expect them to pay separately for it. The delay was essentially out of their hands. We accept CM's evidence that the delay was due to initial paperwork, then COVID-19 related delays on the local authority's side because they were not working in their offices. The claimant's return to work happened very early on in the first national lockdown. Then there was a further delay connected with the employment status of the chair of governors which meant that she was unable to sign the paperwork (see also CM statement para.47).

71. In all the above circumstances, the respondent did what they reasonably could to try to obtain access to the EAP for the claimant, even though they did not assess him until 10 September 2020 (page 121).

72. Another matter which was mentioned by CM at meeting on 2 June 2020 was the proposal for the claimant to move to be line managed by TK from September (page 495). Her email of 4 June 2020 repeats her proposal for a reorganisation of the line management structure of Premises from 1 September 2020 (page 501). She attached a powerpoint presentation showing the proposal for NG and JC to report to TK. By this time NG is referred to as the Site Manager (the post referred to in the FCM job description) but his grade did not change from that at which it was assessed in April 2019.

73. CM also mailed the claimant on 12 June 2020 saying that she would like to refer him to OH again to explore whether there were further adjustments and recommendations that could be put in place and to arrange a meeting at which his duties could be discussed, given he was still on reduced hours, so that she could reallocate some of his usual duties.

74. The claimant objected to the proposed new line management structure (page 515) on 18 June 2020 saying that the slides shows that NG and TK had been

promoted but he had not and asking for TK not to become his line manager because he considered her to have bullied him. Separately, on 26 June 2020, he set out the respondent's duty to make reasonable adjustments (page 522) of a "different job role in a new department within the school" and for TK not to become his line manager. On the same day (page 499) he requested that he be accompanied at all future line management meetings with CM and explained how anxious they made him feel. She agreed to that (see top of page 499).

75. As articulated before us the nub of complaints was linked to the claimant's perception that he had been demoted and that NG had been promoted which he thought would be visually emphasised by the two of them reporting directly to TK (one step from the headteacher) when he had previously reported directly to the headteacher.

76. There is a reference in the Rationale for the change (page 503) that the School Business Manager role (TK) had overall responsibility for site management and premises matters and that the claimant's and NG's job descriptions from July 2019 had required a "peer working professional relationship" rather than a hierarchical one with the job descriptions having comparable responsibility.

77. Given that the claimant positively asked for his role to be amended to remove the responsibility for NG's appraisal removed (and had not taken basic steps to assert line management of NG) it was not reasonable for him to complain if responsibility for line managing NG is to be given to TK. Effectively NG was not being line managed and that was not a sustainable situation. We find that what happened was more that NG's role developed into site manager and that brought him up to have equivalent responsibility to the claimant rather than that the claimant was being demoted.

78. The claimant now knows that NG has had grade increased to H9 back in April 2019 – the post then being designated a higher grade than his own Grade H8. This was 7 months after the claimant had returned to work. We have not been taken to any evidence about how the grading structure is done or any particular grading exercise. The claimant was being supported by the respondent to continue in his current post. NG's career trajectory was on an upward trend but that does not mean that the claimant was demoted or treated less favourably. The responsibilities of the claimant were reduced in consultation with him to assist him with his situation but his role and grading remained the same (subject to his pay being affected by the hours worked).

79. We read the regrading as being a means to increase the financial compensation of NG who was taking on the unsociable hours aspects of C's job which the claimant no longer wished to do. We infer that NG was being rewarded for taking on additional tasks in April 2019 and that the C's need to reduce the scope of his job meant that NG took on additional tasks. So when a proposal was made for NG to be in the structure at the same level as the claimant that was not, we find, a demotion of the claimant but an elevation of NG. The self-sufficiency expected of the site manager and the demarcation of the role compared with the FCM role meant that it was appropriate and

practical for them both to report to the School Business Manager – given the responsibilities of that role. This was all against the background of new headteacher due to start which would then have had only one direct staff report (by which we mean not academic staff) and they would manages the site. This proposed structure was against the background of the claimant's inability to cope with the full responsibilities of the FCM role but that was not what was in the mind of CM when she designed the structure.

