Case Number: 3329472/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Doreen Dankyi	**v**	**St Margaret's School**

Heard at: Watford **On**: 16-19 September 2019
(6 & 7 November 2019 (in chambers)

Before: Employment Judge Bedeau
Members: Mr I Bone
Mrs A Brosnan

Appearances
For the Claimant: In person
For the Respondent: Mr G Ridgeway, Employment Consultant

RESERVED JUDGMENT

1. The claimant was not, at all material times, a disabled person.

2. The claim of direct disability discrimination is not well-founded and is dismissed.

3. The claim of harassment related to disability is not well-founded and is dismissed.

4. The claim of harassment related to race is not well-founded and is dismissed.

5. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.

6. The claim of direct race discrimination is not well-founded and is dismissed.

7. The claim of victimisation is not well-founded and is dismissed.

8. The provisional remedy hearing listed on Monday 24 February 2020, is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 17 December 2017, the claimant made claims of unfair dismissal, discrimination because of race and disability, as well as other unspecified payments. In the response presented to the tribunal on 2 February 2018, the respondent averred that the claims were presented out of time and are denied.

2. At the preliminary hearing held on 22 October 2018, Employment Judge Manley concluded that the claimant's complaints of race and disability discrimination were presented in time.

3. A further preliminary hearing was listed, in private, on 20 May 2019. The case was listed for a final hearing on 16 to 19 September 2019.

The issues

4. EJ Manley, on 22 October 2018, clarified the claims as follows:

> "Claims and issues
>
> 1. The claimant has brought complaints of disability and race discrimination. We looked at the claim form and discussed the complaints but more work is needed before a list of issues can be drawn up. We agreed that I would summarise details of the complaints as discussed so far and the claimant will consider her claim, seek advice and/or carry out research so that a list of issues can be drafted. A preliminary list is as follows:-
>
> Disability discrimination
>
> Section 6 Equality Act 2010 (EQA)
>
> 1) Was the claimant disabled within the definition in EQA at the material time? The claimant has had recurrent episodes of anxiety and depression.
>
> Section 20 and 21 EQA (duty to make reasonable adjustments)
>
> 2) Was there a provision, criterion or practice which put the claimant at a substantial disadvantage in comparison with persons who are not disabled and did the respondent fail to take such steps as it is reasonable to have to take to alleviate the disadvantage?
>
> The claimant's case is that there was criticism of how she carried out her work (for instance by making "to-do" lists) and that an adjustment to her hours was refused.
>
> Section 13 EQA (direct discrimination)
>
> 3) Was the claimant subjected to less favourable treatment because of her disability?

The claimant points to the refusal to adjust her hours and believes that Ms Rose Hardy, who had an aneurism, was allowed to adjust her hours.

Section 26 EQA (harassment)

4) Did the respondent engage in unwanted conduct related to disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

The claimant's case concerns the respondent summoning her to a meeting on Monday 31 July at 8.30am by email on Friday 28 July, allowing her very little time to find someone to accompany her and draft a grievance she had indicated she wished to bring.

Race discrimination

The claimant identifies herself as Black of African origin.

Section 13 EQA (direct)

5) Was the claimant subjected to less favourable treatment because of her disability?

The claimant's case is that she was refused an adjustment to her hours which Jenny Avery was allowed and that she was dismissed because of her race

Section 26 EQA (harassment)

6) Did the respondent engage in unwanted conduct related to disability which had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

The claimant's case concerns the respondent summoning her to a meeting on Monday 31 July at 8.30am by email on Friday 28 July, allowing her very little time to find someone to accompany her and draft a grievance she had indicated she wished to bring.

Section 27 EQA (victimisation)

7) Was the claimant dismissed because she had carried out a protected act by the grievance of 31 July 2018?"

5. Employment Judge J Lewis, at a preliminary hearing on 12 August 2019, further clarified the claims and issues to be determined by this tribunal:

6. The claims are those set out in the Order of 22 October 2018. Further particularisation of the claims is given below.

7. In relation to the issue of disability, there are the following (subject to the particulars to be given by the respondent as to whether this remains in issue):

7.1 Whether the claimant suffered from a mental impairment, as to which she states that she had recurrent episodes of anxiety and depression.

7.2 Whether this had a substantial (ie more than trivial) impact on day to day

activities.

7.3 Whether this was a long-term impact ie (so far as relevant) that it had continued or was likely to continue for more than 12 months. The claimant says it had already continued for 12 months at the time of her adverse treatment and is ongoing.

8 The respondent is to clarify by 19 August 2019, whether in relation to the reasonable adjustments claim, it relies on a defence under paragraph 20 of schedule 8 of the Equality Act 2010 ("EQA") ie whether it contends that it did not know and could not reasonably have been expected to know either that the claimant had a disability or that it placed her at the disadvantage(s) relied upon, and if so to address how that case is to be reconciled with the email from the claimant (using the name Renee Killick) of 28 July 2017.

9 In relation to the duty to make reasonable adjustments:

9.1 The claimant relies upon the following as being the relevant provision, criterion or practice ("PCP"):

9.1.(a) A requirement not to return to work at the point she wanted to return, on or around 19 June 2017.

9.1.(b) The required hours of work in respect of her start time.

9.1(c) The practice in relation to not being permitted to take unpaid leave during the holiday period.

9.1(d) The requirement to undertake an employment review.

9.1(e) The practice of being regarded detrimentally for taking notes.

9.2 The claimant contends that the following were reasonable adjustments that should have been made:

9.2(a) A phased return to work;

9.2(b) A flexible working arrangement;

9.2(c) Performance management to assist the claimant to carry out duties, instead of an employment review;

9.2(d) Being permitted to take notes without that being regarded detrimentally.

9.3 The claimant to inform the respondent by 19 August 2019, whether this fully and accurately sets out the PCP and reasonable adjustments relied upon and, if any corrections or additional matters are relied upon, to state what these are.

10 In relation to victimisation claim, the claimant relies on the grievance of 31 July 2018 raised with Ms Judith Fenn. She must state by 19 August 2019 whether any of the earlier matters referred to in that grievance are in themselves relied upon as protected acts, and if so to particularise what is relied upon, saying

whether this was in writing or verbal, and when and to whom. If this requires an amendment to the claim it will be for the claimant to make any such application as soon as possible."

6. During the course of the claimant's evidence she was taken to a document she had prepared on the provisions, criteria and practices in support of her failure to make reasonable adjustments claim. She listed them 1 to 11. She said that from her list, she was not pursuing numbers 5, 8 and 11.

7. In relation to paragraph 9.1 in Employment Judge J Lewis' case management summary and orders, referred to above, she stated that 9.1 (a) to 9.1(d) were not PCPs. In respect of (9.1(e), it was repeated in numbers 1 and 2 in her list of PCPs. The following is her list:

"PCP – *The neutral circumstances which creates this situation is the claimant having to return to her substantive post,, as requiring the claimant to be suitable to perform duties in line with the contract of employment.*	**Reasonable Adjustment** – *because performing existing role without was causing and exacerbating the symptoms of depression.*
1.To work without 'to do lists'	Allowing the creation of 'to do lists' to undertake and complete work.
2.To work without 'checklists'	Allowing the creation of 'checklists' to undertake and complete work.
3.To work with numerous ad hoc interruptions	Allowing allocated times as necessary to work in privacy and uninterrupted or allowing home working
4.To perform new work tasks without guidance and training.	Providing training and development (eg electronic document management)
6.To work without flexible working arrangements	Flexible working arrangements
7.To work without adjusted hours of work	Adjusted hours of work
9.To continue to work in the same role.	Redeployed to suitable role.
10.No modification of normal disciplinary / employment review procedures.	Modify disciplinary or grievance procedures."

The evidence

9. The claimant gave evidence and did not call any witnesses.

10. The respondent called Ms Judith Fenn, Chair of Governors; Ms Rosemary Hardy, former Head Teacher; Dr Ken Victor Young, Bursar; Reverend William John Morris Gibbs, Deputy Chair of Governors; and Mr David Clout, Governor.

11. In addition to the oral evidence the parties adduced a joint bundle of documents comprising in excess of 176 pages. Further documents were produced during the course of the hearing which were notes of the

Employment Review Appeal Meeting, R1; and Judith Fenn's interviews with a number of witnesses in relation to the claimant's grievance, R2.

Findings of fact

12. The claimant describes herself as Black African. She applied for and was offered the position of Personal Administrator to the Bursar/Human Resources Administrator on 15 July 2016, working full time. This was a new position created for successful applicant to provide support to the Bursar and the Human Resources Manager. The claimant commenced employment on 22 August 2016, subject to a probationary period of six months. We note that she was interviewed along with two other candidates for the position who were white. She was the only black candidate and was successful.

