EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Ralfs	**v**	**The Arbib Education Trust**

Heard at: Reading Employment Tribunal (by C.V.P.)
On: 27, 28 November 2024, 2 December 2024, 19 to 21 May 2025, 22 May 2025 panel discussion in chambers, 23 May 2025 and 17 August 2025 (judgment writing)

Before: Employment Judge George
Members: Ms S Elizabeth; Mr J Appleton

Appearances

For the Claimant: Mr R Holland, direct access barrister
For the Respondent: Mr M Magee, counsel (27, 28 November 2024; 19 to 21 May 2025) Mrs S Brostoff, trustee of the respondent (2 December 2024)

RESERVED JUDGMENT

1. The following complaints of unfavourable treatment because of something arising in consequence of disability are well-founded and succeed:

    a. On 29 March 2022 the claimant was told that his future sick pay entitlement would be reduced if he were to fall ill again in the second year of his employment, depending upon when that illness started;
    b. On 28 November 2022 the claimant was sent a pay review letter informing him that the respondent's Pay Committee had scrutinised his position and that as he was new in role he would not be receiving an increase.

2. The following complaints of harassment related to disability are well-founded and succeed:

    a. The statement by his line manager on 12 December 2022 that the claimant had not acknowledged the impact his sickness

had had on others, specifically on the line manager himself, and the business;

b. The statement by his line manager in a document which was provided to the claimant on 6 February 2023 that he could not agree or disagree with the list of work the claimant stated he had completed.

3. The following complaints of victimisation are well-founded and succeed:

   a. The claimant's pay appeal dated 8 December 2022 was not sent to the Trustees of the respondent's pay committee, contrary to policy. This denied the claimant the opportunity to be heard at an appeal hearing when the policy provided that his achievements would be considered by the pay committee and had the consequence that his allegations of discrimination were not considered by them.

   b. The respondent told the claimant the following untrue statements: that his statement of appeal had been considered by specific members of the pay committee when it had not been and that the pay appeal had been upheld when it had not been considered under the policy but upheld under an ad hoc short form process.

   c. The respondent failed to provide the claimant with pay appeal emails in advance of his grievance hearing on 22 February 2023.

   d. The respondent, in the grievance outcome, failed to uphold the claimant's allegation of discrimination in relation to his pay review.

4. The claimant was constructively dismissed and this was unlawful discrimination contrary to s.15 Equality Act 2010 and/or victimisation contrary to s.27 Equality Act 2010.

5. The remaining complaints of unfavourable treatment because of something arising in consequence of disability, harassment and victimisation are not well founded and are dismissed.

6. The complaint of direct disability discrimination is not well founded and is dismissed.

7. The complaint of unlawful detriment on grounds of protected disclosures is not well founded and is dismissed.

8. The complaint of automatic unfair dismissal contrary to s.103A Employment Rights Act 1996 is not well founded and is dismissed.

9. The provisional remedy hearing is converted to a preliminary hearing in private for case management. Separate case management orders are sent.

REASONS

1. Following a period of conciliation between 25 January 2023 and 8 March 2023, the claimant presented the claim on 5 April 2023. The respondent defended by a grounds of response presented, in time, on 22 May 2023. The claim was case managed by Employment Judge Flanagan at a preliminary hearing in private on 4 January 2024 (page 76).

2. The claim was originally listed for final hearing on 27 November 2024 to 5 December 2024. Unfortunately, due to the sudden and unexpected ill health of Mr Magee (counsel for the respondent) the final hearing had to be adjourned part heard on 2 December 2024. The claimant had concluded his evidence but the tribunal had not yet heard from the respondent's witnesses. It resumed in May 2025 when we heard the respondent's oral evidence and the parties written and oral submissions.

3. We have had the benefit of a joint hearing file running to 1188 pages and page numbers in these reasons refer to that. We were asked to disregard page 779 which was a without prejudice document which had inadvertently been included in the hearing file. This was not admitted into evidence. The parties had each prepared not agreed cast lists and chronologies. Both parties exchanged written skeleton submissions before responding to and expanding on them in oral submissions on 21 May 2025. We had hoped to be able to deliver an oral judgment with reasons before the end of the original time allocation ending on23 May 2025, but that was not possible. They are referred to as CSUB and RSUB in these reasons.

4. We refused an application by the respondent on day 4 of the hearing for permission to rely on a medical report prepared by an occupational health physician in connection with the claimant's application for early release of pension benefits for reasons which were given orally at the time and are not now repeated. The parties are entitled to request written reasons. Any request must be made in writing within 14 days of the date on which this reserved judgment is sent to them.

5. We use initials for some of the relevant individuals from whom and about whom we have heard. We mean no disrespect by this.

Marie Ashton	MA – from Browne Jacobson, grievance investigator
Mirza Kashif Baig (witness – statement taken as read)	MB – Trust Finance Manager March 20216 to November 2023
Rhodri Bryant (witness)	RB – Executive Principal
Sarah Casemore (witness)	SC – HR Director
John Hedger	JH – Trustee and pay committee member

Rachel Kruger	RK – trustee and chair of grievance hearing
William Lazarus	WL – trustee and pay committee member
Tina Lewis	TL – Governance professional
Roger Melody	RM – Interim Finance Director
Annabel Nicoll	AN – Trustee and pay committee member
Jas Samra (witness – unable to attend)	JS – Finance Officer
Oona Stannard	OS – Chair of Trustees

6. The respondent's counsel confirmed that they had no questions for Mr Baig. His statement was admitted into evidence in support of the claimant's case and taken as read. A witness statement had been exchanged for Jas Samra and the claimant wished to rely on her evidence. Unfortunately, she was not able to attend at the time the claimant's evidence was presented; the claimant wished to rely on her statement and wanted us to give it such weight as we thought appropriate. Having considered the submissions of the respondent, we agreed to do this

The Issues

7. The issues to be determined by the tribunal were appended to the order of Employment Judge Flanagan (page 85) subject to the following amendments:

    a. Numbering was amended following discussion on Day 1 of the hearing so that they should run sequentially – irradicating numbering errors. However, since no updated List of Issues (hereafter LOI) was issued there is less confusion if the direct disability discrimination complaints are referred to as issues 1.1 to 1.4 as it is LOI 1.1 which was misnumbered. Then all of the other issues can retain the numbering in the annex to Judge Flanagan's order and it is that original numbering which we have adopted in these reasons. This means that our numbering does not match those in the written submissions, however we think ultimately this is clearer for the parties when cross referencing from the reserved judgment to pre-existing documents in the case.

    b. The claimant's representative had written on 2 February 2024, on receipt of Judge Flanagan's order, to set out certain changes (page 95 – 96). It was accepted that the proposed amendments to LOI (6.2)B; and to LOI 7)1) (reasons for dismissal - by adding LOI para.7)e)) should be made. There was one exception to this because proposed LOI para.7)e)v) "Failing to find that C had been discriminated against during the grievance" postdated the resignation so could not have been one of the reasons for it or a cause of the alleged constructive dismissal.

c. One of those changes was to add to the list of alleged acts said to have contributed to the alleged breach of the implied term of mutual trust and confidence in response to which the claimant alleges he resigned. It was expressed as being the respondent's response to the claimant raising whistleblowing concerns and not as the claimant raising protected acts. However, the same communications were said both to be protected acts and protected disclosure and the same acts were said to be unlawful detriments done on grounds of the protected acts and/or on grounds of the protected disclosures. It cannot have been intended that the claimant would not rely on any proven victimisation as part of the alleged breach of the implied term of mutual trust and confidence. It is clear that that was the claimant's case.

8. In closing submissions, it came to light that the List of Issues had also omitted the legitimate aim relied on in the ET3/GOR as justification for any unfavourable treatment in respect of the decision not to award the claimant a pay increase in November 2022 (ET3 page 65 para.18). That is allegation LOI 2)b).

9. It was unfortunate that it was only during closing submissions that it was noticed that a legitimate aim pleaded as justifying one of the acts alleged to be unfavourable treatment arising in consequence of disability had not been incorporated into the list of issues despite the employment judge at the case management preliminary hearing CMPH inviting parties to write and say whether or not the list of issues was complete. Nevertheless, although there was no explanation for its omission, Mr Holland (counsel for the claimant) accepted that it was an aim that the claimant was on notice of. There would be much more prejudice to the respondent if they were unable to rely on an aim of their actions which they argue justifies it than there would be to the claimant in having to respond to a defence of which he had notice. The legitimate aim had plainly been omitted from the List of Issues in error and it would be an injustice to deprive the respondent of an opportunity to rely on it. We decided that, given the timing of the application to amend the List of Issues, where necessary we would decide whether that legitimate aim was genuinely that of the respondent and whether any unfavourable treatment was a proportionate means of achieving it on the basis of the evidence had already heard.

10. The legitimate aims relied on in para.18 of the Grounds of Response were

    a. "to effectively and efficiently allocate resources within the Trust and to ensure that individuals remuneration is a reflective of their contribution to the business".

    b. Further, the principle stated in the pay policy namely that "The Trust's Business Committee will agree the budget to be set for pay including for pay recommendations from appraisal outcomes, and will make appropriate decisions in the light of the Trust's financial circumstances and each Academy Improvement Plan (AIP)"

Findings of Fact

11. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

12. The claimant had been employed previously by the respondent and when, in 2021, they were looking for a new Finance Director, Mr Bryant approached the claimant and invited him to rejoin them. According to RB the claimant was offered a larger role akin to a COO at £90,000 – which would have included Health & Safety and premises but the claimant did not want to take on that wider role (RB para.3). He agreed to rejoin the Trust and accepted the role of Finance and IT Director (page 99). His salary was agreed at £87,500 and the contract provides for an annual pay review to take effect "in accordance with the Trust's Pay Policy".

13. The policy which applied at the relevant time starts at page 562. The policy does not have a section specifically dealing with Finance Director (or, indeed Director of Finance and IT) or the HR Director (which was SC's role). We were taken to the appeals procedures: there is a procedure at page 572 for the hearing of the appeal which includes that member of staff is entitled to attend the hearing, make representations and be accompanies by a colleague. Relevant papers should be exchanged 3 working days before the hearing.

    "Any appellant has the right to see all relevant papers".

14. The executive principal's duties under the pay policy is at page 563. When RB was asked about this, he said that there was a distinction between staff on salary scales (who if not at the top of the scale would receive an increment by moving up the scale and also a cost of living increase) and staff on spot salaries. JR was on a spot salaried specifically negotiated when he started employment in 2022. Both RB and SC gave evidence that while moving up scale was originally linked to performance, it had become automatic progression and individual was presumed to be working at level which justified progress unless they were under performance management. The gist of RB's evidence seemed to be that performance was not relevant to whether or not an individual, who did not automatically receive the cost of living increase, would be awarded it.

15. There was evidence before us that in previously years the HR Director (SC) and Interim Finance Director (RM) had not always received the cost of living increase. See also SC para.49 where she said that there was precedent for people not receiving costs of living increase during their first pay review cycle following appointment. So it seems that it was only the most senior support staff: HR Director, the Finance Director and Executive Principle and the 3 Headteachers who did not automatically get the cost of living increase.

16. If, as the respondent said, it is the case that performance is not taken into account in decide whether to not those individual should get the cost of living increase then written policy may not match the practice although we find the written policy ambiguous.

17. The term "new in post" we were told is defined in the policy for non-teaching staff as meaning starting after 1 March. Since the FD is not mentioned in the pay policy, there is some ambiguity about whether that definition covered the claimant or not. Overall it appeared to be accepted that it did not.

18. Other relevant policies which we considered included the Equality Policy; the respondent's witnesses accepted that its principles were (or were intended to be) embedded in the organisation.

19. The Staff Absence, Sickness & Cover Policy (page 580) covers both sick pay and managing staff absence: the stated purposes of the sick policy are the legitimate aims relied on in respect of complaints LOI 2.a) and 2)c) (page 86) the allegation about alleged clawback of future sick pay entitlement and that concerning pay on return to work

20. At page 583 the policy provides four options for managing long term absence. SC's evidence was that,

> "What critical about first one is that it is a planned phased return to work program. When operated, [there is a] clear planned programme phasing from week 0 to 6 or to 3 weeks set out in advance back up to full time – very deliberately planned and programme of phasing back up to full time arrangement"

21. We accept SC evidence that in principle this is what the first bullet point was intended to cover. It is consistent with the wording of the policy and with common practice. If there is an open ended phased return then the respondent applies the "Temporary redeployment or adjustments" section and the employee is paid for hours worked. That is the policy.

