



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Denzil McDonald  
**Respondent:** The Governors of Buxton School  
**Heard at:** East London Hearing Centre (by cloud video platform)  
**On:** 14, 15, 19, 20 & 26 January 2021  
**Before:** Employment Judge G Tobin  
**Members:** Ms S Harwood  
Ms J Isherwood

## Representation

**Claimant:** Mr D Green (counsel)  
**Respondent:** Mr R O'Dair (counsel)

*This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.*

# JUDGMENT

The unanimous Judgment of the Employment Tribunal is that: -

- 1 The claimant was not unfairly dismissed in breach of s94 Employment Rights Act 1996
- 2 At all material times, the claimant was a disabled person within the definition of s6 Equality Act 2010.
- 3 The claimant was not subjected to discrimination arising from his disability, in breach of s15 Equality Act 2010.
- 4 The claimant was not directly discriminated against in breach of s13 Equality Act 2010.
- 5 The respondent did not fail in its duty to make reasonable adjustments, pursuant to s20 Equality Act 2010.

6 The claimant's complaints of disability discrimination before 4 June 2019 are out of time pursuant to s123 Equality Act 2010. Notwithstanding these complaints were unsuccessful, the Tribunal rejects these complaints in any event.

7 Proceedings are hereby dismissed.

## REASONS

### The case

1 Proceedings were issued on 10 October 2019. The claims were far-ranging. The claimant complained of discrimination on the grounds of his age, race and disabilities. He also claimed that he had been subjected to detriment and automatically unfairly dismissed for asserting his statutory right not to suffer an unlawful deduction of wages. He claimed (ordinary) unfair dismissal and breach of contract for an enhanced redundancy payment. The claimant brought claims against 3 institutional respondents and 3 individual respondents. By Response of 11 December 2019 the respondents contended that the claimant was dismissed by reason of redundancy and that the respondents followed a fair process. The respondents denied age discrimination, race discrimination, disability discrimination, any detriment or automatic unfair dismissal for asserting a statutory right or any entitlement to an enhanced redundancy payment.

2 The claimant withdrew some of his complaints; the claims that were to be determined were identified by the parties' representatives in a list of issues prepared in advance of this hearing. The list of issues was not agreed. The claimant objected to the respondent's contention that, in the alternative that his dismissal was not because of *redundancy*, pursuant to section 98(2)(c) Employment Rights Act 1996 ("ERA"), the claimant's dismissal could be categorised as for *some other substantial reason* of a kind such as to justify the dismissal of an employee holding the position which the employee held ("SOSR"), under s98(1)(b) ERA.

### The issues to be determined

3 Prior to beginning the hearing, the Employment Judge reviewed the list of issues with the parties' representatives. Given that the length of hearing had been reduced because of judicial unavailability, the Tribunal was keen to press on. A determination of the dispute over the redundancy/SOSR issue would not alter the evidence adduced or make a significance difference to the way that the hearing was conducted so the Tribunal resolved to determine this point after hearing the evidence and upon considering the respective arguments advanced in the parties' closing submissions. We now determine this issue as follows.

4 This is not a situation analogous to *Hertz (UK) Limited v Ferrao EAT 0570/05*, where a Tribunal was not obliged to ascertain the real reason for dismissal. In that case, the employer failed to show a potentially fair reason for the employee's dismissal and there was not sufficient evidence to identify the "real" reason for the claimant's dismissal. That Tribunal could not discover the real reason behind the claimant's dismissal by examining all the facts and the belief of the dismissing officer. Where there is an ulterior

motive and/or insufficient support in evidence or if the legal label does not fit, the Tribunal does not have to accept the reason set out in the Response. However, in this instance there may be genuine confusion as to the difference between a *redundancy* and a *reorganisation*. Redundancy and reorganisation are not necessarily mutually exclusive. Redundancy has a technical legal meaning, while reorganisation simply means a change to working structure, organisation or practices and has no specific legal meaning. It will not render the respondent's defence void if it does not fit the precise definition under s139 ERA as, in this case, we can determine the set of facts which led to the claimant's dismissal and that these facts were made clear to the claimant at the time of the dismissal. That the respondent now sought to argue, in the alternative, it should be allowed to re-label the dismissal as SOSR is a reasonable contention because what matters was the facts and beliefs taken into account at the time of the dismissal: see *Abernethy v Mott, Hay & Anderson 1974 ICR 323 CA* and *Jocic v London Borough of Hammersmith and Fulham & Others EAT/0194/07* and *Hannan v TNR-IPEC (UK) Limited 1986 IRLR 165 EAT*.

5 If this amounts to a re-labelling exercise, we waived the requirement for any formal amendment if such an amendment was necessary. We had regard to the overriding objective set out at rule 2 of The Employment Tribunals Rules of Procedure 2013, and in particular rule 2(c) which raises the imperative of dealing with cases fairly and justly and includes, so far as practical, avoiding unnecessary formality and seeking flexibility in proceedings. The facts and issues had been fully canvassed at the hearing, and the Tribunal was satisfied that the parties would not have conducted their cases significantly different by any uncertainty as to the course that the Tribunal would take. Consequently, no injustice had been suffered and the issue identified at number 4 below was permitted to be addressed and determined.

6 Therefore, the list of issues relied upon was as follows:

**Unfair dismissal**

1. What was the reason for the claimant's dismissal?
2. Can the respondent show that the claimant was dismissed for the potentially fair reason of redundancy, per s98(2)(c) Employment Rights Act 1996 ("ERA"); having specific regard to whether the respondent's pleaded need to replace an unqualified PE teacher with a qualified PE teacher amounted to a redundancy situation within the meaning of s139 ERA 1996?
3. If the claimant was dismissed for redundancy, was the dismissal fair within the meaning of s98 ERA, having specific regard to:
  - a. The respondent's redundancy consultation, carried out from 29 March 2019 to 15 May 2019;
  - b. The Respondent's adherence to the process set out in the Waltham Forest Organisational Change and Redundancy Policy;
  - c. The manner in which the Respondent informed and consulted with the Claimant (or failed to do so);
  - d. Whether opportunity was, or should have been, given to the Claimant to make comments in writing;
  - e. The manner in which the Claimant's right to appeal against his selection for redundancy dismissal was dealt with;
  - f. Whether the Respondent ought to have sought alternatives to the Claimant's redundancy dismissal;
  - g. The circumstances including the size and administrative resources of the employer's undertaking and whether the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for the dismissal; and

- h. Equity and the substantial merits of the case?
4. If the Claimant was not dismissed by reason of redundancy, was his dismissal for SOSR (i.e. reorganization) and if so was the dismissal fair having regard to s98(4) ERA.

