EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Black

Respondent: Meadowhead School Academy Trust

Heard: in Sheffield **On:** 1, 2, 3, 4 and 5 July 2024

Before: Employment Judge Ayre
Ms J Lee
Ms P Pepper

Representation

Claimant: Mr D Flood, counsel
Respondent: Mr D Bunting, counsel

JUDGMENT

The unanimous decision of the Employment Tribunal is that:

1. The claim for unfair dismissal is not well founded. It fails and is dismissed.

2. The claim that the respondent failed to make reasonable adjustments is not well founded. It fails and is dismissed.

3. The claim for victimisation is dismissed upon withdrawal.

REASONS

Background

1. On 1 June 2023 the claimant issued his first claim (1800903/2024) in the Employment Tribunal following a period of early conciliation that started on 7 May

2023 and ended on 9 May 2023. On 6 November 2023 the claimant presented his second claim (1807889/2023) following a period of early conciliation that started on 5 October 2023 and ended on 9 October 2023.

2. A Preliminary Hearing for Case Management took place before Employment Judge Brain on 20 February 2024. At that hearing there was a discussion of the claims that the claimant was bringing and the issues that fall to be decided in this case were identified. The claims, in summary, were for:

    1. Constructive unfair dismissal;

    2. Failure to make reasonable adjustments; and

    3. Victimisation.

3. The respondent concedes that the claimant was, at the time of the alleged acts of discrimination, disabled due to a knee and back complaint.

4. The respondent also conceded, for the purposes of the victimisation claim, that the claimant did a protected act when he raised a grievance on 28 December 2022.

The hearing

5. Both parties were represented by counsel at the hearing. The Tribunal is grateful for the collaborative and helpful approach taken by both counsel during the course of the hearing.

6. There was an agreed bundle of documents running to 815 pages. On the second day of the hearing a further two documents, running to 6 pages in total, were added to the bundle by consent. After the conclusion of the witness evidence, the claimant's contract of employment, which had been omitted from disclosure and from the bundle, was introduced into evidence by consent. Neither party wished to recall any witness to speak to the contract.

7. We heard evidence from the claimant and, on behalf of the respondent, from:

    1. Sarah Johnstone, Assistant Headteacher;

    2. Kam Grewal-Joy, Headteacher;

    3. Kate Miller, Assistant Headteacher and Special Education Needs Co-ordinator; and

    4. Kevin Elliott, Key Stage 3 Engagement Centre Manager.

8. At the start of the third day of the hearing, the claimant withdrew his claim of victimisation. Mr Flood also indicated that the claimant was not relying upon any of the allegations made in the victimisation claim in support of the constructive unfair dismissal claim. Mr Bunting indicated that the claimant would not be making an application for costs in respect of the late withdrawal of the victimisation claim.

9. The evidence of Ms Miller and Mr Elliott was relevant only to the victimisation claim. Mr Flood told the Tribunal that, in light of the withdrawal of this claim, he did not wish to cross examine either witness, but that his decision not to do so should not be taken as any admission that their evidence was accepted. Although the Tribunal read the statements of Ms Miller and Mr Elliott, no weight was placed upon those statements. The parties were given the option of making oral submissions or written submissions supplemented by oral submissions. They chose to make oral submissions.

The issues

10. The issues that fell to be determined at the hearing are set out in the Record of the Preliminary Hearing before Employment Judge Brain. The parties confirmed at the start of the hearing that they remain the issues in the case.

11. At the start of the third day of the hearing however, after the claimant had given evidence and part way through the evidence of Sarah Johnstone, the claimant withdrew the complaint of victimisation in its entirety. Mr Flood indicated that the claimant was not seeking to rely upon any of the allegations of victimisation in support of his complaint of constructive unfair dismissal.

12. During submissions Mr Flood indicated that the claimant no longer wished to argue, in support of the constructive dismissal claim, that there had been a breach of an express term of the claimant's contract. Nor did the claimant wish to rely upon the argument that the changes in the claimant's job role amounted to a fundamental change and an express dismissal in accordance with the principal in ***Hogg v Dover College [1990] ICR 39***.

13. Taking account of the withdrawals made by the claimant during the course of the hearing, the issues that fell to be decided by the Tribunal were as follows:

Time limits

14. Was the complaint of failure to make reasonable adjustments made within the time limit in section 123 of the Equality Act 2010? Any complaints about something that happened before 7 February 2023 in the first case and before 5 July 2023 in the second case may not have been brought in time.

Constructive Unfair Dismissal

15. Was the claimant dismissed?

    1. Did the respondent do the following things:

        1. In or around June 2022, require that the claimant spend 20% of his time undertaking internal seclusion room ("**ISR**") duties and on-call duties?

        2. Fail to comply with the duty to make reasonable adjustments by removing or reducing the amount of ISR and/or on-call duties from the claimant? The claimant says this failure happened from November

2022.

3. Notify the claimant before the end of the academic year 2022/2023 (in July 2023) that from September 2023 most of the claimant's work would be ISR and on-call duties? The claimant says that this would result in a doubling of the amount of time spent doing this kind of work, to the detriment of his work in alternative provision and with the Forest School.

4. Fail to comply with its duty to make reasonable adjustments?

2. Did that breach the implied term of trust and confidence? In particular:

1. did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2. did the respondent have reasonable and proper cause for doing so?

3. Did the claimant resign in response to the breach(es)? Were the breach(es) so serious that the claimant was entitled to treat the contract as at an end?

4. Did the claimant affirm the contract before resigning?

16. If the claimant was dismissed (expressly or constructively), what was the reason or principal reason for dismissal?

17. Is that a potentially fair reason?

18. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

Failure to make reasonable adjustments

19. Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date?

20. Mr Bunting conceded that the respondent applied the provision, criterion or practice ("**PCP**") of requiring the claimant to undertake internal seclusion room and on-call duties, so it was not necessary for the Tribunal to determine that issue.

21. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability? The claimant says that the ISR duties require sitting in the room for a long period of time supervising secluded children, and that because of his back condition, the claimant needs to take micro-breaks which involve stretching and lying down on the ground or a desk. The claimant says that lying

down would be inappropriate in front of children, and that a person without such a back complaint would have been better able to deal with ISR duties. In relation to on-call duties, the claimant says that the requirement to patrol around the school attending incidents causes him difficulty because of his knee condition and that someone without a knee condition would be better able to perform on-call duties.

22. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

23. What steps could have been taken to avoid the disadvantage? The claimant suggests removing or significantly reducing the ISR and on-call duties from 29 November 2022 until the end of his employment.

24. Was it reasonable for the respondent to have to take those steps and when?

25. Did the respondent fail to take those steps?

Remedy

26. In light of our conclusions on the substantive issues above, it was not necessary for us to consider any issues of remedy.

Findings of fact

27. We make the following findings of fact on a unanimous basis.

28. The claimant was employed by the respondent from 1 September 2021 to 14 September 2023, initially as a Student Engagement Manager and, from 1 September 2022 onwards, as an Alternative Provision Co-ordinator. Both roles were at Grade 7 level.