13. Prior to the commencement of her employment, a Pre-employment Health Assessment was conducted by telephone by the respondent's occupational health doctor, Dr Shriti Pattani, Consultant Occupational Health Physician, on 4 August 2016. In the assessment, Dr Pattani stated that the claimant:

> "Is fit for employment but has a health condition. I have asked her to contact me if she has a recurrence of any symptoms". (page of the joint bundle 75)

14. In the claimant's witness statement, she stated that she did not disclose to the respondent her mental health problems as she feared she would be discriminated against, face challenges and may not get the help she required. This was difficult to understand because without telling the respondent about her mental health problems it would be difficult to assert knowledge on its part and for it to make reasonable adjustment unless it could be said that knowledge could reasonably be construed from all of the surrounding circumstances.

15. In the Pre-Employment Health Assessment there is no reference to any mental health conditions she was suffering from at the time.

16. Contrary to her assertion, we find that the claimant was line managed by Dr Ken Young, Bursar, and by Ms Lesley Bates, Human Resources Manager. Ms Bates' management was in relation to human resources issues. We reject the claimant's contention that she was not line managed by Ms Bates as it was clear from the evidence given by Dr Young that he and Ms Bates line managed her.

17. From the commencement of her employment to having successfully completing her probation on 31 January 2017, the claimant accepted that she was coping well and that the problems she described in her Disability Impact Statement were not affecting her. (24)

18. She asserted that her disabilities, at all material times, were anxiety and depression.

19. In her evidence she told the tribunal that during her probationary period she deliberately did not disclose her mental condition to the respondent. The reason was that it was personal and that employers can make judgments.

20. During her employment she used the name Ms Reenee Killick which later changed to her current name.

21. We find that there were no issues between her and Ms Bates during her probationary period. She told the tribunal in her evidence that any changes in Ms Bates' behaviour towards her came after her probationary period had ended. She accepted that she was the best candidate for the position.

22. She was given a very good probationary review although there were concerns expressed about her quality of work and that she would use too much initiative, such as taking a piece of work in the wrong direction by doing more than what was required. There was also an issue about her adapting to workplace practices. In relation to initiative, it was noted that she was able to take the lead sometimes but needed to demonstrate a better understanding of what was already in place to avoid possible duplication or even confusion. Both Ms Bates and Dr Young wrote that she had satisfactorily completed her period of probation. (76-79)

23. In a letter dated 5 April 2017, sent by Dr Young to the claimant, she was invited to meet with him and Ms Bates to discuss her role and responsibilities. He wrote:

> "Given your role, as set out in your job description, has the dual function of providing PA support to the Bursar and undertaking a range of HR administration, it would be helpful to review with you the allocation of your time, your thoughts and your workload, and the school's expectations of the role. As you are aware, the role, in its current form, is relatively new, and the purpose of the meeting is to ensure that it is operating effectively to support the Bursar and HR function, and to address any questions you may have.
>
> In addition, I'm aware from Lesley that you have raised an issue about your working hours, specifically during school holiday periods. As your line manager, and a senior manager with responsibility for the allocation of resources, clearly any decision regarding your working hours lies with me. Given that we will be discussing workload when we meet, I would also like to clarify your question on working hours at this time."

24. The meeting was held on Wednesday 12 April 2017 during which they discussed what was in the letter. No notes were taken and there was no follow up correspondence.

<u>The claimant's flexible working request</u>

25. On 2 May 2017, the claimant made a flexible working request to Dr Young in which she wrote:

> "I am writing to request flexible working arrangements and a request for additional unpaid holiday as my personal circumstances have recently changed.
>
> The reason for my request is that I have recently separated from my husband and I am now responsible for the majority of childcare as I am living alone as a single parent.
>
> Flexible working
>
> Please see attached request form.
>
> Additional holiday
>
> I wold like to request 10 days unpaid leave to my annual holiday entitlement; this would provide the flexibility to manage childcare for both my young children during the holiday period.
>
> If the requests are approved, I would like to commence as soon as is practicable."

26. Her contractual hours were 8am to 5pm, Monday to Friday with a 1-hour lunch break. In addition, she was entitled to 25 days holiday, including bank holidays. In her flexible working request, she asked if she could start work at 8.15 am, Monday to Friday and finish at 5pm with a 45-minute lunch break in term-time. Outside of term-time, Monday to Friday, 9am to 4pm with a 30-minute lunch break. Her holiday entitlement should remain the same. (79(b))

27. Her flexible working request made no reference to her claimed disabilities of anxiety and depression. Further, we have noted that she referred to having recently separated from her husband, had the majority of childcare, and was living alone as a single parent, were the reasons for the request.

28. In a psychiatric report, prepared by Dr Christina Magnusson, Locum Consultant Psychiatrist, dated 8 March 2016, she stated that the claimant's husband separated from her in 2011. He is the father of their two children. She wrote that the claimant had reported a history of episodes of depression and had taken two overdoses in the past. She presented herself as well kempt, calm and pleasant, no psychotic symptoms, no suicidal thoughts or plans. Her risk to self and to others was low. She was experiencing an episode of depression but there were no current symptoms of psychosis or mania. (31–34)

29. We refer to Dr Magnusson's report because what the claimant said in her evidence before us, was that she separated from her husband in 2011 and not in either 2016 or 2017. It was difficult to see how a separation in 2011 could be described in May 2017, as recent. The doctor also did not diagnose a mental impairment in March 2016.

30. The claimant told the tribunal that her son is one year old, and her daughter is five and attends the respondent's school.

31. Dr Young was on leave from 22 to 30 May 2017. On or around 22 May 2017, the claimant was checking his in-tray when she came across a letter dated 1 June 2017, addressed to her by Dr Young. It was unsigned and was not on headed notepaper. After having read it, on the advice of a friend, she took a photograph of it on top of a copy of the Times Newspaper dated Monday 22 May 2017.

32. The letter was written as if the decision had been taken by Dr Young to refuse the claimant's flexible working request application and was written in advance of the planned meeting they were going to have on 31 May 2017, to discuss her application. In the first paragraph of the letter he thanked the claimant for the meeting having taken place on 31 May to discuss her application (81(a) to 81 (b)).

33. Having read the letter, the claimant gave it to Ms Bates who said that it should be given to Ms Rosemary Hardy, Head Teacher. The claimant and Ms Bates then made their way to Ms Hardy's office.

34. Ms Hardy recalled the conversation as having taken place on 25 May 2017. She stated that Ms Bates came to see her in the company of the claimant who was very distressed. She was asked to speak to the claimant about the draft letter found in Dr Young's tray. She talked to the claimant. She told the tribunal that she was not prepared to comment on the content of Dr Young's draft letter but apologised to the claimant as she was distressed. She believed that shortly after the meeting, the claimant went home.

35. In the claimant's evidence she said that Ms Hardy called another meeting and assured her that it was not a "rubberstamping exercise" that Dr Young had undertaken and that her flexible working request would be considered.

36. Following Dr Young's return from leave, he met with the claimant on 31 May 2017 to discuss her flexible working request. After meeting he sent her his outcome letter, dated 31 May 2017, setting out his reasons for refusing her request. He wrote:

> "Following our meeting and having previously considered your request carefully, I must inform you that regrettably these changes to your hours cannot be agreed for the following reasons:
>
> - As you are aware, it is extremely busy first thing in the morning each day, with many issues needing to be resolved early ready for the day, to ensure the school is providing the quality of provision to meet parent and pupil expectations. I have arranged my own working hours to meet this need, and it is essential that PA assistance is also available to deal with matters and support the Bursar's role from 8am each morning. The hours of the post were advertised specifically on this basis, and reducing the level of a

key Bursary resource at 8am would have a significant impact upon the quality and support and performance of the school.

- As a stand-alone role, the Bursar's PA responsibilities cannot be reorganised amongst existing staff: confidentiality being a primary concern as I know you appreciate.

- Similarly, activity within the Bursar's remit and their HR function are equally busy during term and non-term periods, hence advertising a full year role. Non-term time is an important opportunity to address issues in progress work in order to continuously drive up the quality of provision throughout the school. As you know, much of the construction and maintenance work is undertaken during the holidays, together with the full range of my responsibilities, and therefore I require full PA support. In addition, as you will appreciate, given the broad remit, holiday periods are vital to progress HR developments and improvement in administrative systems, and again, part of the rationale for your role was to provide resource to support this activity. Reducing such support during the holidays would very negatively impact upon the overall level of performance of the school.