**Disability discrimination**

5. It is admitted by the Respondent that the Claimant had the following disabilities:
- a. Prostatism (from February 2017);
  - b. Cancer (from August 2017);
  - c. Anxiety and depression (from March 2018);
  - d. Aggravation of an abdominal wound (from March 2018).
6. Further: did the Claimant's hypertension also amount to a disability from November 2018?

**Discrimination arising from disability (s15 EqA2010)**

7. Which of the following were things arising from the Claimant's disabilities:
- a. An increased level of absence, and/or an increased propensity to be absent;
  - b. An increase in the frequency and urgency of the Claimant's need to urinate;
  - c. A decrease in the Claimant's ability to control his bladder?
8. Did the Respondent discriminate against the Claimant because of something arising from his disability by dismissing him, per s39(2)(c) EqA2010?
9. If so, was any of this less favourable treatment a proportionate means of achieving a legitimate aim, namely the efficient management of staff absence and the provision of high-quality education to pupils?
10. Has the claim been presented within the statutory time limit in section 123 Equality Act 2010; and if not, would it in any event be just and equitable to extend the time for presentation of the claim?

**Direct discrimination (s13 EqA2010)**

11. Did the Respondent discriminate against the Claimant on the grounds of disability by dismissing him, per s39(2)(c) EqA2010?
12. Has the claim been presented within the statutory time limit in section 123 Equality Act 2010; and if not, would it in any event be just and equitable to extend the time for presentation of the claim?

**Reasonable adjustments: ss20-21 EqA2010**

13. Which of the following were provisions, criteria or practices (PCPs) which were applied to the Claimant:
- a. The Respondent's absence policy;
  - b. The Respondent's redundancy policy and the process adopted for the restructure of the Respondent's staff in March-June 2019;
  - c. A requirement that the Claimant should work in situations where he could not access toilet facilities in time and/or without leaving children unsupervised?
14. In respect of the PCPs set out at ¶¶13(a)-(b) above: would any of the following adjustments have (a) avoided that disadvantage and (b) have been reasonable for the Respondent to have made:
- a. Disapplying the Respondent's absence policy.
  - b. Leaving the Claimant's disability-related absences out of account in assessing his absence.
  - c. Not imposing, suggesting or applying an absence target of zero further absences in early 2019.

- d. [Withdrawn 17 January 2021]
  - e. [Withdrawn 17 January 2021]
  - f. Allowing the Claimant to make written submissions in response to the redundancy consultation when he was absent from work on disability-related sickness grounds.
  - g. Providing the Claimant with additional time, assistance or support to engage with the redundancy process.
  - h. Permitting the Claimant a longer period for submitting an appeal against his redundancy.
15. In respect of the PCP set out at ¶13(c) above: would any of the following adjustments have (a) avoided that disadvantage and (b) have been reasonable for the Respondent to have made:
- a. Not scheduling the Claimant to attend locations where he would not be able to access toilet facilities at short notice.
  - b. Ensuring that, when the Claimant was on the playing field, that another member of staff was available to cover him at short notice so that he could go to use the toilet.
  - c. Ensuring that the Claimant had access to the toilet facilities on the playing field at all times.
16. Has the claim been presented within the statutory time limit in section 123 Equality Act 2010; and if not, would it in any event be just and equitable to extend the time for presentation of the claim?

## The law

### Unfair Dismissal

4. The claimant claims that he was unfairly dismissed in contravention of s94 ERA. S98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA.

5. The respondent said that it dismissed the claimant for redundancy, pursuant to s98(2)(c) ERA. The respondent contends that the dismissal was for SOSR, under s98(1)(b) if the definition of redundancy was not met. The claimant disputes that he was dismissed for either of these reasons and contends that the real reason for his dismissal was his extensive prolonged sickness absence and/or the respondent's discriminatory approach to this.

6. An employee is dismissed by reason of redundancy, within s139(1)(b) ERA if the reason for his dismissal is that the requirement for employees to do work of a particular kind has ceased or diminished. This will clearly cover the situation where the dismissed employee's own job has disappeared through lack of work; however, it will also cover certain reorganisations. In *Safeway Stores v Burrell [1997] IRLR 200* the Employment Appeal Tribunal ("EAT") held that the test to establish whether or not a redundancy situation existed under s139(1)(b) ERA, should be a 3-stage process:

- 1. was the employee dismissed? If so,
- 2. had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,
- 3. was the dismissal of the employee caused wholly or mainly by that state of affairs?

7. In determining at stage 2 above, whether there was a true redundancy situation, the only question to be asked is whether there was a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such a diminution/cessation in the future. This was approved by the House of Lords in *Murray and Another v Foyle Meats Limited* [1999] IRLR 562. *Safeway* and *Murray* gave little emphasis to the words "work of a particular kind" as the focus was on causation, so a dismissal is by reason of redundancy if it is attributable to the respondent's diminished need for employees to do work of a particular kind.

8. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is 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.

9. The s98(4) test can be broken down to two key questions:

- 1. Did the employer utilise a fair procedure?
- 2. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

10. Accordingly, so far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to its redundancy situation or re-organisation.

11. In *West Midlands Cooperative Society Limited v Tipton* [1986] ICR 192 the House of Lords determined that the appeal procedure was an integral part of deciding the question of a fair process. Indeed, a properly conducted appeal can reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

12. In judging the reasonableness of the employer's decision to dismiss, an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did in fact chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office*; *HSBC Bank plc v Madden* 2000 ICR 1283. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt* 2003 ICR 111 CA and *Whitbread plc (t/a Whitbread Medway Inns) v Hall* 2001 ICR 669 CA.

### Disability

13. S4 EqA identifies "disability" as a protected characteristic.

14. S6(1) defines disability:

A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Discrimination arising from disability

15. S15 EqA precludes discrimination arising from a 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 a disability.

16. S15 EqA is aimed at protecting against discrimination arising from or in consequence of the disability rather than the discrimination occurring *because of* the disability itself, which is covered under direct discrimination. The term *unfavourably* rather than the usual discrimination term of *less favourably* means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because he had taken periods of disability-related absence and this had caused his dismissal, the person may not suffer a detriment because they were disabled as such, but because of the effect of that disability.

