Case Number: 3322927/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss Annika Fay Robinson**

Respondent: **Middlesex Learning Trust**

Heard at: Watford Employment Tribunal **On: 7 July 2025 - 11 July 2025**

Before: Employment Judge Partington, S Wellings, L Hoey.

Representation
Claimant: In person
Respondent: Mr Starcevic, Counsel

RESERVED JUDGMENT

1. The complaint that the Claimant's employment contract was not renewed due to sickness absence related to her back condition was presented within the applicable time limit and will therefore proceed.

2. Save in relation to the complaints that:

    a. the Respondent failed to notify the Claimant that her employment contract was not being renewed,

    b. Mr Ferrie stating that the Claimant had "let [her] colleagues down and [her] students down" by being absent from work, and

    c. Mr Ferrie stating that the Claimant had caused her colleagues "a lot of stress",

    all of the other complaints brought by the Claimant are continuing acts of discrimination culminating in the complaint that the Claimant's contract was not renewed and are therefore presented within the applicable time limit and will therefore proceed.

3. The Claimant's complaints that:

    a. the Respondent failed to notify the Claimant that her employment contract was not being renewed,

    b. Mr Ferrie stating that the Claimant had "let [her] colleagues down and [her] students down" by being absent from work, and

    c. Mr Ferrie stating that the Claimant had caused her colleagues "a lot of

stress",

were not presented within the applicable time limit, but it is just and equitable to extend the time limit. All of these complaints will therefore proceed.

4. The Claimant's complaints of unfavourable treatment arising from disability under s15 Equality Act 2010 are well-founded and succeed in respect of:

    a. The Claimant's complaint that her employment contract was not renewed due to sickness absence related to her back condition;

    b. The Claimant's complaint that the Respondent failed to notify her that her employment contract was not being renewed;

    c. The Respondent failing to make an Occupational Health referral in relation to the Claimant's migraine when one was requested by the Claimant on 24 June 2021.

5. The remainder of the Claimant's complaints of unfavourable treatment arising from disability under s15 Equality Act 2010 are not well-founded and are dismissed.

6. The Claimant's complaints of failure to make reasonable adjustments under s20 and s21 Equality Act 2010 are not well-founded and are dismissed.

7. The Claimant's complaints of harassment related to disability under s26 Equality Act 2010 are well-founded and succeed in respect of:

    a. Arranging for six people to be present at the 18 June 2021 meeting on behalf of the respondent;

    b. Paul Ferrie stating that the Claimant had "let [her] colleagues down and [her] students down" by being absent from work.

    c. Martin Lavelle stating in the meeting that it "would be easy to be cynical in that [C's] return to work from her back operation coincided with when she was due to go to half pay and that she returned to work for a few days before going off with ill health again".

8. The remainder of C's complaints of harassment are not well-founded and are dismissed.

REASONS

Preliminary matters

9. The evidence before the Employment Tribunal (**ET**) comprised of a 730 page bundle. At the start of the hearing the Claimant requested an additional 56 pages be added to the bundle to which Respondent's Counsel (**Counsel**) agreed, save for page 16 which related to ACAS discussions and was therefore removed from the bundle on the grounds that it touched on 'without prejudice' discussions.

10. The Claimant also asked to submit a revised witness statement which she said was only ready today because of delays in agreeing the bundle with the Respondent's solicitors. She said it built on the original impact statement which, until that point, had served as her witness statement. Counsel contended that the Claimant should be kept to her original statement and be allowed to make an oral statement at the start of her cross examination. The ET decided to allow the updated witness statement on the grounds the original statement was an "impact statement" and the ET would need to see the claimant's witness statement and the Respondent would have 2 hours to read it while the Tribunal panel read into the documents.

11. The parties confirmed the list of issues were agreed.

12. In addition to the claimant's witness statement there were the following witness statements for the Respondent:

- Jane Theobald (**JT**), PA to Headteacher, HR & office manager.
- James Broadwell (**JB**), Deputy Head.
- Pauline Parchment (**PP**), the Claimant's line manager and Head of DT department.
- Martin Lavelle (**ML**) - Headteacher.
- Paul Ferrie (**PF**) - Senior deputy Head.

Claims

13. The claimant brings the following claims against the Respondent;

    a. Discrimination arising from disability (section 15, Equality Act 2010)
    b. Reasonable Adjustments (sections 20 & 21, Equality Act 2010)
    c. Harassment related to disability (section 26, Equality Act 2010)

Disabilities

14. At a preliminary hearing on 8 January 2024 the ET determined that the Claimant was disabled by reason of back pain and migraines between March 2020 and 31 August 2021.

Issues

15. The agreed list of issues are as follows.

Time limits

16. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 July 2021 may not have been brought in time.

17. Were the complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

    b. If not, was there conduct extending over a period?

c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

i. Why were the complaints not made to the Tribunal in time?

ii. In any event, is it just and equitable in all the circumstances to extend time?

Discrimination arising from disability (Equality Act 2010 section 15)

18. Did the respondent treat the claimant unfavourably by:

a. Failing to renew her employment contract (the contract came to an end on 31 August 2021 – the claimant's case is that the contract was not renewed due to her sickness absence related to her back condition);

b. Failing to properly notify the claimant that her employment contract was not being renewed (the claimant's case is that an email was sent to her work address that she did not pick up as she on sickness absence and a letter was sent to her old address);

c. Rejecting her Upper Pay Range ('UPR) application in November 2020 (the claimant's case is that due to her sickness absence she was not able to obtain documents that were required as part of the application – in particular, she did not obtain a recommendation from her previous employer);

d. Commencing a formal attendance management process (the claimant's case is that no formal process should have begun as her absences were related to her disability);

e. Conducting a formal attendance management meeting on 18 June 2021 whilst the claimant was on long-term sick leave (the claimant's case is that if the policy applied at all there should have been an informal meeting before the formal process commenced).

f. Failing to make an Occupational Health referral in relation to the claimant's migraine when one was requested by the claimant on 24 June 2021.

g. The manner in which the 18 June 2021 meeting was conducted as set out at paragraph 6.1 below.

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

a. The need for the claimant to be absent from work (sickness absence)

b. The claimant's need to have Occupational Health referral.

20. Was the unfavourable treatment because of any of those things?

21. Was the treatment a proportionate means of achieving a legitimate aim? The

respondent says that its aims were:

a. Staff being capable of demonstrating satisfactory attendance;

b. Efficient use of resources.

22. The Tribunal will decide in particular:

a. was the treatment an appropriate and reasonably necessary way to achieve those aims;

b. could something less discriminatory have been done instead;

c. how should the needs of the claimant and the respondent be balanced?

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

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

25. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

a. A policy of placing the onus on new employees to obtain recommendations from previous employers as part of the process of applying for a pay rise (a UPR application);

b. Not pausing the UPR application process if an employee is on sick leave;

c. Conducting attendance management meetings when employees are absent on sick leave.

d. Not making Occupational Health referrals when a request is made close to the end of term.

26. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

a. the claimant was more likely to be absent due to sickness than someone who did not have her disabilities and so the claimant would be less able to comply with the need to provide documentation as part of the UPR application process;

b. for the same reason the claimant was at greater risk of being subject to the attendance management procedures; and,

c. the claimant was more likely to need the assistance of Occupational Health.