- For the reasons set out above, increasing your entitlement to holiday, albeit unpaid, would also have a detrimental impact on the level of support we are able to provide across the school in key areas.

- Obviously, I appreciate that there are a number of support staff within the school who do work reduced hours during the holiday periods, but this is largely historical and the needs of each individual post are assessed depending on the duties and responsibilities of the particular role. It was clear, when your role was established and advertised, that the role was required equally during the term time and holiday periods.

- Clearly, this is not the outcome that you are seeking, but I hope you will understand the reasons for my decision."

37. The claimant was then informed of her right of appeal which she had to exercise within 14 working days from receipt of the letter. (81c to 81d)

38. The question then arose why had Dr Young drafted an outcome letter in May in relation to the claimant's flexible working request prior to his meeting with her? In his evidence he told the tribunal he had taken legal advice and understood that if the request was granted what was required was for him to send the claimant a letter. However, if it was going to be refused, he would have to have a consultation meeting with her. He understood that he could form a judgment prior to the meeting on the merits of the request and then hold a meeting to discuss it. Should anything of significance come to light during the meeting that would be the time to consider. He told the tribunal that he had spent a considerable amount of his time considering the claimant's predecessor's hours; what support he would need as the Bursar; and what was in the best interests of the school. He concluded that the hours could not be changed, and nothing had changed regarding the needs of the role. He then drafted the letter on that basis. He, however, accepted that it would have been

preferable if he had prepared notes for the meeting rather than drafting an outcome letter.

39. There is no requirement under sections 80F and 80G Employment Rights Act 1996 and in the Flexible Working Regulations 2014, for there to be a meeting to discuss a request, only that the employer shall deal with it "in a reasonable manner". We accept Dr Young's account that he had taken legal advice and was following that advice and the letter reflected his reasons for refusing the request. He told the tribunal that the school had sold land for £12 million in 2015/2016 and that there was a 50-year backlog of maintenance and residual problems to attend to which were completed over a 4-year period. This had placed additional strain on him. He refused the claimant's flexible working request application because of the detrimental impact it would have on the performance of the school, section 80G(1)(b)(vi).

40. In evidence Ms Hardy's told the tribunal and we do find as fact, that the role of the Bursar is a full-time, all year-round role which requires the support of a Personal Assistant. The school has a full programme of summer lettings and was often busy in the holidays and during term time. Among other things, it was let to language schools whose attendees were resident at the school. Dr Young had specifically devised the claimant's role to take into account these developments.

41. As regards Ms Hardy's circumstances, she told the tribunal, which the claimant could not contradict, that she had a brain aneurism but was not offered a phased returned to work. She returned to work against her Consultant's and the Board of Governor's advice because she felt that the children and staff needed her. There was nothing officially agreed about her hours, no occupational health report was prepared for her and she did not have any fixed hours. In relation to her PA, Ms Jenny Avery, she works during term-time including one week into the summer holiday period and one week prior to the start of the school year. She also administers the results of examinations in August. The school did not require her PA to be working 52 weeks in the year.

42. The claimant asserted in evidence that Ms Avery, who is white, following her return from maternity leave, had her hours changed, going from full-time to term-time. The claimant produced no evidence of this, and Ms Hardy told the tribunal that no change had been made to Ms Avery's hours upon her return to work following maternity leave. Having heard the evidence, we accept the evidence given by Ms Hardy as she was aware of the requirements of her own PA.

43. As part of the claimant's case she asserted that staff do not change jobs. We find that her predecessor, Ms Julie Curran, Student Recruitment, did change jobs within the school.

44. Following the outcome of the flexible working request application, the claimant went on sick leave from 31 May 2017. From the Fit Notes she supplied, in the Fit Note dated 31 May 2017, she was not fit for work from

that date to 7 June 2017, as she was diagnosed as suffering from work-related stress. The Fit Note dated 7 June 2017, stated that she was not fit for work from that date to 14 June 2017 and gave the same diagnosis which again was repeated in the Fit Note dated 14 June 2017 covering 13 June to 21 June 2017 (88b to 88d).

45. She was invited to a meeting to discuss her sickness absence on 8 June 2017 but did not attend. She was invited to complete a Health and Safety questionnaire and an appointment was arranged with the respondent's occupational health provider. (159)

46. In her email dated 13 June 2017, she appealed the outcome of her flexible working request application, contesting the reasons given by Dr Young for an 8am start and the workload issues during the school holidays. She asserted that other employees could deal with issues around maintenance. She stated the following:

> "Given my request for flexible working under The Employment Rights Act 1996, I feel like I am being subjected to both inconsistency and bias. The consideration given to my application excludes me from equal treatment given to a range of other administrative support staff that have been approved a variation of flexible working arrangements. It feels as if you are subjecting me to differential treatment in an order to place me under undue pressures and stress and subsequently trying to force me to leave, I cannot think of any other valid reason that my entire request has been declined based on such weak justifications, its cruel and inhumane. The mental health and wellbeing of both an employee and a pupil has not been considered. My request would allow for a fundamental work life balance where I can continue to do a good job and fulfil my parental role. This is illogical for this to be considered and unreasonable ask considering my daughter attends this school on the same site. I find it very demoralising and it remains unjustifiable."

47. We find that the reason given by the claimant for the refusal of her flexible working request was that the respondent was seeking to force her to leave her employment. She made no reference to either race or disability discrimination, nor did she say that she was disabled at that time. (82-83)

48. The claimant's daughter attended the school at which she worked. It was her contention that the 8.15am start was to take into account that she was unable to drop her daughter off in class for 8am. The walk from her daughter's class to her office would mean that she would have to start at around 8.15am.

49. Ms Hardy's evidence was that the school runs a breakfast club from 7.30 in the morning. There was nothing preventing the claimant from dropping her daughter off at that time. Also, around 7.55am, the children would be in the playground where they would be supervised. She also said that it only takes three to five minutes to walk from her daughter's class to the Bursary where the claimant worked.

50. We accept Ms Hardy's evidence whose responsibilities included the welfare of her staff as well as the children. We find that the claimant could

have brought her daughter to school a few minutes earlier than 8 o'clock in the morning who would have been supervised if she was in the playground or her daughter could have attended the breakfast club. Either one of these steps would have enabled the claimant to start work at 8am.

51. In addition, Ms Hardy told the tribunal, and we do find as fact, that academic staff would start teaching at 8.15am and would normally be on site by 7.45 in the morning. If an academic member of staff goes to the Bursary they would need to be there before 8:15 in the morning. As a member of staff working in the Bursary, the claimant would need to be there before 8:15am to attend to any enquiries by academic staff. Ms Hardy gave, as an example, a member of staff in the Geography Department who may want to organise a field trip on the day and would need to speak to the Bursar to approve finance. They would need to go to the Bursary to book an appointment with Dr Young before they start at 8:15am. A member of staff may also have a non-teaching period and may want to contact the Bursar prior to 8.15am. It is important that there be someone present in the Bursary to attend to their queries at that time.

52. Dr Young said in evidence and we do find as fact, that occasionally, he may be out of the office attending meetings at that time in the morning. It was, therefore, important that there be someone present to whom staff could contact to deal with their issues or pass messages on.

53. Dr Young wrote to the claimant on 19 June 2017 stating that she should forward her most recent fit note from her doctor. In addition, he asked her to return the completed HSE questionnaire. He wrote that to enable the respondent to support her return to work, it would be helpful if she meet with the occupational health doctor, Dr Pattani, who would be able to advise on measures which may be useful in addressing her work-related stress and give possible timescales. He arranged an appointment with Dr Pattani on Thursday 29 June 2017. He wrote:

> "As you are absent due to work-related stress, it is essential we ensure that you are fully fit before you return to work."

54. In the claimant's evidence, she acknowledged that as the respondent did not know when she was due to return to work, it was reasonable for her manager to seek occupational health advice with a view to assisting her return to work. She also accepted that arranging an appointment with Dr Pattani was not done to keep her away from work.