17. In *Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15* the EAT emphasised that it was not necessary for the disability to be the cause of the unfavourable treatment. The burden on a claimant to establish causation in a claim for discrimination arising from disability is relatively low. It will be sufficient to show that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. The EAT in *Charlesworth v Dransfields Engineering Services Limited UKEAT/0197/16* said that s15 EqA requires unfavourable treatment to be *because of something* arising in consequence of the disabled person's disability. If the *something* is an effective cause – and influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously) – the causal test is satisfied. However, even if a claimant succeeds in establishing discrimination arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

Direct discrimination

18. S13(1) EqA precludes direct discrimination:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

19. Under s4 EqA, a protected characteristic includes disability.

20. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

21. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an

adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

22. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205 and *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] ICR 931 provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

- i. Has the claimant proved facts from which, in the absence of an adequate explanation, the Tribunal could conclude that the respondent had committed unlawful discrimination?
- ii. If the claimant satisfies (i), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

The Court of Appeal in *Igen* emphasised the importance of *could* in (i). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the disability and not merely arising from unrelated events: see *University of Huddersfield v Wolff* [2004] IRLR 534. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford* [2001] EWCA Civ 405, [2001] ICR 847.

#### Failure to make reasonable adjustment

23. Under ss20-22 and schedule 8 EqA an employer has a duty to make reasonable adjustments in 3 situations:

- i. where a provision, criteria or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers cases on *how* the job, process, etc is done;
- ii. where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers the situation of *where* the job is done;
- iii. where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers those cases where the provision of an *auxiliary aid* (e.g. special computer software for those with impaired sight) would prevent the employee being disadvantaged.

A failure to comply with any of these requirements renders that omission actionable as discrimination under s21 EqA. This claim is focused upon the first provision identified above.

24. It is important to note that the duty to make reasonable adjustments arises only where the disabled person in question is put at a "substantial disadvantage" in relation to a



relevant matter in comparison with persons who are not disabled. S212(1) EqA states that "substantial" means more than minor or trivial.

25. Although substantial disadvantage represents a relatively low threshold, the Tribunal will not assume that merely because an employee is disabled, the employer is obliged to make reasonable adjustments. The Tribunal is obliged to consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and then what adjustments would be reasonable, see *Environment Agency v Rowan 2008 ICR 218 EAT*. We should avoid making generalised assumptions about the nature of the disadvantage and failing to correlate the alleged disadvantage with the claimant's particular circumstances.

26. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The reasonableness of the adjustment is an objective test: see *Smith v Churchills Stairlifts plc 2006 ICR 524 CA*.

27. The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled": s20(3)-(5) EqA. There is a requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons: see *Fareham College Corporation v Walters 2009 IRLR 991, EAT*.

### **The witnesses and documentary evidence**

7 The claimant, Mr Denzil McDonald, provided 3 statements: dated 13 November 2020, 8 December 2020 and 21 December 2021. The first two statements dealt with the claimant's disabilities. The third statement addressed liability issues and, very briefly, compensation. We (i.e. the Tribunal) also heard oral evidence from the claimant.

8 On behalf of the respondent, we heard evidence from the following, who also provided witness statements:

- a. Mrs Kathleen Wheeler, the Executive Head Teacher from 1 January 2012 until 1 February 2020. Witness statement and supplemental statement dated 14 December 2020.
- b. Mr Gerry Kemble, Acting Assistant Director of Education for the London Borough of Waltham Forrest. Witness statement dated 8 January 2021.
- c. Mr Sean Gascoine, school governor since 2014 and the chair of the respondent since the beginning of 2019. Witness statement dated 16 November 2020.
- d. Mrs Jacqueline Bowers-Broadbent, the respondent's head of primary school from 2012 and Acting Executive Head Teacher from October 2018. Witness statement dated 16 December 2020.

9 We were initially provided with a hearing bundle which ran well in excess of 1,000 pages, although further documents were admitted on the application of either party.

## The facts

10 We made findings in respect of the following facts. We did not resolve all of the disputes between the claimant and respondent merely those matters which we regarded as appropriate to determining the issues of this case. In determining the following facts, we placed particular reliance upon contemporaneous or near contemporaneous correspondence, emails and documents. We approached the witness statements with some care because this evidence was prepared some months after the events in question and for the purposes of either advancing or defending the claims in question. Where we have made findings of fact, where this is appropriate, we have also set out the basis for making such findings.

11 The claimant gave his job description as Instructor on the Claim Form. He commenced work for the respondent's predecessor school as a Learning Link Co-ordinator on 23 April 2001. We understand that the claimant undertook various roles with the respondent so that by 1 September 2008 he changed his job title to PE Instructor on the Associate Teacher Scale 6. From 1 October 2011 the claimant was confirmed as a PE Instructor with annual discretionary unqualified teacher's allowance for mentoring duties.

12 The respondent accepted that, at all material times, the claimant was a disabled person in respect of: prostatism (which is a urinary problem) from February 2017; cancer from August 2017, anxiety and depression from March 2018; and aggravation of an abdominal wound from March 2018. The claimant also contended that he suffered from hypertension which also amounted to a disability from November 2018. The claimant's second statement dealt with his hypertension and while this was scant on detail and chronology, the claimant's evidence of his high blood pressures was not challenged by the respondent. We accept that there is sufficient information in his statements combined with the information in the hearing bundle to determine that, in respect of all of the disabilities claimed, that the claimant had the appropriate physical and mental impairments, that these were long-term and that they had substantial adverse effects upon his ability to carry out normal day-to-day activities.

13 The claimant was assessed by Ms Mary Fitzpatrick, Occupational Health Adviser for the respondent's occupational health service on 7 July 2017, 14 March 2018, 26 July 2018 and 12 December 2018. Ms Fitzpatrick produced a report following each appointment [see Hearing Bundle pages 274-275, 335-336, 384-385 and 425-426]. These reports were perfunctory and missing detailed analyses and prognoses. It might have been more appropriate to refer the claimant to an occupational health consultant or an occupational health doctor for a more rigorous assessment as the claimant had a far-ranging, complex and fluctuating presentation. Nevertheless, the occupational health reports provided a record of the claimant's reports of his ongoing illnesses and the OH Adviser's recommendations for addressing them.

14 The claimant had a total of 184 working days absence through sickness from 27 February 2017 through to 9 February 2018 [HB726]. The respondent recorded the claimant's absence between 7 February 2019 to 1 February 2019 at 112 day, although we calculate this as 96.7 days if we discount the overlap, lateness personal/family absence and other paid authorised absence [HB731].

15 The respondent had comprehensive Sickness Absence Management Procedures. The relevant procedures for the first part of the claimant's leave were at pages

158 to 189 of the hearing bundle. These policy and procedures were in force from September 2015. The respondent then implemented a revised Sickness Absence Management Procedure from September 2018. This is at page 190 to 211 of the hearing bundle. The claimant did not contend that there were substantial differences between these policies nor that he was placed at any disadvantage by the revised procedure.

