EMPLOYMENT TRIBUNALS

Claimant: **Dr D Legg**

Respondent: **The University of Manchester**

Heard at: **Manchester Employment Tribunal**

On: **26 to 28 June 2024 (24 and 25 July 2024 in Chambers).**

Before: **Employment Judge Eeley**
Mrs C Linney
Mr I Taylor

Representation
Claimant: In person
Respondent: Mr C Breen, counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded. The claimant was not unfairly dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

3. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

REASONS

Background

1. The claimant brought claims of unfair dismissal and disability discrimination arising out of his employment with the respondent. The case was case managed at a preliminary hearing on 24 November 2022 and a list of issues was produced for use at the final hearing [41-42].

2. The list of issues was discussed with the parties at the outset of the final hearing. In relation to the unfair dismissal claim, the respondent confirmed that the potentially fair reasons for dismissal were capability or 'some other substantial reason' in the form of a breakdown in the relationship between the parties.

3. For the purposes of the disability discrimination claims, the respondent had not conceded that the claimant was disabled in the manner alleged for the purposes of the claim. The claimant had not provided a section 6 disability impact statement as he had been directed to do by the Tribunal. The disability relied upon by the claimant was originally said to be breathing/respiratory problems. The claimant clarified that he had been diagnosed with sleep apnoea which he referred to as "severe obstructive sleep apnoea." He also confirmed that he had been diagnosed with ADHD since he was dismissed by the respondent and that he wished to rely on ADHD as a second relevant disability for the purposes of his disability discrimination claim. The Tribunal discussed this development with the parties. Mr Breen indicated that the respondent was taken by surprise by it but did not take issue with the claimant relying on ADHD for the purposes of the discrimination claim. He made it clear that any diagnosis of ADHD had been made after the termination of employment and that the respondent was not aware of the ADHD during the course of the claimant's employment (which was the relevant period for the purposes of the disability discrimination complaints.) The respondent did not concede that the claimant was disabled by reason of ADHD or breathing problems/severe obstructive sleep apnoea at the relevant times. Knowledge of the alleged disabilities was also denied.

4. The evidence in the case showed that the claimant also has diabetes and a thyroid condition. These were *not* relied upon by the claimant as disabilities for the purposes of his discrimination claims.

5. The Tribunal clarified the claim of failure to make reasonable adjustments. The list of issues indicated that the reasonable adjustment contended for was *"an extension of the period of time in which the claimant was allowed to complete a period of in person teaching prior to the official probationary review meeting in February 2022."* There was some suggestion in the papers that the claimant might seek to argue that he should have been

allowed an extension of time to complete the relevant teaching *beyond* the meeting in February 2022 and that the claimant was seeking to argue that he should have been given an extension of time to complete the necessary teaching until the July meeting. The claimant was asked to confirm how he wished to put his case. Was he contending for an extension of time from November 2021 until the meeting in February 2022 or was he contending for an extension of time from November 2021 until a meeting in July 2022? Having reflected upon it, the claimant confirmed that he was contending for an extension of time until February 2022 and not until July 2022.

6. In relation to the section 15 claim, Mr Breen confirmed that the respondent relied on the following 'legitimate aim' (for section 15(1)(b)): *"To ensure that the claimant complied with the requirements of his contractual probationary objective in order that he pass his probation and be appointed as a permanent member of the academic staff having demonstrated that he had the requisite skills to fulfil that role and that he wasn't being set up to fail."*

7. The list of issues for determination by the Tribunal was agreed with the parties with the above discussed adjustments.

8. The Tribunal received written and oral witness evidence from the following people:

    a. The claimant, Dr David Legg, a former research fellow with the respondent.

    b. Professor Ann Webb, Professor of Atmospheric Radiation within the Department of Earth and Environmental Sciences at the respondent.

    c. Professor Michael Burton, Professor of Volcanology within the Division of Earth and Environmental Sciences at the respondent.

    d. Professor Peter Green, Vice Dean for Teaching, Learning and Students for the Faculty of Science and Engineering at the respondent.

9. The Tribunal was provided with an agreed bundle of documents consisting of 551 pages. We read those documents to which we were referred by the parties. References in square brackets below are references to pages within the agreed hearing bundle, unless otherwise stated.

Findings of fact

10. The respondent's Division of Earth and Environmental Sciences ("DEES") is one of five departments within the respondent's School of Natural Sciences. The School of Natural Sciences is one of two Schools within the

Faculty of Science and Engineering. DEES is the second largest Earth Sciences Department in the UK and achieved 7th position in research quality, together with Oxford University, in the 2021 Research Excellence Framework Assessment ("REF"). DEES has 75 academic staff of which there are currently 8 tenure-track fellows. Typically there are 150 post-doctoral research staff and 300 PhD students. It recruits around 140 undergraduates and 150 Masters Students each year.