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

28. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    a. The respondent contacting her previous employer themselves to obtain a recommendation as part of the UPR application process;

    b. The respondent pausing the UPR process until the claimant was able to obtain the recommendation herself;

    c. Relaxing the requirements of the attendance management process in relation to disability-related absences;

    d. Not conducting attendance management meetings whilst the claimant was absent on sick leave; and,

    e. Making Occupational Health referrals irrespective of the proximity until the end of term.

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

30. Did the respondent fail to take those steps?

Harassment related to disability (Equality Act 2010 section 26)

31. Did the respondent do the following things:

    a. Conducted an attendance management meeting on 18 June 2021 whilst the claimant was on long-term sickness absence;

    b. Arranged for six people to be present at the 18 June 2021 meeting on behalf of the respondent as opposed to only the Headteacher (Mr Lavelle) being present as provided for by the respondent's attendance management policy.

    c. Mr Ferrie stating that the claimant had "let [her] colleagues down and [her] students down" by being absent from work".

    d. Mr Ferrie stating at the meeting that the claimant had caused her colleagues "a lot of stress".

    e. Mr Lavelle stating in the meeting that he was "cynical" about the timing of the claimant's return to work in April 2021 and its link to her sick pay being halved.

32. If so, was that unwanted conduct?

33. Did it relate to disability?

34. Law

35. I am grateful to Counsel for setting out relevant law in his submissions and which I utilise below as appropriate, with additional references where relevant.

Time Limits

36. By s 123(1) of the Equality Act 2010 ("EqA" or "the Act"), claims to the ET

under the Act may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the ET thinks just and equitable. That period of three months is subject to provisions which extend it to take account of the mandatory early conciliation involving ACAS. Also, s 123(3) of the Act provides that conduct extending over a period is to be treated as done at the end of the period.

37. The practical effect of all those provisions in this case is that any complaint about an act done before 13 July 2021 would be out of time unless (i) it was part of conduct extending over a period which ended on or after that date or (ii) the ET thought it was just and equitable to extend time.

38. A distinction is drawn between a continuing act (i.e. a policy, rule, scheme, regime or practice that continues to be applied) and a one-off act that has merely continuing consequences. But *in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530*, the Court of Appeal said that 'policy, rule, scheme, regime or practice' should not be treated as a complete statement of what amounts to a continuing act; the focus should be on the substance of the complaint. This was approved in *Aziz v FDA 2010 EWCA Civ 304*, where the Court noted that, in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents.

39. There is no requirement that the 'conduct' extending over a period for the purpose of S.123(3) must all relate to the same protected characteristic. Similarly, there is no reason why conduct extending over a period cannot involve a number of different types of prohibited conduct, such as a mixture of harassment and direct discrimination. It may be more difficult to establish that there has been discriminatory conduct extending over a period where the acts that are said to be linked relate to different protected characteristics and different types of prohibited conduct, but there is no absolute bar. (*Worcestershire Health and Care NHS Trust v Allen [2024] EAT 40, para 13*)

40. Unproven or non-discriminatory acts cannot be relied on as conduct extending over a period (*South Western Ambulance Service NHS Foundation Trust v King 2020 IRLR 168; Lyfar-Cisse v Brighton and Sussex University Hospitals NHS Trust and ors EAT 0100/19*).

41. So far as the discretion to extend time is concerned, it has been said that the exercise of the discretion is the exception not the rule (*Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434*). But an extension does not require exceptional circumstances. In exercising the discretion a Tribunal may (not must) have regard to the checklist contained in S.33 of the Limitation Act 1980, as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336* which sets out the factors for the tribunal to weigh up includes considering the prejudice that each party would suffer as a result of the decision reached and have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the complaint; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Discrimination Arising from Disability

42. By s 15 EqA:

(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.

43. As Langstaff J explained in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305*, two separate causative steps need to be established for a claim to succeed under s 15:

    a. the disability had the consequence of "something", and

    b. the claimant was treated unfavourably because of that something.

44. Langstaff J said it did not matter in which order the tribunal approaches these two steps.

45. In *Pnaiser v NHS England and anor 2016 IRLR 170*, EAT, Mrs Justice Simler summarised a number of key points that govern the correct approach to a S.15 claim:

    a. The tribunal must first identify whether there was unfavourable treatment and by whom.

    b. It must then determine what caused the impugned treatment, or what was the reason for it, focusing on the conscious or unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the impugned treatment and, as in a direct discrimination case, the 'something' need not be the main or sole reason for the unfavourable treatment but must have at least a significant (or more than trivial) influence so as to amount to an effective reason for or cause of it.

    c. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport [1999] IRLR 572*. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

    d. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing

J in Hall), the statutory 1 purpose which appears from the wording of section 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* a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

g. Miss Jeram argued that “a subjective approach infects the whole of section 15 ” by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, ‘discriminatory motivation’ and the alleged discriminator must know that the ‘something’ that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages — the ‘because of’ stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the ‘something arising in consequence’ stage involving consideration of whether (as a matter of fact rather than belief) the ‘something’ was a consequence of the disability.

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

i. As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”.

j. Alternatively, it might ask whether the disability has a particular

consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

46. The importance of looking into the mind of the putative discriminator when the test is "because of" was emphasised by the CA in *Dunn v Secretary of State for Prisons [2018] EWCA Civ 1998* at para.18: "Because of". It is a condition of liability for disability discrimination both under section 13 and under section 15 that the complainant should have been treated in the manner complained because of either (under section 13) his or her disability or (under section 15) the "something" which arises in consequence of that disability. That will typically, though not invariably, involve establishing (with the benefit of section 136 if required) that the disability, or the relevant related factor, operated on the mind of the putative discriminator, as part of his or her conscious or unconscious "mental processes". Establishing an employer's "motivation" (as it is often put – NB that this is not in this context the same as "motive") is of course a familiar exercise in discrimination law generally. The most recent authoritative exposition is in the judgments of the majority in the Supreme Court in *R (E) v Governing Body of JFS [2009] UKSC 15, [2010] 2 AC 728:* see in particular per Lady Hale at paras. 62-64 (pp. 759-760).

47. Indeed, Mrs Justice Simler returned to the question of the causative link required under S.15 in *Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT,* where she stated that: 'On causation, the approach to S.15… is now well established... In short, this provision requires an investigation of two distinct causative issues:

    a. did A treat B unfavourably because of an (identified) something? and

    b. did that something arise in consequence of B's disability?

48. The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found.

49. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied.

50. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

51. The critical question is whether the 'something' arose "in 'consequence of' (rather than being caused by) the disability… This is a looser connection that might involve more than one link in the chain of consequences.

52. The respondent will have a defence if it can show either of the things set out in ss (1)(b) or (2).

53. To be proportionate the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so, see *Homer v Chief Constable of West Yorkshire [2012] UKSC 15.* This is a balancing exercise for the ET of the reasonable needs of the business against the discriminatory effect of R's actions, see *Department of Work & Pensions v Boyers [2022] EAT 76*. It is relevant to consider whether or not a lesser measure could have achieved R's legitimate aim (*Naeem v Secretary of State for Justice [2017] UKSC 27*). The ET should consider

whether the measure taken was proportionate by reference to the time the unfavourable treatment was applied rather than in hindsight (*Trustees of Swansea University Pension Scheme v Williams UKEAT/0415/14* not challenged in later CA and SC decisions in the case).