16 Mrs Wheeler reported a conversation that she had with the claimant where he said that he was having difficulties in February 2017. Mrs Wheeler contended that the claimant's toileting problems were nowhere near as serious as he claimed in his statement and in his oral evidence. It is possible that the claimant's problems got worse over time, but we do not accept that view because of the absence of any contemporaneous complaint or other reference to such problems. The claimant contended that he was required to hold lessons off-site at Wanstead Flats. He said that he wet himself on a number of occasions because his need to go to the toilet came on quickly and as he was the only member of staff, he could not leave the children. We reject his evidence on this point. We do not accept that these unfortunate occurrences happened frequently, occasionally or, if it happened at all, then more than once. Mrs Wheeler was very clear that she would not expose the claimant to such potential embarrassment. It would be hugely inappropriate for such an incident to happen in front of the pupils. Finally, in the absence of any corroborative evidence to the contrary we just do not accept that the claimant told his line manager, head of department, friend and confidant, Matt Neil, about such incidents and he did nothing. We do not accept that anyone in a position of responsibility would allow such a state of affairs to continue without doing something and a friend would not ignore such potentially humiliating circumstances and do nothing.

17 Mrs Wheeler specifically addressed what adjustments were required with the claimant around this time. She said she checked the claimant timetable to ensure he remained close to the toilet facilities and that he had a key to the off-site toilets at Wanstead Flat, which we accept were close and available to him. The on-call system was available to the claimant which was likely to be more appropriate when the claimant was in the school. Wanstead Flats playing fields were a few minutes' walk from the school toilets (2 minutes according to Mrs Wheeler and 10-15 minutes according to the claimant). We prefer Mrs Wheeler's evidence as the playing fields were said to be no more than an equivalent length of the school away. Mrs Wheeler was hugely sympathetic to the claimant's medical condition (indeed she had cancer herself) and although she did not interrogate the claimant about his toileting arrangements, we determine that if this had been a problem then Mrs Wheeler would have dealt with it in the sympathetic and supportive manner that she approached other aspects of the claimant's illness and sickness absence. In any event we accept Mrs Wheeler's evidence the claimant did not teach on Wanstead Flats often, which was largely due to his extensive sickness absence. When at the school he taught approximately 2 lessons per week in the winter months raising to 4 lessons or so per week during the spring/summer months.

18 The occupational health report of 14 September 2017 noted

Mr MacDonald still experiences some bladder urgency and therefore as and when required he needs to be able to access toilet facilities promptly. We have discussed various ways that he may manage this problem from a personal/medical perspective but from a practical perspective I would request that management consider ways that this might be achieved during his working day. E.g. Arrangements to achieve swift (brief) class cover if and when necessary. Some schools have a pager arrangement for such purposes. Consider timetabling arrangements to ensure he would not be out in the field all day away from toilet facilities

This advice is consistent with, and reinforced, the measures that the respondent had undertaken.

19 The Absence Review Meeting Record, which the claimant signed on 21 September 2018, specifically addressed this matter. It recorded the claimant has been able to manage the toilet situation. Indeed, at no stage prior to this did the claimant raise, either formally or informally, that he was having difficulties in managing his bladder problems.

20 On 19 December 2018 the occupational report noted:

[The claimant] has been diagnosed with dangerously high blood pressure...  
Mr MacDonald is currently receiving treatment for both his blood pressure and prostate pain...  
His blood pressure medication has only just been started and as yet the benefits have not been established.

21 The Buxton School Reorganisation Restructure Proposal of March 2019 stated:

...  
Securing improved pupil outcomes during this time of saving must be our priority. Standards in PE must improve, which will lead to improved outcomes for pupils which should lead to improved examination results. Unqualified teachers will be replaced by teachers who hold QTS (Qualified Teacher Status). This is the case in PE. No replacement is currently needed in English as this contract will terminate.  
...

22 The claimant attended school on 1 April 2019, which was his first day back from having to go to Grenada following his father's death. The respondent had given the claimant 5 days of paid bereavement leave to organise the funeral and attend to his father's financial affairs.

23 Mrs Bowers-Broadbent has arranged for a meeting with the claimant at 8.30am to discuss the restructuring/redundancy. This was to provide for individual consultation. The claimant said that he arrived for the meeting in her office although Mrs Bowers-Broadbent was not there. Mrs Bowers-Broadbent contended that she was in her office for the appropriate appointment but that the claimant did not show up. She said she asked her PA to look for the claimant, but her PA could not find him in the school. We prefer the account of Mrs Bowers-Broadbent; she was very clear that she was in her office expecting to meet the claimant and she did not leave until she went to the hall for the staff meeting later that morning. Mrs Bowers-Broadbent said that she was frustrated that the claimant did not come to the meeting, which is consistent with how we expected her to react. The claimant was not clear how long he contended that he remained in Mrs Bowers-Broadbent's office. His evidence was not as credible or convincing as that of Mrs Bowers-Broadbent. Furthermore, we expected to see a degree of frustration from the claimant, rather than the nonchalance displayed, if Mrs Bowers-Broadbent had, in fact, not turned up for this important meeting.

24 Mrs Bowers-Broadbent had organised a staff meeting in the hall later that morning for the staff who were not able to attend the consultation meeting of Friday 29 March 2019. The claimant turned up after the meeting started. 7 members of staff were already in attendance and Mrs Bowers-Broadbent continued the consultation meeting. When the consultation meeting concluded Mrs Bowers-Broadbent asked the claimant to remain. She asked for an explanation for his non-attendance at the earlier meeting, for which none

were forthcoming. Mrs Bowers Broadbent then explained the way his post would be affected by the restructure and the timeline for the consultation period. She gave the claimant a copy of a proforma letter addressed to him dated 29 March 2019. This letter confirmed that the claimant's post of PE Teacher [sic] was directly affected by the proposed new structure. The letter referred to the collective consultation with the recognised trade union (of which the claimant was a member):

...  
Formal consultation will run until the Wednesday 15<sup>th</sup> May and during this time you have the option to be spoken to on an individual basis to discuss your options. It will also be an opportunity for you to raise concerns and request any specific support during this difficult period.

...  
If you have any queries inspected this letter, please do not hesitate to let me [sic]

25 As was the case for all members of staff, Mrs Bowers-Broadbent offered the claimant the opportunity to go home which he took. He called in sick the next day. In fact, the claimant did not return to school after that date.