22. Rights to sick pay for support staff including the Finance Director (the FD) are set out in the paragraph which straddles pages 583 – 584. Normally, if the employee has less than 4 months' service they are only entitled to 1 month company sick pay (hereafter CSP). In the 2nd year of service, they are entitled to 2 months' full pay and 2 months' half pay CSP. However,

"Entitlement is calculated by taking into account the length of service on the first day of absence and any sick pay received in the 12 months prior to the first day of each absence."

23. There is a rolling 12 months entitlement. This means that under the policy whether or not an employee is entitled to CSP is affected by whether or not they have received CSP at any point during the 12 month period prior to the date on which a period of sickness absence starts.

24. The claimant had to work with his previous employer through a six month notice period before joining the respondent so Roger Melody was appointed to act as interim Finance Director until 4 February 2022. The claimant was due to start on 1 February 2022. It seems to have been agreed between the claimant and Mr Bryant that Mr Bryant would continue to manage the IT function initially while the claimant settled in.

25. In what must have been a devastating blow for the claimant and his family, he was diagnosed with relapsed Hodgkins Lymphoma on 14 February 2022 and informed Mr Bryant and Ms Casemore about the diagnosis two days later. He had originally developed the disease while working for his previous employer and had told Mr Bryant about that before accepting employment with the respondent. There is and has been no dispute within these proceedings that cancer is a deemed disability and that the claimant was at all relevant times disabled within the meaning of s.6 EQA.

26. One of the key areas of disputed evidence between the parties is whether (as alleged by Mr Ralfs) RB proposed that he should be paid enhanced sick pay in exchange for working or whether (as alleged by the respondent) RB decided to award the claimant enhanced sick pay and the claimant's statement that he wanted to work when he could was unconnected with that. Mr Ralfs and Mr Bryant each gave evidence about a meeting on 18 February 2022 (a couple of days after he told his employer about the diagnosis) when this was discussed but what was offered by the Trust and what was agreed by the claimant at it is hotly contested.

27. There is some relevant evidence from which inferences can be drawn which is of assistance in deciding which version of events to prefer.

28. At page 277 (and also page 615) is an email from SC to RB timed at 11.07 which sets out some cost modelling for "Finance & IT Director cover/pay". The modelling sets out the financial cost to the Trust of the proposed enhanced sick pay. The modelling also refers to budgeting for RM to return to provide cover for a 2.5 day week. It recounts the claimant anticipating that he would be able to work 1 week in 4 during March and May but not to work during June and possibly also July. It does not address whether there will be any ramifications later on if the claimant is absent or on reduced hours into a second year.

29. Page 727 contains some WhatsApp messages between the claimant and RB between 16 February and 9 March. Mr Ralfs said that the reference on 23 February 2022 to "my proposal" clearly means offer of sick pay for working.

However, RB stated this was a proposal of getting team together to see how working when could might work in practice as there is a reference to RM MB and he meeting to discuss roles and responsibilities. Either interpretation is consistent with the wording and this evidence is neutral.

30. On 22 February 2022 (page 279), the claimant wrote to RB saying that "the plan for the Trust needs to work with or without my support".

31. The claimant's timeline in his grievance (page 498) points to a perception of a change in attitude from the 14 March What's App. This is at page 728 and, in it, RB asked the claimant to "whatsapp me each day to tell me if you are working or not, … and then perhaps send an email each week to firm up the hours you worked that week".

32. Page 311 is a letter from the claimant's Haemotologist's advising that he may be able to do light duties from home depending on how he's feeling. SC says that this was sent to her following her call with the claimant on 22 March 2022 (SC para.15).

33. The claimant responded to RB's WhatsApp by email (page 653) in which he said that he would not send the requested messages or "weekly timesheets". There is no mention of pay in his email or in the response.

34. Page 731 is an exchange of WhatsApp messages between 22 March and 14 June in which RB says to the claimant that he is struggling from duty of care perspective and workflow one in not having any contact with him. The claimant had started chemotherapy on 16 March 2022 so this was obviously an incredibly difficult period for him which he describes vividly in his statement.

35. SC had two calls with the claimant on 22 and 23 March 2022 (which we deal with in more detail below) and, on 29 March 2022, she wrote (page 511) to "summarise the position that we have agreed regarding your sick pay, undertaking work and staying in contact whilst you are undergoing chemotherapy". She set out that he would be paid full pay 4 March to 3 April 2022, half pay 4 April 2022 to 3 August 2022 and, thereafter, any leave would be unpaid. She also stated that the position on a return to work would be no further entitlement to sick pay within the 12 month period up until 3 March 2023 and

> "From 4 March 2023 onwards, any entitlement to sick pay will also be calculated by looking at any sick pay received in the previous 12 months prior to the first day of any absence. Any sick leave taken between 4 March 2023 – 3 August 2023 will be paid at half pay up to a total cap of 4 months pay within the relevant rolling 12 months period. From 4 August 2023 onwards, 12 full months will then have elapsed since the exceptional sick pay payment and the usual entitlement outlined in the Staff Absence, Sickness & Cover Policy will simply apply as normal."

36. Under the heading "Working during chemotherapy" on page 512, she stated

"The letter from your doctor date 4 March has advised that it is possible that you may not be able to work during the 4-5 months you are receiving chemotherapy but also indicated that it is nevertheless possible that you may be able to perform some light work duties from home at intermittent points depending on how you are feeling. You have also indicated that you are very keen to help out with work at the Trust as and when you can and that you feel that this would be potentially beneficial for your wellbeing. As you are aware, we have appointed [RM] to cover the Finance Director role in your absence on a 0.5 FTE basis, which you feel is sufficient to cover the role during this period. Neither you or your doctor are able to predict how you are going to feel during this period and you have reported that so far you have been feeling worse than you had expected. We would like to be clear that there is no expectation on our part that you will be working during the period of your chemotherapy but we would of course welcome and value any work that you feel you are able to take on. We have agreed that you will contact Roger as and when you feel able to work as the most straightforward way to manage this. Rhodri in turn will liaise with Roger periodically about whether you have been able to take on any work, so that Rhodri can continue to have visibility of work across the team.".

37. We also note page 1033 where SC, in her notes preparing her response to the claimant's grievance, says "very early on RB and JR had come to an informal agreement that JR would continue to do whatever work he could and in return the Trust would enhance his sick pay."

38. In SC's statement to MA in the investigation meeting about the arrangement (page 690) said that, following a call with the claimant which led to the 29 March 2022 letter, they had "agreed to draw the line, give it to him as pure sick pay, forget about work and do it on his terms."

39. We wish to record that the responsibility is on the respondent/employer to make clear to their employee what has and has not been agreed in this sort of situation.

40. We find that what RB had decided prior to meeting with the claimant on 18 February 2022 was to give him enhanced sick pay of an additional 4 months half pay with no expectation that he would work during sickness absence. The evidence that supports that is the modelling in SC's email at page 615.

41. It is consistent with that, that it was the claimant who raised the prospect of him being able to undertake some work during cancer treatment and we accept RB's evidence to that effect. The claimant told RB that he had previously found it helpful to his mental health to carry out some work when he could; it was not that RB asked him if he would work. The claimant told RB probably during that meeting that, during previous chemotherapy, he had been able to work one week in four.

42. The claimant points to evidence from the grievance investigation as supporting his evidence that an agreement was reached on 18 February 2022 that he would be paid enhanced sick pay in exchange for working when he could (SC notes page 1033 and SC interview with MA on page 690 quoted above). We think that SC understood following the meeting on 18 February (probably from RB) that the claimant had said he would be able to work and

that had been accepted as part of the conversation about enhanced sick pay. It's plausible in those circumstances that RB and JR did leave the meeting with different understandings of whether there was any obligation on the claimant to *earn* enhanced sick pay.

43. We take on board RB's evidence that the Finance function at this time was in a very difficult situation. Obviously one's sympathies lie primarily with the claimant who was facing an uncertain future for himself and his dependants. However, the reality for the Trust was that they'd needed someone more heavyweight in the position which is why they had recruited the claimant. Another finance officer had left unexpectedly so they were low on resource in that department. They agreed a salary above budget which suggests they were particularly keen to recruit the claimant. The Trust was using a finance system which was not producing reliable data and an important part of what an incoming Finance Director was expected to do was improve the quality of financial reporting. Overall, the Trust itself was also in a difficult position once the news of Mr Ralf's diagnosis was shared with them because, not only were RB and SC personally saddened for the claimant (with whom RB had a strong and positive working relationship from his previous period of employment), but a key member of staff needed to be supported through a potentially uncertain length of absence and a potentially devastating disease. When the claimant said words to the effect that he could probably do some work, we find that RB was grateful and readily accepted without thinking how it might be perceived by the claimant or what the implications were operationally or in relation to pay entitlement.

44. Having taken into account all the evidence we have heard on this point, much of which is ambiguous, these are our findings on what happened on 18 February 2022. The respondent offered for the claimant to be given enhanced sick pay and the claimant agreed to that. Separately there was an arrangement where the claimant would work when he was able to but there was no obligation on him to do so and would be no penalty on him if he did not.

45. We suspect that both sides thought that there was goodwill and this may have affected why RB didn't think it necessarily to make the arrangement formal. The respondent did not intend the enhanced sick pay to be conditional on working during cancer treatment but the claimant came away believing that there was some kind of obligation which has crystallised over time to a belief that he was earning the extra pay. The references in the SC's evidence to the grievance investigation about what had been agreed between RB and JR are to an informal agreement – not a legally binding requirement that in order to receive enhanced sick pay the claimant was expected to work.

46. The claimant was clearly very upset by the WhatsApp message of 14 March 2022 because it appears to require a level of reporting regularly which was at odds with the flexibility of him being able to work when he felt fit enough to do so. It's unfortunate that at the meeting 18 February they didn't discuss how they would allocate him work in an uncertain situation or how RB would have oversight of that work to ensure team working. We take on board that the claimant's state of health was unknown; it was a fast changing situation. The

claimant was justifiably upset for at least two reasons: he had offered to work when able, was probably (wrongly) feeling responsibility for the situation but there would be days and times when he was unable to even check emails and he had all the stress of his condition and its treatment to contend with. He was also a senior employee so that type of micro-management seems extremely inept.

47. To judge by the claimant's description of this WhatsApp message in his grievance (page 498), this significantly changed his view of whether RB was supportive. SC maintained in oral evidence that on 22 March 2022 the claimant had made clear to her that he did not want to communicate with RB, despite attempts by counsel to minimise the time over which she appeared to be saying this was the case. It is not that the claimant refused ever to communicate with RB where necessary for work and we have been taken to emails in the Spring 2022 when he did so. It is not that the claimant refused to be present in the same Teams meeting as RB: Mr Bryant accepted that he did so. What the claimant was taken to mean was that he did not want his *de facto* line manager for absence or work purposes to be Mr Bryant and this was arranged. He communicated work related matters to RM and his absence was managed by SC. It is not surprising that Mr Bryant felt cut out and that he had less oversight of the work that the claimant was doing as a result.

48. The claimant started period of sickness absence on 4 March 2022. There was disputed evidence about the amount of work carried out by the claimant after that date. The claimant's account is at his paras.75 to 78. Contemporaneous or near contemporaneous evidence includes an email exchange at page 529 – 530. The claimant set out (page 530) examples of work done between March to May 2022. Mr Bryant's oral evidence was that he wasn't in position to dispute that that work had been done.

49. Mirza Baig was tendered by the claimant but the respondent had no questions for him so his statement was taken as read. He gave broadly supportive evidence that Mr Ralfs was carrying out meaningful work during this period. Ms Samra was not available to be called when the claimant's evidence was presented so there is a question for us as to how much weight we should give to her evidence. However, in the light of RB's oral evidence that he does not dispute the substance of page 530 – he is just unable to agree to it from his own knowledge - we do not think her evidence adds much to claimant's account of what he did. We accept that he did meaningful work of value to the respondent when he was able during that period.

50. However Mr Bryant felt that there were tensions about work allocation as between the various members of the finance team and he considered that he did not have enough information. Mr Baig had emailed on 9 March 2022 with concerns about how to authorise urgent matters and about workload(page 297). That is the background to a conversation between SC and the claimant by phone on 22 March 2022.