80. CM responded to the claimant's concerns on 1 July 2020 (page 528 – 529). Among other things, she points out that when he raised the allegations of bullying or harassment by TK she provided him with the respondent's policy and he did not choose the formal route. She pointed out that medication had been arranged for him and the two colleagues and he had not engaged with it. In her last paragraph CM notified him that she had decided that the proposed change in line management would go ahead. As she emphasised in oral evidence there had been no mediation but neither had there been a no formal complaint so she considered that the change in structure should go ahead. Then by the time of the meeting on 9 July 2020 (page 561) CM simply changed her mind. It appears from page 562 that CM had reconsidered the plan and suggested that the claimant could elect to be managed by TK or by herself until October half term. CM herself was moving away from management of the site so long term management by her would mean the claimant being managed by someone outside the 'Premises' side of the school structure. A new headteacher might, as CM pointed out, have had their own ideas about a convenient management structure. The claimant replied on 12 July 2020 (page 553) explaining that that uncertainty made him anxious. CM replied to ask him whether he wanted her to continue to line manage him after she returned to her substantive role of Deputy Headteacher on the new head's appointment or if there was someone else he could suggest.

81. In one sense the proprosal that TK become the claimant's line manager was not imposed on him. There was a consultation, he expressed dislike, a decision was made that the new structure should be put in place and then the plan was not pursued. To the extent that this episode is relied on as evidence that he was being demoted then we disagree with that suggestion for reasons we have already explained.

82. To conclude our findings of relevant facts, in response to the claimant's request for the reasonable adjustments of a different role (page 522), CM told him that there was "only one vacant position in the school from September, which is currently out to advert" and informed the claimant that it was at H4 Grade and did not include the school house. We consider that, in providing this information, CM was merely answering the claimant's question by telling him which role was vacant. She did not imply that it was suitable; she was providing information. She did not offer it to him.

83. The claimant started a further period of long term sickness absence on 24 July 2020, the date on which the ECC was issued.

Law applicable to the issues

<u>Discrimination arising from disability</u>

84. 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."

85. 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.*

86. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler in <u>Pnaiser v NHS England</u> [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. 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)[…].

(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) 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."

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

a. 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?

b. 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".

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

d. 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.

e. 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.

88. The other potential defence is lack of knowledge of disability. This requires the respondent to show that they did not know and could not reasonably have been expected to know that the claimant was disabled (constructive knowledge is discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA)

Harassment

89. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(1) A person (A) harasses another (B) if—
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
> (b)the conduct has the purpose or effect of—
> (i)violating B's dignity, or
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> (2) …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a)the perception of B;
> (b)the other circumstances of the case;
> (c)whether it is reasonable for the conduct to have that effect."

90. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT (a race related harassment claim) at paragraph 22, Underhill P (as he then was) said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers,

> and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

91. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

92. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out further guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR report]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

93. In Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31, the EAT considered the meaning of "related to" within s.26 EQA and contrasted it to the test of "because of" within s.13 EQA,

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. … "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

Breach of the duty to make reasonable adjustments

94. 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.

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

    b. 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.

    c. 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.

    d. 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.

    e. 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.

    f. 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.

95. 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."

96. 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.

97. 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.

98. 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"

99. 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."

100. 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

101. 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. In this case, the scope of the victimisation claim has been narrowed to a single alleged protected act and a single alleged detriment, as set out in Issues para.15 above. There is a difference between the parties about what was said by the claimant on the occasion when he claims he did a protected act, but it is common ground that he asserted his belief that he had the right to sue the respondent under the EQA. The first question for the Tribunal is therefore whether this amounted to a protected act.

102. The next issue in the victimisation claim is whether the claimant suffered the detriment as he alleges (which requires us both to consider whether the core facts alleged are made out and whether they amounted to a detriment in law) and secondly, if those facts are made out, what subjectively was the reason that the respondents acted as they did.