26 The claimant confirmed that he was given the relevant paperwork and that he read the Re-organisation Restructure Proposal March 2019 Changes planned for September 2019 document at pages 659 to 691 of the hearing bundle because he said that he could not see how the school could achieve costs savings by replacing him with a qualified teacher and he also did not think that the work he undertook was different to a qualified teacher. Nevertheless, the claimant did not raise these points at that time.

27 On 4 April 2019 Mrs Bowers-Broadbent sent all staff, including the claimant a questions and answers ("Q&A") document. The covering email referred to the key dates in the Q&A document and asked staff to book a slot with the local authority HR adviser on 24 April 2019 to answer question or provide information about redundancy, voluntary redundancy and pensions. The claimant did not respond to this email.

28 There is correspondence in the hearing bundle which evidences settlement negotiations between Ian Moyes, who was a full-time officer for the claimant's trade union and Gerry Kemble and/or Sarah Pike in early May 2019. On 9 May 2019 Mr Kemble wrote to the claimant's trade union representative in respect of the redundancy settlement negotiations. he stated:

... [the School's] position is that they are following due process and as such there is no scope to offer anything that goes beyond what DM would get if he were made redundant...

Assuming this is not acceptable to your member then the absolute priority for him should be, with support from yourself, to ensure he offers detailed feedback as part of the consultation process.

29 On 20 May 2019 Mrs Bowers-Broadbent wrote to all staff confirming that a number of posts would be made redundant. This included the claimant's post of Unqualified PE Instructor. Mrs Browns-Broadbent emailed the claimant and his trade union representative a copy of this letter together with an expression of interest form for the additional posts created. The letter identified the additional posts as alternative jobs available to those affected by the restructuring, which included Extended Schools Co-ordinator, Pastoral Support and Pastoral Leader (Aspirational). Some or all of these posts might have been suitable for the claimant given his trajectory and experience. The claimant did not complete any expression of interest form nor did he make any no formal enquiry in respect of these vacancies.

30 On 22 May 2019 Mrs Bowers-Broadbent send to claimant a Notification of Selection for Redundancy. The letter stated:

Further to my previous correspondence and our recent discussions/meetings it is with regret that I am now writing to inform you that you have been selected for redundancy, to take effect on 31<sup>st</sup> August 2019.

I am very sorry that formal declaration of redundancy has proved necessary and that it has not been possible to find a suitable alternative approach to resolve the difficulties previously outlined.

I have to inform you that it is now the responsibility of the Local Authority Director to issue you with formal notice of redundancy by 31<sup>st</sup> May 2019 for implementation on 31<sup>st</sup> August 2019.

Any member of staff issued with notice of termination of service has the right to a formal appeal before Governor(s) against dismissal and deletion of their post.

Please inform me no later than Friday 24<sup>th</sup> May 2019 by 5:30pm via email [email address]

Should you wish to take up the offer of an appeal you will have the right to be accompanied by a recognised Professional Association/Trade Union representative or by a work colleague....

31 On 23 May 2019 Ms Linzi Roberts-Egan, Deputy Chief Executive, of Waltham Forest council send the claimant a formal notice of termination of employment:

I refer to the recent consultation that has taken place regarding the restructure at Buxton all Through School. The consultation period ended on 15<sup>th</sup> May 2019.

The consultation document issued earlier this year and ratified in its final form by the governors on 17<sup>th</sup> May 2019 confirms that as part of this restructure, your post has been deleted and unfortunately there are no other employment opportunities at the School for you at this time.

In view of the above it is with regret that I write to confirm that your post of Unqualified PE Teacher has been declared redundant. This letter, therefore, constitutes the formal notice of the termination of your contract of employment on the grounds of redundancy...

You have the right to appeal against the decision to terminate your employment. If you do wish to do so, then please write to the Chair of Governors, Buxton School, stating your grounds for appeal within 10 working days of the date of this letter...

32 On 9 July 2019 the claimant sought to appeal against his dismissal. He wrote to Ms Roberts-Egan and said that he had not been well enough to respond sooner. His letter was reasonably detailed and raise complaints about a failure to inform and consult about the redundancy situation and a failure to carry out a fair selection process. The claimant said that his dismissal was not a genuine redundancy and he raised complaints of disability discrimination and race discrimination.

33 On 23 July 2019 Mrs Bowers Broadbent responded to the claimant in an equally detailed letter. Mrs Bowers-Broadband contended that the claimant was 17 working days out of time for his appeal and said that his appeal was not accepted.

## **Our determination**

### Unfair dismissal

34 The respondent must establish the reason for dismissal and that this was a permissible reason under s94 ERA. The respondent's position was that the claimant was

dismissed for redundancy, specifically because it wanted to replace unqualified teachers, in PE and English, with qualified teachers. This was set out in the Re-organisation/ Restructure Proposal March 2019 and explained by Mr Bowers-Broadbent in her evidence. These proposals were rational and business orientated.

35 The claimant was not employed on a Teacher's contract and he did not hold qualified teacher's status (QTS). Although the respondent was loose with its terminology for the claimant's job description or job status, we do not accept the claimant's contention that he worked at the level that we would accept was a school teacher. The claimant had not undergone the requisite teacher-training, nor did he hold the necessary teaching qualification of a university degree in teaching (BA(Education)) or a Post-Graduate Certificate in Education. The respondent sought to support the claimant in the past to undertaking the certification process as the claimant could then undertake a more extensive role. However, the claimant did not pursue this course as he had found a niche, which he was satisfied with. The claimant was a PE Instructor and was, no doubt, very good at this role. But his role was not the same as a qualified teacher's role because, as highlighted in cross-examination, he did not, as a matter of course, undertake a more complex or academic teaching role. We accept that there is a difference between the role of an instructor, who provides coaching and training, and that a teacher's focus is more developmental, adaptable and structured.

36 There is no reduction in *work of a particular kind* merely because there is a change in the kind of employees required to do such work. There was a difference in the claimant's role to that of a (qualified) PE teacher. We reject the claimant's contention that he did the same work as a qualified teacher. We accept the evidence of Mrs Bowers-Broadbent that once a QTS replacement was appointed, it was intended that he or she would deliver the more academic aspects of national curriculum teaching as an integral part of the job rather than provide ad hoc cover for absences of other shortfalls, as the claimant had done. Accordingly, we determine that the reason for the claimant's dismissal was one of redundancy, pursuant to s98(2)(c) ERA.

37 The claimant contended that his dismissal was unfair under s94 ERA because of a failure to consult or a failure to consult adequately or meaningfully. Because the claimant could not attend the information/consultation meeting set for 29 March 2019, Mrs Bowers-Broadbent had organised a meeting to inform him of the redundancy situation on his first day back from paid bereavement leave. However, the claimant did not turn-up to this appointment for no apparent reason. Nevertheless, the claimant did appear at the additional staff consultation meeting, after it had started, later that morning. Mrs Bowers-Broadbent discussed the proposed restructuring with him and gave the claimant a copy of the relevant notification letter and the reorganisation/restructuring paperwork.