51. The claimant's allegation is that in the first call, which we find was on 22 March 2022, he was told that the enhanced sick pay might be taken away.

This was firmly denied by SC "I have no reason to make that call" but she accepted that there was some uncertainty when she left the call because she had to talk to RB about reporting lines. She also said in oral evidence that the claimant was very angry in the call on 22 March 2022.

52. There must have been some reference to the entitlement to sick pay in year 2 of employment and whether there would be an impact of additional sick pay in year 1 or an expectation of the same additional sick pay in year 2. This is not the same as the claimant being told that the additional 4 months at half pay in year 1 would be removed and we reject that allegation. The claimant's evidence is that in a second call the following day he was told that the enhanced sick pay would not be removed.

53. Claimant discusses this in his para.70) and 71). We note first that the claimant's evidence is that in the second call that he was reassured that what he calls the "original agreement" would be honoured. We infer from this that the "original agreement" was to work when he was able to and there was no obligation to work at a particular level. He was also reassured by the letter (para.71) which says the same – see quote above.

54. The claimants' own evidence is that from the 23 March conversation and receipt of the letter of 29 March (page 511) he understood that there was no expectation for him to work if he was unwell to do so. The clear corollary from that is that the enhanced sick pay would not be removed if he didn't work. There is no other explanation for what he describes as incredibly reassuring and a huge relief. The passage quoted at para.36 above clearly states that there is no expectation on the respondent's part that the claimant would do work.

55. The claimant's perspective on this has shifted over time as he explains in his grievance. That doesn't change what the respondent did at the time. Where the claimant now says that he was told pay might be removed or that there was a clear obligation to work in exchange for sick pay which was otherwise at risk, he does so viewing the events of February and March 2022 in hindsight from the perspective of someone whose view of whether the respondent was supportive or not has changed over time.

56. The contemporaneous email to the claimant at page 619, explained by SC's para.14, is some evidence from which to understand what she had told the claimant on 22 March 2022 about what needed clarification. We accept that what she had to clarify with RB was whether the claimant could report to RM as he suggested. This seems consistent with our findings of the claimant's stated wishes and what SC understood RB had arranged with the claimant. It is understandable that she would need to check the reporting line. She would have been able to assure him that there was no expectation on him to work at all – that the sick pay was unconditional because that is what had been planned from the start. We accept her oral evidence to us that she told the claimant on 22 March that there was no expectation on the part of the respondent that he would do any particular level of work. What she needed to check was not whether the pay would remain but whether the reporting

could be as the claimant suggested. She realised through the grievance that the claimant misunderstood what she said on 22 March.

57. We think that when the respective parties referred at the time to an arrangement they appear to be talking at cross purposes. When SC in para 14 refers to an arrangement, that is a reference to the arrangement that claimant would carry out some work when he was able. It only makes sense for it to mean that in the context of concern of a lack of communication or a lack of clear lines of communication. However the claimant appeared and appears to think that when they talk about an arrangement they mean work in exchange for sick pay. That was not what the respondent's meant by the arrangement.

58. SC in her investigation meeting with MA (page 690 – 691) accepted that the claimant may have inferred that the pay (i.e. the sick pay to be paid April to July 2022) would be removed but was clear that that was not what she said. She points out that the grievance merely states that that was suggested not that that was directly communicated.

59. Whatever SC said in the phone call on 22 March which caused uncertainty for the claimant (and the circumstances of the call, from his description, were not ideal), she did not warn him that the enhanced sick pay might not be honoured. It was not that which she needed to check with RB; what she needed to check was the reporting line and it was about that that she sought to reassure the claimant in her mail at page 619.

60. SC later wrote to the claimant about his sick pay entitlement in the future (page 511). For reasons he explains later, the claimant was not in a position to read and analyse this letter at the time and, in December 2022, he wrote with some questions about it (page 541). We consider that exchange – stepping out of the chronology to do so - because it informs our findings about what SC intended by what she wrote on 29 March 2022.

61. The question is then what had the respondent decided in relation to the claimant's sick pay entitlement in the second year? SC drafted the letter which, when sent, was that at page 511 and sent it to RB (page 927) for him to consider.

62. Had the policy for support staff been applied in terms, and were the words "sick pay" in the final paragraph on page 583 to be regarded as including enhanced sick pay and not merely sick pay under the policy, then if the claimant started a period of sickness absence on 4 March 2023 he would not have been entitled under the policy to any sick pay because of the enhanced sick pay he received in the first year. That is because he had received an additional 4 X ½ month's salary or 2 X 1 months salary in the period 4 April 2022 to 3 August 2022 meaning that in the 12 months prior to 4 March 2023 he had already received 3 months' CSP – the full second year entitlement. The operation of the policy would have the effect of pushing back his second year entitlement by up to 4 months because he had been given enhanced sick pay in first year.

63. We find that SC and RB did not want the consequence to be that the claimant should have no CSP entitlement in the second year. The effect of the wording they use is potentially not as advantageous in year 2 as if he had not had the enhanced sick pay in the first place but potentially more advantageous than if they had done nothing.

64. SC sought to restate the claimant's entitlement to sick pay in his second year (i.e. from anniversary of start of sickness absent on 4 March 2023) as set out in para.35 above. It is very difficult to understand how what she said would operate in practice. One reading of that sentence is that despite the policy he would be paid something during the months March to August 2023 if absent due to sickness in that period. However it seems to be accepted by the respondent that the claimant was disadvantaged by the statement that he would be paid half pay CSP from March 2023 to August 2023.

65. The letter was an imperfect attempt to clarify the potential position for the claimant in Year 2. In her email of 9 February 2023 (page 458) SC stated that their intention "was to provide you with the equivalent amount of sick leave in your second year." We understand that to mean that their intention as at March 2023 was the claimant should have the same entitlement to sick pay in his second year of service as he would have had under the policy had he not been given enhanced sick pay in the first year of service. However they recognised that the wording of the letter does not do that. The wording of the letter would probably lead to him receiving less sick pay should he go off sick on an absence starting between 4 April 2023 and 3 August 2023 than he would have received had he not had the enhanced sick pay, depending on what was meant by 'sick pay' un the final paragraphs of page 583.

66. The reasonable employee would probably have understood that an award of enhanced sick pay would be entirely outside the policy and therefore have no implications for their sick pay entitlement under the policy. So when the claimant realised the letter of 29 March 2022 meant that he might, depending on when a period of absence started, have a reduced sick pay entitlement compared to the full second year entitlement he justifiable considered himself to be disadvantaged by that.

67. Ultimately as RB said, once the respondent realised what the wording used meant, it was easier to assume that the claimant hadn't had the special arrangement in Year 1 and therefore would be afforded the CSP under the policy in year 2, effectively as though the words "sick pay" at the bottom of page 583 only referred to sick pay under the policy. This happened within a couple of months of the claimant pointing it out, as we explain below.

68. When the claimant questioned the terms of the 29 March 2022 letter on 30 December 2022 (page 541), SC replied on 4 January 2022 (page 540). The reference by the claimant in the third paragraph on page 541 to the original "goodwill gestures" and then the Trust changing its position reinforces our findings that there was no agreement or arrangement on 18 February that the claimant should work for enhanced sick pay. He also challenged the amendment of his future right to sick pay. Separately, he stated that his pay

for December was for hours worked only which he alleged went against the terms for a phased return in the Absence, Sickness and Cover Policy.

69. SC's reply states that her intention in the 29 March letter had to been to set out what sick pay would be payable in year 2 in circumstances when he had had sick pay outside the Trust policy but does not attempt to restate what that might be. In relation to the December salary, she stated that she understood from RB that at a meeting in December 2022, Mr Ralfs had told RB that he only expected to be paid for hours actually worked. RB gave evidence to that effect and was not shaken in insisting that the claimant understood the position.

70. We accept that in her letter of 29 March 2022, SC set out with the intention to record what the claimant's sick pay entitlement in his second year would be and intended to root it back into policy. She appears to have realised that it might be argued that applying the policy in these circumstances meant that any sick pay entitlement in the second year was postponed until 3 August 2023. The fact that she did not simply say in 29 March letter that any enhanced sick pay would be disregarded for the purposes of calculating sick pay entitlement in the second year and fact that she mailed RB about what was reasonable (page 927) suggest that she did not intend C's sick pay rights to be totally unaffected by the enhanced sick pay. She chose a form of words which are hard to understand and do not represent a discussion with the claimant.

71. Her email 9 February 2023 where she states that the initial intention had been to provide "equivalent amount of sick leave in your second year" is vague because it begs the question "Equivalent to what?" and the issue was not sick leave but company sick pay (page 458). However, she also said that she realised that the wording of her letter of 29 March would not necessarily provide the outcome the respondent intended and that "we intend to simply apply the normal terms of the Staff Absence, Sickness & Cover Policy (which assumes that you never had the additional 4 months sick pay at half pay)". In other words, she sought to argue that the letter of 29 March 2022 was poorly worded and that the respondent had never intended the contractual entitlement to CSP to be adversely affected by the grant of enhanced CSP.

72. We do not think that the claimant's professed belief once he had digested the email of 29 March 2022 in December 2022 that he had been working for pay was reasonable (C para.291) given that he had clearly been told that there was no expectation on him to work.

73. Prior to this, on 16 October 2022 the claimant's consultant Haematologist approved the claimant's proposal that he should return to work on amended duties of 2.5 days a week from home from early December (page 350).

74. He was referred to an occupational health therapist and the OH report is at page 360. The therapist provides advice that the claimant is fit to start to return to work on 1 December and work up to 50% hours over a 3 week phased return. "there continues to be an element of the unknown as to

whether full recovery is possible or whether symptoms are long term." The OH therapist doesn't comment on the future.

75. There was a return to work meeting on 21 November 2022 which is covered by the email page 384. This sets out a three week gradual phased return up to 50% as recommended by OH and states that if 50% is manageable it will be maintained through to 8 January and reviewed on 4 January to see whether hours can be increased or the status quo maintained.

76. Our finding of what the Staff Absence, Sickness and Cover policy means (para. 21 above) has the consequence that the claimant's entitlement was only to be paid for hours worked. When this was investigated as part of the grievance (see page 682 within the claimant's interview with MA) the claimant stated that he had had a conversation with RB about the phased return to work (probably that on 21 November 2022) and reported RB saying that,

> "if you are on phased return longer than 6 weeks the policy says that you will be paid hourly. I was clear on my response and was very careful with my words and I said, whatever the Policy says is fine by me."

77. RB was extremely firm in his evidence that the claimant understood he was only be paid for hours worked. If, as we accept, RB believed that the claimant was entitled to be paid for hours worked under the policy then when the claimant said "whatever the policy says is fine by me" then clearly RB would take that to mean an acceptance that he was to be paid for hours worked. It is very understandable that RB would take that as acceptance and he relayed that to SC.

78. The policy also does distinguish between phased return work and temporary adjustments. The claimant argues that using terminology of a phased return in his case (which was not a pre-planned phased return to full time) was confusing and leads to the implication that the respondent was acting under the first point (under which they should pay his full salary) and not the second (under which they should pay for hours worked).

79. We find that the respondent applied the policy correctly when they calculated the pay. The claimant's December pay was calculated on basis of hours worked and the payslip is the written notification that that is how it has been done.

80. The policy does state that the ramifications for the employee of the arrangement should be explained and confirmed in writing. They were not confirmed in writing until 4 January 2023 when the claimant was sent a contract amendment (page 540).

81. There was, therefore, a failure to apply the policy in that the respondent did not confirm the arrangements for the return to work in writing before the return. The language used in the emails and probably in the meetings does talk about a "phased return" but it was only phased return up to 50% hours and the substance of the medical evidence pointed to a return to full time working taking much longer and having a far more uncertain outcome than is

envisaged in the policy by the a "phased return". That does not mean simply a phased return to work but a phased return to full time hours, roles and duties.

82. On any objective view, the claimant should have been able to understand that, if not before then certainly when SC wrote on 4 January 2023 to say that that was the category he fell into. This was in response to his query of 30 December 2022. Even though she refers to OH evidence that postdates his return to work the respondent did have OH evidence to the same effect before it (see her explanation at her para.28 where she also refers to the Haematologist's consultation which was to be on 2 February 2023). They knew this on 30 November 2023.