103. We bear in mind that s.136 of the Equality Act 2010 applies to victimisation cases, as it does to all claims under the EQA. 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 s.63A of the Sex Discrimination Act 1975 but the following guidance is still applicable to the equivalent provision of the EQA.

    a. When deciding whether or not the claimant has been the victim of direct discrimination (or, as in the present case, victimization), 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.

    b. We bear in mind that there is rarely evidence of overt or deliberate victimisation. 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.

104. 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 subconsious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

Conclusions

105. We now set out our conclusions on the issues 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.

<u>Date of knowledge</u>

106. The respondent concedes that they had actual knowledge of the claimant's disability as of 18 March 2020, the date of the occupational health report at page 434 (PDF page 454). It is argued on behalf of the claimant that they had constructive knowledge of disability from 26 June 2018, the date of the occupational health report at page 274. In paragraph 3 of that report the OH professional describes the current health and medical circumstances to be

> "As you are aware that Joe is off work with stress, he tells me that he appears not well enough to resume work. Joe is managing the symptoms with prescribed medication and he says the symptoms seem to be improving as he is no longer irritable to his family. It is also perceived that Joe has recently improved in sleeping. There are perceptions the stress/anxiety levels progressively got worse over a period of more than 18 months. Joe perceives that this has been caused by staff shortages mainly. Joe was upset with some of the contents of the referral and I advised him to discuss with his manager."

107. The effects of anxiety and depression on the claimant are described in para.3 of his impact statement to be "panic attacks, feeling nervous, restless, having an increase heartrate, feeling weak/tired, obsessive overthinking and difficulties concentrating" as well as "low mood and low self-esteem, not taking pleasure in things I used to enjoy and feelings of hopelessness". He talks about finding decision making difficult, memory loss, concentration difficulties and mood swings.

108. The OH advisor (page 275) stated that there is an underlying medical condition which appears to account for the absences and that this "is likely to recur, however with treatment/psychosocial therapy it is anticipated that this will reduce the risk.*"* The occupational health advisor had not been asked to give an opinion about whether the EQA was applicable.

109. Sicknotes provided by the claimant to the respondent which ultimately ran continuously from 1 May 2018 to 6 September 2018 and which advised that the claimant was suffering from anxiety and depression. It is argued on behalf of the claimant that the information in the OH report, taken with the sicknotes, was sufficient to mean that the respondent had constructive knowledge of the

fact of disability which is now admitted to have existed from the time of the diagnosis with anxiety and depression in May 2018. The sicknotes initially referred to headaches and stress (page 111). Then the second sicknote dated 15 May 2018 referred to anxiety and depression.

110. It is argued on behalf of the claimant that paragraph 2(2) of Schedule 1 to EQA is relevant in that the effects or impacts of the condition should be regarded as continuing if they are likely to recur in the sense that they could well recur. That argument must therefore be that, as at 26 June 2018, evidence was available to the respondent that even if there was some improvement from the start of the period of illness the most severe effects of the illness were likely to recur. The claimant relies on the answer to para.3 on page 275 (see para.108 above).

111. When considering whether the employer had constructive knowledge, we need to consider whether they had knowledge of the facts which underpin the disability, the facts which amount to the disability – including that significant adverse impacts would be long term. Although the report says that the claimant is off work with stress, the GPs sicknote by then did say anxiety and depression. The respondent knew that he had been prescribed medication, which was enabling him to manage the symptoms. The effects of the condition as they were aware of them as at June 2018 were that they caused him to be irritable to his family, that it impacted adversely on his sleeping and that it meant that he was unable to work. Although we note that it is recorded that the symptoms are said by the claimant to have become progressively worse over a period of more than 18 months it is not said by him that he was disabled before May 2018.