38 The claimant read this documentation and voiced criticism of this in his witness statement and at the hearing. He said that he was too ill to raise such criticism during the consultation exercise. We reject this after-the-event assertion. The medical evidence before the Tribunal does not support the claimant's contention that he was unable to consult with his employers, either with or without adjustments.

39 The respondent consulted with the recognised trade union, which was wholly appropriate in the circumstances. The claimant was a trade union member and was also individually represented by a full-time trade union officer, Mr Moyes throughout this period. Mrs Bowers-Broadbent sent correspondence to the claimant (and all other employees)

encouraging a dialogue. She anticipated possible staff concerns with a Q&A document. So, as well as providing for collective consultation, Mrs Bowers-Broadbent also provided for individual consultation.

40 The claimant made no criticism of the Waltham Forest Organisational Change and Redundancy Policy or the respondent's adherence to this at any stage up to his dismissal and within a reasonable period thereafter. The process that led to the claimant's dismissal appeared to us to be substantially fair, and in the absence of any timely complaint otherwise, within the band of reasonable responses open to an employer of this type in these circumstances.

41 The timeframe allocated for consultation was, at least, adequate. At no stage during this consultation period did the claimant or his trade union full-time officer or anyone else on the claimant's behalf ask for a pause in the process or raise any other adjustments to the consultation. Nor did anyone raise the claimant's ill-health as a possible impediment to the process adopted. Any contention that the claimant was not allowed to make written comments about this process is resoundly rejected. If the claimant had concerns, then he or his representative should have put them in writing or they did not (or could not) raise them orally. He is an intelligent man; he was well versed in raising complains and he did not need to be invited to do so at every stage of a process. He also had an experienced trade union representative to assist and guide him.

42 Perhaps most damning of the claimant's position was the fact that his trade union representative had been negotiating a severance package with the local authority representatives during this time. Matters came to ahead 2-weeks before the claimant's notice of dismissal where the respondent confirmed its final position and advised the claimant's representative that if the termination offer was not acceptable then the claimant ought to address any issues through the consultation process. So, the claimant was able to instruct his representative in negotiations with his employer's representatives to pursue a satisfactory payoff but somehow he was not well enough to deal with the substantive criticism of the redundancy process. That contention is unrealistic. The respondent provided for extensive and meaningful consultation and the claimant chose to concentrate on the alternative route of individual negotiation through his trade union full-time officer. It was only some months after he did not get what he wanted that that the claimant complained about the consultation process. His criticism in this regard is hollow and insincere.

43 The dismissal letter of 23 May 2019 set out the claimant's rights of appeal, so it compiled with the requirements of *West Midlands Co-op v Tipton*. He was given until 5 June 2019 to lodge his appeal setting out his appropriate grounds. The claimant did not either lodge an appeal or indicate his desire to appeal within this time frame. It was not until 9 July 2019 that the claimant raised a possible appeal, which was 5-weeks outside the time limit given to appeal (and 7-weeks from his dismissal notice). The claimant said that he was unwell, and he complained the genuineness of the redundancy, the process adopted and raised complaints of disability and race discrimination.

44 There is no medical evidence that shows why or how the claimant was able to appeal on 9 July 2019 but not by 5 June 2019. The claimant suffered no cognitive or any other impairment preventing him, or his trade union representative, from putting in writing his objections to the restructure and his dismissal within the timescale set for the appeal. In his witness statement and evidence, the claimant said he had been in a position to do



this since soon after 2 April 2019.

45 Indeed, the respondent had good reasons to want to keep to the deadline including the appointment of a qualified teacher to replace the claimant so as to allow that person to be in post before the Autumn term. Mrs Bowers-Broadbent said in evidence that an appointment had already been made by the time the claimant had lodged his late appeal.

46 The claimant was offered the right to appeal, and he did not avail himself of this right within the timescale provided by the respondents. The respondent's time limit was reasonable and neither the claimant nor his representative sought any extension to appeal. The claimant's appeal was out of time, there was no good reason for lodging his appeal so late and, accordingly, it was within the range of reasonable responses for the respondent to refuse to deal with this as an appeal.

47 Mrs Bowers-Broadbent wrote to the claimant (and his trade union representative) on 20 May 2019 advising him about the availability of alternative work and the respondent's intention to utilise such vacancies, if possible, to minimise redundancy dismissals. We note that some of these vacancies might have been suitable replacement jobs for the claimant, although not necessarily according to the statutory definition of suitable alternative employment. The claimant did not respond to this approach. So we find the respondent did in fact seek alternatives to dismissing the claimant, but the claimant did not respond to this possible option.

48 In assessing the respondent's dismissal, we determine that the respondent utilised a fair procedure and the decision to dismissal fell within the range of reasonable responses open to this employer.

49 For completeness, if the claimant's dismissal was not for redundancy, then his dismissal was for a business re-organisation under SOSR and for the reasons set out above we determine that a SOSR dismissal would have been both substantively and procedurally fair.

The claimant's disability and the respondent's knowledge thereof.

50 We made as a finding of fact that the claimant had the following disabilities contended and we explained above how we made such findings:

50.1 Prostatism (from February 2017);

50.2 Cancer (from August 2017);

50.3 Anxiety and depression (from March 2018);

50.4 Aggravation of an abdominal wound (from March 2018); and

50.5 Hypertension (from November 2018).

Discrimination arising from disability (the s15 EqA claim)

51 The claimant suffered from the matters identified in section 5(a) to (d) in the list of

issues, that is beyond doubt. Whilst we find that the claimant's disabilities led to an increased level of absence, we find as a fact that the claimant did not suffer the urinary and bladder problems at 7(b) and (c) to the amount contended. His account was greatly exaggerated.

52 The discrimination alleged is in respect of the reorganisation and restructuring process and the claimant's dismissal. We reject the contention of discrimination at issue 8. The claimant's sickness absence was substantial and long-lasting. Both Mrs Wheeler and Mrs Bowers-Broadbent were supportive to the claimant, Mrs Wheeler considerably so. Both applied the sickness absence procedures flexibly and in a manner that markedly favoured the claimant. We were suspicious at the level of munificence afforded to the claimant, but we accepted the explanation of both that they regarded the claimant as a good employee and were hugely sympathetic to him because of his cancer.