54. Cost alone will not provide a justification for discriminatory treatment *Woodcock v Cumbria Primary Care Trust 2011 ICR 143, EAT* and *Heskett v Secretary of State for Justice 2021 ICR 110, CA*, in which Lord Justice Underhill stated that 'the essential question is whether the employer's aim in acting in the way that gives rise to the discriminatory impact can fairly be described as no more than a wish to save costs. If so, the defence of justification cannot succeed. But, if not, it will be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim is legitimate. The distinction involved may sometimes be subtle… but it is real'.

55. An employer has a defence to a claim of discrimination arising from disability if it did not know and could not reasonably have been expected to know that the claimant had a disability – S.15(2) EqA.

56. Knowledge, both actual and constructive is knowledge of the facts that made C disabled or which caused the substantial disadvantage, see *Gallop v Newport City Council [2014] IRLR 211 CA*.

57. Counsel refers to the legal principles in relation to knowledge in a s.15 EqA claim summarised by the EAT in *A Ltd v Z [2020] ICR 199 para.23*: "(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see *York City Council v Grosset [2018] ICR 1492 CA* at paragraph 39.

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

59. The question of reasonableness is one of fact and evaluation, see *Donelien v Liberata UK Ltd [2018] IRLR 535 CA* at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

60. When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see *Herry v Dudley Metropolitan Council [2017] ICR 610*, per His Honour Judge Richardson, citing *J v DLA Piper UK LLP [2010] ICR 1052*, and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether

it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.

61. The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code [the Equality and Human Rights Commission Employment Statutory Code of Practice], which (relevantly) provides as follows: "5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

62. An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

63. It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (*Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665*).

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

65. The Code also suggests that '[e]mployers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' – para 5.14.

66. The Code also makes the important point that knowledge of a disability held by an employer's agent or employee – such as an occupational health adviser, personnel officer or recruitment agent – will usually be imputed to the employer (see para 5.17).

67. In *Gallop v Newport City Council 2014 IRLR 211, CA* the Court emphasised that the issue is whether the employer had actual or constructive knowledge of the facts constituting the claimant's disability: it does not matter whether the employer comprehends that these facts amount, as a matter of law, to a disability. The employer cannot, therefore, deny relevant knowledge by relying on its unquestioning adoption of occupational health advice. Instead, it must make its own factual judgement as to whether the employee is disabled.

Reasonable Adjustments

68. The requirements of the duty to make reasonable adjustments are set out in s20 EqA and, by s 21, a failure to comply with the duty amounts to discrimination.

69. The duty applies where a "provision, criterion or practice" ("PCP") puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

70. The disadvantage must be linked to the disability.

71. The duty is to take such steps as it is reasonable to have to take to avoid the disadvantage. “Substantial” means “more than minor or trivial” (s 212 EqA).

72. The employer is not subject to the duty if it shows that it did not know, and could not reasonably be expected to know, that the person had a disability and was likely to be placed at the relevant disadvantage (Sch 8 Para 20 EqA).

73. Counsel referred us to guidance on the approach to s.20 EqA that was given by the EAT in *Environment Agency v Rowan [2008] IRLR 20 and RBS v Ashton [2011] ICR 632* in which Langstaff J said:

'[. . .] an Employment tribunal considering a claim that an employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with Section 4A duty must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer . . . .

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the Claimant.'

74. Later in the same paragraph the tribunal continues to say 'in our opinion an Employment Tribunal cannot properly make findings of a failure to make reasonable adjustments under Sections 3A(2) and 4A(1) without going through that process. Unless the Employment Tribunal has identified the four matters we have set out above . . .'.

We interpose to say that of course it is not in every case that all four matters need to be identified but certainly what must be identified is (a) and (d).”

“…Thus, so far as reasonable adjustment is concerned, the focus of the tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons.”

75. The guidance was approved by the Court of Appeal in *Newham Sixth Form College v Sanders [2014] EWCA.*

76. The concept of a “provision, criterion or practice” is not defined in the Act and should be given a broad meaning and includes both formal and informal practices (*Lamb v The Business Academy Bexley UKEAT 2015*), but is not wide enough to include one off decisions which are not part of a usual or

informal practice (*Ishola v TFL [2020] EWCA Civ 112*).

77. C must be placed at a substantial disadvantage and "substantial" means something more than minor or trivial (s.212(1) EqA). This is a comparative exercise and C must be at a substantial disadvantage compared to others who do not have the disability. This is not the same as the comparator in a direct or indirect discrimination claim (*Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265*).

78. The reason for the substantial disadvantage from the PCP must be connected with C's disability (*Hilaire v Luton BC [2022] EAT 166*).

79. A failure to consider whether or what adjustments to make is not itself a breach of the duty under s.20 (*Tarbuck v Sainsbury Supermarkets UKEAT/0136/06*). Obtaining a medical report could not itself be a reasonable adjustment because it simply assists in considering what adjustment if any to make and will not itself alleviate any disadvantage (*Spence v Intype Libra UKEAT/0617/06*).

80. The EHRC Code sets out factors that may be taken into account in deciding whether an adjustment contended for is reasonable or not and the first factor is whether the adjustment will be effective in preventing the disadvantage (para.6.28 Code). It is not the case that the adjustment must be guaranteed or reasonably certain to eliminate or reduce the disadvantage, but the prospect of it doing so is a factor to be taken into account. Elias J said *in Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265*:

"... So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty is one of the factors to weigh up when assessing the question of reasonableness"

Harrassment

81. S.39(2) EqA defines prohibited conduct that may be relied upon by employees in bringing a claim in the ET and it includes "(d) subjecting B to any other detriment". The effect of s.212(1) EqA, which provides that "detriment" does not include conduct that amounts to harassment is that if R's conduct in the meeting on 18.6.21 amounted to harassment it cannot also amount to discrimination under s.15.

82. "Unwanted conduct" means unwelcome or uninvited, see *Reed v Stedman [1999] IRLR 299* and EHRC Code para.7.8.

83. The meaning of "related to" is wider than the concept of "because of" used elsewhere in the EqA and the ET must make clear findings of the impugned conduct and how it relates to the protected characteristic (*Windsor Clive Primary Achool v Forsbrook [2024] EAT 123*.

84. The ET must consider whether the conduct has the purpose or effect of violating C's dignity etc. In this regard the EAT has stated that there are boundaries to what may amount to harassment see *Richmond Pharmacology v Dhaliwal [2009] IRLR 316*:

'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 (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.

85. Further, the section imports an objective test as to whether the impugned conduct had the harassing effect and both subjective effect on C and the objective test must be satisfied (*Pemberton v Inwood [2018] EWCA Civ 564*). The ET in assessing the objective test should take into account the context, see *Greasley Adams v Royal Mail [2023] ICR 1031* e.g. where comments came to light in the course of an investigation.

Facts

86. We find the following facts on the balance of probabilities. Where we have needed to resolve disputed facts we make that clear. We have not made findings on every fact presented to us, but merely on those which assist us to come to a decision bearing in mind the list of issues. Page references are to pages in the bundle unless prefixed by initials in which case they are paragraph references in the relevant witness statement.