112. What this OH report does not deal with is the prognosis or the length of time that these effects are likely to continue for. The specifics given in the report of the impact on the claimant's ability to carry out day to day activities are limited, although he was unfit for work. There is no qualitative assessment of what the improvement described by the claimant at the OH meeting meant an whether the improvement was caused by treatment (which ought to be ignored). In other words, it is hard to judge whether the improvement ought to have caused the respondent to conclude that the claimant no longer suffered significant adverse impacts but they were likely to recur - depending upon treatment – or, alternatively, that the claimant still suffered significant adverse impacts despite being less unwell.

113. Either way, there is nothing in that OH report that tells the reader when the claimant might recover or that the effects are likely to continue for any particular period of time, and, in particular, that the effects were likely to continue for a further approximately 10 months from the date of the report. The report's passing reference to the condition recurring is insufficient to cause the reasonable reader to think that any recurrence of the more serious impacts was likely to make the effects long term in the statutory sense. This means that the respondent did not, at the time of receiving this report, have the information that the impacts on the claimant of the mental health condition that he had been diagnosed with were likely to be long-term as defined within the EQA.

114. The effects may have been likely to recur and if that comment is read as suggesting that he was less badly affected at the time of the report than he had previously been it is of course relevant that the more serious aspects would be likely to recur. But that is not sufficient to notify an employer of the facts which amount to a disability. Such facts would need to include those which put them on notice that the timescale over which such a recently diagnosed condition was likely to affect the employee could well be at least 12 months overall.

115. We consider, however, that even though the claimant had returned to work in September 2018 the warning that the effects were likely to recur and the respondent's experience of managing the claimant and his needs at work mean that by May 2019, 12 months after the onset of the condition and 12 months after the onset of the period of long-term sickness absence, the respondent ought to have known that the claimant was disabled within the meaning of the EQA. Indeed, because they had actual knowledge of significant adverse impacts as at May and June 2018 we consider that they therefore had actual knowledge of the fact of disability from May 2019 because 12 months had by then expired and they had been warned that any significant adverse impacts of the condition on the claimants ability to carry out day-to-day activities were likely to recur. The claimant was still on amended duties and therefore they were or should have been aware that he continued to suffer the effects of the mental health condition.

116. This means that any of the allegations in the list of issues which pre-date May 2019 cannot succeed as s.15 EQA claims because the respondent has demonstrated that they did not have actual or constructive knowledge of the fact of disability at the relevant time. This affects the s.15 EQA claim in respect of the alleged unlawful act Issue 3.2. It seems to us that it is not necessarily fatal to a harassment claim if the respondent did not know or have constructive knowledge of the fact of disability.

<u>Discrimination arising in consequence of disability</u>

117. In case we are wrong about our conclusion on the date of knowledge we in any event go on to consider Issue 3.2 not least because it is the heart of the claimant's claim.

118. Issue 3.2: The claimant has not made out the core facts of this allegation. There was no permanent reduction of the claimant's role on his September 2018 return to work, nor did the changes amount to a demotion (see paras.29 to 31 above). There is no evidence that there was such a permanent change. The arrangement reflected in the complimentary letters from IM in September 2018 (pages 290 and 290a) make clear that the reallocation of tasks was done to ease the claimant's return to work after long term stress-related sickness absence and any change was done by consent. What happened on day to day basis thereafter was not inconsistent with that temporary division (see paras.33 to 35 above).

119. Issues 3.3 and 3.9. These are the allegations that in January 2020 and July 2020 Ms King deducted one or more days of pay from the claimant's salary for sickness absence despite knowing that this was disability related absence. In fact, the deductions were in February and August 2020 (pages 681 and 682) that the deductions were made but nothing turns upon the precise date. Our findings about these deductions are in para.49 above which we refer to but do not repeat. The deductions were made in accordance with the policy that employees are not paid for the first two days of sickness absence and that disability leave is only awarded if it is claimed. The claimant was unaware about the policy for disability leave and did not know that he needed to claim for it.