29. The claimant previously served in the military and, whilst there, suffered injuries to his knee and back. For a long time he was able to manage these injuries using a combination of pain relief, physio and stretching exercises. His condition did however deteriorate over time, and by June or July 2022 the claimant considered himself to be disabled. In July 2022 the claimant suffered a further injury to his back. In 2023 he suffered an injury to a ligament in his ankle.

30. The respondent is a large secondary school in Sheffield with approximately 1,900 pupils. The respondent's school day contains 5 periods. Periods 1, 2, 3 and 5 each last for an hour. Period four is split into 3 thirty minute periods – 4a, 4b and 4c. This is to reflect the staggered lunch period operated by the school.

31. When the claimant joined the respondent he filled in a Work Health Assessment Questionnaire. The claimant did not disclose his back or knee conditions on the form and answered 'no' to all of the following questions:

    1. Do you have any physical or mental health conditions or long standing impairments?

2. Do you need any special aids or adaptions to assist you at work, whether or not you have a disability?

3. Are you currently having or waiting for any medical treatment or investigations? and

4. Have you any other health problems?

32. The claimant was provided with a contract of employment and accompanying documents, which included a disability question: "*do you have a physical or mental impairment that has a substantial or long term adverse effect on your ability to carry out normal day-to-day activities*". The claimant replied no to that question.

33. The claimant began working as a Student Engagement Manager on 1 September 2021 and was provided with a job description for the role. The role included some elements of behaviour management. Not all of the duties that he was required to carry out were included in that job description. For example, for approximately two hours every day the claimant was required to walk to a nearby retail park and around the school to round up and send in to school any students who were late or not present. The claimant was able to perform these duties and made no complaint about them. In particular he didn't complain that they were not in his job description or that he struggled to do them physically. There was no evidence before us to suggest that the claimant had any difficulties performing the role of Student Engagement Manager because of his health conditions.

34. The claimant reported to Sarah Johnstone, Assistant Headteacher, and initially the relationship between the two of them was a good one. Ms Johnstone reports to the school's Headteacher, Kam Grewal-Joy.

35. The respondent valued the claimant as he has a particularly unique skill set. There were however some concerns about aspects of his performance and conduct in the Student Engagement Manager role, and in April 2022 a position became available as Alternative Provision Co-ordinator. Alternative provision is provided by the local council for children who are not able to settle in school or who need extra support. Such children are sent off the school premises to attend learning at alternative provision centres run by the council.

36. Ms Johnstone and Ms Grewal-Joy thought that the claimant would be well suited to perform the Alternative Provision Co-ordinator role. They also knew that the claimant was interested in Forest School provision and in running Duke of Edinburgh awards. The Forest School is in essence an outdoor classroom, set up to give children experience outdoors, by getting them involved in activities involving natural objects and learning about nature. At Meadowhead school the Forest School is located on the school field, where there is also a basic wooden classroom structure.

37. Ms Johnstone and Ms Grewal-Joy decided to create a bespoke role for the claimant, combining the Alternative Provision Co-ordinator role with responsibility for leading on Duke of Edinburgh and the Forest School. They believed that this would play to the claimant's strengths. The new role was given the title of Alternative

Provision Co-ordinator, Duke of Edinburgh and Forest School programme leader.

38. In May 2022 Kam Grewal-Joy met with the claimant to discuss the new role. Ms Grewal-Joy's evidence to the Tribunal was that when she discussed the role with the claimant she explained that it would include alternative provision co-ordination, Duke of Edinburgh, leading the Forest School programme and behaviour management duties including on-call and Internal Seclusion Room duties.

39. The Internal Seclusion Room ("ISR") (also known as the Internal Exclusion Room or IER) is a room where students who have misbehaved are sent for the rest of the school day as an alternative to being excluded from school. It includes a number of desks along the walls of the room. Students sit at the desks with their backs to the centre of the room and facing the wall, often wearing head sets as they participate in online learning. A member of staff is present throughout the school day and lunchtime in the Internal Seclusion Room. The ISR is approximately 6.5 metres long and 4.5 metres wide. Although there are desks on two sides of the room, there is space in the middle of the room. The claimant accepted that the room was 'as long as a limousine'. There is room to stand and walk around the room and members of staff are not required to remain seated when supervising students in the ISR.

40. Ms Johnstone also discussed the new job with the claimant. She told the Tribunal that during these discussions she told the claimant that he would be required to do on-call and ISR duties. The on-call duties involve walking around the school dealing with any behaviour incidents. There are normally 3 members of staff on call at any one time, although sometimes this is not possible. The ISR duties involve remaining in the ISR supervising students. A desk and chair are provided for the member of staff, but they are free to stand up, move and walk around the room whilst doing the supervision duties.

41. The claimant's evidence to the Tribunal was that during the discussions about the new role no mention was made of ISR/IER duties, that those duties were very different to the duties that he had previously been carrying out, and that he did not agree to perform them.

42. After the meeting with Ms Grewal-Joy the claimant was provided with a job description for the new role. The job description included assisting with supervision when required, assisting with on call duties and undertaking "*any other duties and responsibilities, which do not change the character and purpose of the post, as may be determined after negotiations between the Headteacher, the post holder and the appropriate trade union*". The claimant accepted the offer of the new role.

43. In early July 2022 the claimant was provided with a draft timetable for the new role ("Work plan 1"). The total hours allocated to the claimant under the timetable were 35 a week. Of those, 5 hours a week (an hour every lunch time) were to be spent in the Internal Exclusion Room and 2 hours a week (one hour on a Thursday and one hour on a Friday) were to be spent on call.

44. The claimant was concerned that there was insufficient time allocated in the timetable to the alternative provision work, as just 10 hours a week were initially

allocated to this part of the job. He raised this at the time with his union representative Jo Bennett and her advice was to "*stick with your guns and say you don't want to do the IER for 5* hours" and that the job description didn't refer to IER duties. The claimant took this advice and told Jo Bennett that he would speak to Sarah Johnstone and say he did not agree to the IER but was happy to do the teaching and on calls.

45. It is telling that in emails sent between the claimant and his union representative on 5 July 2022 the claimant did not tell his union representative that IER / ISR or on call duties had not been discussed with him previously or that he had not agreed to perform them. Rather, the concerns he expressed to his union representative were that there was not enough time allocated for him to do the alternative provision role. It was the union representative who suggested he tell the respondent that he did not want to do the IER duties and that the job description did not refer to it. Moreover, in an email sent to Ms Johnstone on 7 July, the claimant referred to having had a conversation about what he described as 'extra duties'.

46. We find on balance that the claimant was told during the discussions about the new role that on-call and ISR duties would be involved, although not how much. Certainly by early July at the latest, approximately two months before the claimant took up the role, he knew they would be part of his new role.