87. We refer to the Claimant as “C” and the Respondent as “R”. The other initials are set out in the preliminary matters section above.

88. In the lead up to C’s employment by R, on 18 May 2020 JT wrote to C to say:

“As we are in unprecedented times and we cannot see candidates teach, if you are successful during the video interview you will in the first instance be offered a fixed term contract of either 6 or 12 months dependent on how your interview went. We will of course aim to see you teach as soon as possible once we returned to school and would then be in a position subject to your lesson to be able to offer you a permanent contract.”

89. On 21 May 2020 R sent C an offer letter for a 12 month fixed term contract (**FTC**) starting 1 September 2020. That letter stated that *“This is a temporary appointment pending the recruitment of a permanent post holder... The Academy does not guarantee any employment subsequent to the termination of this appointment”.*

90. On 1 September 2020 C’s employment began. She was employed in R’s Design Technology department (**DT**) as Second in Charge. There is some debate as to whether the contract was technically a FTC given it was expressed to be terminable on notice, but the ET finding is that all parties viewed the contract as for a fixed term between 1 September 2020 and 31 August 2021, and therefore C was considered by all involved to be in a different category from permanent members of staff.

91. On 22 September 2020 C had her first referral to Occupational Health (OH)

due to sciatica (p227).

92. On 24 September 2020 C put in her Upper Pay Range (**UPR**) application form (pp139 - 190) which, if successful would result in a pay rise.

93. On 5 October the OH report was sent (pp238 – 240).

94. On 6 October 2020 C took sickness absence due to Covid (p242).

95. On 15 October 2020 C provided a fit note to R for absence due to sciatica for the period 15 October 2020 to 29 October 2020 (p252).

96. On 2 November 2020 R informed C by letter that she was unsuccessful in her UPR application (p138 and 205).

97. C says the school should have obtained a recommendation from her previous employer but did not.

98. We find as fact that JT did try to contact the Claimant's previous employer by phone on 2 occasions and left a message with the headteacher's PA to call back, as reflected in JT's w/s (para 14) and bundle (pp195/196/197) and note that C concedes this (C/30).

99. We also find as fact that the previous employer did not return the call and that is not contested.

100. On 4 November 2020 C underwent surgical discectomy (405).

101. On 13 November 2020 C provided a fit note to R for absence for recovery from spinal surgery (258).

102. On 31 December 2020 C provided a fit note to R for absence for recovery from spinal surgery (p259).

103. On 18 January 2021 R undertook a curriculum review which was led by JB (p207-208). At that meeting it was decided not to renew C's contract of employment when the FTC came to an end.

104. R says that the reason for the failure to renew the contract was a change in curriculum reducing the teaching hours for **DT** (ML/56 - 58); (JB/11-13). The decision was taken at a review meeting on 18 January 2021, which, says ML (para 54) and JB (para 9) in their witness evidence, is when the curriculum for the next academic year is usually planned and at a stage when C had been absent only since October.

105. The meeting minutes at page 208 refer to this ('replace the 2i/c element of her role internally'), and confirm that R would not be recruiting for a new teacher in place of the Claimant given the reduction in hours taught. This decision to reduce the hours of teaching in Design and Technology was made to allow for additional time for students in Maths and English, due to the pressure to approve progress eight scores, as there is in all Schools.

106. Additionally, student numbers opting to study DT at GCSE level (Key Stage Four) were relatively small. Alongside the reduction to Key Stage 3 hours, the Trust did not need more staff members in the department. (MB/57

and 58).

107. Any outstanding hours previously covered by the Claimant which remained on the new timetable were to be absorbed by the existing staff within the department and the Claimant's Teaching and Learning Responsibility (TLR) position as second in Technology, would be fulfilled by an existing staff member. The TLR position involved no additional teaching hours for the person who absorbed this aspect of her role (MB60; JB.15).

108. In cross examination JB further clarified that it was because C was still on a fixed term contract that her contract was identified as the one that would not be renewed. Those on permanent contracts were not in consideration for possible termination of employment.

109. ML further confirmed in cross-examination that it would be too time consuming to consider a redundancy exercise and that in effect it was most logical not to renew C's contract given that she was the only relevant member of staff on a FTC.

110. R says that as a result it was decided C's contract would not be renewed and that it had always been clear that the Claimant's appointment was a fixed term contract, and there was no guarantee that a permanent position would become available (MB/59).

111. We find as fact that ML, as headmaster, was the ultimate decision maker regarding staffing requirements and the decision not to renew C's contract, notwithstanding R's position that the decision was one made collectively by the Senior Leadership Team in that meeting.

112. In cross-examination, C invited MB and JL to explain why a colleague of hers, Alistair Williams, who was initially recruited by R as an agency worker, had been put on a permanent contract. The explanation provided was that his role was to replace a different member of staff (Donna Kenyon) from the staff member C had been recruited to replace, he had started as a temp in April 2020, was considered to be a strong candidate, and had been offered a permanent role in October 2020 to come into effect in September 2021. JT in her cross-examination explained the reason for such a long lead time was because it reduced the fee due to the agency if that person continued to be employed by the agency before joining R as a permanent hire, which was corroborated by ML.

113. C thought it suspicious that the temporary colleague had been offered a permanent role so soon before the decision was taken not to renew her contract and thought that his appointment had been orchestrated so that there would not be a role left for her and that the non-renewal of her contract had thereby been engineered.

114. We find R's explanation as to why the temporary worker was recruited in the way that he was to be plausible given that it reflects industry practice regarding temp-to-perm fees and it is understandable that R would want to retain the person they had brought into replace the member of staff who had left by securing them onto a permanent contract but timed in a way to minimise the agency fee.

115. However, we do not accept R's contention that C was hired on the basis

that her permanent employment was subject to a further review in January 2021. It is clear from the email to her of 18 May 2020 that it was envisaged that C was to be put onto a permanent contract if she succeeded in her teaching observation. There was no suggestion in this email that her permanent employment was to be the subject of an assessment in January 2021. If, as R says, this was the norm, then it could have made this clear in the 18 May email, but it did not. Further we were not taken to any documents that suggested C's permanent appointment would be subject to the January 2021 review.

116. In addition, ML in cross-examination conceded that the increased focus on English and Maths were not new pressures. In our view these pressures would have been known at the point of recruiting R in May 2020.

117. R relies on the contract referred to above that such appointment carried no guarantee of a permanent role because of the statement "*The Academy does not guarantee any employment subsequent to the termination of this appointment"*. However, these words are preceded by the statement "*This is a temporary appointment pending the recruitment of a permanent post holder...*". When read with the email of 18 May 2020, the clear intention of R was to recruit someone into a permanent role, subject to a successful teaching observation, in line with R's recruitment approach adopted during Covid.

118. As already noted, C was then off work because of her back from 15 October 2021 to 31 March 2021. As a consequence there was no opportunity for the teaching observation to occur which, in cross-examination, ML confirmed could have taken place in that first term and that there was no reason to think that C would have been unsuccessful in securing a permanent contract. This is supported by the evidence of PP in cross-examination who also attested to C's competence in the time she had worked with C.

119. We note that ML in cross-examination stated that while this may have been the case, any decision to offer a permanent role would have been subject to the January 2021 review. However, as we have already noted above, there was no documentary evidence provided to support this alleged process and the statement is at odds with the written communications we refer to above.