55. We find that this was a genuine attempt by the respondent to support the claimant's return to work. (85 - 86)

56. In Dr Pattani's report dated 30 June 2017, sent to Ms Bates, she wrote the following:

> "Dear Lesley

> Thank you for asking me to meet with Ms Killick to provide advice on supporting her return to work as she has been off work and the GP has signed her off with 'work-related stress'. We met on 29 June at 1:30pm. Her daughter had a presentation afternoon so we finished before 2pm.
>
> Ms Killick and I discussed her perceived work-related stressors which included her application for flexible working and some inter-personal issues. Ms Killick likes her job and tells me she wants to return to work. I explained to her that in order to resolve this matter, she will need to discuss the issues with her line manager so that the matter can be addressed and she can return to work. She explained that she does find conversations around inter-personal relationships difficult to discuss. In my experience, many people find these types of conversations difficult and I have shared this with her. I have therefore suggested she meets with your counsellor for 1– 2 sessions with a specific aim of how she might communicate some of her concerns regarding the inter-personal relationships to her line manager.
>
> In summary, Ms Killick's health has improved since she first started her sickness absence. In my opinion, to support her return to work, I would suggest that she meets with the school counsellor for one – two sessions so she can discuss how she is going to communicate her work-related stressors to her line manager. I would advise she then meets with her line manager with the completed HSE risk assessment to have the discussion about her perceived stressors, and also discuss a structured, supported return to work plan. Once this is completed, she can return to work unless her health situation changes.
>
> I understand she has a meeting regarding her flexible working request. From a medical perspective she is fit to attend such meeting.
> I have not made a further appointment to review her at this stage.
>
> Ms Killick has checked the content of this e-mail for accuracy and has given her permission for it to be sent to you. I am sending her a copy of this e-mail." (88a)

57. As regards the claimant's appeal against the outcome of her flexible work request, following two postponements due to her unavailability and at her request, Ms Hardy heard the appeal on 5 July 2017. Having considered the grounds and the claimant's account, it was rejected for the same reasons given by Dr Young. She stated that the role of the Bursar's PA carries considerable responsibility and that the claimant's request to amend her hours of work in the morning would have a significant impact on the support and cover which was available. The role involves confidentiality and it was for that reason that it was not appropriate for responsibilities to be reassigned to other administrative staff. Further,

> "The Bursar and the HR department work throughout the calendar year and whilst during the school holidays the nature of some of that work may be different, the need for the resource remains." (89-90)

58. A return to work meeting was scheduled to take place on 20 July 2017 at which point the claimant had had two counselling sessions. The meeting eventually took place on 27 July 2017. There was a delay in the claimant completing and sending off the HSE form due to her broadband and printer.

Meeting on 27 July 2017

59. Completing the HSE form was a tick box exercise. Questions 1 to 24, required the claimant to answer either, "never", "seldom", "sometimes", "often", or "always". From questions 25 to 35 she was required to tick boxes, "strongly disagree", "disagree", "neutral", "agree", "strongly agree". From the responses given she was questioned by Dr Young. In answer to questions 5, 14 and 21, she said that she was the subject of personal harassment in the form of unkind words and behaviour; she experienced friction or anger between colleagues; and was sometimes subjected to bullying. She said that the perpetrator was Ms Bates, Human Resources Manager. It was noted that the primary concern was the claimant's perception that Ms Bates had no respect for her privacy, especially when in her office and was offended by the way Ms Bates came round to her side of the desk and looked at her computer screen as well as the paperwork on her desk. As a preventative measure, the claimant, tried putting bags and even spare shoes in the way to prevent Ms Bates from accessing the side of the desk where she worked. She said that such attempts failed as Ms Bates would walk to her side of the desk and in the process, would kick the items on the floor. She addressed it once with Ms Bates, but Ms Bates took the view that she was being rude and was questioning her integrity. The claimant said that she trusted Ms Bates completely as far as confidentiality was concerned. She was unable to raise her concerns with Dr Young as she worked in a small team of three and it would be awkward to raise them. She further stated that culturally, she felt uncomfortable complaining to an "elder", meaning her line manager, Dr Young.

60. In addition to her perceived invasion of privacy, the claimant said that Ms Bates 'chucked' her paperwork at her, was perceived to be authoritarian; and lacked respect for her. She said that Ms Bates, at times, would give her a lot of work to do then halfway through the task, take the work back. She believed the confusion was intentional, in that she was being set up to fail. She also said that everything from Ms Bates seemed to be like 'lastminute.com', and gave as an example, a piece of work Ms Bates asked her to do, which was to create a tracker but she did not know that Ms Bates wanted her, as part of that work, to create a template. She had not populated the tracker with information, nor was she using the information to keep Ms Bates informed.

61. When asked by Dr Young why she did not address her concerns with Ms Bates more forcefully, she replied that she was very bad at confrontation. She said that she discussed it with the staff counsellor that she intended, on her return to work, to raise these issues with Ms Bates and how she needed to respect her work environment. She suggested that she may have lunch with Ms Bates in order to "clear the air". There were no other colleagues she found difficult to work with.

62. Dr Young pointed out to the claimant that some of the answers she gave were on the face of it, contradictory. The claimant said that there were times when she had been under extreme time pressure, such as, getting

together the application schedules for the new Head of Junior School position; members of the Senior Management Team were demanding information that was not necessarily available; and that the deadlines were incredibly tight. She also expressed anxiety at being asked to build an interview schedule, then having the job taken away from her by Ms Bates. She felt belittled and professionally embarrassed. As a final example of having to work under extreme pressure, she remembered the day she was due to take annual leave, Ms Bates asked her for a huge amount of information. As a result, she stayed late to complete the work, even having supper with the boarders.

63. She was asked by Dr Young whether it all came to a head after her request for flexible working had been declined. She repeated that she was not good at dealing with confrontational matters as she thought that any attempts to do so would be fruitless. She said that a possible trigger was when the Head Teacher asked her to do something that would normally be asked of her PA. As her PA had been given some time off work for personal reasons, the claimant believed that in conjunction with the refusal of her flexible working request, that the respondent was acting unfairly. She said that someone had asked her whether she was "ok" and at that point she burst into tears and left work. She went home and spoke to a friend who suggested she should visit her doctor. She was then signed off work, being diagnosed with work-related stress.

64. She was then asked about the eight questions she failed to answer. In relation to question 23 "I can rely on my line manager to help me out with a work problem", she replied that until she was signed off work, there had not been any work-related problems. In relation to question 31, "My colleagues are willing to listen to my work-related problems", she replied that she sought support from her colleagues but did not know if this was being given "willingly", which explained her inability to answer the question with any degree of certainty. In relation to question 33, "I am supported through emotionally demanding work", her response was that there had not been any emotionally demanding work.

65. When asked by Dr Young 'How she saw us taking all of this forward', she said that she would like to return to work before the teachers return as her absence would probably not have been noticed. She felt more comfortable addressing her relationship with Ms Bates by e-mail and acknowledged that it would have to be addressed. Dr Young concluded by saying that he would consider and share his conclusions with her later that day. (94 – 96)

66. In evidence, under cross-examination in relation to invading the claimant's space and kicking bags and shoes, the claimant said that on about five or six occasions Ms Bates would invade her space and was frequently kicking her bags. She later said that it happened three or four times overall but not during her probationary period. She stated that Ms Bates would come into her office about three times a day and would throw papers into her tray about twice a day.

67. From the claimant's account, her complaints about Ms Bates must relate to the period between the end of January after successfully completing her probation, and 31 May 2017, when she went on sick leave. However, she told Dr Young that she had no work-related problems. Her evidence in relation to her relationship with Ms Bates was inconsistent and unreliable. There was no mention by the claimant of having been discriminated against because of race and/or disability.

68. Dr Young's reasonably held belief, following the meeting on 27 July 2017, was that the claimant did not accept that her role was essentially a split one. She did not appear to understand that it required her to receive and to follow instructions and guidance from both him, as Bursar, and Ms Bates as Human Resources Manager. She appeared to believe that Ms Bates had no right to monitor her work. She also indicated that she would only be satisfied with an excessive amount of privacy which would be unreasonable in an office-based role. She was concerned that Ms Bates would come round to her side of the desk and may see confidential information. The claimant expressed the need for and had developed the practice, of creating a physical barrier of chairs and files to prevent Ms Bates accessing her side of the desk. In light of these concerns, Dr Young decided to address them at an Employment Review meeting and wrote to the claimant on 28 July 2017 inviting her to such a meeting, scheduled to take place on Monday 31 July at 08:30am at the school. He then wrote:

> "At this meeting, the question of your employment will be considered in accordance with the School's Terms and Conditions of Employment.
>
> I specifically wish to discuss with you your suitability for the position you currently hold; especially in light of our recent meeting.
>
> I must inform you at this time that the school considers that you may not be suitable for your position and this may result in the termination of your employment.
>
> You have the right to be accompanied by a fellow work colleague or Trade Union representative at this meeting. Please let me know in advance if you intend to be accompanied.
>
> You are required to confirm your attendance at this meeting. Should you fail to attend the meeting without giving prior notice of some exceptional reason for non-attendance, it may be held in your absence and may end in termination of employment." (111)

69. The claimant e-mailed Dr Young on 28 July at 11:09 in the morning, stating the following:

> "Dear Ken
>
> Employment Review Meeting
>
> I acknowledge receipt of your letter dated 28/7/17 (today) following a Health and Safety questionnaire review meeting on 27/07/2017 (yesterday), where I discussed that I had felt personally bullied and harassed. I am unable to get a companion at such short notice due to the hasty time scale; therefore I request that this meeting be

re-arranged. I am surprised how quickly this has proceeded given that I have been fit and waiting to return to work for over three weeks.