120. In paragraphs 13-15 of the CSA Mr O'Keeffe argued that it is clear that the deductions were made to the claimant's pay and that payroll was Ms King's responsibility. It is not true, however to say that TK personally made the deductions which happened because of the automatic application of a policy. Mr O'Keeffe then argued that since it was deducted because of the claimant's sickness absence the responsibility transfers to the respondent to seek to prove that the deductions were a proportionate means of achieving a legitimate aim. It is argued that there cannot be such a proportionate means of achieving a legitimate aim because there was no proper justification for requiring employees to have to apply for the benefit and this was not something that was covered in argument or evidence by the respondent.

121. However, the issue that we have to decide is an allegation that Ms King deducted pay. This does not seem to us to equate with an argument that Ms King failed to notify the claimant of the right to claim under the policy. It appears to be common ground, and the claimant accepted, that employees have to apply for paid disability leave. We accept Ms Macrae's evidence that on induction employees are taken through the availability of the various policies and where they are stored. The claimant had access to union advice and indeed appears to have made good use of that advice when challenging deductions from pay in relation to his phased returns. He was unaware when it was that he had discovered that he had to apply for the leave.

122. It seems to us that what the claimant is now, in fact, seeking to argue is that because he was absent on sick leave the respondent failed to tell him that there was this disability leave that he might be able to benefit from. As it emerged during the course of the proceedings and in closing submissions it amounts to a wholesale attack on the policy itself as being not a proportionate means of achieving a legitimate aim.

123. It was argued by the respondent that this could not amount to discrimination because all disabled people were treated favourably in this respect, this was a benefit that was available to all disabled people. As an attack on the policy itself this was not an argument which the respondent had come prepared to meet. We have not had any evidence on the other circumstances in which the policy to grant disability leave has been applied. We have no evidence whether when such an application is made it is a question of judgment for the relevant manager as to whether to grant it or whether it is something that

follows automatically when a disabled person applies for leave which the manager is satisfied is related in some way to the disability.

124. In our view there may be good reasons why an application should need to be made and the respondent has not had a fair opportunity or notice that this allegation was going to be the subject of evidence and argument within these proceedings.

125. In short, the respondents have provided a complete answer to this by saying that the reason the Ms King deducted the two days' pay in February and August 2020 was that she was following the sick pay policy that says that the first two days of any sickness related absence will not be paid. We have accepted that the respondent had actual or constructive knowledge that the claimant's anxiety and depression was disability related by this point in time. However, we accept that they also had a legitimate aim of the consistent application of a policy for sick pay and we reject the argument that simply by requiring employees to apply for this disability leave rather than awarding it to them automatically this makes the application of the policy disproportionate. In circumstances where employees have a general knowledge of what policies exist and where to find them and where some employees, including the claimant in particular, are represented by trade union representatives the requirement under the policy for employees to apply for this leave in order to be considered for it seems to us to be a proportionate means of achieving a legitimate aim.

126. Issue 3.4: We refer to our findings about the meetings between CM and the claimant in paras 51 to 67 and, in particular, to para.59 to 61 which are our findings about whether these alleged comments were made and in what context. We accept much of what alleged to have been said but reject the allegation that CM required work to be completed by strict deadlines. They weren't strict deadlines (see para.57). Successive meeting notes show that tasks were carried over from one meeting to the next. Therefore the allegation is only made out in part. We do not attach the same meaning to the words as does the claimant. In all the circumstances, it wasn't unfavourable treatment of him but part of a supportive approach. Alternatively, we accepted CMs evidence and find that it was part of their proportionate way of seeking to manage his return to work.

127. Issue 3.5: CM did ask the claimant to specify which hours he would be able work but she did not insist he tell her or pressurise him into giving a response. She expressed surprise that he needed to consult with his trade union which was reasonable when what she need was for him to say what he thought that he, personally, was capable of. In those circumstances we conclude that this was not unfavourable treatment by CM because of that lack of pressure. The email exchange by which she asked him to provide this information was gently worded (we refer to para.62 and 63 above). It is clear that the respondent needed to know the hours that the FCM was going to be available for work.