120. Therefore the ET finds as fact, that were it not for C's sickness absence due to her back pain, it is probable that she would have succeeded in obtaining a permanent role, in which case she would not have been automatically selected for termination of employment in January 2021 when her role was identified as the one to be cut because she was the only employee on a fixed term contract.

121. When ML was asked in cross-examination whether he had considered a redundancy exercise to fairly identify which staff member should not be retained, ML rejected that possibility out of hand as it involved far too much time and effort as it would require additional work such as the creation of a business plan and that he had not considered that to be an option.

122. We now deal with R's factual contention that it did not have knowledge of C's disability. In support of this, R states that C's fit note at p259 gave the

reason for absence as recovering from surgery to 31 March 2021. The OH report of 5 October 2020 at p238 does not contemplate surgery but does prognose recovery with treatment. R says that as a result of this, at the time of the decision on 18 January 2021 the information suggested that C's absence would be coming to an end. ML also points in his witness statement to the pre-employment responses where C does not disclose disability as further reasons not to suspect she was disabled.

123. C also pointed us to the OH report at p238 dated 5 October 2020 which states:

"It is difficult to be clear whether Annika's condition will fall under the remit of the Act at present, if the pain and other symptoms were to continue until February 2021 the condition would fall under the remit of the Act. My view is that without treatment her condition could continue for that length of time."

124. She also drew our attention to the fit note at p259 which states that C will be off until 31 March 2021. This was forwarded to Martin Lavelle on 8 Jan 2021 (p264). She also cited her pre-employment questionnaire (p112) that refers to recurring sciatica and three instances of being bed bound by back injury.

125. Counsel states at para 7.5 of his closing submissions that:

Upon receipt of the OH report dated 5.10.20 R had knowledge of the impairment of back pain and that it was having a substantial effect on her ability to carry out normal day-to-day activities but not that the condition was long term. Even the OH clinician could not say as much in the report, only that the without treatment condition "could" last until February 2021 in which case it would fall under the EqA. The Fit Notes submitted by C disclose that she was under treatment and recovering from surgery (p258-259). Such surgery could alleviate the condition. It is submitted that R could not reasonably have been expected to know that the condition was long term until it received the Fit Note dated 31.12.20 stating that C will be unfit for work until 31.3.21

126. We agree. Mr Lavelle, saw from the OH report he received on 5 October 2020 (ML/39) that it stated "*It is difficult to be clear whether Annika's condition will fall under the remit of the Act at present, if the pain and other symptoms were to continue until February 2021 the condition would fall under the remit of the Act*". Together with the fit note confirmation that he received on 8 Jan 2021, that C was going to be off until 31 March 2021 recovering from surgery, it was likely that her "*pain and other symptoms*" would be continuing until February 2021, and that therefore as stated in the report, "*the condition would fall under the remit of the Act*".

127. On 22 January 2021 C was sent an email informing her that her contract would not be renewed after August 2021 (p209).

128. On 1 February 2021 C was sent a letter confirming that C's appointment will terminate on 31 August 2021 (p211).

129. In cross-examination C says that she did not receive this letter until 11 March 2021 because the school sent the letter to her work email address rather than her personal email address, and she was not using her work email address while off sick, and the hardcopy was sent to her old home address.

130. JT says in her witness statement (JT/20) that throughout her period of absence, when she received correspondence from the Claimant, she communicated both from her work email address and also replying to emails sent to her work email using her personal email address. She says the Claimant did not direct her, nor the Trust, to use a specific email address, such as her personal account, to correspond with her.

131. When JT was asked in cross-examination if she could have checked with C the best email address to contact her during her sickness absence, JT conceded she could have but did not.

132. JT went on to say that "The letter was sent to the address we had on file for the Claimant, which was the only address that we had confirmed as her current address at the time that the letter was sent [page 131]" (JT/24).

133. We find as fact that the home address on the school's system was the claimant's old address and that the claimant did not specifically tell the school her new address; rather, in her evidence, the Claimant relied on evidence that the school should have inferred her new address from references such as needing to update HMRC with her new address and the school should have pro-actively checked the claimant's updated address before sending her the letter (C/37).

134. We find as fact that JT sent the letter to C's work email address only, given JT concedes this, and that C only became aware of the letter on 11 March 2021 as she conceded in cross-examination, when she logged into her work email and as reflected in a WhatsApp message with PP (p730) confirming she had just seen some emails from JT "about her contract sent in January". We do not find she would have seen this email sooner because the email correspondence we were shown in the bundle was consistent with C's contention that she only responded to earlier emails from R that were sent both to her work **and** personal email address.

135. On 23 February 2021 ML met with PP to discuss the curriculum change to DT and related staffing changes (p212).

136. On 17 March 2021 there is a further OH referral (p271).

137. On 31 March 21 there is a further OH report (p278) stating:

"In my opinion, it is likely that [C's]:

- Back Condition
- Migraines
- Anxiety and Depression

Are all likely to fall under the remit of the [Equality] Act [2010]."

138. On 19 April 2021 C was on a Return to Work (**RTW**) on a phased basis. There was an informal RTW meeting with JT (JT/27; ML/87).

139. C contends no informal meeting took place before the formal absence meeting took place, however we find that an informal meeting did take place which was the meeting on 19 April 2021. The absence policy notes that "informal attendance monitoring will take the form of return to work meetings"

(p78).

140. On 4 May 2021 C started sickness absence due to migraines. C provided a fit note for the period 4 May 2021 to 18 May 2021 (p295).

141. On 17 May 2021 C was sent a letter inviting her to stage 1 sickness absence meeting on 27 May 2021, which was later postponed (p302).

142. On 25 May 2021 C provided another fit note due to migraine for the period 19 May 2021 to 20 July 2021.

143. On 18 June 2021 the Stage 1 sickness absence meeting took place (p335) which was while the claimant was on long term sickness absence.

144. The claimant contends there were 6 people at the meeting which is not contested. They were ML, PF, C, a union rep, John Sear (HR Business Partner) and JT (minute taker). We find as fact that, save for ML, the claimant was not told who would be at the meeting beforehand as the invitation to the meeting did not explain that.

145. We find as fact that at the meeting PF stated to C that "Both students and colleagues have suffered as a result of [C's] absence." That is stated in the meeting minutes (335). We also find that PF stated that C had "let her colleague and the students down" as the Claimant picked out this specific phrase in her follow up email (p338) and it is similar in tone and expression to the statement recorded in the minutes. We do not find that PF said C had caused her colleagues "a lot of stress" as this was not picked up by C in her follow up email and is only mentioned much later when formal proceedings have started.

146. We find as fact that ML stated "that it would be easy to be cynical in that [C's] return to work from her back operation coincided with when she was due to go to half pay and that she returned to work for a few days before going off with ill health again" as that is stated in the minutes (p335) given that it closely mirrors what is set out in paragraph 4.1.5 of the List of Issues (p45).

147. On 24 June 2021 C sought an OH referral regarding her migraines (p355 and 357). In the email from C to JT seeking the OH referral C stated "Dr Lubin may have some suggestions about reasonable adjustments that could be made".