Your letter is out of the blue and not what I was expecting as I was expecting to return back to work after a period of stress, triggered as a form of harassment against me personally. As I am not aware what an Employment Review meeting is, please can you kindly send me the policy that this review meeting falls under? There is also some further information that I ask as follows:

- Who will be in attendance at the meeting?
- What aspects of my employment exactly are you reviewing?
- What criteria will you be using to measure the review?
- What has led to this meeting?

I feel this is an example of precisely why I feel personal bully and harassment, I was simply too intimidated and embarrassed about what was happening to come forward. Now, having come forward, I am being subjected to further unfair treatment and discrimination and I believe it is all because I am black and this unlawful.

The shock of this letter today has triggered great anxiety and stress on my mental health and I have made arrangements to seek medical advice immediately and will keep you informed of any diagnosis from my doctor." (101)

70. The claimant accepted in evidence that this was the first time she alleged race discrimination. She also accepted that she did not make an allegation of race discrimination in relation to the refusal of her flexible working request.

71. At 11:14am on 28 July 2017, the claimant e-mailed Dr Young stating that it was her intention to lodge a grievance. She felt that she had been unfairly treated because she is black and had recently suffered ill-health. She wrote that she had not received a copy of the grievance policy she had requested the previous week. Once received, she would submit a formal grievance. (103)

72. At 1:31 in the afternoon, she e-mailed Dr Young again and asked him whether or not she would be allowed to return to work on Monday 31 July, or remain off work at his request? (105)

73. Although Dr Young could not recall sending an e-mail to the claimant on the same day at 5:30pm, an e-mail was sent from his account to her stating that he had just returned to the office and could confirm that she was expected to return to work on Monday 31 July. He attached the grievance procedure; re-arranged invitation to an Employment Review; process for conducting an Employment Review; and response to the claimant's subject access request. (105)

74. Again, on the same day at 6:49pm, the claimant e-mailed him referring to his e-mail at 5:30pm. She wrote that as she had only just received the grievance policy and was preparing her grievance, it would be premature to hear her grievance. She referred to her treatment when she submitted her flexible working request and said that she was being victimised due to

her alleged unfair treatment because of racial discrimination. She stated that as Dr Young and Ms Hardy were named in her grievance, she did not feel that it was appropriate for him to hear her grievance as there would be a conflict of interest. She would ensure that her grievance was lodged first thing on Monday 31 July.

75. In relation to the Employment Review meeting, she wrote that it would be inappropriate for Dr Young to chair it. As her companion would not be able to attend, it would be reasonable to rearrange the meeting within a reasonable timescale. She then wrote:

> "Given that I am now suffering with a mental health disability, I do have a legal right to be accompanied and it would be easier for me to communicate any concerns with a companion present as I have already voiced.
>
> The school should be aware that the Equality Act 2010 protects me from the race and disability discrimination I am facing."

76. She then stated that she would be bringing a cheque for £10 on Monday 31 July to cover her subject access request. She then wrote the following:

> "Please note that I have declared that I am suffering from depression, and now on medication for mental health treatment. The doctor has not signed me off work and therefore I am able to attend work at 08:00am on Monday 31 July 2017 and I am happy to discuss any reasonable adjustments that may be required. Thank you for confirming that I will be back at work on Monday". (104)

77. She e-mailed Judith Fenn at 01:52am on 31 July 2017 attaching her grievance letter for Ms Fenn's attention. (106, 120 - 123)

78. At 02:21am the claimant e-mailed Dr Young stating that as her grievance involved Ms Hardy, Ms Bates and himself, she had decided to submit it to Ms Fenn. She stated that she would be attending work and may experience some 'side effects' due to anti-depressants treatment for depression. (107)

79. In relation to her grievance, Dr Young wrote to her on 28 July stating that her grievance hearing would take place on Monday 31 July at 08:30am. The intention was to hold the grievance hearing before the Employment Review hearing. As the claimant objected to Dr Young conducting the grievance, as well as the Employment Review hearing, the grievance hearing was adjourned to be chaired by Ms Fenn.

80. Although the claimant expressed her belief that Dr Young should not chair the Employment Review meeting due to the fact that she was going to raise a grievance against him, and although she had indicated she had not had sufficient time to get a companion to accompany her to the meeting, these were not issues raised at the Employment Review meeting, which went ahead at approximately 08:31 on 31 July. She told us in evidence that her colleagues would have been reluctant to attend as her companion,

hence she did not contact any of them. She said she had not brought a representative to any of her meetings with the respondent.

81. We accepted Dr Young's evidence that he did not see the claimant's e-mail, sent on 28 July 2017 at 18:49, until after his meeting with her on 31 July. He did see and responded to her earlier e-mail at 11:09 on 28 July in which she stated that the shock and anxiety of his invitation letter triggered great anxiety and stress on her mental health.

82. The e-mail of 28 July 2017 sent at 6:49 in the evening, was the first time the claimant stated that she was suffering from a mental health disability. As we have already stated, this document was not read by Dr Young prior to the Employment Review meeting. (104)

83. Dr Young received and read the e-mails sent to him by the claimant prior to the review meeting in which the claimant referred to suffering from stress, anxiety and depression.

Employment Review meeting on 31 July 2017

84. At the Employment Review meeting, Dr Young explained that taking into account the claimant's anxiety in having to attend the meeting, her colleagues did not know about the meeting. He would take notes and share them with her after the meeting. He said that the respondent had the discretion whether to follow a disciplinary procedure having regard to her short length of service. He explained that the meeting was arranged due to his concerns that she would not be suitable for employment in her current position. He was of the view that she struggled to communicate, and she had said until her recent period of stress, she had not experienced any problems in the workplace. He, however, noted that she was unable to communicate with Ms Bates as the Human Resources Manager, with whom she had to work very closely.

85. The claimant said that she did not struggle to communicate work-related matters, but struggled with personal matters, such as how she was feeling. There was a discussion about Ms Bates, her going round to the claimant's side of her desk, and objects being placed on the floor. Dr Young said that the claimant was uncompromising when it came to working in what he described as a necessarily flexible job. The claimant referred to her having to set up detailed systems to ensure everything was done to the very best of her ability. Dr Young noted that the way she worked was wholly disproportionate to the scale of matters at hand and cited examples of the numerous printed and handwritten "to do" lists and "check lists" in her office. He explained that the nature of the job meant that, at times, there needed to be more flexibility and that the workload would be unpredictable. The claimant replied that she had always been a systems person as it increases efficiency and saved time.

86. In relation to Ms Bates, Dr Young said that it was not unreasonable for a senior colleague to come to the claimant's side of her desk to explain something on the screen. The claimant replied that there was nothing on

the screen at the times Ms Bates came around to her side of the desk. She suggested that Ms Bates simply wanted to see what was on her desk and was exerting her authority and was intimidating her. She would also "chuck" work on her desk in front of her.

87. Dr Young noted that the claimant did not work as if in a team, or in a collaborative manner. He referred to work she had been asked to do which was then saved in areas of the network without informing Ms Bates where they were. He suggested that the claimant wanted some autonomy from Ms Bates in respect of the HR function. He also noticed that she did not keep Ms Bates abreast of progress in relation to some tasks. The claimant replied that she would only raise a concern if she was struggling with a particular task. She said that she had no problem working with Ms Bates but felt she had been bullied by her. She also felt that she had been harassed and that Ms Bates over-scrutinised her work. It was unfair treatment and concluded that it was because Ms Bates did not respect her because she is black. It was pointed out to the claimant that Ms Bates was on the recruitment panel that recruited her notwithstanding that she was the only black person short-listed. The claimant's response was to say that it was not relevant. Dr Young reminded her that the Head Teacher's recent temporary personal assistant was Ghanaian and she, the PA, had not raised concerns about being treated in a racist manner. The claimant's response was to say that the assistant was temporary, therefore, not relevant.

88. Dr Young also mentioned that non-white staff did not feel that the institution was racist. The claimant replied that she was the only African/Caribbean black person and she was being discriminated against. She referred to the McPherson report and that racism had always been close to her heart as she frequently witnessed discrimination.