83. Clearly there was a failure of communication because that should have been made clear in the return to work meeting on 21 November, and confirmed in writing before he started and before he was paid.

84. On 28 November 2022, the claimant was told that he was not being awarded a pay rise (page 515). This letter reads like a standard letter which hasn't been tailored properly to the claimant. It talks about the outcome of an individual professional development appraisal discussion which didn't happen because the claimant was absent. It mentions an assumption that the staff member will have increment if not reached top of pay scale which was inapplicable to the claimant – who was not on a pay scale. The reason given for the lack of a pay rise was that the claimant was still new in role.

85. The pay committee had met (on 9 November) and considered RB's report at page 363. The recommendation put forward for Mr Ralfs is at point 3 on page 367: "We are considering various options going forward but as new in role would suggest stays on the same salary at 87.5K."

86. New in Role is defined as starting after 1 March so Mr Ralfs did not meet that definition as he had started on 1 February. SC was asked for other reasons by MA (page 692) and said:

> "The notion of March is a red herring as that applies to staff moving up the pay scale. John is not on a pay scale, he is on a spot salary, so there is no jump up a pay point for him. I have identified as part of my submission that there are 2 roles in the Trust not covered by the pay policy, which are the HR Director and Finance Director. They are not described, they are missing. There is a lack of written documentation about how it is set. One of my recommendations is that the Pay Committee address that going forward. New in role in John's letter doesn't mean what is in the policy - it means you are a recently appointed senior member of staff. On a spot salary, setting pay when joining is done by negotiation. It is much more ad hoc."

87. There was precedent for members of senior staff not to receive the cost of living increase in some years. SC explained what she felt when she didn't get the inflationary pay increase in 2020 further on in the answer to MA. Then

she talked about the claimant's salary being above what they had budgeted and the salary being looked at less than 12 months ago.

88. In SC's mind, there would be various justifications for not given Mr Ralf an inflationary pay rise: there were precedents in her own case and that of RM; his role was outwith the policy; the salary agreed was above budget and it had been looked at less than 12 months ago. Those are all non-discrimination reasons why could have been reasonable not to award inflationary pay rise.

89. But in the present case, we are concerned with the question of what the reasons were that RB actually had in mind when making the recommendation – given that Mr Ralfs technically was not "new in role". Mr Bryant candidly states in his para.32,

> "The reasons for my decision were that he was relatively new to his role in that he was still in the first year of employment, it was a very senior role and he was recruited on a spot salary in excess of what had been budgeted and outside the normal salary bands. All of those factors had he not been off sick would have likely resulted in him not receiving a cost of living rise within his first year of employment. In addition to those factors there were other factors which fed in to my decision which were that *he had only been at work for a few weeks before going off on sick leave, he had not yet taken on some of the responsibilities of his role eg the IT function, he was still in his probationary period (this was extended due to his absence), and we had recruited a temporary interim Finance Director to cover his absence*." (our emphasis**)**

90. Those factors in italics were directly connected with his cancer related sickness absence; the fact that he had only been at work for a few weeks before taking sick, the fact that his probation had been extended and the recruitment of the temporary FD – those are all so directly connected with the sicknesses absent that we are satisfied that a material part of RB's reasoning was that sickness absence.

91. The reasoning also appears in the contemporaneous email of 1 December 2022 from SC to Mr Ralfs (page 523-4). The fourth paragraph also refers to not taking on the full responsibilities of the Finance and IT Director role and recognises that he would assume that full role in time and it was not his fault.

92. This was in reply to an email from Mr Ralfs on the topic of the pay review. On 30 November 2022, he had challenged the decision not to award a pay review asking "can I just check that I am ineligible for any increase … as I am technically "still new in role" due to so much sick leave this year." The claimant replied to SC on 2 December 2022 expressing surprise that he would be ineligible for an inflationary pay rise because of a period of serious sickness.

93. SC and the claimant met on 30 November and 7 December 2022 and she informed him about the appeals process; her email the following day to RB refers to that (page 389). She followed that up with an email at page 632

saying that she had then had a brief conversation with RB and one of them would come back to them within the next week. Mr Ralfs replied the same day saying there was no need, that he did not want to be treated any differently from anybody else so would go through the appeals process (page 631). We accept that in those meetings, SC used words to the effect of those set out in LOI 3) a); those words are contained in her email of 7 December 2022 and she probably said something similar face to face, including on 30 November.

94. There had obviously been a discussion about this between SC and RB as she said to Mr Ralfs. There is also reference to that in RB's 12 December 2022 mail to the Trustees (page 397). In the first paragraph of that email, RB informed the Trustees that the claimant thought the lack of pay rise was unfair because his absence was due to cancer and he was therefore being treated differently based on his disability. This is a simply worded allegation that the claimant thinks the pay review decision is discrimination and the first paragraph ends by recounting that allegation.

95. The first sentences of the second paragraph reads,

> "Sarah and I had discussed this last week and we were going to agree to it because, in the end, he would probably would win a case in court because it is difficult to defend given that he is the only person in the Trust who was not getting the uplift."

96. The juxtaposition of the last sentence in the first paragraph and the first in the second paragraph is alleged by the claimant to lead to inference that RB and SC think that they would probably lose a discrimination claim. Their evidence was that that was not what they were discussing; rather they averred that they were discussing unfairness of the position of directors compared with the support staff because the contractual position about pay rises was unclear.

97. We think that the most plausible explanation of the juxtaposition of these two sentences in the two paragraphs is that SC and RB (contrary to what they told us) had realised that there was a signification litigation risk to the Trust were Mr Ralfs to bring a discrimination complaint about the failure to award him inflationary pay rise. RB made the decision to change his recommendation before the claimant put in a formal appeal but we are nonetheless satisfied that this was not just because of the contractual uncertainty but because he recognised the risk of successful discrimination claim.

98. RB outlined his version of the chronology of the decision to award a pay increase to in his response to the grievance (page 641). In that, he stated that he and SC agreed that they should propose an uplift to the pay committee on 7 December after the claimant and SC's conversations that day. The pay appeal letter was then presented on 8 December (page 519 – 520).

99. In that appeal, the claimant states that he had worked in return for extra support equivalent to two months pay. He explains why he argues that the reasons given for refusing him a pay rise were disability discrimination because of link between the reasons given and the effects of or treatment for

cancer om page 520. He describes the refusal as “potentially unlawful discrimination” and against “many of the Trust’s guiding principles”.

100. There was then an exchange emails with Trustees from 12 December late in the day to approve the uplift. The consent from the Pay Committee was therefore given by email rather than in a formal committee meeting or following an appeal hearing. However, the Trustees appear not to have been sent the claimant’s appeal statement. TL forwarded it to RB (page 395).

101. The proposal was put by RB to the members of the Pay Committee (WL, OS, AN and JH) in his email of 12 December 2022 (see paragraph 96 to 98 above). The email continues by saying that AN had agreed that the respondent could pay the uplift and RB was asking the committee for that approval. WL consents but says that he is “flabbergasted” that the claimant had submitted an appeal letter prior to any conversation with RB and that his opinion of him had changed “and not for the better”. RB replied saying that he felt the same about the claimant. JH replied (page 433) saying that he agreed with all that WL said. AN seems to have provided verbal consent to RB who (on 24 January 2023 – page 433) said the basis for his recommendation was that it was procedurally incorrect that they had judged the claimant to be new in role.

102. RB also said on that date – in an email to TL – that he had tried to make the uplift happen without going through the formal appeal process to avoid any further stress for John.

103. In that, the respondent appears to have invented a short form appeal outside the policy where the appeal is going to be conceded. RB said that he believed the key thing was about the pay and that once the decision was made to increase the pay the claimant would be satisfied. However the policy does not provide for a short form process. The policy does not set out an informal stage. RB says that he discussed it with Annable Nicholl.

104. The respondent also said that the pay committee was not the appropriate place to make a complaint of discrimination. If that were true or a reasonable stance to take, no one reacted to the reasoning given by the claimant in his pay appeal by saying “We have a complaint of discrimination here. We need to open a grievance investigation.” Given what we find to be RB’s acknowledgement of the risks of a successful discrimination complaint, it was naïve not to take the allegations seriously.

105. The claimant and RB had met on 12 December 2022 apparently before RB sought the Pay Committee’s consent to the uplift. In that meeting it is quite possible that the claimant continued with his assertion that he was discriminated against in relation to the pay review and that RB held his hands up and said “we got it wrong”. We accept that RB did not mean to agree that there had been discrimination but can’t overlook that the same day he wrote to Trustees and accepted the risk that they might be found to have discriminated. RB may well have used the words “noise around the decision” in the context of the discussion about the pay review TIDY UP REVIEW BACK FOCUS ON 719.

106. The claimant wrote an email following that meeting (page 400) in which he said he understood that there were two main factors which added "noise" around the pay decision which possibly led to the Trustees deciding not to award a pay increase: the financial support with the enhanced CSP and a feeling that the claimant had not shown consideration for how his sickness had impacted the Trust.

107. RB's first account of that conversation is in his response to the grievance (page 648 – 649. He denied saying that the claimant had been discriminated against but rather had said that he recognised that was how the claimant felt but the Trust disagreed. Both that and in notes of the interview with MA (page 719) are close contemporaneous evidence that it was RB who first said to the claimant that he did not recognise the impact on anyone else. We reject RB's oral evidence that it was the claimant who raised it.

108. Comparing that with the allegations in LOI 3.c), d) and e) which are said to have occurred in this meeting on 12 December 2022, RB accepted that he occasionally said "noise" in the context of meaning various unspecified factors and probably did say it in the context of the decision not to award a pay review and he did say that the claimant had received additional sick pay and had not acknowledged the impact his sickness absence had had on others, specifically RB himself. The factual allegations made in LOI 3).c), d) and e) are made out.

109. The claimant's reaction, in particular to the statement that he had not acknowledged the impact his sickness absence had had on others, as set out in his email at page 400 evidences the depth of his upset. RB decided not to reply to this email (page 400).

110. The claimant was sent the formal outcome to his appeal by letter dated 20 December 2022 (page 535). SC's oral evidence about the circumstances in which she drafted the letter was that she had done so in significant haste without any of the paperwork to hand; the school had closed for Christmas the previous week but she wanted to ensure that the claimant had the response before the Christmas holiday. She expressed the wish that she had spent more time over it or not offered to help by doing it at all and denied any intention to lie or deceive. RB spent very little time reading it over and approved it within 15 minutes of it being sent to him.

111. The letter contains various inaccuracies. The statement of appeal had not been considered – the document itself was never forwarded to the Trustees. The appeal had been upheld but out with the process set out in the policy. It was sent by TL but drafted by SC and approved by RB. Of those, SC did not know that the statement of appeal had not been sent to the Trustees on the Pay Committee but the other two did.

112. The claimant presented a grievance on 4 January 2023 (page 498). MA was appointed as an external investigator. The methodology and actions taken in the investigation are detailed in her report dated 6 February 2023 at page 473 to 499 which was provided to the claimant about 5 days before the grievance hearing.

113. The grievance investigation report included a record of MA's meeting with RB on and RB had provided a written statement of his response to the grievance. One of the things the claimant said in the grievance was that he had made a good attempt at working between March and May 2022 (producing his letter of 13 December 2022 – page 529) and had some noticeable achievements despite undergoing salvage chemotherapy. Mr Ralfs found out through the grievance report that RB had made a statement in response to that (page 645) that he could not agree or disagree with the list of work that the claimant said he completed. "Some of the items such as phonecall or zoom meetings take considerably less time than others and I do not believe it is possible to define what hours in a given week this may suggest."

114. In the meantime, the claimant had made a DSAR seeking the documents related to his pay appeal. He had requested them on 18 January 2023 (page 422) and pursued it through various exchanges before making a DSAR on 25 January 2023 (page 440).

115. What is meant by the pay appeal papers? The claimant was asking for the documentation considered by the Trustees: the pay policy provides that any appellant in respect of a pay review decision has the right to see all relevant papers. On 8 February 2022, RB wrote to the claimant to confirm that no appeal process had taken place (page 450), that he had spoken to AN who had in effect acted as the appeal panel and that their intent in avoiding the formal process was to support him as the Trust was prepared to pay the outcome he was seeking as well as to avoid the decision being postponed until after Christmas. This was when the claimant found out that there hadn't been a hearing and that the letter of 20 December 2022 contained inaccuracies.