128. If, contrary to our conclusion, it was unfavourable treatment, we would need to look to the respondent to justify the treatment because part of the reason

for CM asking was that the claimant was, at that point in time, unable to carry out the full hours of the role for disability related reasons. We would find that the request for the claimant to specify which hours he would be able to work as agreed altered hours was reasonably necessary and apt to achieve the legitimate aim of ensuring that the claimant's return to work was managed in a way which alleviated as much stress as possible for him and ensured the smooth running of the school.

129. Issue 3.6: to the extent that we accept that the allegation is made out, it was not unfavourable treatment and, if it was it was a proportionate means of achieving the legitimate aim. As we set out in para.64 to 67 above, we have found that the tasks set to the claimant were not unrealistic, they did not *have* to be done by the following week because there was no penalty for failing to do so (although that was the target for the claimant), and CM was patient and supportive of the claimant in his return to work. Providing the claimant with a copy of the Health and Attendance policy at this point, 4 weeks after the claimant's return to work when he was still working between 5 to 10 hours per week and there was no immediate prospect of an increase in those hours, was a proportionate approach. It was reasonably necessary for CM to balance support to the claimant with information about the appropriate policy when seeking to manage his return to work and ensure the smooth running of the school.

130. Issue 3.7 It was not unfavourable treatment of the claimant for the respondent to promote NG because nothing was taken from the claimant's role without his consent. We consider that, viewed objectively, the proposal for the claimant to report to TK rather than to the headteacher did amount to unfavourable treatment. The reorganisation had the effect that another layer of management was introduced between the claimant and the headteacher (at that time a vacant position). An employee might reasonably consider themselves to have been disadvantaged following that reorganisation.

131. However, we are quite satisfied that none of CM's reasons for the reorganisation were any inability on the part of the claimant to cope with the full responsibilities of the FCM role. It is that which is relied on by the claimant as the "something". In any event, the argument that the reorganisation was unfavourable treatment for a reason arising in consequence of disability is predicated on the claimant being unable to carry out the full responsibilities of the FCM role for disability related reasons. Our view is that the school did their best to manage that situation and to support the claimant in building up the duties he took on by doing everything with his consultation and consent.

132. To the extent that informing the claimant that he would report to TK and that NG would be moved into a position of parity with him also reporting directly to TK was unfavourable treatment of the claimant, none of the reasons for that were either of the "somethings" set out in Issue 5.1 or 5.2. The reasons were that TK had been appointed as School Business Manager so it made sense for that role to be the sole point of contact for the incoming headteacher. Also, NG's role had moved to one which required more of a peer working relationship with the claimant. To the extent that this was because of the claimant's inability to cope with the full FCM role that was

limited to his own request to be relieved of aspects of the FCM original role including aspects of line management responsibility for NG. Mr Goddard had had not effective line management and the claimant had, certainly initially, asked not to line manage NG and to have matters such as carrying out appraisals removed from his own area of responsibility. The claimant had agreed that to site management becoming the responsibility of NG. It was unrealistic for these matters not to be reflected in a change of line management for NG or a change in his role. It was plainly in pursuit of the legitimate aim of the smooth running of the school to ensure that all staff had active line management and the claimant was consulted on the plan. He also agreed to the changes to his own role which made a change of line management for NG necessary.

133. Issue 3.8. Our findings on this factual allegation are at para.82 above. It was not unfavourable treatment to inform the claimant about the available position given that he had asked for a different role in a different department (see para.74 above). It was not unfavourable treatment to tell him of the only vacant position in the school. CM was open to him about the grade and conditions of the role; she did not offer him the role but merely provided him with information. Besides, CMs reason for providing the information was entirely that the claimant said that he wanted a different role in a different department and was not either of the two "somethings" relied on.