89. Dr Young asked about her mental health disorder to which she replied saying that the doctor she visited on 28 July diagnosed her as suffering from depression and prescribed Citalopram. She had earlier advised him that she required reasonable adjustments prior to the meeting but these were not made.

90. At that point Dr Young adjourned the meeting to seek advice. He told us that he had sought advice from an employment specialist and on his return to the meeting, he informed the claimant that he was dismissing her with immediate effect and would be paid three months' pay in lieu of notice. He said that the school employed staff from many different nationalities and abided by the Equality Act. She was advised that she had the right to appeal his decision. We make this further finding of fact that according to Dr Young, the claimant would have found it very difficult to return to the workplace, and he would have found it difficult to work with her due to the tone and nature of her e-mails which suggested a very significant disquiet, touching on a loathing of the respondent.
(118 – 119)

91. On 6 August 2017, the claimant appealed her dismissal. She wrote that she was suffering from anxiety and depression which was exacerbated by her unfair treatment. She had a recurring condition diagnosed the previous year by a mental health consultant and that she had recently been suffering from two episodes in less than three months at work. She claimed that the decision to dismiss her was an act of disability discrimination as she was protected as a disabled employee. She further alleged that she was dismissed for lack of desire; inability to seek help; working in isolation and need for privacy; and creating systems to manage work. In addition, she stated that she had been subjected to harassment or discrimination and that the perpetrator was Ms Bates. She referred to the matters already aired before Dr Young at the Employment Review meeting. She stated that the bullying and harassment compounded, causing her high levels of stress and anxiety which in turn made her ill with a variety of symptoms but did not report the bullying and harassment as it was her word against another with no witnesses. She further stated that the doctor signed her as fit to return to work.

92. She also asserted that she had been discriminated against in relation to her flexible working request as there was both inconsistency and bias. The pressures she was under was an attempt to force her to leave. She said that she was signed fit for work but then she was isolated and not allowed back for four weeks. On 28 July 2017, a doctor prescribed her anti-depressants for anxiety and depression, the second time in the space of two months, which was due to bullying in the workplace. (124 – 126)

93. She was invited by Dr Young in his letter dated 11 August 2017, to an appeal hearing scheduled to take place on 18 August 2017 before Mr David Clout, Governor, who would be chairing the meeting. Dr Young wrote that her appeal was on two grounds, namely that she was a disabled employee who had been discriminated against under the Equality Act, and she had been treated in a manner that amounted to harassment because of her race. (127)

<u>Appeal against dismissal on 24 August 2017</u>

94. In fact, the appeal hearing went ahead on 24 August 2017. The claimant was not accompanied. At the start of it she withdrew her ground of appeal based on race. Her dismissal appeal was on grounds of her disability. She stated that she was dismissed because she was unsuitable and not because of bullying. She said that due to the fact that she had been signed off work for work-related stress, the respondent should have made reasonable adjustments to accommodate her condition. She maintained that Ms Bates kicked her bag and did things which made her feel personally that her space had been invaded, but she did not have to put up with it. She did not understand what she had done wrong and was fit to return to work. She created systems to manage her workflow and had a Masters' degree in Educational Leadership and Management. She taught at Southgate and Barnet College, then privately for community groups. She was previously employed as a School Business Manager.

95. When asked about the other part of appeal being about discrimination, she replied that race discrimination was not an issue in relation to her dismissal. The flexible working request issue, she stated, was part of her reasons for her stress. She said that the doctor she visited on 28 July, diagnosed her as suffering from depression and prescribed citalopram. She was told to return to work and when she did her employment was terminated.

96. Mr Clout said that he did not want to give a 'knee-jerk' reaction and would need to take advice. The claimant opted to have the decision in writing rather than waiting for ten minutes for Mr Clout to consider the outcome and give his decision. (R1)

97. He wrote to her on 24 August 2017, setting out his outcome and reasons. He stated the following:

> "At the appeal hearing you were unaccompanied. I was accompanied by Chris Walsh who took the minutes of the meeting.
>
> I am now writing to confirm my decision.
>
> At the hearing you gave the following grounds for your appeal:
>
> - Harassment and discrimination on the grounds of race.
> - You claimed racial harassment and discrimination within your letter of appeal but now wish to withdraw that part of your appeal. No further discussion on these points took place.
> - You are a disabled employee and have been discriminated against under the Equality Act 2010.
>
> The background to your appeal was set out in your letter sent to me on 6 August 2017. Together we explored your issues at the appeal hearing on 24 August.
>
> I also considered the record of your return to work interview with Dr Ken Young held on July 27th 2017 and a record of your Employment Review Meeting held with Dr Young on 31 July 2017.
>
> Having considered the grounds of your appeal, and the evidence in relation to this matter, it appears to me that you had not made your employer aware of any mental health issues at appointment or during your period of employment. Your medical certificate gave the reason for your absence as 'stress'.
>
> The reasons for your dismissal were not negated by your medical record and your explanation for developing stress and its associated effects placed much emphasis on your poor relationship with the HR person. You provided numerous subjective assessments of her behaviour towards you but I believe her behaviour could be seen as normal in an office environment. The reasons for your dismissal were that you were not delivering as per expectations as set out at the time of your appointment. It is therefore my conclusion that the decision to dismiss is upheld. You have exercised your right of appeal. This decision is therefore final." (128 - 129)

98. We find, and do accept, Mr Clout's evidence that during the appeal, the claimant did not produce any medical evidence in support of her condition.

99. The claimant was asked by a member of the tribunal why she did not produce any medical evidence at the dismissal appeal hearing, she replied that it was because she was depressed and anxious.

100. Mr Clout did not see the claimant's e-mail dated 28 July 2017, sent at 6:49pm until he perused through a copy the tribunal bundle prior to this hearing. (104)

101. It was clear to the tribunal that during the appeal, the claimant specifically withdrew race discrimination as a reason for dismissal.

The claimant's grievance

102. The grievance meeting was held on 6 September 2017, chaired by Ms Fenn, Chair of Governors. The claimant attended but again was unaccompanied. Ms Jenny Avery, Head Teacher's PA was present and took notes. At the outset, the claimant said that she did not understand why the meeting was being held. She alleged that she had been racially discriminated against and had been told to leave because of it.

103. We note that her statement contradicted what she had stated during the dismissal appeal hearing, that she withdrew race as the reason for her dismissal and relied instead on disability.

104. As regards her treatment by Ms Bates, she covered the matters she previously aired before Dr Young and Mr Clout. She was asked whether she would say that Ms Bates deliberately kicked her belongings, or she had tripped, or did she not know? She responded by saying "I can't know". They then discussed the flexible working request.

105. After meeting Ms Fenn conducted her own investigation and interviewed Dr Young; Ms Bates and Ms Hardy. She obtained a statement from Ms Bates regarding the issues raised by the claimant of racial harassment. She also had photographs of the office where the claimant worked. Those interviewed all gave accounts different from the claimant's account of their involvement.

106. The claimant's grievance was on the grounds of race discrimination and racial harassment. Having investigated the matter and taking into consideration the various accounts given, Ms Fenn wrote to her on 13 September 2017, dismissing her grievance. She stated that she had asked the claimant how she would like the matter resolved, to which the claimant replied by saying that she did not see how it could be resolved. She did not find evidence of racial discrimination in the school turning down the claimant's flexible working request, nor in the treatment of her by Ms Bates.

107. We find Ms Fenn's letter very detailed and it addressed the claimant's grievance and she had undertaken a reasonable investigation into her complaints before coming to her conclusion. (142 – 147)

The grievance appeal

108. On 18 September 2017, the claimant appealed against the grievance outcome. She asserted that the grievance had been badly handled and was not upheld; there were no clear and transparent policies in place to deal with issues as they arose; no close attention was paid to the racial discrimination issues she raised informally; and was immediately dismissed before her grievance was investigated. She wrote:

> "I believe that the dismissal was because of the allegations in relation to race discrimination and measures taken prior to dismissal count as detriment and by definition of detriment suffered because of the doing of a protected act and was therefore victimisation.
>
> At this appeal stage, the best possible outcome is to negotiate a settlement agreement to avoid any further action." (148)

109. The appeal was heard on 30 October 2017 and was chaired by Reverend Bill Gibbs, Deputy Chair of Governors. The claimant attended and was unaccompanied. Ms Avery was present to take notes. The claimant said that she did not want to repeat matters and was there as part of the process but did not want to go through her account again. She asserted that she had been racially discriminated against and that was the reason why she was dismissed. She was questioned by Reverend Gibbs who pointed out to her that he was struggling to find any evidence of racial discrimination and harassment. In Reverend Gibbs' evidence, he stated that he felt that she displayed "triumphal disengagement" in the process as he was led to believe that in some way, she was enjoying the proceedings which he found saddening.