116. The documentation available was:

    a. RB's original report to the Pay Committee; this covers all employees but includes the claimant.

    b. The redacted minutes of the Pay Committee meeting approving the recommendation;

    c. RB accepted in oral evidence that emails between himself, WL and JH fell within this category (page 398 – 397 and page 433). These are the email confirmations of agreement by members of the pay committee. There is no record of AN's consent which was given orally.

117. When the DSAR came in (page 434) RB expressed himself confused about what more was needed. He listed the above documentation and the redacted minutes of the original Pay Committee meeting. However, these had by then (25 January 2023) been provided to the grievance investigator and it emerged the following day (page 442) that MA had not forwarded those documents to the claimant and had not explained why.

118. The grievance was considered by the Trustees who made up the grievance panel at a hearing on 22 February 2023 (page 848). MA was available to answer questions and Mr Ralfs asked her whether she had reviewed and investigated the paperwork around obtaining permission for the pay appeal to succeed. She said that she received some emails that were "very brief and intended to review the decision to reverse it". She was asked whether there was any mention "of papers/discussion around discrimination of the work I had done" and answered not to her knowledge. RB was in the room when she said that and he did not correct her. When asked about that in oral evidence, he said he assumed that the claimant would have had the emails as part of the process and thought that MA should have sent them to him. He accepted that it was untrue to say there was no mention of discrimination in the emails. However, he was not now able to remember the particular exchange in the 22 February grievance hearing and denied influencing MA not to forward the document. There is a later email from TL (page 792 dated 18 April 2023) in which she stated that MA decided not to share the information with the claimant.

119. The allegation is that the Trust refused to give him the emails (LOI (6) E. The respondent did not say that the claimant wasn't entitled to them and they were referred to in the grievance appeal. Nevertheless, collectively, the respondent did not send the claimant all papers to which he was entitled until the Pay Policy.

120. RB's explanation was that, initially they were talking at cross-purposes because he did not regard there as having been an appeal hearing and then because he himself had sent the relevant documents to TL and presumed that they had been sent to the claimant. We accept that evidence. However, TL forwarded them to MA who did not forward them to the claimant.

121. Looking at the alleged acts, LOI (6) F is an allegation that the claimant had to make more than 5 requests for the document; it adds nothing to the failure alleged in E. The actions of the respondent set out in LOI (6) E, F, G, and H which we have found to have occurred are that there was no appeal hearing within the pay policy but a short form appeal with no hearing as a consequence of which the Pay Committee did not consider the arguments put forward by the claimant about his achievements or objectives because his pay statement was never forwarded to them; also as a matter of fact the respondent did not provide the claimant with the appeal paperwork in breach of policy.

122. It appears from the contemporaneous documentation that, RB did not sent the paperwork while the appeal was extant as they were short circuiting the process and he considers MA to bear responsibility ultimately for LOI (6) E because he expected her to send the documents to the claimant in the grievance process. For that reason, one might say that the entire reason RB denied that the papers had been withheld is that he had send the papers to the investigator within that process and, perhaps, didn't think about whether emails showing the process of obtaining consent to the pay increase should earlier have been handed over as part of the "short form" appeal process they adopted.

123. RB and SC both accepted that the claimant had the right to see those documents, specifically the Trustees emails at pages 397 and 433 agreeing with RB's recommendation that the appeal be allowed.

124. Who was responsible for handing them over? SC did not at any stage have them, so she cannot be responsible for this. RB had them; we accept that he didn't realise until 24 January 2023 that those emails were what the claimant was asking for – by which time the grievance had been issued on 4 January 2023. The only formal paperwork that what we have referred to as the "short form" appeal process created was the outcome letter. By the time the grievance has been lodged, it was reasonable for RB and SC to try to distance themselves from the process.

125. MA handed over the grievance investigation report (dated 6 February 2023) after the emails had been sent to her. The actual allegation is that 5 days before the grievance hearing, the claimant should have had pay appeal documents as part of grievance investigation paperwork. That is the timescale provided for in the grievance policy and TL told him on 19 January 2023 that he would receive it then (page 420).

126. So far as the allegation at LOI (6)I is concerned, the claimant argues that had his pay appeal been properly considered then the Pay Committee would have considered his achievements or objectives. The respondent's evidence which we accept is that when deciding on the inflationary pay award there was no performance element to the pay award. There is a particular difficulty with objectives in that at this point the claimant had no particular objectives. There had been no formal appraisal at which to assess his individual contribution.

127. The conclusions of the investigator were set out starting at section 4.1 of her report (page 488). They included her conclusion that the initial decision not to award the claimant an inflationary pay increase was based on the fact that he had only been appointed within the last year and budgetary reasons linked to the type of role he holds and the way that pay was considered for those senior roles. MA concluded that it was not directly as a result of illness but was critical about the respondent's communication which meant that she proposed that the grievance was partly upheld in relation to communication flaws. In this reasoning, she fails to analyse the connection between the deemed disability and some of the other stated reasons – such as the claimant being 'new in post'.

128. There are specific comments made during the grievance hearing which are relied on by the claimant (see CSUB para.68) as hardening his views. RB (page 859 point 6) stated that the claimant had refused to tell him about the work he was doing "that could have been perceived as a potential conduct issues for wilful neglect of duty" but agreed that the claimant could report through RM. The claimant does appear to have refused to communicate directly with RB in the normal way a direct report would; we accept SC's evidence to that effect. That is not to say that they never interacted when the claimant attended meetings during the period of his treatment and recovery but it went beyond the 10 – 14 days which the claimant's representative

argued was all that had been shown. Otherwise the meeting held by SC would have been held by RB.

129. The claimant listed this comment as one of his reasons for resignation (para.497.c.ii.). RB said in the grievance hearing that he thought it was unprofessional for the claimant to refuse to talk to his line manager; our impression is that RB was hurt because he had high regard for the claimant. However the claimant had been upset by the request for weekly emails setting out the hours he worked.

130. The claimant resigned, initially giving one month's notice on 24 February 2023 (page 737) and then with immediate effect on 27 February 2023 (page 738). In the 24 February letter he cited discrimination in the original pay award, failure to follow policy and misleading representations (page 737). LOI 7) suggests that the allegation of failure to follow policy is the failure to follow the pay review policy, alleged failure to following policy on payment for hours worked on a return to work, failure to notify him of his pay on return to work, failure to consider his complaint of discrimination in the pay appeal (as the panel decision on the grievance is outstanding at that point), failure to provide paperwork in relation to the pay appeal. The alleged misleading representations concern the letter dated 20 December 2022 reversing the pay review decision compared with the reality that there had been no hearing and the Pay Committee had not seen his appeal statement which was notified to the claimant on 8 February 2023. That we accept as contemporaneous evidence about why he resigned on notice.

131. The second letter adds that he "cannot be part organisation where employees are discriminated against and rights ignored. Ignoring policies and writing letters setting out as facts events that did not happen is an unforgiveable breach of trust. Then to hear these actions justified as being for my own benefit at Wednesday's hearing I feel is indefensible." (page 738)

132. We presume that this is a reference to the respondent's explanation that they had short-circuited the formal appeal process presuming that it was in the claimant's interests not to have the rigour of an appeal meeting. They had by the time of the grievance hearing accepted that the claimant positively wanted the opportunity to put his case to the Pay Committee.

133. In his statement evidence for the tribunal, the claimant set out his reasons for resignation over three pages which expands upon the reasons given contemporaneously (para.496 – 498). We accept that these were reasons he genuinely held at the time and were part of his reasons for resignation. Paragraph 497 focuses on the same three matters which have been litigated as discrimination in a., b. and c. but the conduct alleged against the individuals at the Trust uses heightened language which isn't borne out by the objective facts as we have found. For example, he alleges that the Trust "knew (sic) paid me for 'hours worked' whilst knowing full well these were inaccurate and less than the actual hours I was working." and "The introduction of the clawback was made in direct response to communication challenges I was facing". There is no evidence to support these assertions.

134. Others of these matters said in para.497 to be things he believes to have been discriminatory were not part of his discrimination claim or harassment or victimisation complaint. We have therefore not considered whether, for example, not being considered for a performance related increase was discriminatory. As will be seen below, only some of those matters are found to be unlawful in any event. Matters such as performance related increase and moving onto the Leadership pay Scale in the first 12 months of his employment would have been contrary to what happened to SC – who was not treated in that way during her first year pay review.

135. The way the claimant describes things in his para 498 is a significant overstatement of what we have found to be the fact which again goes far beyond the list of issues allegations. We do not reject his evidence that they were reasons for refusal. There is a suspicion that he has included more than was in his mind at time of resignation. Nevertheless, his reasons for resignation included the actions which are relied on within the litigation but Mr Ralfs appears to have had a much broader set of reasons in mind. For example, he refers to the handling of his DSAR in para.498.bb.

136. The respondent did do some things wrong and some of those we find amount to discrimination, harassment and victimisation as we set out below. However there was no intent to discriminate or harass. There was an attempt to shut down the discrimination complaint rather than properly investigate it. The fact that the respondent also took supportive steps by offering enhanced sick pay and by trying to minimize the disadvantage to the claimant of the terrible consequence of the recurrence of his disease do not stop the things they did wrong from being unlawful. The fact that twice they promptly rectified the financial implications of their decisions does not stop those decisions being unlawful. The claimant did know that he had been discriminated against and this was not recognised and not properly investigated within the pay appeal. The support this respondent gave to the claimant at a very difficult time does not make us blind to what they did wrong. Unfortunately, the claimant appears to have reached the point where he could not see that they had done anything right.

137. We infer from the support that the claimant was highly regarded. We accept that the respondent did not want to lose the claimant. They valued him as employee and tried to persuade him to rescind his resignation. OS offered to meet with him and they met on 3 April 2023. Ultimately, the claimant made clear that he did not want to retract his resignation.

138. The grievance outcome is at page 829 and was sent on 1 March 2023. They found no evidence of discrimination in relation to the pay appeal (complaint 1). It also dismissed the allegations of discrimination in relation to the pay on return to work and the letter of 29 March 2022 description of sick pay entitlement in year 2.

Law applicable to the issues in dispute

Direct disability discrimination

139. Employees, such as the claimant, are protected from discrimination by s.39 Equality Act 2010 the material parts of which provides that an employer must not discriminate against one of their employees by dismissing them or subjecting them to a detriment.

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

141. Section 23(1) EQA provides that, on a comparison for s.13 where the protected characteristic is disability, the circumstances relating to a case include a person's abilities. In other words, the comparator should be someone who has similarly affected abilities to the effect on the claimant's abilities of the relevant disability. For example, if the effect of the relevant disability includes absences due to sickness or hospital treatment, the comparator is someone who also has absences due to sickness or hospital treatment.

142. All claims under the EQA (including direct discrimination, discrimination arising from disability, victimisation and harassment) are subject to the statutory burden of proof as set out in s.136. The application of this section in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of the then applicable anti-discrimination legislation, but the guidance is still applicable to the equivalent provision of the EQA.

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

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

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

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

147. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

Discrimination arising from disability

148. Section 15 EQA provides as follows:

> **"15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

149. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. It

should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
>
> *EHRC Employment Code paragraph 5.6.*

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

> "the proper approach can be summarised as follows:
>
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant 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 […].
>
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability

may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

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

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

> a. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?
>
> b. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something".
>
> c. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something".
>
> d. Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

152. The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31–32, and Chief Constable of West Yorkshire Police v Homer [2012] ICR 704 , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. This requires the employer to show that the treatment is objectively justified, notwithstanding its discriminatory effect on the employee: Hardy & Hansons para.32. The Tribunal has to take into account the reasonable needs of the business but should

> "make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary". (*ibid*)

153. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove and "they must produce evidence to support their assertion that the treatment is justified and not rely on mere generalisations" (EHRC Code para.5.12).

154. The test for objective justification contrasts with that of the 'band of reasonable responses'; the Tribunal emphatically is not considering whether no reasonable employer would have acted as this employer did but whether this employer has shown that their treatment of this claimant was genuinely done to achieve an aim assessed by the Tribunal as a legitimate business aim; whether the treatment was apt to achieve that aim and whether it was reasonably necessary with a view to achieving that aim.