47. On 7 July 2022 the claimant sent an email to Sarah Johnstone in which he raised concerns about the timing and amount of what he described as the "*extra duties I have been time tabled for next year and how this will affect the ability to carry out the AP role*". In that email he commented that "*When we discussed the AP role we had a conversation about extra duties and at that time you discussed P3 teaching and then possibility of P4 on duty. I mentioned then how it would impact the AP role.*" He also wrote that "*IER cover is something I did not agree and heavily impacts the ability to carry out the AP role for any afternoon, especially if I need to carry out visits.*"

48. There is no mention in the email of 7 July of any health issues affecting the claimant's ability to do the new role. Rather the email gives the impression that the claimant's concerns were firstly that there would not be enough time to do the additional provision side of the role, and secondly that he had not agreed to do IER duties. What is clear is that even before he took up the new role the claimant did not want to do IER duties.

49. Ms Johnstone was in hospital when she received the email of 7 July so just sent a brief acknowledgement to the claimant. When she was back at work Ms Johnstone arranged a meeting with the claimant to try and reassure him that the timetable she had created was fair and would give him sufficient time to carry out the alternative provision duties. The previous Alternative Provision Co-ordinator had been allocated 6.5 hours a week to manage alternative provision. The claimant was ultimately allocated double that amount, 13 hours a week. He was also allocated 10 hours to Duke of Edinburgh and 5 hours to Forest School. Only 20% of his work would be in ISR and on-call.

50. The claimant took up the new role as Alternative Provision Co-ordinator on 1 September 2022. He continued to report to Sarah Johnstone. His duties from the start included both on-call and IER totalling 7 hours a week and for a period he raised no concerns about having to perform these.

51. On 18 November 2022 the claimant told Joy Kelsey, the respondent's HR Manager, that he was struggling with his back and knees and that the work he was carrying out was aggravating it. The respondent immediately referred the claimant to Occupational Health and an assessment was arranged for 24 November by telephone.

52. On 23 November 2022 the claimant sent an email to Joy Kelsey in HR, in which he wrote:

"*Following our conversation on Friday 18th November, I am putting into writing that I brought to your attention that recently I was diagnosed as having a disability. During my time in the military I suffered an injury to my knee and back, up until now I have been able to manage the symptoms caused by my injury but unfortunately it has become progressively worse.*

I would like to request some reasonable adjustments and work place adaptions to help manage my disability in the work place…. as you know I have an Occ Health meeting tomorrow….

I need an open spaced work area where I can regularly get up, move around and stretch (preferably in private as at times I need to lie on the floor to stretch). I would also request I am taken off duties where this is not possible and that also require excessive use of stairs or where I am sat for long periods unable to relieve my pain. i.e: On call and ISR duties. These are recommendations discussed and agreed by my physiotherapist….

Thank you for your understanding and support…."

53. On 24 November the claimant was assessed over the telephone by Occupational Health. A detailed report was prepared following the assessment. The report contained the following:

"*Paul reported that he has previously been able to manage all the work tasks required in his core role; however, he tells me that some duties have been added onto his core role, which entail activities that exacerbate his back and knee pain, and his pain has worsened over the past 2 months. He identified these as walking around the school and repeated use of the stairs when he has to deal with truant pupils, and the inclusion room, where he is required to sit for an hour….*

I appreciate these comments reflect Paul's view of the situation and that management may well take a different view….

Impact on work

Paul has ongoing symptoms of back and knee pain, which has worsened over the

past 4 years, and which is exacerbated with prolonged sitting, walking and stair use. He advised that he has been required to undertake additional tasks at work, which include these activities, and in addition, he does not currently have adequate space in his current office to perform the stretching exercises that help him manage his back pain."

54. The report stated that the claimant was fit for work with support and adjustments and made the following recommendations:

    1. A Display Screen Equipment (DSE) Assessment at his workstation;

    2. An ergonomic chair to support his back;

    3. Regular breaks from DSE work – both micro breaks of a few seconds every twenty minutes during which he changes position, and short breaks of 2 to 3 minutes every hour, during which he stood up away from the desk and stretched or walked; and that

    4. If feasible, consideration should be given to finding alternative office space with room for him to stretch.

55. The Occupational Health Nurse who carried out the assessment also commented in the report that "*Paul advised that he feels he would be able to manage the activities associated with the additional duties if he had the ability to undertake the stretching exercises and if his work station provided more space and comfort to help with his back pain"* and that "*In terms of adjustments, you may wish to consider flexible working, changing tasks or the pace of work, and allowing time for appointments and treatment if these cannot be arranged outside working hours.*

56. The report was sent to the respondent on 29 November 2022 and Ms Grewal-Joy arranged a meeting with the claimant to discuss it. The meeting took place on 5 December 2022. Present at the meeting were Ms Grewal-Joy and Joy Kelsey from HR, the claimant and his trade union representative. During the meeting Ms Grewal-Joy asked whether the disability had been declared at the time of his employment, and the claimant said that he did not have the issues at the time he joined the respondent. He told Ms Grewal-Joy that his pain was made worse by sitting in cramped conditions in the office, although he had recently moved desk and this had helped.

57. The claimant told Ms Grewal Joy that his condition did not affect his ability to do the Forest School and Duke of Edinburgh work, but that it was the on-calls that were the issue because he didn't have time to stretch if he had to be based in the ISR immediately after doing on call work.

58. The minutes of the meeting, which were sent to the claimant and his union representative for approval, and on which they made no comment, recorded a number of action points:

    1. Investigation of areas in the school where the claimant could stretch in privacy;

2. Purchase of an ergonomic chair;

3. A DSE assessment;

4. Swaps in the claimant's timetable to better provide opportunities for micro breaks;

5. The claimant to take micro breaks as necessary within the day; and

6. Time to be provided for the claimant to attend physio or GP appointments if these could not be arranged out of school time.

59. The claimant accepted in his evidence to the Tribunal that a DSE assessment had been carried out, that he had been provided with an ergonomic chair approximately a month after the Occupational Health assessment, and that he had been able to take micro breaks. He also said that he could take short 2-3 minute breaks when in his office but not in the ISR.

60. On 7 December the claimant sent an email to his trade union convenor saying that he was not happy with the outcome of the meeting on 5 December, that he felt bullied and pressured into not getting the adjustments he had asked for, and that he felt the Headteacher was pushing to remove him from his post and was dismissive of his disability. The union convenor advised him to email and thank the respondent for the adjustments that they had agreed to make and to request a 6 week review after the ergonomic chair was received. She also commented that whilst Occupational Health can recommend adjustments, they cannot insist and that it is down to the employer to decide what adjustments can be made.

61. Following the meeting on 5 December, Ms Grewal -Joy asked Sarah Johnstone to create a new timetable for the claimant. The new timetable contained 4 hours of on call and 3.5 hours of ISR duties. None of the ISR duties took place immediately after the on-call, but rather the claimant was allocated Duke of Edinburgh or alternative provision duties immediately following on-call. This would have enabled him to rest and stretch. The claimant was allocated just 30 minutes of IER on Monday, Tuesday and Wednesday, and an hour on Thursday and Friday.

62. The new timetable was sent to the claimant on 12 December. The claimant's trade union representative wrote to the respondent the same day asking that the respondent reconsider the proposed timetable. The reason given was that "*Paul requested his on call duties be reduced on removed as part of a reasonable adjustment and although we appreciate lunch has been moved to in between the duties they still appear to have been increased. On call going from 2 hours to 4. Overall duties was 7 hours and is now at 7 ½ hours."*

63. Ms Grewal-Joy replied to the trade union representative indicating that her recollection of the meeting on 5 December was that there was an issue with the timings of the on call duties which had been addressed in the amended timetable.