110. In answer to a question put to Reverend Gibbs by a member of the tribunal, he answered that the claimant did not say that her treatment and dismissal were due to her disability. He was clear she was saying that it was as a result of her racial origin.

111. In his letter dated 7 November 2017, he wrote to the claimant setting out the outcome of her grievance appeal. He stated the following:

> "I am now writing to confirm my decision.
>
> At the hearing you gave the following grounds for your appeal:
>
> - You asserted that you were sacked because your employer was racially motivated.
>
> Having considered the grounds of your appeal and the evidence in relation to this matter, it appears to me that there is no new evidence and are no grounds for your appeal.
>
> It is therefore my conclusion that the decision that there was no evidence of racial harassment or discrimination is upheld.
>
> I enclose notes taken when we met for your records.

> You have now exercised your right of appeal and this decision is therefore final." (157)

112. In the respondent's grievance procedure, a copy of which was sent to the claimant, under "right to be accompanied", it states the following:

> "You may be accompanied to this meeting held to discuss your grievance by a colleague or Trade Union official."

113. We, therefore, find that the claimant knew she had the right to be accompanied by a work colleague or trade union official and could have insisted on exercising that right or request that the grievance meeting be adjourned in order to arrange for someone to accompany her at the next meeting.

114. In the respondent's disciplinary and dismissal procedure, it states:

> "We retain discretion in respect of the disciplinary procedure to take into account your length of service and to vary the procedures accordingly. If you have a short amount of service you may not receive any warnings before dismissal but you will retain the right to an Employment Review meeting and the right of appeal." (166 to 169)

114. The claimant told us that to help her in her work she would use 'to do' and 'check' lists. There was no evidence to show that she was prevented from using these aide memoirs by the respondent.

115. In the claimant's Disability Impact Statement, she wrote that in relation to her activities between May 2016 to November 2018, the depression was complex and varied. She felt bad, hopeless and lost interest in things she enjoyed. Her symptoms persisted for months and was enough to interfere with her work, social life and family life. She suffered from continuous low moods, sadness, hopelessness, helplessness, was tearful and became guilt-ridden. Her weight decreased and she suffered from constipation, disturbed sleep and would wake up early in the morning. She became irritated when people did not understand her and would become physically aggressive with anyone who tried to talk to her. She would stay in bed and would not speak to friends or family members because of her anxiety and paranoia. Someone had to watch over her at all times, particularly when preparing meals to ensure that that task was done safely. Often meals for her family would be delivered to her home. She neglected her basic needs as she lacked motivation to wash and dress herself, often going days without washing. When speaking to others she would become confused when they explained certain things to her. When attending meeting she would take weeks to prepare. Carrying out normal day-to-day activities would take 3 to 4 times as long as a non-disabled person. Her son attended nursery full time because she did not have the capacity to care for him. She had use of the services of a cleaner. (24)

116. Of note she made no reference to having to use 'to do' and 'check' lists to help in some of her daily activities.

117. We did not find this evidence convincing as there was no supporting evidence from witnesses or from documents in relation to the claimed adverse effects on normal day to day activities, for example, there was no evidence from those whom the claimant said had to watch her or had suffered from or had witnessed her aggressive behaviour. The account given was not supported by reference to the medical evidence we were taken to.

118. We were told that the respondent has a training budget for its staff which is currently £145,000 a year. This is from of a turnover of £7million

Submissions

119. The tribunal heard submissions from the claimant and from Mr Ridgeway, Employment Consultant, on behalf of the respondent. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, as amended. We have also taken into consideration the authorities referred to us.

The Law

120. The Section 6 and Schedule 1 of the Equality Act 2010, "EqA." defines disability. Section 6 provides;

> "(1) 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."

121. Section 212(1) EqA defines substantial as "more than minor or trivial". The effect of any medical treatment is discounted, schedule 1(5)(1).

122. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

123. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24

124. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

125. The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.

126. Harassment is defined in section 26 EqA as;

> **"**26 Harassment
>
> (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 and intimidating, hostile, degrading, humiliating or offensive environment for B"

127. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

128. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it is for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable

for the claimant to have felt that their dignity had been violated, or an adverse environment created.

129. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

130. Section 20, EqA on the duty to make reasonable adjustments, provides:

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

131. An employer's failure to adhere to its own time limits during a disciplinary procedure could not amount to either a provision, criterion or practice and "taking care" cannot amount to a reasonable step. "Incompetence, a lack of application or a failure to stick to time limits cannot be properly be characterised as a provision, criterion or practice.", Carphone Warehouse Ltd v Martin [2013] EqLR 481.

132. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

133. Guidance has been given on the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1)the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2)the physical feature of premises occupied by the employer;
>
> (3)the identity of a non-disabled comparator (where appropriate), and
>
> (4)the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has

> gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.
>
> A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

134. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

135. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283, [2007 ICR 1359, the Court of Appeal held that increasing the period during which the disabled employee could claim full pay while on sick leave to alleviate financial hardship following a reduction in pay, would not be a reasonable step to expect the employer to take as it would mean that the employer would have to assess the financial means and stress suffered by their disabled employees.

136. In the earlier case of Meikle v Nottinghamshire County Council [2005] ICR 1, the Court of Appeal held that where the disabled employee's sickness absence was caused by the employer's failure to implement a reasonable adjustment, it may be a reasonable adjustment to maintain full pay.

137. On sick pay, paragraph 17 of the EHCR Code 2011, states:

> "Workers who are absent because of disability-related sickness must be paid no less than the contractual sick pay which is due for the period in question. Although there is no automatic obligation for an employer to extend contractual sick pay beyond the usual entitlement when a worker is absent due to disability-related sickness, an employer should consider whether it would be reasonable for them to do so., 17.21.
>
> However, if the reason for absence is due to an employer's delay in implementing a reasonable adjustment that would enable the worker to return to the workplace, maintaining full pay would be a further reasonable adjustment for the employer to make." 17.22.

138. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there

must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

139. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

140. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons."

141. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

142. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future "the consideration point" be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

143. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant's appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

144. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

145. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the

section 20 was not engaged simply because the attendance management policy applied equally to everyone.

146. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

147. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

148. The test is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

149. As regards victimisation, section 27 EqA 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."

150. For there to be unlawful victimisation the protected act must have a significant influence on the employer's decision making, Nagarajan v London Regional Transport [1981] IRLR, Lord Nicholls**.** In determining whether the employee was subjected to a detriment because of doing a protected act, the test is whether the doing of the protected act had a significant influence on the outcome, Underhill J, in Martin v Devonshire Solicitors [2011] ICR EAT, applying the dictum of Lord Nicholls in Nagarajan

151. It is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor, EHRC Employment Code, paragraph 9.10, and Pathan v South London Islamic Centre UKEAT/0312/13.

152. Under section 13, EqA direct discrimination is defined:

> "(1) 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."

153. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

154. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

155. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

156. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

157. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

158. The Court then went on to give a helpful guide, "could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

159. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

160. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

161. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management

consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal and her argument was accepted that the employment tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

162. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

163. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex.

164. A similar approach was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

165. If the claimant overcome the first limb of the burden of proof test, the burden transfers to the respondent to provide a non-discriminatory explanation, Royal Mail Group Ltd v Efobi [2019] ICR 750, a judgment of the Court of Appeal.

Conclusion

Disability

166. On the issue of disability, the tribunal acknowledged the medical report from Dr Christina Magnusson, Consultant Psychiatrist, dated 8 March 2016, in which the doctor stated that the claimant had reported a history of episodes of depression but had no psychotic symptoms, no suicidal thoughts or plans; and risk to herself and to others was low. She was experiencing an episode of depression but there were no current symptoms of psychosis or mania.

167. In the fit notes, the diagnosis was work-related stress, covering the period May to June 2017.

168. In Dr Pattani's report dated 30 June 2017, it was noted that the claimant's health had improved since she first started her sickness absence. What was required was for her to meet with the school's counsellor for one or two sessions to discuss work-related stressors with her line manager. There was no diagnosis that the claimant was suffering from depression.

169. The tribunal was not referred to any further medical evidence that the claimant was suffering from depression and anxiety.