155. The other potential defence is lack of knowledge of disability but that is not relied on in the present case.

156. In order to find that an act complained of was to the detriment of an employee the Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.

157. The EHRC Code of Practice on Employment (2011) advises in para 9.8 that a detriment is "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

158. The Supreme Court in Williams v Trustees of University of Swansea Pension and Assurance Scheme [2019] I.C.R. 230 UKSC, said that in most cases there was little to be gained by seeking to draw narrow distinctions between unfavourable conduct in s.15 EQA and detriments. Section 15 requires consideration of what was the treatment complained of and whether it was unfavourable. In Williams the treatment complained of was the award of a

pension in a particular amount but the claimant would not have been entitled to any pension were it not for his disabilities so the level of his award was not unfavourable.

Harassment

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

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

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

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

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

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

162. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out further guidance on the relevant approach to a claim under section

26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR version of the case report]:

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

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

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

Victimisation

164. Section 39(4) EQA which forbids an employer to victimise an employee

> "(a) as to [their] terms of employment;
> (b) in the way [they] afford [them] access … to opportunities for promotion, transfer or training …;
> (c) by dismissing [them];
> (d) by subjecting [them] to any other detriment"

165. Victimisation is defined in s.27 to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The section, in full, states:

"27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

166. The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the Equality Act. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

167. Therefore when deciding whether or not the claimant suffered victimisation the tribunal first needs to decide whether or not he did a protected act (something which is admitted in this case by the respondent). Next the tribunal needs to go on to consider whether he suffered a detriment and finally we should look at the mental element. What, subjectively, was the reason that the respondents acted as they did.

168. We bear in mind that s.136 of the Equality Act 2010 applies to victimisation cases (see above). We also bear in mind that there is rarely direct evidence of why a person acts in a particular way, particularly in discrimination cases. As in the discrimination complaints, a person's subjective reasons for doing an act must be judged from all the surrounding

circumstances including direct oral evidence and from such inferences as it is proper to draw from supporting evidence and documentary evidence.

169. For a victimisation claim to succeed, the doing of a protected act does not have to have been the sole or even the principal cause, as long as it was a significant part of the respondent's reason for doing the act complained of. However, the detrimental act or act in response to a complaint of discrimination does not constitute victimisation for the purposes of s.27 EQA if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable: Martin v Devonshires solicitors [2011] ICR 352, EAT; Page v Lord Chancellor [2021] ICR 912, CA.

Protected Disclosure detriment and dismissal

170. The structure of the protection against detriment and dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and is made by the claimant in one of the circumstances provided for in s.43C ERA.

171. Section 43B(1), as amended with effect from 25 June 2013, reads as follows,

> "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

172. More than one communication can be read together to amount to a qualifying disclosure: Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. In Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1439 CA, Sales LJ explained that there was no rigid dichotomy between "information" and "allegation" in the definition. As he put it in paragraphs 35 and 36,

> "35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). …

> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in [Nurmohammed], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

173. The structure of s.43B(1) therefore means that the tribunal has to ask itself whether the worker subjectively believes that the disclosure of information, if any, is in the public interest and then, separately, whether it is reasonable for the worker to hold that belief. Similarly, we need to ask ourselves whether the worker genuinely believes that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

174. The reference to Nurmohammed is to Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA, where the Court of Appeal gave guidance to the correct approach to the requirement that the Claimant reasonably believed the disclosure to have been made in the public interest at paragraphs 27 to 31 of the judgment:

    a. The tribunal has to ask (a) whether the worker believed, at the time that he or she was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

    b. Element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.

    c. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.

    d. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his or her head at the time that he or she made it. Of course, if he or she cannot give credible reasons for why he or she thought at the time that the disclosure was in the public interest,

that may cast doubt on whether he or she really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief, but nevertheless find it to have been reasonable for different reasons which he or she had not articulated to herself at the time: all that matters is that his/her (subjective) belief was (objectively) reasonable.

e. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it. Lord Justice Underhill stated that he was inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase '*in* the belief' is not the same as 'motivated by the belief'; but that it was hard to see that the point would arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

175. If the worker has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively. So far as is relevant, s.47B provides that:

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

176. Section 103A, so far as is relevant, provides that:

> "An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

Constructive Dismissal

177. Section 95(1)(c) of the Employment Rights Act 1996 and s.39(7) Equality Act 2010 make it clear that dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

178. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that they no longer intend to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat themselves as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is

more than one reason why the employee resigned then the tribunal must consider whether any repudiatory breach by the employer was an effective cause of the resignation. The crucial question on causation is whether the repudiatory breach played a part in the employee's resignation.

179. In the present case, the claimant argues that he was unfairly dismissed because he resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL which was derived from earlier cases including Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

180. The tribunal has to decide whether the conduct in question in a particular case amounts to a breach of the term, by considering whether there was a 'reasonable and proper cause' for the conduct; and if not, whether the conduct was 'calculated or likely to destroy or seriously damage trust and confidence'. This requires the tribunal to consider the circumstances objectively, from the perspective of a reasonable person in the claimant's position:· Tullett Prebon plc v BGC Brokers LP [2011] IRLR 420, CA.

181. One important question for the tribunal is, therefore, whether, viewed objectively, the facts found by us amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

182. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then they were constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

183. This has been described as a demanding test: Frenkel Topping Ltd v King (EAT/0106/LA) para.12. It has been held that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:

> "… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."

184. It is also important to remember that the Malik test is not satisfied merely by conduct which was intended or likely to destroy or seriously damage the relationship of trust and confidence – the claimant must also show that there was no reasonable or proper cause for that conduct: RDF Media Group plc v Clements para.103 [2007] EWHC 2892 QB.

185. Once they have notice of the breach, the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied.

186. The last straw doctrine is explained in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed.

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." (paragraph 19)

187. The doctrine was considered by the Court of Appeal in Kaur v Leeds Teaching Hospital [2018] IRLR 833 CA. Having discussed the development of the authorities in this area, Underhill LJ explained that

> "there are two theoretically distinct legal effects to which the 'last straw' label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back[4] consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction because Lewis J does so in his judgment in *Addenbrooke* which I discuss below; but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so." (paragraph 45)

Before giving the following guidance,

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)

(5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy." (paragraph 45)

188. Once the tribunal has decided that there was a dismissal we must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

"Section 98 Employment Rights Act 1996

1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
2. A reason falls within this subsection if it-
a. Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
b. Relates to the conduct of the employee,

[(ba) …]

c. Is that the employee was redundant, or
d. ...

> 3. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-
> a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> b. shall be determined in accordance with equity and the substantial merits of the case."

189. The claimant has also argued that the alleged dismissal was automatically unfair as for the reason or principle reason of protected disclosures and/or victimisation. In a constructive dismissal case, the reason for the dismissal (if any) is therefore the employer's reason for the conduct in response to which the claimant resigned: Salisbury NHS Foundation Trust v Wyeth (UKEAT/0061/15: paras: 30 & 31). The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal.

190. This involves a subjective inquiry into the mental processes of the person or persons who did the acts complained of. The classic formulation explaining the reason for a dismissal is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

In principle, the reason for the acts complained of can be identified in the same way.

191. It is sufficient for a discriminatory constructive dismissal that discriminatory considerations materially influenced the conduct that amounted to the repudiatory breach of conduct. In principle, a 'last straw' constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination.

> "Where there are a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. … it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory." De Lacey v Wechseln Ltd [2021] IRLR 547, EAT para.69.

192. In principle, the same approach applies to the question of whether the reason or principle for an alleged constructive dismissal was the making of more or more protected disclosures or protected acts.

Conclusions on the Issues

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

Direct disability discrimination

194. LOI 1.1 to 1.4 are the allegations of direct disability discrimination. The specific acts alleged both in relation to the direct disability complaint and the discrimination for a reason arising from disability complaint are the same, namely:

    a. The statement in the letter of 29 March 2022 which the claimant alleges was a "clawback" of any future sick leave if he were to fall ill again in the second year of his continuous employment because he had been granted enhanced CSP in year 1;

    b. The decision notified by letter of 28 November 2022 that he would not receive an inflationary pay increase because he was "new in role";

    c. The reduction of his pay to payment for hours worked only instead of full pay when he returned to work with effect on 1 December 2022.

195. Dealing with the last point first (LOI 1.1.c)), we have found that that decision was in accordance with policy because, despite the language of phased return being used, the claimant was not in fact on a phased return to full time working over a pre-defined period. The policy provides for a return on full pay only in those circumstances. Therefore the appropriate comparator would be someone who, like the claimant, was gradually increasing their hours up to 50% after sickness absence with the prospect of further increase in hours being hoped for but uncertain. Under the policy, such a comparator would have been treated in exactly the same way as the claimant and there was no less favourable treatment of him in relation to this.

196. The appropriate comparator for LOI 1.1.b) would be a new and valued employee who had been absent during the first 10 months of their employment for a comparable amount of time as the claimant but for reasons which did not relate to disability. There is cogent evidence in RB's statement that the reasons why the respondent did not award the claimant the pay increase included that he had not taken up his full role as originally expected, that he had only been at work for a few weeks before taking sick leave, that he was in an extended probationary period and the need to cover the claimant's absence with an interim FD. He had also been recruited on a spot salary, there was precedent for employees in that position not to receive an inflationary pay increase and his recruitment at a level above the salary budgeted for (i.e. higher than the market rate assessed within the previous 12 months) were all part of the reasons why the claimant was not awarded a pay rise in November 2022. They would, in our view, all apply in the case of a hypothetical comparator in materially the same situation as him apart from disability and there was no less favourable treatment.

197. The fact that in previous years SC and RM had not received inflationary pay rises tends to support a finding that a hypothetical comparator would have been treated the same. We are satisfied that there was no less favorable treatment on grounds of disability in relation to this.

198. We think that the fact that SC and RM had not received inflationary pay rises in the past was in the forefront of SC's and RB's minds when they refuted discrimination. However they did not analyse the reasons for refusing the pay rise with any rigour. Although we have accepted that they knew realized that there was a significant litigation risk that a complaint of discrimination would succeed because he was the only staff member not to get the rise (see para.97) they did not in fact realise that the refusal of the pay review was discriminatory. That is because they appear not to understand at the time that disability discrimination can occur when the reason for the unfavourable act is connected with disability even without less favourable treatment. Some of the factors taken into account in refusing the pay increase were related to disability but we are satisfied that the fact of disability itself was not in any way the grounds for this decision.

199. As to LOI 1.1)c), the appropriate hypothetical comparator would be someone who had been awarded enhanced CSP of a further 4 months half pay during the first year of their employment because of non-disability related sickness absence. We conclude that SC would have written to them to them to try to explain the effect on their CSP entitlement during the second year of their employment. As we say in para.70 above, the fact that she did not simply say that any enhanced sick pay would be disregarded suggests that she did not intend the claimant's sick pay rights to be totally unaffected by the enhanced sick pay. However we do not think there is anything from which we can infer that this represented less favourable treatment than a suitable hypothetical comparator would have received or that the grounds included disability itself. The burden of disproving discrimination does not pass to the respondent.

200. The direct disability discrimination complaint is not well founded and is dismissed.

Discrimination arising in consequence of disability

201. LOI 2)a) The respondent argues that, on any view, the claimant was not disadvantaged by what he was told in the letter of 29 March 2022 (see paras.35 and 60 to 65 above).

202. The letter does not tell him that there would be a "clawback" of any future sick leave which is the specific wording used in LOI 2)a). The letter tells him that his sick pay entitlement in his second year of employment would be paid at half pay for 4 months when the policy states 2 months' full pay and 2 months' half pay taking account of any CSP paid during the previous 12 months (para.22 & 23 above). The exact meaning is difficult to understand. The effect of what was stated might be – depending on whether and when the claimant took further sick leave – that he was not entitled to sick pay in year 2 in the amount provided for on the face of the policy – because he had had

enhanced CSP in year one. See our analysis in para.62 above. In effect he was told there was some adverse impact on future sick pay entitlement under the policy of the fact he had received enhanced sick pay in year 1. This is not in precisely the terms alleged in LOI which refers to sick leave but we are satisfied that it was clear to the respondent throughout the final hearing that this was the case they were expected to meet.

203. Applying the policy without modification would mean that he potentially would not qualify for sick pay in year 2 as soon as he would have had he not received the enhanced sick pay. The respondent argues that the postponement of his entitlement to sick pay in year 2 cannot be legally regarded as a disadvantage because it arises out of benefit he only received because he is disabled. They rely in this argument on Williams v Trustees of Swansea University [2019] I.C.R. 230 UKSC.