53 The claimant's dismissal was, of course, unfavourable treatment. However, we do not regard the restructuring/reorganisation process as some form of smokescreen to get rid of the claimant because of his sizable sick leave absence or other manifestation of his disabilities because that pathway was much more complex and harder to justify than simply proceeding towards a capability dismissal.

54 We determine that the claimant was not subject to unfavourable treatment because of something arising from his disabilities. The application of the restructuring/reorganisation and the claimant's dismissal are dealt with in our finding of fact and our determination above. This had nothing to do with the claimant's disability or something arising from the claimant's disability. There was no causal link between the claimant's absence or urinary problem and his dismissal. The low threshold is not met because the claimant's dismissal and that of the unqualified English teacher was based upon clear rational and business reasons and nothing to do with his absences or disabilities.

55 We deal with appropriate time limits below.

Direct disability discrimination (the s13 EqA claim)

56 An assessment of less favourable treatment requires a comparator. The comparator can be an actual or hypothetical person but must be one who does not share the claimant's protected characteristics and is not in materially different circumstances from him. For disability cases the comparative exercise must include the disabled person's abilities: s23(2)(a) EqA. So, when making a comparison for the purposes of examining direct disability discrimination, a Tribunal must take account of how a person with the same abilities as the claimant would have been treated. The appropriate comparator in this disability discrimination case is a fellow non-qualified instructor or non-qualified teacher of similar grade and skills to the claimant, who did not have any or all of the claimant's disabilities and was well-regarded and good at their job.

57 There is an identifiable comparator in this instance, Mr Sylvester Williams, an unqualified teacher in the English Department. An actual comparator is preferable to assessing what might happen on a hypothetical basis. Mr Williams' role was identified as part of the restructure, in similar circumstances to the claimant. Mr Williams had a "good" sickness absence record and, we understand from Mrs Wheeler, that he, like the claimant was encouraged and offered previous support from the respondent to pursue academic teacher training and qualification. Nevertheless, Mr Williams left his role following the

redundancy exercise and his role was advertised for a qualified teacher.

58 Even if we did not have an actual comparator, we would not be persuaded to find less favourable in this instance with a hypothetical comparator as the claimant's dismissal was rational and justified by the respondent as set out above and was nothing to do with his disability. The first stage of the *Barton* and *Wong* test is not met because Mr William's example precludes further assessment. On the facts of this case there is no less favourable treatment.

Reasonable adjustments (the ss20-21 EqA claims)

59 The respondent's absence policy provided for trigger points and review periods before certain actions were undertaken. There was considerable management discretion available within the scope of the policy. The purpose of any absence policy is to offer support and assistance to staff experiencing ill-health with a view to minimising sickness absence levels. The objective of such a policy is to help facilitate an employee's return to work or to provide for a fair and transparent termination of employment, where a return to work is not foreseeable. The respondent's absence policy achieved that purpose by providing a clear and structured response to the claimant's ill health and his high level of absence. The policy provided for the regular referral of the claimant to occupational health and for the occupational health advice to be addressed. In the space of over 2-years the claimant progressed to a second formal review.

60 The claimant contended that he suffered stress because of the respondent sought to manage or oversee his absence. The contention that the respondent should disapply its absence policy makes no real sense because it suggests that the respondent should not follow any absence counting, recording or review process. If the claimant was at work, then like all other employee's, his attendance and duties should be managed in a structured and meaningful manner. Not applying an absence policy for periods when he was not at work suggest that the claimant ought to be managed in some arbitrary way, which is neither reasonable nor is it feasible. When an employee is not at work the Tribunal expects his employer to record and manage his absence.

61 The claimant had very generous contractual sick pay arrangement, which provided a greater necessity for managing his sickness absence. Both Mrs Wheeler and Mrs Bowers-Broadbent exercised their discretion in respect of the claimant's sick pay very generously. The absence policy provided for flexibility and Mrs Wheeler provided a very light touch in her application of the absence procedure (as she suffered from cancer herself she understood what the claimant was going through). Mrs Wheeler was always supportive. Mrs Bowers-Broadbent was less familiar with the claimant's debilities, yet she was similarly supportive through the absence procedures. Counting the claimant's disability-related absence provided the essential context of the overall picture. Record keeping was essential to review ongoing support, not least for the regular occupational health referrals. It also enabled a proper account to be made in respect of the claimant's eligibility for contractual and discretionary sick pay. The claimant suffered no significant detriment to his disability related absences being counted in assessing his absences. He made no complaint about this at the time, nor did he contend at the time that this made him more stressed.

62 We reject the claimant's contention that Mrs Bowers-Broadbent sought to impose a zero further absence on him. Although this was mooted at the second formal absence review meeting of 6 February 2019, it was not implemented. We reject the contention that raising such a matter in discussion amounted to a detriment. The review meeting was an open and frank engagement with the issues. It would not be a meaningful review if the parties could not discuss (and discount) the various options available. Mrs Bowers-Broadbent intimated that she wanted to move towards zero absence for the claimant and we accept her evidence that this was not said to intimidate the claimant or make him feel uncomfortable. It was an aspiration that was not translated into any objective following the input from the claimant and the claimant's representative.

63 Issues identified at 14(f), 14(g) and 14(h) implies that the claimant was put at a significant disadvantage during the redundancy process. In particular that the claimant was not allowed to make written submissions in respect of the redundancy consultation, and that he was not given assistance or support through the redundancy process. As can be seen from our findings above, the claimant was offered the opportunity to make submissions. The respondent discussed the redundancy situation and negotiated with the claimant's trade union representative on a possible settlement package. When the negotiations broke down, Mr Kemble even reminded the claimant of his need to engage with the redundancy process, yet the claimant did nothing, nor did he indicate that he had any particular difficulty with that type of engagement. The claimant is insincere in contending that he was not given a full opportunity to engage with the redundancy process. The collective consultation was proceeding, the programme is provided for both individual and collective consultation. During this particular time the claimant sick notes were for his prostrate related complications. It was never clear that the claimant would not return to the school following his absence in early April 2019. Neither the claimant nor his trade union representative raised any difficulties in engaging with the redundancy process and neither asked for additional time. We consider the redundancy timeline as reasonable and appropriate in the circumstances.

64 The claimant did not ask for a longer period of time to submit his appeal against dismissal nor did he or his trade union representative highlight any difficulties he may have experienced. The settlement negotiations had concluded before the claimant was given notice of dismissal and the claimant appealed 6 weeks out-of-time. As stated above we are not persuaded that any delay was due to any difficulties that related to the claimant's disability. His late appeal may have been an effort to disrupt the process in order to bring the respondent back to the negotiating table or it might have been because, as the respondent's representative asserts, the claimant and his representative could have taken their eyes off the ball and overlooked this option. Irrespective of why the claimant chose to appeal so late, we do not accept that his delay was for a disability-related reason and accordingly permitting such a long period for submitting an appeal against his redundancy was not a required adjustment for his disabilities.