64. On 13 December Jo Bennett from the GMB sent an email to the respondent in

which she quoted from the Occupational Health report and referred again to the claimant's difficulties using stairs.

65.

66. The claimant was off sick on 14th and 15th December. The 16th December was the last day of the school term and was a half day. The school was then closed until Tuesday 3 January 2023.

67. By mid-December 2022, just a few weeks after the claimant told the respondent about his health problems, it is clear that he was not happy at work. On 12 December one of the Behaviour Managers at the school reported to Ms Johnstone that the claimant had come into the office that morning and complained that she (the Behaviour Manager) had gone behind his back, before commenting "*I f…king hate this place*" and walking out.

68. On 28 December the claimant submitted a grievance. In the grievance he complained about Ms Grewal-Joy and Ms Johnstone, alleging that they had treated him differently and made him feel bullied and harassed since declaring his disability. He asked that as an outcome of the grievance the incidents of bullying and harassment should be investigated and resolved and that his disability should be recognised and reasonable adjustments put in place.

69. The grievance was considered by Lynda Jones, Chair of Governors. An informal grievance meeting took place on 23 January 2023 and on 24 February Ms Jones wrote to the claimant informing him of her decision. Ms Jones concluded that the claimant's disability had been recognised and that reasonable adjustments had been made. She did not uphold his complaints that he had been bullied and harassed by Ms Grewal-Joy. She did not uphold his complaint that he had been bullied by Ms Johnstone, but recognised that there was an issue in the relationship between the claimant and Ms Johnstone which needed to be addressed. She recommended that a round table meeting should be arranged to try and resolve what she perceived to be a fractured working relationship between the claimant and his line managers, and to agree to trial the adjustments that had been put in place and agree a date to review them.

70. In early January 2023 the claimant began applying for other jobs. He also provided more information to Joy Kelsey about his knee injury, indicating that he was now not able to perform on-call duties. In response to this, Sarah Johnstone created a new timetable for the claimant in which there were no on call duties at all, but 7.5 hours of ISR each week. Ms Grewal Joy sent the revised timetable to the claimant on 13 January.

71. The claimant sent an email to Sarah Johnstone on 17 January in which, amongst other things, he complained about the amount of ISR duties included in the new time table. He wrote that, although removing him from on-call duties would reduce his knee pain, it would exacerbate his lower back issue. He suggested that the Occupational Health report had suggested reducing or removing both ISR and on call duties, which was not in fact the case. He said that additional time in the ISR

was causing him discomfort because he could not get up from the desk and walk away to stretch his back and knees in the ISR because there were pupils present. He also asked whether he would be offered a second ergonomic chair for the ISR, or would be expected to move his existing specialist chair to the ISR every time he was on ISR duties. He finished the email by "*formally requesting again that my duties that cause pain and are related to my disability are reduced or removed, as per my original emails and the Occ health report*".

72. Ms Johnstone knew that it was possible for a member of staff to stand up and walk around in the ISR room, and that the claimant was not required to stay sitting at the desk when on ISR duties. Recognising that the claimant had previously suggested that at times he may need to lie down on a desk or the floor to do his stretches, and that he did not want to do that in front of pupils, she suggested to the claimant that if he needed a break from ISR duty he should contact another member of staff and ask him or her to relieve him. She also suggested that, if he was having difficulty with the stairs, he should only cover the ground floor when on-call. She asked him to consider these adjustments.

73. On 19 January Ms Johnston wrote to the claimant stating that she had not received any feedback on her suggestion of him contacting a 'shadow' member of staff to release him from ISR duty when he needed to stretch. She said that she had asked another member of staff to listen out for his call when he was in the ISR that day. She also encouraged him to make use of this support to prevent discomfort. In the email Ms Johnstone told the claimant that she had asked for a second specialist chair to be ordered, to be based in the ISR, and that until the second chair arrived, a caretaker could move his current ergonomic chair to the ISR when he was in the ISR. In response to Ms Johnstone's email the claimant replied, "*I do not think this is a suitable adjustment for my disability still and I am seeking further advice from Union Rep prior to any further discussions.*" He did not however explain why he thought that the proposals were not suitable adjustments.

74. Ms Johnstone replied to the claimant on 19 January repeating again her suggestions that:

1. the caretaker move his ergonomic chair to the ISR for him until a second chair arrived;

2. He contact another member of staff to relieve him from the ISR when needed; and

3. He revert back to his previous timetable with on-call duties but only cover the ground floor, to avoid having to use stairs.

75. She finished her email by commenting: "*I appreciate that you need time to take advice and I understand that you may not answer, but please know that these adjustments / solutions are in acknowledgement of the discomfort you are experiencing and have been explaining to me / the school and aim to prevent any further symptoms.*" There was no evidence before us of the claimant responding to this email.

76. The claimant continued to apply for other jobs and on 25 January 2023 the claimant asked Ms Johnstone for time off to attend interviews for new jobs on 1st February and 2nd February.

77. The following day he sent a further email to Ms Johnstone in which he complained that on two occasions that week he had not been able to take his lunch break whilst in ISR. Ms Johnstone replied apologising for this and stating that she would provide cover over lunch herself. Ms Johnstone also asked the rest of the team to ensure that they were providing cover for the claimant. They told her that they were when asked.

78. On 7 March 2023 the claimant complained again that he had not been able to have lunch because no one had taken over ISR for him. He said that he had radioed the Senior Leadership Team but no one was available. He recognised however that there were staff shortages at the time.

79. Ms Johnstone questioned the team about the claimant's email. She was told that they had not received any calls from the claimant to help. She was also aware that the ISR Manager, who is the member of staff who spends most time in the ISR, did not usually have any difficulty in getting staff to relieve him if he needed to leave the room for a short period of time.

80. On 8 March 2023 Ms Johnstone decided to ask to view the pre-recorded CCTV from the ISR room. The reason she asked for the CCTV was so that she could get to the bottom of the concerns that the claimant was raising about not being relieved in the ISR room by other members of staff, and not being able to take lunch. The claimant had alleged that he had been in the ISR on three separate occasions for extended periods without access to food, and that staff were consistently late to their duties and not available to support him.

81. Having viewed the CCTV footage, Ms Johnstone concluded that there were some discrepancies between what the claimant was telling her, and what she saw on the CCTV footage. For example, although on 7 March there was a 30 minute delay in the claimant being relieved from ISR, on other occasions staff had arrived promptly to relieve the claimant and the claimant was observed eating lunch in the ISR. This caused Ms Johnstone to have further doubts about the claimant's honesty.

82. Moreover, although the claimant had told the respondent he did not want to do any on-call duty, on occasion he volunteered to do it. On 29 March the claimant told Assistant Headteacher Steve Bacon, that he would pick up duties such as on-call if the school was short.