204. We do not consider this to be the same situation as applied in Williams. There, the claimant took his accrued pension benefits immediately without any reduction for early receipt because he was unable to work for disability related reasons. The amount of those pension benefits was adversely affected by part-time working prior to early retirement which was itself due to disability related reasons. If he had not been disabled, he would have had no pension at all.

205. In the present case, the claimant was awarded discretionary enhanced sick pay and was absent from work in receipt of CSP for disability related reasons. The letter concerned whether he would receive the same contractual benefits as non-disabled employees or whether the discretionary sick pay would reduce the potential value of that. The contractual benefit which was potentially affected does not arise out of the benefit he only received because he is disabled.

206. Furthermore, our view is that the disadvantage to the claimant is that he was given enhanced sick pay with no expectation that there would be any down side to it and was then told that there would be a down side in some circumstances.

207. Would the reasonable employee think they'd been disadvantaged by being told that their entitlement to sick pay in the future might be affected by the enhanced sick pay they received in Year 1? The respondent has stressed throughout that they were generous to the claimant and, when challenged about them, they quickly said that the way policy should apply in his case is as though he had had no enhanced sick pay. The speed with which they clarified the situation is some evidence that the reasonable employee would consider themselves to be disadvantage because they had been offered a benefit at a vulnerable time which had adverse consequences that they were not initially told about. LOI 2)a) is made out and was unfavourable treatment.

208. The next question is whether part of SC's reason for writing the letter setting out that provision was that claimant had been "compelled to take sickness absence" (LOI 2.1)) We accept that it was; part of the reason for her to clarify what his entitlement would be in future years were he to be absent was that

he was absent at the time she wrote the letter with such a potentially serious condition. The burden passes to the respondent to show that sending the letter of 29 March 2022 was a proportionate means of achieving a legitimate aim.

209. Those particularly relevant for this allegation are potentially LOI 2.3.b "To ensure that all staff are treated with fairness and consistency with regards to absence and cover" – although there is no reference there to fairness and consistency with regards to *paid* absence - and definitely LOI 2.3.c: "To provide clarity with regards to the processes that will be followed should the need for absence arise".

210. Although in principle writing to set out how a policy will be applied in the future when there has been a discretionary departure from it in the past is likely to support the aims of fairness and consistency with regards to the arrangements for absence and clarity with regards to applicable processes, this letter was not, objectively, a proportionate way of achieving either of those legitimate aims because:

    a. it was difficult to understand - we have been unable to understand what the effect of the wording on page 511 actually was;

    b. we infer that SC (and RB who approved the letter) did not intend the claimant's future CSP rights to be totally unaffected by the enhanced sick pay (see para.70 above) which would mean there was a discriminatory effect on the claimant;

    c. SC accepted in evidence that it didn't have the effect she intended; and

    d. SC did not discuss the detail of what she proposed with the claimant in advance. The only conversation was brief on the phone when the claimant was out for a walk.

211. The claimant succeeds on LOI 2)a) to the extent set out in the judgment. The respondent was quick to clarify that there would be no adverse consequence to future CSP rights of the enhanced CSP in year 1 when it was queried. Once discrimination has been committed, it is not possible to undo it. However, we merely note that the respondent did take practical and reasonably prompt steps to undo the financial consequences of things they had got wrong. In terms of whether the respondent's actions broke the implied term of trust and confidence that has to go in the balance.

212. The facts alleged in LOI 2)b) are made out. The claimant received a pay review letter on 28 November 2022 informing him that he would not receive an inflationary pay increase. The reasons for that decision included that the claimant had been compelled to take sickness absence due to suffering with his disability (see para.89 above).

213. The alleged legitimate aim relied on is in the Grounds of Response para.18 page 65 (see para.10 above). Those multi-stranded aims are potentially legitimate aims of the business.

214. However, this decision concerned whether or not to approve or refuse an *inflationary* pay rise. The wording of the letter (page 515) may refer to the outcome of an individual professional development appraisal discussion and moving up a step in the pay scale but neither applied in the claimant's case and the letter did not appear to be tailored to the particular decision about him for reasons we explain in para.84. Indeed SC's evidence was that the FD role was not covered by the pay policy (see para.86). If one considers the part of the aim limited to "effectively and efficiently allocate resources" and consider the second strand to mean that pay increases should be within budget then whether or not to award an inflationary pay increase might achieve those aims. Nevertheless, most of the aims set out in para.10.a. above are unlikely to be achieved by the grant or refusal of an inflationary pay rise which apparently involves no consideration of performance and contribution.

215. Indeed we found that most staff pay was not at this point assessed with reference to performance; SC's evidence was to that effect and RB presumed that people were performing unless they were subject to performance management.

216. On the one hand, if we accept that there was no consideration of contribution when deciding whether or not give inflationary pay risk then that decision is not capable of achieve that part of the aim. On the other hand had contribution had been part of decision whether or not to give the claimant an inflationary pay rise, then when his appraisal been postponed for disability related reasons it is hard to see how the respondent could justify the decision. Although a respondent does not have to rely on an aim that they genuinely had in mind at the time they made the decision, the aims set out in para.10 are not evidenced as having been actually considered by RB or the Pay Committee when making the decision.

217. Furthermore, there is the contractual dichotomy: the contract of employment provides for an annual review but SC had identified that pay reviews for Directors were not covered by policy and needed to be to make the policy fit for purpose. That makes it harder for the respondent to justify the decision because they did not have a policy to fall back on to ensure consistent treatment.

218. In principle, the factors explained by SC to MA (para.86) were unobjectionable. They were taken into account by RB when he recommended that there should be no pay rise. Nevertheless, the fact that the contract provides for a review but the policy does not, that the reason given at the time was factually inaccurate (he was not new in role as defined) and only regarded as new in role because of disability related sickness absence mean that we do not think the decision was reasonably necessary. The fact that the decision was reversed also makes it harder to say there was a real need not to increase the pay because it was already set at a market level and so

recently as to mean that inflation had not yet depressed the value of his salary. The decision not to award a pay review was unjustified unfavourable treatment arising in consequence of disability.

219. LOI 2)c) this is not made out as a matter of fact. The claimant's pay was not reduced retrospectively. He was never to be paid more than hours worked and this was a correct application of policy. However, he was not told that this was how the policy would operate in his case until 12 December 2022 and then only orally when the policy says it should be confirmed in writing. That was not done until 4 January 2023 which was after his December payslip.

220. Our view is that the reasonable employee would not regard themselves as disadvantaged in their employment by being paid in accordance with the policy and the respondent actions in this regard do not amount to a detriment. Furthermore, they applied the policy when calculating his pay so, even if we are wrong and it was unfavourable treatment to pay him for hours worked rather than full pay, this was a proportionate means of achieving a legitimate aim of ensuring that all staff are treated with fairness and consistency with regards to absence and cover because consistency is achieved when you apply a policy correctly.

221. We do not consider the failure to inform him in writing to be a sufficiently serious breach of the policy to justify finding of disability discrimination. Failing to communicate the decision is not, in any event, alleged to be a discriminatory act in itself.

Disability related harassment

222. LOI.3).a) we found that SC did make the comments "as you were new in post and hadn't yet reached the point of taking on the full responsibilities of the Finance and IT Director role (EJ leadership of the IT function) and …" (para.93 above).

223. By that comment, she was explaining a potentially discriminatory reason for not getting a pay rise (potentially in the sense that, in other circumstances, it might have been objectively justified). However, we do not think that that automatically means that it is reasonable for the comment to have the harassing effect. The bar for the statutory test is higher than being told something that you did not like or was wrong – or even unlawful. In cross-examination it was put to SC that the comment was insensitive – a comment has, in our view, to be more than insensitive for it to be reasonable for it to be regarded as harassment. To find otherwise would not give full weight to the statutory words, bearing in mind the words of Underhill P (as he was then) that not every racially slanted adverse comment violates a person's dignity – similarly not every comment which refers to or reveals potential discrimination arising from disability also violates a person's dignity.

224. We can see why the claimant was upset because he inferred from this comment that the respondent had discriminatory reasons for refusing his pay review and also that the management discounted the support he had given

by working when unwell. We still don't think it meets the statutory test for harassing effect because it was not reasonable for it to violate his dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for Mr Ralfs.

225. LOI.3).b) is the comment by RB recorded at page 645 during his response to the grievance. It came to the claimant's attention when he received the grievance report shortly after 6 February 2023 (para.113 above). The context of this statement was that the claimant had worked through chemotherapy when he was able to. RB stated that his oversight had been limited because of the change in reporting by the claimant from reporting to RB to reporting to RM.

226. The entirety of the answer by RB is a bit dismissive of the claimant's contribution in very difficult circumstances. It's certainly insensitive. It seems unlikely that the Executive Principle would have quite so little knowledge of what the claimant was doing – in the end he did say he had no reason to doubt it. We accept that the claimant was upset and did not want RB to make the comment.

227. When we consider whether the objective element of the definition is made out, we consider that – in the context explained - it could reasonably be regarded as humiliating for the claimant to read that his line manager's opinion was dismissive of the work he had done and reasonably regarded as creating an offensive atmosphere for the work knowing that when he presented his line manager with a list of work he said he had done he simply said he could not agree or disagree and downplayed how long some of the tasks would take. The claimant had been significantly affected by the salvage chemotherapy and had nonetheless continued to try and make some kind of contribution to his role. In those circumstances we think it would be reasonable for this answer to have the harassing effect. The comments certainly upset the claimant profoundly, as he alleges. The harassment complaint is made out in relation to this allegation.

228. LOI 3).c), d) and e) were all said to have been said during a meeting on 12 December 2022. We accepted that RB said that the claimant had not acknowledged the impact the claimant's sickness had had on others, specifically RB himself and probably did refer to having to work during his summer holiday (see our findings about this meeting at paras.105 to 108). He did also say in the meeting that there was "noise" in the context of the decision not to award a pay review but – on its own – we consider that a neutral comment. However, the reference to the support the claimant received from the Trust in connection with the comment that the claimant had not acknowledged the impact his sickness had on others together could reasonably be regarded as harassment. It is the juxtaposition of those two and the particular comment by a line manager at LOI 3).e) that could justifiably be regarded as hostile and offensive in all circumstances. The claimant was reasonable to consider it so and the depth of his upset is palpable from the wording of his email at page 400 to 402.

229. The harassment complaint succeeds in part.

Protected disclosures.

230. The same communications are relied on by the claimant as protected disclosures and protected acts. They were made in writing so we accept that the communications were made as a matter of fact. We do not think that the wording on 30 November 2022 that he received no increase because he was regarded as new in role due to so much sick leave raises the connection with disability sufficiently clearly that it could be said to allege discrimination or otherwise fall within the definition of protected act. Too much is to be implied. However (as detailed below) the email of 2 December 2022 (which contrasts the claimant's position with that of his colleagues), his comments on 7 December 2022 and his wording of the pay appeal dated 8 December 2022 do.

231. The protected disclosure argument is in a sense parasitic upon the argument that these communications made allegations of disability discrimination. It is said that this information tended to suggest that the respondent had breached its public sector equality duty under s.149 Equality Act 2010 in the exercise of its functions. That is the legal obligation which it is alleged was breached. In other words, it is argued that the communications showed that there had been discrimination by the respondent of the claimant (an employee and member of its own staff) which tended to show a breach of the legal obligation to have due regard to the need to eliminate discrimination in exercise of its functions.

232. We reject that as a contrived argument. The communication concerned only the claimant's own personal position. There is no indication in the communication that the claimant is warning against a practice which might affect others so it appears to be about a single employer-employee relationship. We are not satisfied that the claimant believed at the time he made the communication that the disclosure was in the public interest because it is exclusively connected with his own position. When looking at the Nurmohammed factors, beyond the status of the respondent as a public body, there is nothing to given any public interest to the communication. Any belief that the communication was in the public interest was not a reasonable one to hold and the communications were not protected disclosures for that reason.

233. The protected disclosure detriment and automatic unfair dismissal complaints fail because the claimant had not made protected disclosures.