65 Mrs Wheeler knew about the claimant's bladder problems from spring/summer of 2017. The claimant's condition was originally described as prostatism although he was diagnosed with cancer relatively soon thereafter. Mrs Wheeler described a number of conversations, both formal and informal, with the claimant about his illnesses and the effect of these on his job. It is the claimant's case at the hearing that he frequently needed to urinate at a moment's notice and that he could not hold back so that he often wet himself. We believe Mrs Wheeler that he did not tell her this. There is no mention of any discussion of the suitability or not of wearing incontinence pants or pads, which is the

most obvious question, because the claimant did not raise such a level of incontinence. This undermines the claimant's credibility further and is consistent with the respondent's case that this matter is hugely exaggerated. In any event, we accept Mrs Wheeler's evidence that the claimant had a key to the toilet on Wanstead Flats. The claimant did not contend that these toilet facilities were too far away (merely that he did not have a key) so it was not necessary for the respondent to explore the cost and feasibility of portable toilet facilities. Mrs Wheeler explained that the claimant's lessons on the Flats were not particularly frequent, subject to the weather, and that there was an on-call system which would have enabled him to summon assistance fairly quickly. The claimant's only contemporaneous comment on this matter was that he was managing his condition in early September 2018 and he did not at any stage indicate otherwise, until he brought this claim. At no stage did his trade union representative indicate that the claimant was having difficulties doing his work of taking lessons on at Wanstead Flats.

66 We dealt with Mr Neil's knowledge of the claimant's toileting problems and how this contributed to our conclusion that the claimant exaggerated his story in our findings of fact. That said, even if the claimant's difficulties were as acute as claimed, then there was little that the respondent could have reasonably done, short of removing the claimant from taking his lessons at Wanstead Flats.

67 Mrs Wheeler's evidence was clear, if she had been made aware of such severe symptoms as described by the claimant then she would have had to remove him from his teaching duties because she said she could not expose him to such potential humiliation and also it would be wholly inappropriate to leave a class with a teacher who wet himself. It would have been prohibitively expensive to arrange for a full-time shadow, so other than cancelling all of the claimant's trips to Wanstead Flats there was no potentially effective adjustment which would have been reasonable.

#### The time limit/jurisdiction issues

68 Claims of discrimination in the Employment Tribunal must be presented *within 3 months* (i.e. 3 months less a day) of the act complained of, pursuant to s123(1) EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA provides that that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month time limit period if they think it *just and equitable* to do so, under s123(1)(b) EqA. The Acas conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for Employment Tribunal proceedings: see s18A and s18B Employment Tribunals Act 1996 and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014.

69 *Continuing acts* under s123(3)(a) EqA are distinguishable from one-off act that have continuing consequences; time will run from the date of the one-off act complained of; see *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*, *Aziz v FDA [2010] EWCA Civ 304* and *Okoro and another v Taylor Woodrow Construction Limited and others [2012] EWCA Civ 1590*. There was no continuing act(s) in this case because we find there was no discrimination. The acts that the claimant complains of do not represent a continuous pattern or course of alleged discriminatory conduct by any specific individual; they are discreet allegations with ongoing consequences. In respect of the s21 EqA claims, a failure to make reasonable adjustments occurs when the duty ought to have been fulfilled, which on the claimant's evidence might be from as far back as 2017 in

respect of the urinary-related complaints.

70 The Claim Form was received by the Employment Tribunal on 10 October 2019. 3-months back from that date is 11 July 2019. The addition of a further 36 days for early conciliation leads to a last date for the occurrence of an in-time claim to 4 June 2019. Therefore, any alleged discrimination act prior to 4 June 2019 is out of time.

71 The unfair dismissal claim has been brought within the appropriate (different) time limit under s111 ERA. The alleged discriminatory decision to dismiss, which took effect at the end of summer term, and the decision not to allow him to appeal are in time. Therefore, all of the claimant's complaints of the respondent's failures to make reasonable adjustments (pursuant to s20 and s21 EqA) are out of time except at issue 14(h).

72 As stated above, we have discretion to extend the time limit pursuant to s123(1)(b) EqA. There is no presumption that Tribunal's should extend time, the onus is on the claimant to persuade the Tribunal that it is just an equitable to do so: *Robertson v Bexley Community Centre CA [2003] IRLR 434*.

73 In considering whether to exercise its discretion, the Tribunal should consider the prejudice that each party would suffer as a result of granting or refusing an extension of time and should have regard to all of the other relevant circumstances. A key issue to be addressed, according to *ABM University Local Health Board v Morgan UK EAT/0305/2013* is: (1) Why was it that the primary time limit had been missed? (2) Why, after expiry of the primary time limit, was claim not brought sooner than it was?

74 The claimant appeal was out of time so he should have been alert to the need to act promptly and without unnecessary delay. Surprisingly, the claimant's solicitor ignored that some of his complaints were out of time when she issued proceedings on his behalf, so no explanation was forthcoming at that early stage. Despite this being identified on the list of issues, the claimant proffered no evidence in his witness statement in respect of his delay in bringing proceedings earlier. There was no explanation in the documents as to why proceeding were issued late in respect of 8 of the 9 surviving reasonable adjustment complaints.

75 The claimant referred to his ill-health in answers to questions from the Tribunal, yet during this time he did attend work and occupational health appointments, he corresponded and discussed his medical condition and work matters, he was represented by his trade union and even 3-months before he issued proceedings he wrote to his employer to complain about disability discrimination.

76 All of the out of time alleged discrimination are matters that the claimant had direct knowledge of and could have raised at the time, bringing timely Employment Tribunal claims when necessary. Lack of knowledge of Employment Tribunal time limitations is not accepted as a sufficient explanation for non-compliance with s123 EqA. The claimant is intelligent and articulate. He is a mature and experienced employee. He is capable of undertaking research and discovering the Employment Tribunal jurisdictional requirements, even if he was not advised of this by his trade union full-time officer.

77 The Tribunal is required to take into account the balance of prejudice between the parties and the perspective merits of the claim: *Rathkrishnan v Pizza Express (Restaurants) Limited EAT/0073/2015*. As the claimant's claims of discrimination are

rejected on their merits, any prejudice from rejecting the out-of-time complaint's will be minimal.

**Employment Judge Tobin  
Date: 22 March 2021**