148. On 5 July 2021 R emailed C to say that it would not be facilitating an OH assessment (p364) because the purpose of such report is to help R understand what reasonable adjustments would be needed to help C return but as a planned phased return was not possible the costs of the OH referral could not be approved.

149. On 16 August 2021 C provided a further fit note for migraine, for the period 20 July 2021 to 31 August 2021.

150. On 23 August 2021 C put in a data subject access request (p372).

151. On 31 August 2021 C's contract ended.

152. On 12 October 2021 ACAS conciliation began (6).

153. On 22 October 2021 ACAS conciliation completed (6).

154. On 17 November 2021 C's ET1 was submitted (7).

Application of the law to the facts

Time limits

155. The Tribunal finds that only in relation to the alleged failure to renew C's contract on 31 August 2021 was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates as all the other complaints occurred prior to 13 July 2021 and are out of time.

156. In considering whether there was conduct extending over a period, the ET notes the contentions in paragraph 10 of Counsel's closing submissions, in particular at para 11 where it is stated:

"The ET must decide whether any of these are conduct extending over a period. The UPR application is entirely discrete and of a different type to the others. The failure to notify is also historic and an act of an entirely different character to later conduct."

157. For her part, C said in cross examination that all of the treatment she experienced came into focus following the stage 1 absence meeting on 18 June 2021 following which she saw all of the preceding acts as arising from C's discriminatory attitude towards her. Further, owing to her continuing ill health, which is well evidenced in the bundle, she was unable to bring a claim earlier than when she did.

158. We find that the overall theme of C's complaints is that R did not recognise her as disabled and therefore did not treat her in accordance with the Equality Act and that looked at through that lens, and that the same individual, ML, was the decision maker in relation to the UPR, the formal attendance management process, the decision not to make an occupational health referral, that there is a continuing act culminating in the non-renewal of the claimant's contract on 31 August 2021, in relation to which the claimant's claim was brought in time. We therefore find all of those claims to be in time as the result of being a continuing act.

159. Those acts complained of in which ML did not play a decisive role, namely the sending of the notification that the contract was not being renewed, which was carried out by JT, and the allegations of harassment by PF, was not a continuing act.

160. However, regarding all of the acts complained of, whether continuing or not, we find that the reason C did not bring claims earlier is because she only came to view her treatment as discriminatory following the stage 1 attendance meeting on 18 June 2021 but owing to ongoing health issues that are well documented in the bundle, whereby C was signed off as not fit for work with migraines since that date until the end of her employment on 31 August 2021 (see p311 and 370), and continued after that date (p391, 397), could not start proceedings earlier than when she did.

161. We have weighed the prejudice that each party would suffer and have had

regard to all the circumstances of the case. Were we not to exercise our discretion to extend time it would clearly prejudice C's ability to bring a substantial number of her claims; in contrast, given the relatively short period of time that the claimant was employed by R and the limited period of time during which the 'out of time' acts complained of occurred, and that R has access to relevant witnesses and documents throughout that period, the relative prejudice to R in being able to respond to the claims is relatively minor. Further, the reasons for the delay which include the claimant's later realisation that her treatment was potentially discriminatory and her ill health, that posed an obstacle to her bringing a claim sooner than she did, means we find that it is just and equitable in all of the circumstances to extend time.

Discrimination arising from disability (Equality Act 2010 section 15)

Did R treat C unfavourably?

162. R concedes that the non-renewal of C's employment contract can amount to unfavourable treatment, and we agree given that it had the effect of terminating C's employment with R.

163. We find that failing to properly notify C that her contract was not being renewed can amount to unfavourable treatment as an employee can expect to be properly notified of such an event, and, as we have found as a matter of fact, C was not properly notified at the time because R did not send the relevant letter to her current address or personal email and therefore C did not pick up the letter until 11 March 2021, some 2 months after the decision had been taken.

164. We find that rejecting the Claimant's UPR application can amount to unfavourable treatment as it resulted in C not getting a pay increase.

165. We find that commencing a formal attendance management process does not amount to unfavourable treatment as this was a legitimate option available to R to attempt to manage C's absence in the context of her significant absence over the relevant school year.

166. We find conducting an informal management meeting that C had agreed to attend, even when on long term sick leave, does not amount to unfavorable treatment for the reasons above.

167. We find that failing to make an OH referral can amount to unfavourable treatment because it is denying C access to a benefit in which she had a legitimate interest given her disabilities. The OH referral C sought on 24 June 2021 related to her migraines.

168. In relation to the manner in which the 18 June 2021 meeting was conducted as set out in the harassment section of the List of Issue (see paragraph 31(b) to (e) above), as will be seen below, we find the issues at paragraphs 31(b), (d) and (e) to be well founded as a result of which C is precluded from advancing these claims under s15 Equality Act 2010 by virtue of s212 Equality Act 2010 as an act of harassment cannot also be a detriment and unfavourable treatment under s15 Equality Act is a detriment.

169. In relation to the complaint at paragraph 31(c) our finding of fact was that this did not occur.

Did the following things arise in consequence of C's disability?

170. We find that both the need for C to be absent from work (sickness absence) and C's need to have an Occupational Health referral arose from C's disabilities. It is clear on the facts that C's absences were caused by her back pain and migraines as evidenced in her fit notes. Further, the OH referrals were in relation to her disabilities. The OH referral C sought on 24 June 2021 related to her migraines.

Was the unfavourable treatment because of any of those things?

171. Regarding the non-renewal of C's employment contract we find that this was because of the claimant's absence. That is because, as we have found as fact, it was made clear to C that her permanent employment was subject to a satisfactory teaching observation which was intended to take place soon after she joined the school. It was not subject to any other conditions, in particular, it was not subject to an assessment of staffing needs in January 2021. All of the evidence we saw suggested C would meet the requirements of that observation and R conceded that it was probable she would. The only reason that staffing observation did not happen was because C was absent owing to her disability. We therefore find there to be a direct link between C's absence, which precluded the teaching observation, the consequence of which resulted in C not being made a permanent member of staff before January 2021.

172. In turn, the consequence of that was at the point staffing needs were assessed in January 2021, C was the only relevant employee on a FTC and therefore, as JB confirmed in his evidence, it was C's employment that was terminated at the end of the school year in light of the staffing requirements. No other employees were considered for having their employment terminated because they were permanent members of staff.

173. We do not find that failure to post the letter confirming the end of C's contract to C's new address arose because of her absence or need for OH referral. We find that arose because C did not expressly notify R of her new address.

174. In contrast we do find that R's failure to send the letter to her personal email address was a result of her absence, because R knew that C was not in work (whereas the correct home address of C was not made expressly clear to R) and as a result this could prevent her from accessing her work emails, particularly given that email correspondence <u>from</u> C <u>to</u> R during this period was from C's personal email address.

175. We do not find R's rejection of C's UPR application was because of her absence or need for OH referral. The UPR rejection was because ML had found, based on the evidence provided by C, that C had not demonstrated the required standard for UPR. We find that it was open to ML to form this view based on the evidence he had before him. We do not see that C's absence played a part here given C was able to provide the evidence she submitted, which was duly considered by JT. Further, R had made attempts to obtain a reference from C's previous employer but the previous employer had not provided that reference. That was not a result of C's absence (or need for an OH referral), rather it was an omission by her previous employer.