83. On 19 April the claimant informed Ms Grewal-Joy and others that he had been shortlisted for another role and had an interview on 21st April. Ms Grewal-Joy replied thanking the claimant for letting her know and suggesting that he speak to Sarah Johnstone or Steve Bacon, so that one of them could help him prepare for the interview. The claimant suggested that this response was an indication of Ms Grewal-Joy wanting him to leave. Ms Grewal-Joy's evidence was that it was normal practice at the school to help staff prepare for interviews. On balance we

prefer Ms Grewal-Joy's evidence on this issue and find that this email was an indication that Ms Grewal-Joy was trying to help the claimant, not that she wanted him to leave.

84. On 21st April 2023 the second ergonomic chair for the claimant arrived and was placed in the ISR. Ms Johnstone sent an email to Stacey Shaw, a colleague, in which she asked whether anything else could be done to "*fully ensure that his working environment in the ISR is the same or better than his office space? I am keen to ensure that all reasonable adjustments have been considered and where possible, implemented.*" This email, which was not copied to either the claimant or his trade union representative, is telling of the approach taken by Ms Johnstone, which was to try and support the claimant and make all reasonable adjustments that were possible.

85. On 3 May 2023 a round table meeting took place at the recommendation of the grievance hearer. Present at the meeting were Lynda Taylor, the grievance chair, the claimant, a trade union representative, Kam Grewal-Joy, Sarah Johnstone, Lesley Blackett HR Advisor and a minute taker. The meeting lasted almost 3 hours and discussed a number of issues, including reasonable adjustments.

86. The minutes of that meeting, which were sent to the claimant and his union representative for comment, record that the claimant was asked by Lynda Taylor what it was about the ISR that caused him pain. In response the claimant said that he could not tell when his back would be sore and ISR did not give him the freedom to get up when he needed to. When Lynda pointed out that it is possible to stand up and walk around in the ISR, he replied "*that is not sufficient*", that he had never agreed to ISR and that it was not within his job description. There is no mention in the minutes of that meeting of the claimant saying that he needed to lie down to stretch or crack his back.

87. By the time of that meeting all of the on-call duties had been removed from the claimant's timetable. The claimant was asked whether, in light of his comments about the ISR, it would be better to revert to on-call. The claimant replied "*yes*". The minutes also record that: "*Lesley stated that the OH recommendations have been put in place and asked why can Paul do things in his office that he can't do in ISR. Paul explained that it is just not working for him and it is not an effective adjustment and it wasn't discussed with him.*" There was no explanation of why it was not working.

88. It was suggested that the timetable be amended so that the claimant do a mix of on-call and ISR and the claimant's trade union representative suggested that such an arrangement should be trialled. The conclusion of the meeting was that the duties for the role should be split between ISR and on-call and distributed throughout the week at different times of the day. The claimant's proposal to reduce the hours of ISR and on-call was not immediately accepted but the Headteacher promised to review it in the context of the needs of the school. A review date to consider the amended timetable and reasonable adjustments was set for 27 June.

89. After the meeting an amended timetable was drawn up. By this stage of the school year, there was more flexibility, as teaching of GCSEs and A levels was

coming to an end in preparation for the exams which start in May, and Year 11 and 13 students would be going on exam leave. Additional staffing resource was therefore available so the claimant's ISR and on-call duties could be reduced.

90. On 12 May Sarah Johnstone sent a revised timetable to the claimant. This was the third time during the school year that the claimant's timetable had been amended. The new timetable contained 3.5 hours of ISR duties and 2.5 hours when the claimant could do either ISR or on call as he preferred, depending on how he was feeling that day. Ms Johnstone also ensured that the claimant had time either side of a 'fixed duty' (ISR or on-call) to do stretches.

91. On 4 May the claimant began a period of sickness absence. He self-certified his absence initially and then submitted a fit note certifying him as unfit to work from 10 to 23 May due to work related stress.

92. The claimant returned to work on 24 and 25 May to undertake Forest School training which was off site. He then went off sick again and was certified by his GP as being unfit for work due to work related stress, back and knee pain from 26 May to 18 June.

93. Whilst he was off sick the claimant saw a doctor at Chesterfield Royal Hospital about an injury he had sustained to his ankle. On 7 June the doctor signed a fit note stating that the claimant may be fit for work with adjustments but should avoid on-call duties for approximately 3 months. The following week the doctor provided a further fit note, dated 13 June, which referred to the claimant's knee problem and suggested 'lighter duties ISR + on call'. It is not clear from that fit note whether the doctor is recommending that the claimant should do ISR and on-call or not. One reading of the fit note is that the claimant should do ISR and on-call as part of lighter duties.

94. On 21 June an absence review meeting was carried out by Ms Grewal-Joy. The claimant indicated during that meeting that, although there were unresolved issues, he did want to return to school as he was missing colleagues and students. His trade union representative suggested that the unresolved issues might be alleviated on the claimant's return to work as he had not yet tried out the adjustments that had been agreed.

95. It was agreed that the claimant would ask for relief from on-call staff if he needed to take time out to stretch. The claimant was offered a phased return to work but said he didn't feel that one was necessary. It was agreed that there would be flexibility in relation to on-call and the ISR room depending on the claimant's well-being on any given day and his need to stretch. The claimant agreed to trial this.

96. The claimant returned to work on 26 June and on 30 June there was a meeting between the claimant and Sarah Johnstone. The claimant was asked how the new timetable was going and replied that it seemed fine. In his evidence to the Tribunal the claimant said that the reason he made that comment was because by that stage he was tired physically and mentally, knew it was the last couple of weeks of school and that the timetable would not be changed prior to leaving. Whilst that may very

well have been the case, he certainly gave the impression to the respondent during the meeting on 30 June that the amended timetable was working fine.

97. A further meeting between the claimant and Ms Johnstone took place on 14 July. During that meeting he told Ms Johnstone that his duties, on–call and ISR had all been OK that week.

98. On 7 July 2023 the claimant sent an email to Joy Kelsey telling her that he had been offered two dates for knee surgery in September 2023 and that he would be off work for between one and six weeks after the surgery, following which he would require light duties.

99. On 14 July the claimant wrote to Sarah Johnstone asking for a copy of his time table for the following year. Three days later, on 17 July, the claimant received a job offer from Holy House School. He sent an email to Ms Grewal-Joy and Joy Kelsey in which he wrote:

"*I have just received a call from Holy House School with an offer of employment. They will be sending references today.*

Once Holy House School has received the references, I will then be in a position to hand in my resignation. I will still be in Meadowhead in September so can support any handover.

Thank you for your support in this transition."

100. The claimant was very pleased to have received the job offer and excited about the new role. He began contacting colleagues and contacts to tell them about the job and that he would be leaving the school. On 17 July he sent an email to Hazel Canning in which he wrote:

"*Some great news…..I will be leaving Meadowhead and have been offered a brand new role as Forest School Lead / behaviour / everything else role at a special school for 7 to 14 year olds, so I am very excited!*

Can I just say ***thank you*** *for your support in FS, which has helped me move roles.*

Can I ask that any further correspondence goes to my personal email…."