170. We have taken into account the contemporaneous documents available during the claimant's employment as well as the disability impact statement. The disability impact statement gives a completely different view of the claimant's mental state and the alleged effects of her medical condition on day-to-day activities. We found that it could not be relied upon as it referred to matters the tribunal would have to consider but without any supporting evidence. We bear in mind that she performed well during her probationary period. Even when she was off work due to sickness, she was able to communicate with the respondent by producing long, detailed e-mails. The wording in the e-mails appeared to be lucid and coherent. She told us that she would take her daughter to school in the morning. This is in marked contrast to what she has stated in her disability impact statement and bore no relation to any of the contemporaneous external evidence, that she was confined to her home and unable to look after herself. We came to the conclusion that the disability impact statement was produced with the specific purpose of her focussing on matters the tribunal would have to consider in determining the issue of disability, which, in the tribunal's view, was not a true reflection of her circumstances.

171. No medical evidence was produced by her during her appeal against dismissal in support of her mental condition. We have already referred to

the medical evidence put before us which do not show that the claimant was, at all material times, suffering from anxiety and depression. Although we are not required to refer only to the medical evidence but to evidence from which it can be found that the claimant was suffering from a mental impairment which had substantial adverse effects on normal day to day activities, we were unable to rely on her disability impact statement and on her oral evidence. Accordingly, we have come to the conclusion that the claimant, at all material times, was not disabled.

172. Even if she was disabled suffering from anxiety and depression, we would conclude that the respondent was unaware of her disability until 31 July 2017, as acknowledged by Dr Young, Bursar.

Direct disability discrimination

173. In relation to direct disability discrimination, the claimant has to establish a prima facie case of less favourable treatment because of disability, Efobi. She relies on the refusal to adjust her hours and believed that Mrs Hardy, who had an aneurism, was allowed to adjust her hours. The claimant did not make an application for her hours to be adjusted based on her claimed disabilities. Quite the contrary, in her e-mail correspondence on 28 July 2017, she wanted to return to work on 31 July and asked Dr Young whether that was possible, who confirmed that it was. There was no reference to adjusted hours upon her return to work. This only featured in her earlier request for flexible working which made no reference to disability and it was refused for business reasons.

174. In relation to Ms Hardy, we found that she had a brain aneurism but was not offered a phase returned to work. She returned to work against medical and the Board of Governor's advice because she felt that the children and staff needed her. She did not have any fixed hours.

175. Even if the claimant was disabled at the material times, Ms Hardy was not an appropriate comparator. Applying Madarassy, the claimant has not established a prima facie case of less favourable treatment, therefore, the burden does not shift to the respondent. Accordingly, this claim is not well-founded and is dismissed.

Harassment related to disability

176. As regards harassment related to disability, the claimant's case is that the respondent called her to a meeting on 31 July at 8:30 in the morning, by e-mail dated 28 July, which allowed her very little time to find a colleague to accompany her and to draft a grievance.

177. In her e-mail dated 28 July 2017 at 11:09am, she stated that as she had been required to attend the meeting at short notice, it amounted to unfair treatment and discrimination because she is black. She did not state that her treatment was related to her disability. On the evidence, it was not related to her disability as the letter required her to attend the Employment Review Meeting on 31 July because Dr Young considered that she was

unsuitable due to the deteriorating relationship between her and Ms Bates and how she carried out her duties which was unrelated to her disability.

178. Although the conduct in calling her to the meeting was unwanted in that the claimant raised her concerns, it was unrelated to her disability.

179. We have come to the conclusion that there was no unwanted conduct related to disability or to the claimant's disabilities. This claim is not well-founded and is dismissed.

Direct race discrimination

180. In relation to the direct race discrimination claim, the claimant asserted that she was refused an adjustment to her hours in her flexible working request and relied on Ms Jenny Avery, whom she alleged was given an adjustment to her hours, as her comparator, who is white. We have made findings of fact in relation to Ms Avery's circumstances and we have found that her hours were not adjusted. She is, therefore, not an appropriate comparator. The claimant did not put forward as an alternative, a hypothetical comparator.

181. The other aspect of her direct race discrimination claim is that she was dismissed because of her race. The evidence she gave was inconsistent. During the appeal against her dismissal, she withdrew her allegation race discrimination and relied instead on disability. However, at her grievance and her grievance appeal hearings, the reason she asserted for her dismissal was her race and not her disability.

182. From our findings of fact, we could not decide that she was dismissed because of her race. The preponderance of the evidence was that there had been a breakdown in the relationship between her and Ms Bates, and that affected the working relationships in the team, including Dr Young, which meant that she was unsuitable to continue in her contracted role. This unrelated to race or to her race. We bear in mind that Ms Bates was on the interview panel that selected her, notwithstanding her race. We have come to the conclusion that the claimant has not established a prima facie case of discriminatory treatment because of race. Accordingly, this claim is not well-founded and is dismissed.

Harassment related to race

183. In relation to harassment related to race, the claimant relies on the same matters as her claim of harassment related to disability. We come to the same conclusion in relation to this claim as we did in relation to harassment related to disability, in particular, the letter inviting the claimant to the Employment Review Meeting on 28 July 2017, was sent because Dr Young took the view that she was unsuitable for the post and was not sent for a reason related to her race. We repeat that she was the only black candidate out of the three shortlisted for the new post advertised and was successful. The respondent knew she was black and offered her the position. Her race then did not play a part in its decision, but her

qualifications, experiences and attributes made her a strong and successful candidate. There were no issues of race raised during the claimant's probation, only after her request for flexible working was refused. She was called to the meeting on 31 July because her relationships with her two managers in a team of three, had broken down.

Victimisation

184. As regards to the victimisation claim, the claimant relied on her grievance sent to Ms Fenn on 31 July 2017 at 1:52 in the morning. This was not read by Dr Young prior to conducting the Employment Review Meeting with the claimant. We bear in mind that she had already been invited to the meeting on 28 July and was warned about the possibility of dismissal. Dr Young also did not read the grievance during the review meeting. It follows from this that he had no knowledge of the protected act, that being the grievance, when it came to his decision to dismiss the claimant.

185. The claimant has to establish a causal connection between the protected act and her dismissal, in that Dr Young was significantly influenced by her grievance in arriving at his decision to dismiss. This had not been established. We, therefore, conclude that the victimisation claim is not well-founded and is dismissed.

Failure to make reasonable adjustments

186. In relation to the claimant's claim of failure to make reasonable adjustments, she has relied on a number of provisions, criteria, or practices. Even if we accept that she was disabled at all material times, which we do not, we have taken into account the evidence given by Dr Young in respect of the claimed pcps.

187. In relation to numbers 1 and 2, in which the claimant alleged that staff were required to work without "to do lists" and "check lists". Dr Young told the tribunal that there were no such restrictions in the Bursary, nor did the respondent apply those restrictions generally. The claimant was unable to refer to evidence where these restrictions applied. We were not satisfied, on the balance of probabilities, that this was a provision, practice or criterion applied by the respondent. The claimant did use the lists as aids in her work.

188. In relation to number 3, to work with numerous ad-hoc interruptions. This is a fact of working life. It was not a requirement that staff should work with ad-hoc interruptions but as part of ordinary working life, interruptions do occur. Ad-hoc suggests a lack of planning. People would enter a room or office unexpectedly. The telephone would ring. Emails would be received and may have to be read straightaway. Urgent work would have to be undertaken. This is not a provision, practice or criterion. Even if it could be, there was no evidence that the respondent applied it.

189. In relation to number 4, to perform new work tasks without guidance and training. There was no evidence that this was applied by the respondent.

Dr Young told the tribunal that the school has a large training budget, £145,000 out of the £7 million turnover which is used for guidance and training purposes for its staff.

190. In relation to number 6, to work without flexible working arrangements, and work without adjusted hours, we find that the respondent has policies in respect of the flexibility in terms of working arrangements and adjusted hours. Adjusted hours have been granted. The claimant's case was that her flexible working request was based on her caring responsibilities, not on her disability.

191. As regards 9, to continue to work in same role. Staff do change roles and that the claimant's predecessor, Ms Julie Curran, Student Recruitment, was allowed to change her role.

192. In relation to number 10, no modification of normal disciplinary/ employment review procedures, the claimant did not elaborate on what this meant. We bear in mind that she was reminded of her right to be accompanied and could have asked for an adjournment if she needed more time to prepare for the meeting on 31 July but did not. There was no evidence before us that this was a pcp imposed by the respondent.

193. Even if the claimant was disabled at all material times, the pcps she has relied on are not pcps, therefore, this claim of failure to make a reasonable adjustment is not well-founded and is dismissed.

194. Having regard to our conclusions that all of the claims are not well-founded, the provisional remedy hearing listed on 24 February 2020, is hereby vacated.

_____
Employment Judge Bedeau

Date: …27 January 20……..

Sent to the parties on: .....

.....
For the Tribunal Office