134. For reasons set out in the above paragraphs, we have concluded that each element of the s.15 EQA claim fails.

<u>Harassment</u>

135. Each of the above alleged matters is also argued to be unlawful disability related harassment contrary to s.26 EQA.

136. As we have set out above, the allegation in Issue 3.2 that the claimant was demoted on his return to work in September 2018 was not made out as a matter of fact. Therefore the claimant has not established that the act which he alleges to have been harassment happened as a matter of fact.

137. Issues 3.3 and 3.9: as we have set out above, the deduction of 2 days' pay for sickness absence on 2 occasions was made because to do so was consistent with the applicable policy. We accept that this deduction was related to disability in that the deduction was made in the claimant's case) because of sickness absence which was disability related (although that was not inevitably the case) However, we do not think that it is reasonable to regard these deductions as having the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading humiliating or offensive environment for him. The deduction was simply due to the application of the relevant policy and therefore did not have the purpose of harassment. All employees, whatever the reason for their absence, were not paid for the first 2 days so there was no singling out of the claimant which might have been degrading or humiliating. No doubt he would rather have been paid for the 4 days (in total) but that is not the test and is not sufficient for a finding that this policy meets the statutory test for harassment.

138. Issue 3.4, 3.5 and 3.6; It neither had the purpose nor could it reasonably be regarded as having the effect of harassment for the respondent to act as we have found that they did in respect of these allegations. All of these three allegations arise from CM's actions during meetings between her and the claimant on 5 May 2020, 12 May 2020 and 2 June 2020 when she was meeting with him weekly to support him through a return to work. Our detailed findings are set out above but our finding that she was supportive, flexible, made only reasonable requests and appropriately balanced the claimant's interests with those of the school lead us to the conclusion that CM did not intend her actions to have the harassing effect. Furthermore, for the same reasons we do not think that it is reasonable for her actions to have the harassing effect.

139. Issue 3.7: The principal reason why we reject the allegation that the reorganisation (to use a shorthand for the specific issue set out in Issue 3.7) was disability related harassment is that we have concluded that it cannot be said that the restructure was related to disability. In fact the restructure was to do with the responsibilities of everyone else: TK has responsibility for the site manager's role and NG, as site manager, had responsibility for the site. To the limited extent that could be said that the claimant's altered hours or voluntary amendment to his job description were part of the reason for the reorganisation that couldn't reasonably say that it had the harassing effect. The claimant had been consulted throughout and agreed to the changes to his job description; it cannot reasonably be said that a reorganisation which reflects those changes has the statutory harassing effect.

140. Issue 3.8: Similarly one cannot reasonably say that providing the claimant with information about the only vacant role in the respondent school had the harassing effect when the information was provided in response to the claimant's request.

<u>Failure to make reasonable adjustments</u>.

141. We turn then to the claim of breach of the duty to make reasonable adjustments. We accept that the respondent had a PCP of requiring employees to be able to do all aspects of their roles at all times in order to retain those duties on a permanent basis and that that put the claimant to a substantial disadvantage compared with persons not being disabled by reason of depression and anxiety in that he was less likely to be able to comply with that requirement and more likely to have his duties removed from his job role.

142. However, where the claimant argues that it would have been a reasonable adjustment to that policy to reallocate his duties on a temporary basis, that is exactly what the respondent did. We have found against the allegation that on the claimant's return to work in September 2018 his duties were reallocated permanently. In fact, we have found that it was not until May 2019 that the respondent had actual (or constructive knowledge of disability) and could not, therefore, had had actual or constructive knowledge that the claimant would have been put to a substantial disadvantage compared with

people who did not have his disability. This would be sufficient to defeat this argument in itself. In the alternative, the respondent consulted with the claimant and only reallocated those duties which he did not wish to continue to do or did not feel able to continue to do in order to support his return to work. It was made clear to NG at the outset that this was on a temporary basis.

143. Another step which the claimant argues would have alleviated the substantial disadvantage to him was to enrol him in the Employee Assistance Programme at an early stage (Issue 14.4).