Victimisation

234. As we explain above, the email of 30 November 2022 does not, in our view, amount to a protected act. However the wording of the 2 December 2022 email, the communication on 7 December 2022 and the pay appeal document dated 8 December 2022 clearly do. With one exception, there is no reason to distinguish between them for the purposes of deciding whether those communications were the grounds for the acts complained of. All three refer to the same alleged act of discrimination, the refusal to grant a pay rise for disability related reasons.

235. LOI.(6)A We accept that it was detrimental to the claimant for his pay appeal not to be sent to the Chair of the Trustees Pay Committee. He was entitled under the pay policy to have his appeal considered. Although the committee members accepted RB's recommendation to grant the pay increase, it is clear from the wording of the appeal document (page 519) that he explains why he argues that the decision amounts to disability discrimination (see para.99 above). There was more, therefore, than simply the amount of money involved in consideration of the appeal. Failing to forward the appeal document meant that the claimant's attempt to communicate directly with those governing his employer was ineffective and we think the reasonable employee would consider themselves to be disadvantaged by that. They claimant found out about this through the grievance.

236. The burden of disproving victimisation transfers to the respondent to show that failing to send the pay appeal statement to the Trustees was not in any way done on grounds of the protected acts, principally because of the email at page 397. In it, RB who had received the pay appeal statement, informed the trustees that the reasons he had not received the pay rise in the first place included the Trust's generosity with the enhanced CSP and goes onto say that, nevertheless, the claimant thought he was being treated differently because of disability in the pay review.

237. That was true, but it was not a neutral statement. We can see that the effect was to cause at least two trustees to think worse of the claimant. We have accepted that RB and SC considered that there was a substantial litigation risk relating to a discrimination complaint and that that was what RB referred to in his second paragraph. The lack of neutrality in the email and the consciousness that the claimant had a meritorious argument of discrimination are matters from which we could infer that the discrimination complaints were grounds for not forwarding the claimant's pay appeal statement to the Trustees.

238. RB may, as he claims, have been motivated by desire to deal with the appeal informally in the short-form process he initiated and adopted. The principle that the claimant should have the pay rise was conceded in the context of the claimant having returned to work only about 10 days previously and the respondent dearly wanting him to be re-established into his role.

239. However, we are not satisfied that no material part of the reason for withholding the full statement from the Trustees was the fact that it was a discrimination complaint. Indeed the actions in not opening an investigation (were the pay committee an inappropriate place for discrimination allegation to be considered) suggests that the respondent rather wanted to shut down the discrimination complaint about the pay review. We have found it to be a well founded complaint. Our conclusion that RB wanted to shut these allegations down is supported by the comment he made to SC in response to the claimant's detailed critique of RB's actions on 12 December namely "don't give it any more oxygen" (page 400).

240. The factual allegations in LOI (6).B) and C) are mostly made out. They are that the claimant was lied to in being told that the statement of appeal had been considered by the pay review body when it had not and that the pay appeal had been upheld. The letter complained of contained various inaccuracies (para.111 above). SC drafted it and her words are not deliberate untruths because she did not have all the information available when drafting but RB approved it and he was aware that a short-circuited process had been followed. The wording is in standard form but it we can understand why the claimant thinks that it intends to mislead because it is inaccurate in important ways.

241. The burden of proof transfers to the respondent because RB's comment "shorter is better" on the drafting (page 407) chimes with his comment the following month about the discrimination complaint "don't give it any more oxygen". We think that this was probably part of his thinking that it was better all round to close the appeal complaint down and not fully investigate the allegations of discrimination. The claimant was falsely told that the appeal statement had gone forward to the Trustees in his outcome letter. LOI (6) C is made out. This was a detriment to him because he believes that his complaints have been considered in full and that his discrimination complaints have been aired when they hadn't. The reasonable employee would consider themselves to be disadvantaged by that. For similar reasons as in relation to LOI(6) B, we consider this to succeed as an allegation of victimisation.

242. LOI(6).D does not concern an act of the respondent. Therefore it is not an issue which we need to determine in the case.

243. So far as LOI (6).E, F, G and H are concerned, (see para.121 above) the respondent should have handed over the appeal emails to the claimant and didn't. Ultimately, RB expected it to be done by MA. If they had been handed over they would have appeared in the papers for the grievance appeal meeting. The claimant was told he would receive them with the pack 5 days before the grievance hearing and did not. He did make repeated requests for the documents. The witnesses all had that pack and those, such as RB, who were familiar with the emails and what amounted to the appeal documentation should have seen they weren't there. Someone should have asked MA why she had not included those emails in the evidence disclosed to the claimant. She also untruthfully said in the grievance meeting that the pay appeal documentation didn't include reference to discrimination. We have not heard from her and there are a number of possible explanations for that statement. TL's understanding from her contemporaneous email appears to be that MA had decided not to send them to the claimant.

244. Either way, the claimant was not given the documents pay policy says he should have been given until after the grievance hearing. This was disadvantageous to him because they were the only record of the decision making by which he was awarded the inflationary pay award that was part of his grievance. The burden of disproving that the reason why he wasn't given them was that of one or more of the protected acts passes to the respondent and they've not been able to discharge it. They have not presented a

satisfactory explanation as to why the claimant was not sent those emails and they themselves contain an acceptance by the Executive Principal that the respondent was at risk of a successful discrimination complaint. In the absences of cogent evidence, we draw the inference that the fact it was a discrimination complaint was at least part of the reason for concealment.

245. LOI.(6)H. It is true that RB confirmed to the claimant on 8 February 2023 that there had been no formal appeal process and hearing as such. This was how the claimant found out that his appeal statement had not been sent to the trustees and that the "short form" process had been adopted without consultation and outside the process. We do not see that as a separate detriment to the claimant rather than part of the process of discovering what had happened. Points E, F, G and H are part of the same wrongful act.

246. LOI (6) I: Part of the consequence of the claimant not having a full appeal was that Trustees on the Pay Committee were not shown the claimant's account of work he had done. That was something which should have happened, which according with the pay policy. However, we do not understand this allegation to be anything other than something wholly contained within LOI(6). A. It does not merit separate consideration.

247. LOI (6): J: It is true as a matter of fact that the grievance failed to find disability discrimination (see outcome at page 829). The Grievance Panel upheld the decision of the investigator who appears not to have considered a potential s.15 EQA complaints. She had incorrectly stated in the grievance hearing that the pay appeal documents did not contain mention of discrimination and failed to hand the relevant pay review documents to the claimant. This raises the suspicion that at least part of her reasons for her conclusions were the fact that the claimant had raised discrimination complaints. However the grievance outcome was actually decided by the grievance panel which was chaired by RK.

248. In the absence of MA or any evidence from the Pay Committee we are not satisfied that the respondent has satisfied the burden of proving that the decision to reject the allegations in the grievance that the claimant had been discriminated against in relation to his pay award.

249. In relation to LOI (6).K, we refer back to the facts found in relation to LOI.3)a) to e). We have upheld the allegations of harassment in relation to RB's statement to the grievance investigator that he could not agree or disagree with the list of work that the claimant claimed to have done and his conduc on 12 December 2022 (LOI3)c), d) and e). It is also alleged that the incidents at LOI 3) a) to e) were detrimental treatment on grounds of the claimant's protected acts. However, the definition of detriment in s.212(2) Equality Act 2010 expressly excludes conduct which amounts to harassment so those matters cannot amount to detriment on grounds of protected acts.

250. The particular allegations of harassment in c), d) and e) related to comments by RB in response to or in the context of a discussion in which the claimant has said that he considers himself to have been discriminated. RB knows

that there is a risk that were the claimant to bring a claim of alleged discrimination it would be successful. However, the definition of detriment means that as successful allegations of harassment they are not also acts of victimization.

251. In any event, we accept that SC, on 30 November and 7 December 2022 did say that he had not received the inflationary pay award because he was new in post and had not taken on the full responsibilities of his role. We have concluded that the first protected act took place on 2 December so the first iteration of the comment cannot have been motivated by the claimant's protected act. That tends to suggest that when SC repeated the comment that was also unrelated to the protected act. In fact, she was just repeating the reasons relied on by the respondent from the letter sent to the claimant on 28 November and her comment was in no way motivated by the complaint of discrimination. The complaint was the context and not in any way the reason for the statement.

Dismissal

252. Among the matters relied on cumulatively as a breach of the implied term of mutual trust and confidence is LOI 7)1)b.iv. The allegation is that the respondent did not properly consider his complaints of discrimination. That must relate to events prior to the resignation to be in order to be relevant here and we find that it means the failure to forward the pay appeal for the Pay Committee to consider (although that is separately particularised in LOI 7) 1) b. viii and ix) but also the grievance investigator's conclusion that the claimant had not been discriminated against which he discovered through the grievance report.

253. It can be seen that there is a lot of overlap between the different categories of alleged breaches. For example, the allegation of failure to follow policy and misstating facts are aspect of the same conduct. Repeating the same conduct restated in a different way does not make it more serious. Nevertheless, there is more in the list set out at LOI 7) there that we have found to be unlawful discrimination, harassment and victimisation than isn't .

254. We remind ourselves that, according to the claimant's witness statement there were many other reasons for resignation beyond those in the List of Issues (see the lists set out in his paras.497 and 498).

255. The handling of the pay appeal and the failure to hand over the relevant papers are serious. RB and SC may have wanted to avoid giving the claimant the stress of an appeal hearing and may have felt that it would be counterproductive to re-establishing working relations. If so, that was a misjudgment of the claimant's wishes and his own assessment of what was in his interest. He was entitled to proper consideration of his pay appeal; they could have offered to short circuit it but they unilaterally decided to do so. The claimant had raised plausible allegations of discrimination, ones we consider well founded, and RB short circuited consideration of those allegations by a shortform process which was not within the policy.

256. The claimant was dissatisfied by that and brought a grievance. Most of grievance investigation was carried out perfectly properly (despite what we say about the outcome) but the claimant was not given the pay appeal papers. He knew that there were documents which were withheld from him and we now know those to be emails in which RB reported to the Trustees and dismissed the claimant's allegation of discrimination. The contents were important. This is notwithstanding the provision in the pay policy that he should be provided with a category of documents which covered them and provision in the grievance policy that he should be given them. RB and SC both said in oral evidence that he should have had them.

257. The triggers for the resignation without notice were conduct of the grievance hearing (which has not itself been alleged to be discrimination, harassment or victimisation). But within the grievance process, the claimant found out that some comments were made by RB that we've agree amount to harassment. He was also influenced by comments made on 12 December that we agree amounts to harassment. It was only on 8 February that the claimant was told in terms that his pay appeal statement had not been sent to the trustees.

258. Even on the more limited findings of wrongdoing within the variety of matters within the claimant's contemplation when he decided to resign, the acts of the respondent amount to conduct which was likely to destroy or seriously damage the trust and confidence the claimant had in them. Given that the acts included concealment of alleged discrimination and a failure to investigate allegations of discrimination there was no reasonable and proper cause for their actions and the test of breach of implied term of mutual trust and confidence is met.

259. This was series of actions by the respondent in the run up to the grievance hearing. On these facts, there is no question of affirmation of contract arising.

260. The most significant aspects of conduct which cause us to conclude there was a breach of the implied trust and confidence term include the failure to award the inflationary pay rise, and the heart of the claimant's reasons were the handling of his complaints over the inflation pay rise and his pay appeal as well as the respondent dragging their feet over producing documents for his grievance. We do not forget that he was also angered about the letter about sick pay from 29 March 2022 which he read and understood in December 2022; we reject his allegations about that – it was not an introduction of a "claw back". We do not overlook that the breadth of detail in his paragraphs 497 and 498 goes far beyond the narrower unlawful acts.

261. Much of the way the claimant describes what the respondent did is objectively exaggeration. Nevertheless, the discriminatory or otherwise unlawful matters are a sufficient contribution to the overall repudiatory breach as to render the constructive dismissal discriminatory, applying the test in De Lacey.

262. We wish to add a comment that the respondent did act quickly and supportively when the claimant's diagnosis was notified to them. They wanted to support him. Our sense from RB and SC's evidence is that they

appear to have failed to appreciate that discrimination can be unintentionally and that disability discrimination can be unlawful if the reason for the treatment relates to disability even if it isn't less favourable treatment because they did not engage with that argument.

Approved by:

Employment Judge George

Date: …20 August 2025……..

Sent to the parties on:
.21 August 2025.....

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For the Tribunal Office