176. In relation to R's decision to commence and conduct a formal attendance management process, we have already found those not to be unfavourable treatment for someone with high levels of absence. Though for completeness, we note that those steps arose as a result of C's absence.

177. In relation to failing to make an OH referral, R's contention is that the OH referral was not pursued because an OH appointment could not be obtained before 12 July 2021 and C's contract was expiring on 31 August 2021 and was not going to be renewed and therefore there was no utility in obtaining an OH referral which was for the purpose of assisting C's return to work, and that these reasons were not because of something arising from C's disabilities. However, as we have already found that C's contract was expiring on 31 August 2021 as a result of her absence, it follows that this decision not to make the OH referral, was a result of her absence.

Was the treatment a proportionate means of achieving a legitimate aim?

178. In relation to R's decision not to renew C's contract, we find that this was not a proportionate means of achieving a legitimate aim for the following reasons. R says that it had to operate to a budget with efficient use of staff and staff costs e.g. salaries and that given the genuine decision to increase teaching in maths and English and reduce teaching in DT it was a proportionate means of achieving a legitimate aim to decide not to renew C's contract or offer a permanent contract for September 2021.

179. R says that C's salary was £47,611 (p117) plus the additional costs of employer NICs and pension contributions. That was a significant amount of R's budget when the teaching requirement could be fulfilled by existing staff on permanent contracts.

180. R says that disabled employees are not objects of charity to be retained when their work is no longer required or necessary.

181. R contends that C has not put forward a case that another member of staff in the DT department was a more natural choice for dismissal. R says that C raised that Alistair Williams was taken on as permanent in October 2020 and the evidence is that he was recruited to replace Donna Kenyon, who left in December 2019 and he started work on an agency basis in April 2020 and was offered a permanent contract, which was signed in October 2020. It is a proportionate means of achieving a legitimate aim not to offer C a permanent contract rather than breach the contract signed in October 2020 and terminate the longer serving and known qualities of Alistair Williams.

182. We find that R, as a matter of law, cannot rely on cost alone as a legitimate aim and that it seeks to do so here. Even if its legitimate aim is not precluded on this basis, we disagree that the approach adopted was an appropriate and reasonably necessary way to achieve those aims. As we set out further below, R was on notice that C was disabled and that her absence was because of her disability. As we have already found above, the consequence of that was that she had not been able to complete the teaching observation that would have, in all likelihood, resulted in a permanent position. Therefore, as a result of her disability, C was still on a fixed term contract and therefore more vulnerable to dismissal at the point of R's staffing review. Had R taken this into account it could have considered a less

discriminatory alternative, such as carrying out a redundancy exercise, or putting in place a set of temporary arrangements, which took account of C's disability and the support she might need to get her back into work in due course. However as ML said in his evidence, no alternatives were considered because of the time and effort involved in, e.g. putting together a business case. Given the impact on C of her losing her employment, we find that it would have been reasonable for R to take such steps, despite the extra work involved.

183. In relation to not notifying C of the non-renewal of her contract, we find that not using her personal email address to do this, and not checking that R could use her personal email address because that was not normal practice, which was the reason given by JT, was not a proportionate means of achieving a legitimate aim as it had nothing to do with the stated legitimate aims advanced by R, and even if it had, making no attempt to establish the best way of communicating with C while on sickness absence, was not an appropriate and reasonably necessary way to achieve those aims given the simplicity of taking such a step.

184. In relation to the failure to make an OH referral, we do not find in favour of R's contention that this was a proportionate means of achieving a legitimate aim. That is because, whilst we agree that the purpose of such OH referral would be to find ways to help C back to work, and that the resulting OH report would be ready only two weeks before C's employment was due to end, the decision to turn down the report was on the basis of cost alone, which cannot justify discriminatory treatment.

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

185. We find that R could reasonably have been expected to know that C had a disability, namely her back pain, from 8 January 2021. That is because of our findings of fact that in the OH report ML received on 5 October 2020 (ML/39) it stated that *"It is difficult to be clear whether Annika's condition will fall under the remit of the Act at present, if the pain and other symptoms were to continue until February 2021 the condition would fall under the remit of the Act"* [our underlining]. Together with the fit note confirmation that ML received on 8 January 2021, that C was going to be off until 31 March 2021 recovering from surgery on her back, it was likely that her back pain would be continuing until February 2021, and that therefore, as stated in the OH report, "*the condition would fall under the remit of the Act*". We note that JT had also seen these documents at approximately the same time as ML.

186. As noted in the case law cited above, it does not matter whether the employer comprehends that these facts amount, as a matter of law, to a disability. Furthermore, in our view, R has not demonstrated that it was unreasonable for it to have had knowledge of C's disability. Any lack of clarity about C's disability in the pre-employment checks was superseded by the information referred to above which ML and JT were aware of by 8 January 2021.

187. However we do not consider R knew, or could reasonable have known C had a disability arising from her back pain before 8 January because the explanation of C's back pain in her self-assessment report (112) pointed away

from the seriousness of it because whilst there was a reference to having back pain C stated that she was “sometimes limited by back issues but this is infrequent”.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

188. We find that R knew or could reasonably have been expected to know that the claimant had the disability, in relation to back pain, from 8 January 2021, but not before then, for the reasons given above.

189. In relation to migraines we find that in light of the OH report dated 31 March 2021 which stated that C’s migraines are likely to fall under the Equality Act 2010, that R knew C had a disability relating to migraines from 31 March 2021. However we do not consider R knew C had a disability arising from migraines before this because whilst C refers to having Chronic Daily Migraine in her pre-employment questionnaire, she only specifies absence arising from it between 25 February 2019 until 19 July 2019 which was over 2 years before her employment with R began, and in the OH report of 5 October 2010 migraine is not cited as causing substantial adverse effects on C at that time. It was only in the OH report of 31 March 2021 that C’s migraine is noted as likely to be a disability and it was only since 26 April 2021 (p291) that any of C’s absence was due to her migraine.

190. As a result, C’s claims in relation to the UPR process must fail as the alleged incidents occurred before R had knowledge of C’s disabilities.

What PCPs did R have?

191. In relation to the surviving claims, we find that R had the following PCP:

    a. Conducting attendance management meetings when employees are absent on sick leave. R has conceded this.

192. We find that in relation to not making an Occupational Health referral when a request is made close to the end of term, that on the evidence before us, this was a one-off decision; there was no evidence of a policy or practice in this regard. And therefore we find that it cannot amount to a PCP following *Ishola v TFL [2020] EWCA Civ 112*.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability?

193. In relation to the surviving claim which at this point is that R conducted attendance management meetings when employees are on sick leave, we find that C was more likely to be absent due to sickness than someone who did not have her disabilities given the weight of evidence showing the C’s sickness absences being linked to her disabilities in the relevant fit notes and therefore C was at greater risk of being subject to the attendance management procedures, and therefore C was at substantial disadvantage compared to someone without C’s disabilities who would be less likely to be absent and therefore such to the absence management process.

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

194. As we have already stated above, R knew of C's disabilities and that it caused absences given the fit notes making express links to the disabilities as causing the absences and therefore was more likely be subject to the attendance management policy at the time the process was commenced in relation to C.