101. The following day he sent private emails to Syreeta Illingworth in which he wrote:

"*I have accepted a job in a SEN school as a Team Leader for Forest School…. I won't start until October….*

Just waiting for contract etc so I can official resign."

102. He also wrote to Susan Wraith to tell her he'd been offered the job and commented: "*I'm going to miss all the kids though! And you guys at AP who have been great to work with*".

103. The claimant had by 17 July decided to accept the new role and resign from his position with the respondent, once references had been taken up and he had signed a contract of employment with the new employer.

104. In response to the claimant's request, Sarah Johnstone created a timetable for the claimant, knowing that he was unlikely to be working in the school in September. The new timetable contained a significantly increased amount of ISR and on-call work. On Mondays the claimant was allocated 4 or 5 hours ISR and 1 hour on call. On Tuesday 1 or 2 hours ISR and 2 hours on call. Wednesday contained 1 or 2 hours ISR and 1.5 hours on call, Thursday 1 or 2 hours of ISR and 1.5 hours on call and Friday 1 or 2 hours ISR and 1 on call. There was a total of up to 13 hours a week ISR and 7 hours on call duties.

105. This final timetable showed no consideration for the reasonable adjustments that had been made and it was ill advised of Ms Johnstone to give it to the claimant. We accept that, when she gave the timetable to the claimant, she thought it unlikely that the claimant would still be in post in September. It would have been preferable however not to provide a timetable at all given that he was facing either an operation or starting a new job elsewhere, particularly since Ms Johnstone can have been in no doubt by that stage that providing a time table with increased ISR and on-call would upset the claimant.

106. Ms Johnstone's evidence to the Tribunal that she needed to include additional hours in the time table because the ISR manager had left and his duties needed to be reallocated was not persuasive. Particularly since she also told the Tribunal that the school was recruiting a new member of staff to work in the behaviour management team.

107. Ms Johnstone could have marked the timetable as provisional, or indicated that the additional ISR and on-call duties were only in there temporarily and would be removed, but she did not do so. She also included the claimant's name on the timetable, which is a clear indication that it was his timetable rather than anyone else's.

108. The claimant forwarded the new timetable to his trade union representative on 19 July with the comment: "*if I wasn't leaving would that even be legal???*". The representative replied commenting "*surely this supports your tribunal case?*"

109. On Sunday 3 September 2023 the claimant sent an email to Ms Grewal-Joy resigning from his position. In his email he asked to be released early without working all of his notice period and wrote that:

"*I am resigning from my position….following signing my new contract this weekend….*

I feel that I am left with no choice but to resign in light of my experiences over the past year regarding a fundamental breach of contract, disability discrimination and ongoing victimisation and harassment due to raising a grievance in regards to my disability….

Further to all this and the 'last straw' was my time table being changed again for this new term and the duties that cause pain and discomfort due to my disability have ben doubled again from 7.5 hours to 15 hours….this new time table would be impossible for me."

110. By the time he sent this email the claimant had already issued proceedings in the Employment Tribunal.

111. On 4 September Ms Grewal-Joy acknowledged the claimant's resignation and agreed to release him from his contract as he had requested. She also offered him paid leave on Wednesday 6 September to prepare for his operation the following day. Equally, she said that he could attend school as normal if he preferred and a temporary timetable would be created for the day.

112. The claimant was due to have an operation on his knee on 7 September so had a period of agreed absence. His operation was postponed, but he was then absent from work due to stress and anxiety from 7 to 14 September 2023.

113. On Monday 11 September 2023 the claimant informed Joy Kelsey that his operation had been cancelled at short notice and that, having spoken to his legal advisor, returning to the school would cause him further stress and anxiety. Ms Grewal-Joy wrote to him the following day thanking him for the update and offering him garden leave from 14 September for the remainder of his notice period.

114. The claimant replied declining what he described as a generous offer and stating that "*I am therefore resigning with immediate effect."*

115. The claimant's employment terminated on 14 September 2023 and he began his new job at Holy House School later that month.

The Law

Constructive unfair dismissal

116. Where an employee resigns, as the claimant in this case did, he can still claim unfair dismissal if he can establish that his resignation falls within section 95(1)(c) of the Employment Rights Act 1996, which provides that:

> "*(1) For the purposes of this Part an employee is dismissed by his employer if….*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

117. The questions that the Tribunal needs to consider in a constructive dismissal claim in which, as in this case, the claimant alleges that the respondent breached the implied term of trust and confidence, are:

1. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent;
2. Did the respondent have reasonable and proper cause for doing so;
3. Did the claimant resign in response to the breach of contract by the respondent; and
4. Did the claimant affirm the contract before resigning?

118. It is well established that a course of conduct by an employer can, when looked at as a whole, amount to a fundamental breach of contract even if the 'last straw' incident which prompts the employee to resign is not in itself a breach of contract (***Lewis v Motorworld Garages Ltd [1986] 157 CA***).

Reasonable adjustments

119. Section 20 of the Equality Act 2010 states as follows:-

> "(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…"*

120. Section 21 of the Equality Act 2010 provides that:-

> "*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"*

121. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan [2008] ICR 218*** and in ***Royal Bank of Scotland v Ashton*** **[2011] ICR 632**, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders*** **[2014] EWCA Civ 734**.

122. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage…"

123. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

1. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

2. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

3. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

4. Is the claim brought within time?

124. Paragraph 6.28 of the Equality and Human Rights Commission Code of Practice on Employment sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

1. The extent to which it is likely that the adjustment will be effective;

2. The financial and other costs of making the adjustment;

3. The extent of any disruption caused;

4. The extent of the employer's financial resources;

5. The availability of financial or other assistance such as Access to Work; and

6. The type and size of the employer.

125. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage.

Conclusions

126. The following conclusions are reached on a unanimous basis.

Reasonable adjustments

127. The respondent admits that the claimant is disabled pursuant to the Equality Act

2010 and that it applied a PCP of requiring the claimant to undertake ISR and on-call duties.

128. The claimant alleges that those duties put him at a substantial disadvantage compared to someone without his disability in that:

1. The ISR duties require sitting in the room for a long period, and that he is not able to take breaks to stretch and/or lie down on the desk or the floor, because lying down would be inappropriate in front of children. He suggests that this causes him discomfort and pain as a result of his back condition.

2. The on-call duties involve patrolling around the school attending incidents, which cause him difficulty because of his knee condition. In particular he finds it difficult to climb stairs.

129. We have first considered whether the ISR duties placed the claimant at a substantial disadvantage in comparison with someone who does not have a knee or back condition. The respondent's evidence was that it is possible for a member of staff to stand up and walk around the ISR room and that the claimant was not required to remain sitting whilst performing ISR duties. The claimant suggested that he was required to remain seated whilst in the ISR room.

130. We prefer the respondent's evidence on this issue. We find that the claimant was able both to perform micro breaks (which involve changing position for a few seconds) and to stand up and walk around the room whilst performing ISR duties. He was not required to remain seated at the desk at all whilst in the ISR, and certainly not for an hour. We do however accept the claimant's evidence that he was not able to stretch his back by lying on a desk or floor in the ISR room when children were present.