144. There was a delay in enrolling him onto the EAP but we accept that the reasons for that delay were genuine and, to the extent that the delay was not reasonable, were outside the control of the school but because of the actions of the provider, Herts for Learning. As a Foundation School they had opted into the package offered by Herts for Learning but not activated this option and, initially, there was a regrettable but not substantial delay in doing so. Our detailed findings about the reasons for the subsequent delay are set out in paras.68 to 71 above. The respondent did take steps to try to expedite matters. Although a referral to the EAP had a prospect of assisting the claimant to be treated for his condition(s) and therefore to be fit to do more of his role, there were no further steps to expedite a referral for the claimant that the respondent could reasonably have taken in all the circumstances. It would not have been reasonable for the respondent to pay privately for an equivalent programme. The process seems to have been administratively cumbersome but there is no evidence that that wasn't the process.

145. Issue 14.5 In fact, CM did continue to line manage the claimant until she herself stepped away from management of the business side of the school. It would not have been reasonable to require her to line manage him indefinitely even when no longer otherwise involved in management of the business side of the school. Nevertheless, CM appears to have given him the option of her continuing or invited him to nominate someone else. We are not aware of any response. We also note that the claimant has not provided evidence from which we could infer that there was a prospect that he could have done more of his role had CM had continued to line manage him. In all of the circumstances we do not think there was anything further that it was reasonable for the respondent to have to do in relation to the line management of the claimant within the time period relevant for this claim.

146. As to Issue 14.6, it is suggested that, when on altered hours, the claimant should have been given longer to carry out tasks. In fact, the tasks he was given in order to give structure to his week, if not completed were rolled over to the next week. This was done on multiple occasions so our conclusion is that, in reality, the claimant was given extra time to complete the tasks. No fixed deadline was even imposed. There is a difference between a fixed deadline and a target date for completion to assist the claimant with organisation, prioritising and to help him realise when he was completing work.

<u>Victimisation</u>

147. The victimisation claim is now solely now focuses on the allegation that the claimant's role diminished and was transferred to NG following his absence. It is alleged that that happened because of the claimant to CM on 8 October 2019 to the effect that he believed he had a case to sue the respondent under the EQA.

148. The respondent did not concede that the claimant's statement of this belief amounted to a protected act and pointed to the dispute over whether, as the claimant alleges, he said that this was because of the demotion of NG or whether, as the respondent says, the claimant did not elaborate on the reasons why he thought he had the right to sue.

149. In order to amount to a protected act under s.27(2)(c) or (d) EQA it is sufficient if the individual does "any other thing for the purposes of or in connection with" the EQA or makes "an allegation (whether or not express) that" the respondent has contravened the EQA. We are of the view that saying that he believes that he has the right to sue, in the context of the discussion recorded by CM in her email at page 401, the claimant's assertion clearly amounted to an allegation that the respondent had contravened the EQA. It would also, potentially, cause the respondent to believe that the claimant may bring Tribunal proceedings against them and, were we of the view that there were facts from which we could decided that that belief was part of the respondent's reasons for acting then that would fall within s.27(1)(b) EQA.

150. However, we have found as a fact that no reduction of the claimant's role and transfer of that role to NG took place – certainly not without the claimant's consent. In particular, if we focus on the period of time following the protected act on 9 October 2019, the negotiations to change his job description were consensual. No employee could reasonably consider themselves to be put to a disadvantage by amendments to their duties to which they had consented as a means of supporting their return to work. Such amendments to the claimant's duties as did take place were not a detriment within s.39(4)(d) of the EQA.

151. Furthermore, on the claimant's return to work in May 2020, the reduction to his role to limit the activities he undertook was entirely connected with and caused by his phased return and altered hours. We are quite satisfied that the reasons were not in any sense those of the 9 October 2019 complaint of discrimination or a fear that the claimant would present an Employment Tribunal claim.

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Employment Judge George
Date: …16 December 2022…………..

Sent to the parties on: 20.12.2022
For the Tribunal Office: GDJ