What steps could have been taken to avoid the disadvantage? The claimant suggests:

195. In relation to the surviving claim, C suggests R could have:

a. relaxed the requirements of the attendance management process in relation to disability-related absences; and

b. not conducted attendance management meetings whilst the claimant was absent on sick leave.

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

196. We find that it was **not** reasonable for R to take those steps for the following reasons. Following *Bray v Camden LBC UKEAT/1162/01* to which we were referred by Counsel:

"The logical consequences of the argument that an employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. In our view, the tribunal was correct, as a matter of good sense, to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill-feeling and be a potential for unauthorised absenteeism."

197. In our view, it would not be reasonable for R to be precluded from addressing significant absence, even if that absence arose from disability, as part of its absence management policy, as that would defeat the purpose of the policy, which is to determine how best to deal with absence. Indeed, R had only arranged a stage 1 review meeting which was required to investigate and make decisions regarding absence management, going forward, and was not threatening disciplinary action.

198. In relation to not conducting absence management meetings on sick leave, given the amount of sickness absence taken by C during her employment by R, it would have effectively precluded R from being able to address C's absence which would not be a reasonable step for R to taken, particularly given C was able to attend the meeting in any event.

Did the respondent fail to take those steps?

199. This question becomes otiose in light of our findings that the steps were not reasonable.

Harassment related to disability (Equality Act 2010 section 26)

200. Based on our findings of fact we find R did the following things:

a. Conducted an attendance management meeting on 18 June 2021 whilst the claimant was on long-term sickness absence.

b. Arranged for six people to be present at the 18 June 2021 meeting on behalf of the respondent.

c. PF stated that the claimant had "let [her] colleagues down and [her] students down" by being absent from work;

d. ML stating in the meeting that it "would be easy to be cynical in that [C's] return to work from her back operation coincided with when she was due to go to half pay and that she returned to work for a few days before going off with ill health again".

201. We do not find R did the following things:

a. PF stating at the meeting that the claimant had caused her colleagues "a lot of stress" given this was not in C's follow up email and therefore the contemporaneous note of C does not corroborate this.

If so, was that unwanted conduct?

202. We do not find the attendance management meeting on 18 June 2021 to be unwanted conduct. We find that R called that meeting in accordance with its attendance management policy and had valid grounds for so doing in light of C's absence and therefore we do not consider that the meeting *per se* had the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

203. In relation to arranging 6 people to be present at the meeting without telling C, we find that was unwanted conduct. The uncontested evidence was that C was visibly distressed when she turned up to this meeting and there was no evidence that C had been told in advance who would be there. C's evidence was that she was only expecting ML to be there. However in addition to ML there was PF, JT and John Sear (HR Business Partner) in attendance, as well as C and her union rep. The effect of this was to create an intimidating environment for C. C's account of her reaction at the time we find to be genuine in light of the evidence of PF which noted C's distress, and that it was reasonable for C to have that perception given that no advance warning of who was going to be present at the meeting had been provided to her.

204. In relation to PF stating that the claimant had "let [her] colleagues down and [her] students down" by being absent from work, we find this to be unwanted conduct. We were not persuaded by PF's evidence that saying this provided a way into the conversation or was in some way to acknowledge the guilt C might be feeling about her absence. We find this statement to be unsympathetic and unnecessary and that it had the effect of violating C's dignity or creating a hostile, degrading or offensive environment for B. Again, C's account of her reaction at the time we find to be genuine in light of the evidence of PF which noted C's distress, and that it prompted C to follow up in writing where she described the comments as "extremely disrespectful" and "disgusting" (p338). We find that it was reasonable for C to have that

perception given the nature of the language used and the circumstances in which it was used – namely C's absence arising from her disabilities.

205. In relation to ML stating in the meeting that it "would be easy to be cynical in that [C's] return to work from her back operation coincided with when she was due to go to half pay and that she returned to work for a few days before going off with ill health again", we find this to be unwanted conduct. We were not persuaded by ML's explanation that he was being careful to ensure that the wrong inferences about C's absence were not drawn. In light of the OH reports and fit notes that had been provided to R we do not think this was in any way necessary for ML to say and had the effect of violating C's dignity or creating a hostile, degrading or offensive environment for B. As above, C's account of her reaction at the time we find to be genuine in light of the evidence of PF which noted C's distress, and that it prompted C to follow up in writing where she described the comments as "disgraceful" and "an attempt at deformation of character" (p338). We find that it was reasonable for C to have that perception given the nature of the language used and the circumstances in which it was used – namely C's absence arising from her disabilities.

Did it relate to disability?

206. We find that all three instances of unwanted conduct were related to C's disability given the fact of the meeting and comments at the meeting all arose from C's absence caused by her disability.

Conclusion

207. In conclusion, therefore, it is the unanimous decision of the ET that:

a. The complaint that the Claimant's employment contract was not renewed due to sickness absence related to her back condition was presented within the applicable time limit and will therefore proceed.

b. Save in relation to the complaints that:

i. the Respondent failed to notify the Claimant that her employment contract was not being renewed,

ii. Mr Ferrie stating that the Claimant had "let [her] colleagues down and [her] students down" by being absent from work, and

iii. Mr Ferrie stating that the Claimant had caused her colleagues "a lot of stress",

all of the other complaints brought by the Claimant are continuing acts of discrimination culminating in the complaint that the Claimant's contract was not renewed and are therefore presented within the applicable time limit and will therefore proceed.

c. The Claimant's complaints that:

i. the Respondent failed to notify the Claimant that her employment contract was not being renewed,

ii. Mr Ferrie stating that the Claimant had "let [her] colleagues down and [her] students down" by being absent from work, and

iii. Mr Ferrie stating that the Claimant had caused her colleagues "a lot of stress",

were not presented within the applicable time limit, but it is just and equitable to extend the time limit. All of these complaints will therefore proceed.

d. The Claimant's complaints of unfavourable treatment arising from disability under s15 Equality Act 2010 are well-founded and succeed in respect of:

i. The Claimant's complaint that her employment contract was not renewed due to sickness absence related to her back condition;

ii. The Claimant's complaint that the Respondent failed to notify her that her employment contract was not being renewed;

iii. The Respondent failing to make an Occupational Health referral in relation to the Claimant's migraine when one was requested by the Claimant on 24 June 2021.

e. The remainder of the Claimant's complaints of unfavourable treatment arising from disability under s15 Equality Act 2010 are not well-founded and are dismissed.

f. The Claimant's complaints of failure to make reasonable adjustments under s20 and s21 Equality Act 2010 are not well-founded and are dismissed.

g. The Claimant's complaints of harassment related to disability under s26 Equality Act 2010 are well-founded and succeed in respect of:

i. Arranging for six people to be present at the 18 June 2021 meeting on behalf of the respondent;

ii. Paul Ferrie stating that the Claimant had "let [her] colleagues down and [her] students down" by being absent from work.

iii. Martin Lavelle stating in the meeting that it "would be easy to be cynical in that [C's] return to work from her back operation coincided with when she was due to go to half pay and that she returned to work for a few days before going off with ill health again".

h. The remainder of C's complaints of harassment are not well-founded and are dismissed.

Remedy

208. Remedy will be dealt with at a separate remedy hearing.

Approved by:

Employment Judge Partington

13 July 2025

JUDGMENT SENT TO THE PARTIES

17 July 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

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