131. The Occupational Health recommendations were that the claimant take micro breaks every 20 minutes and short breaks where he would stand and stretch or walk every hour. There was no evidence before us of how often the claimant needed to lie down to stretch or crack his back. He was able to take micro breaks whilst in the ISR and to take short breaks which involved standing and walking.

132. Whilst we accept that the claimant was not able to lie down or on a desk in the ISR, he was not required to be in the ISR for more than an hour at a time. He could have taken breaks by standing and walking around the ISR and could have laid down or across a desk before and after his ISR duties. He could also have called a colleague to come and relieve him. When the claimant was asked during the 3 May meeting why he could do things in his office that he couldn't do in the ISR he merely replied, "*it is just not working for him and it is not an effective adjustment".* He did not say why it wasn't working for him and made no mention of needing to lie down.

133. Whilst the threshold for establishing a substantial disadvantage is not a high one, the claimant has not in this case met it in relation to the ISR duties. He has not persuaded us, on the evidence, that the inability to lie down to do stretches whilst in the ISR for a limited period of time placed him at a substantial disadvantage when

compared with someone without his disability, given that he could stand up, change his position and walk around.

134. In light of our conclusions on that issue, it follows that there was no requirement to make adjustments in relation to the ISR duties.

135. Turning next to the question of whether the on-call duties placed him at a substantial disadvantage, we accept the claimant's evidence that, because of his knee condition, it was difficult for him to go up and down stairs and that a requirement to go up and down stairs placed him at a substantive disadvantage. We have taken account of the fact that the test as to whether a disadvantage is substantial or not, is not a high threshold, as substantial means 'more than minor or trivial'.

136. The claimant performed a number of duties that involved walking and other physical activities, including the Duke of Edinburgh and Forest School duties. We do not accept that the requirement to walk whilst performing on-call duties placed the claimant at a substantial disadvantage because he was able to walk, but we do find that the requirement to perform on-call duties that involve the use of stairs placed him at a substantial disadvantage. The duty to make reasonable adjustments therefore arose in relation to on-call duties over more than one floor.

137. When the claimant told the respondent in January 2023 that he was struggling to do on-call duties because of a knee injury, the respondent removed all on-call duties from him. In January 2023 he was given an amended timetable with no on-call duties at all. Ms Johnstone also suggested that, if he wanted to resume on-call duties, he perform them on the ground floor only, to avoid having to use stairs. There are normally three members of staff on-call at any one time, although this is not always possible due to resourcing issues.

138. The requirement to do on-call duties was only reinstated in May 2023 when the claimant was presented with a fourth timetable. The reason on-call duties were reinstated at that time was because, during the round table meeting on 3 May, the claimant had said it would be better for him to revert to doing on-call than just to do ISR. It was agreed during the meeting that the claimant would be given a mixture of ISR and on-call with a degree of flexibility as to which he did. During the meeting his union representative had suggested trialling this out and it was agreed that there would be a trial period for the new timetable.

139. The new timetable put in place in May contained just two thirty minute periods of on-call, and a further three thirty minute periods during which he could do either ISR or on-call at his choice. As a result of the claimant's sickness absence in May and June 2023, he only actually worked to this timetable for four weeks before the end of the summer term. There was no evidence before us as to how much on-call he actually did during this period or that he was required to climb stairs at all when performing on-call duty.

140. Although the final time table presented to the claimant on 19 July 2023 contained more on-call duties, the claimant did not work to this timetable because he resigned.

141. Between the introduction of the new timetable in January 2023 and May 2023 the claimant was not required to do any on-call. After he returned to work on 26 June, there were 30 minute periods of on-call in his timetable, most of which were optional, but there was no evidence before us to suggest that during these periods of on-call he was required to go up and down stairs. Ms Johnstone had made it clear in January that he could do on-call on the ground floor only.

142. The substantial disadvantage to the claimant arising from the requirement to go up and down stairs when performing on-call was therefore removed in January 2023.

143. The next issue for us to consider is whether the respondent knew or could reasonably have been expected to know that the claimant was likely to be placed at a substantial disadvantage by being required to do on-call duties including the use of stairs. The duty to make reasonable adjustments does not arise until the respondent has actual or constructive knowledge of the disadvantage. The respondent admits that it had knowledge of the claimant's disability in November 2022 when the claimant informed HR of his back and knee conditions, but the question of knowledge of the disadvantage caused by the stairs is a separate one.

144. The Occupational Health Report dated 29 November stated that the claimant's back and knee pain was exacerbated with prolonged sitting, walking and stair use. On 13 December Jo Bennett from the GMB referred again to use of the stairs in an email sent to Ms Grewal-Joy.

145. We find that the respondent knew or should have known about the disadvantage suffered by the claimant when using stairs by 29 November 2022 when it received the Occupational Health report.

146. It was therefore at this point that the requirement to make reasonable adjustments to on-call duties arose.

147. The respondent made the adjustment of removing on-call duties in the new timetable prepared on 14 January 2023, approximately six and a half weeks later. At least two of those weeks were the school holidays when the claimant was not at work.

148. The claimant alleges that the adjustment that should have been made was to significantly reduce or remove the on-call duties. The duties were removed in their entirety in the timetable dated 14 January 2023, and were only reinstated at the claimant's request and with his agreement in May 2023. When on-call duties were reinstated, the amount of on-call duty was significantly reduced from the original timetable to just two thirty minute periods a week, with the possibility of a further three 30 minute periods if the claimant chose and felt able to do them.

149. We find that the respondent therefore removed the substantive disadvantage caused by climbing stairs and complied with its duty to make reasonable adjustments to on-call duties by the middle of January 2023. There was no failure to make reasonable adjustments after that date.

150. The complaint for reasonable adjustments was raised in the first claim, which was presented on 1 June 2023, following a period of early conciliation that started on 7 May 2023 and finished on 9 May 2023. Any complaints about failure to make reasonable adjustments prior to 8 February 2023 are, therefore out of time. The complaint about the failure to make reasonable adjustments in relation to on-call duties was therefore presented outside of the primary time limit.

151. We have considered whether it would be just and equitable to extend time. In submissions Mr Flood said that it would be just and equitable to extend time because the claimant had raised a grievance promptly on 28 December 2022 and the grievance process had not concluded because there should have been a review meeting in relation to the adjustments discussed in the round table meeting at the end of June, and that had never taken place. It was, therefore, only when the claimant had lost faith in the internal process that he decided to issue proceedings.

152. That submission is not supported by the evidence before us. The claimant started early conciliation on 7 May, just a few days after the round table meeting, and issued proceedings on 1 June – well before the expiry of the review period agreed on 3 May. It cannot therefore be said that the claimant was waiting for the outcome of the review period before issuing proceedings.

153. Time limits exist as an important principle of public policy. Although the Tribunal has a wide discretion to extend time in discrimination cases, there is no presumption that time should be extended.

154. The claimant has had the benefit of considerable advice and support from his trade union throughout the period of his employment in the new role. There was no evidence before us to suggest that the claimant was not aware of his right to bring a Tribunal complaint, or that he was not aware of time limits for doing so. The claimant was clearly aware of his rights because he referred frequently in correspondence to reasonable adjustments and to disability.

155. It would not, in our view be just and equitable to extend time in this case. The claim for reasonable adjustments was not therefore made in time.

156. Notwithstanding our findings on this issue, we have nonetheless considered whether the claim for failure to make reasonable adjustments has merit. We find that it does not. Firstly because the requirement to carry out ISR duties did not place the claimant at a substantial disadvantage, and secondly because the respondent made the reasonable adjustment of removing all on-call duties in January 2023 and then, when they were re-introduced in May 2023 with the agreement of the claimant and his trade union representative, significantly reducing the amount of on-call duties.

157. The time taken to remove on-call duties was not, in our view unreasonable. The duty arose at the end of November when the respondent received the Occupational Health report. It was fulfilled on 14 January 2023. The respondent acted promptly in arranging for an occupational health review which took place within a few days of the claimant first making the respondent aware of his health conditions. The occupational health report was received on 29 November, and a meeting was

arranged promptly for 5 December to discuss the report and adjustments.

158. Following that meeting a new timetable was drawn up on 9 December and sent to the claimant that day. After the claimant's trade union representative asked on 12 December for the timetable to be looked at again, it was reviewed within a few weeks. The claimant was off sick on 14 and 15 December, 16 December was a half day and the school then broke up for Christmas holidays. It did not re-open until Tuesday 3 January 2023 and the amended timetable removing on call duties was produced 11 days later. In the circumstances there was no unreasonable delay. In contrast, there was some delay in arranging for the provision of both the first and the second ergonomic chair, but that did not form part of the claim for failure to make reasonable adjustments.

159. We therefore find that the respondent did not fail to comply with its duty to make reasonable adjustments.

Constructive unfair dismissal

160. There are three alleged breaches of the implied term of trust and confidence that are relied upon by the claimant :

1. A requirement imposed in or around June 2022 to spend 20% of his time undertaking ISR and on-call duties;

2. A failure to comply with the duty to make reasonable adjustments by removing or reducing the amount of ISR and/or on call duties from November 2022 onwards;

3. Notifying the claimant in July 2023 that from September must of his work would be taken up with ISR and on-call duties.

161. In relation to the first of these alleged breaches, we find that the claimant was told in early July 2022, when the first timetable for the Alternative Provision Co-ordinator role was sent to him, that 20% of his time would be undertaking ISR and on-call duties. At the time this timetable was issued, the respondent had no knowledge of any health conditions of the claimant. The respondent also knew that, in his previous role, the claimant had spent two hours every day doing duties which were at least similar to on-call duties, as well as duties which involved supervision and behaviour management.

162. The provision of the timetable came after a discussion between the claimant and Ms Grewal-Joy about what the new role would involve. During that discussion Ms Grewal-Joy told him that there would be some ISR and on-call duties in the new role. Although ISR was not specifically mentioned in the job description, supervision was. Moreover, the claimant had previously carried out duties that were not included in the job description for the role of Student Engagement Manager, without complaint.

163. It was not in our view a breach of contract for the respondent to include in the timetable 20% of time allocated to ISR and on-call. The respondent had a genuine

need for this work to be carried out and had discussed it with the claimant before issuing the timetable. There was therefore no breach of the implied duty of trust and confidence in June or July 2022.

164. For the reasons set out above in relation to the reasonable adjustments claim, we find that there was no breach of the duty to make reasonable adjustments. We also find that considerable adjustments were made to support the claimant once he informed the respondent of his health issues. His timetable was amended three times during the 2022 – 2023 academic year, he was referred to Occupational Health, adjustments were made to his duties, a DSE assessment was carried out, his office space was adjusted and, albeit with some delay, two ergonomic chairs were ordered for him. This was in the context that the respondent is a large and busy school with considerable demands upon staff, particularly in the post pandemic period.

165. The final alleged breach of contract was the issuing of the new timetable in July 2023. It is not in dispute that the claimant was provided on 19 July 2023 with a timetable, with his name on it, that contained a significantly increased amount of on-call and ISR. The claimant had not yet resigned from the respondent's employment, and, as far as the respondent knew, he may well have been returning to work in September.

166. The respondent was in no doubt by that stage that the claimant did not want to do ISR or on-call duties and that, certainly since November 2022, the reason he had given for this was his health, which the respondent admits was a disability. There was in our view no good reason on the evidence before us, for Ms Johnstone to include such a high volume of on-call and ISR in the timetable. Whilst we accept her evidence that the ISR Manager had resigned and his duties needed to be reassigned, she did not provide a reasonable explanation for why his duties had to be allocated to the claimant. Nor is there any indication on the timetable itself that the timetable is provisional and subject to change, or that the on-call and ISR duties may be removed or reduced once recruitment had taken place.

167. It is understandable that the claimant was upset by being provided with this timetable.

168. The provision of this time table did, in our view, amount to a breach of the implied term of trust and confidence. Ms Johnstone knew very well by that stage that the relationship between her and the claimant had broken down, and that a large part of that breakdown was due to the dispute over ISR and on-call duties. She would have known that giving him this time table was likely to further damage the relationship and in particular the trust and confidence between them.

169. It cannot in our view be said that she had reasonable and proper cause for issuing this time table. Issuing the new time table in July 2023 did therefore amount to a breach of trust and confidence.

170. We have then considered whether the claimant resigned in response to the breach of contract. We note that the claimant began looking for other jobs in January

2023 and had a number of interviews. He received the job offer on 17 July but did not resign until 3 September once his new employer had taken up references.

171. The claimant suggested in his evidence to the Tribunal that, had the respondent made the adjustments that he was asking for, then he would have stayed, and that he only decided to leave because of the new timetable, which he described as the final straw.

172. We do not accept his evidence on this issue. It is clear from the emails that he sent to colleagues and contacts, unprompted, in July 2023, that by 17 July he had already decided already to leave. For example, on 17 July he wrote to Hazel Canning: "*Some great news…..I will be leaving Meadowhead and have been offered a brand new role….I am very excited…"*

173. On 18 July he wrote to a colleague: "*I have accepted a job in a SEN school as a Team Leader for Forest School…I won't start until October*" and "*I'm going to miss all the kids though! And you guys at AP who have been great to work with".* On 19 July, having received the time table, the claimant forwarded it to his union representative with the comment: "*if I wasn't leaving would that even be legal?*"

174. That is in our view a clear indication that the claimant had already decided to leave the respondent's employment before he was given the time table on 19 July. His decision was made when he got the job offer on 17 July. That job, although on a lower salary, was focussed on Forest School provision which is one of the claimant's key areas of interest. He waited to resign until his references had been taken up by his new employer and he had signed his new contract of employment, not because he hoped that the respondent would offer him a different timetable which he considered to be more favourable.

175. We therefore find that the claimant did not resign in response to the breach of contract but because of the job offer. He was therefore not constructively dismissed.

176. The claim for constructive dismissal fails and is dismissed.

Employment Judge Ayre

Date: 5 July 2024

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/