Fellowships

11. Tenure-track fellowship positions typically last for 5 years and have reduced teaching work in order to focus on research activity. Full academic roles (where an individual has full tenure of the department) involve full research and teaching responsibilities from the outset. The Tribunal heard and accepted that tenure-track fellowships at leading universities like the respondent are extremely prestigious and competitive and are only awarded to exceptional candidates who show potential to be world-leading academics. Such tenure-track fellowships carry the expectation that the freedom to focus primarily on research for 5 years will allow the individual to become a leader in his/her field. This would be evidenced by highly cited peer-reviewed publications and by their ability to build their own research teams by winning research funding. The funding which underpins the employment of a tenure-track fellow is fixed for a specific period and their contract of employment with the respondent is therefore fixed term. Subject to the individual successfully completing their probation period, the expectation is that they will then progress to become a fully established member of staff, taking up a lecturer position within the department with a full range of academic duties (which includes teaching.) Such a permanent or full member of the department is centrally funded, on an ongoing/permanent basis by the University. The funding for tenure-track fellowships comes from a different source to the funding for permanent full members of the department.

12. There is competition between universities to attract the best academics. The respondent seeks to organise itself to pull in the best academics at the early stages of their careers with a view to securing them for the University in the long term. An 'early career academic' must also establish their own professional identity by developing their independence as a researcher (as evidenced by their output of publications and papers), by writing and competing for grants, and by forming their own academic networks. They must also advance their teaching practice and cope with increasing levels of administrative responsibility over the course of their fellowship. All of this will help to demonstrate that they can succeed as a fully established, permanent member of academic staff when their fixed term fellowship ends. The Tribunal heard and accepted that DEES has recruited 12 fellows over the past 5 years and all of these, with the exception of the claimant, have successfully completed probation or are on track to do so.

Academic probation

13. The Tribunal understands that 'probation' amongst academic staff is a lengthier and more involved process than within many other sectors. Given the longer time frames involved in the process of academic research, academic probation within the respondent is longer than the 3 to 6 months typically found in other sectors of employment. Extended probation periods in universities are the product of an agreement reached in 1974 between university authorities and the Association of University Teachers ("The Academic and Related Salaries Settlement.") The purpose of academic probation is to decide, at the end of the probationary period, whether a member of staff should be retained. This decision should be based on "the long-term interests of the university itself, of the other members of staff, and of its students." The working group which formed the agreement set out several criteria that a probationer was expected to satisfy:

    a. The probationer must have satisfactorily performed all teaching, tutorial and supervisory work assigned to him/her.
    b. The probationer must have satisfactorily engaged in the research work in his/her subject.
    c. The probationer must have properly carried out all examination and administrative duties assigned to him/her.
    d. The probationer must have shown promise, through his/her work, of continuing development as a teacher and scholar.

14. It was agreed that, in practice, it would take at least three years to evaluate whether a probationer satisfied the relevant criteria (although in exceptional cases it could be done in two.) At the respondent university the standard probation period is 3 years with a possible extension into a fourth and final year. The respondent's policy setting out probationary arrangements for academic members of staff states that (paragraph 3), *"the probationary period will be not more than four years and will end no later than 31 July in the fourth year of appointment."* Paragraph 4 of the same policy refers to "Interruption to the Probationary Period." The Tribunal accepts that this would typically apply to periods of parental leave or long-term sick leave which effectively "stop the clock" for the purposes of probation. In such circumstances, when the staff member returns from leave their probation period resumes from where they left it, so that they are not considered to have had more than 4 years' probation even though, chronologically, it may have lasted for more than 4 years. In such cases the probation is effectively 'frozen' during the period of leave and continues from where it was paused once the person resumes work.

15. As set out below, the claimant in this case was given an initial extra year to February 2021 and then an exceptional extra year to February 2022. The respondent's witnesses were not aware of anyone else receiving a fifth year in probation other than where the probation was paused for a

portion of the overall period pursuant to the "Interruption to the Probationary Period" process described above.

16. It is apparent from the evidence heard by the Tribunal, that the duration of a tenure track fellowship may differ from the length of the probation period. The former refers to the fixed term of employment with a fixed external source of funding before an individual progresses to become a permanent member of the department/faculty, whose employment is funded centrally from the University's budget. Probation is the mechanism used to assess whether an individual can be offered permanent employment with the respondent. It may differ in duration to the tenure-track fellowship. For example, an individual may pass probation within three years even though their fellowship is five years long. However, as a matter of practicality, a probationary period cannot be longer than the fixed term tenure-track fellowship. The assessment of a person's suitability for a permanent role within the University cannot extend into the permanent appointment itself. An individual needs to have passed probation by the end of the tenure-track fixed term fellowship in order to be considered for appointment on a permanent basis to the University's academic staff. To that extent there is a 'hard stop' on the end of a probationary period. There may be some practicable flexibility to extend the probationary period within the lifespan of the fixed term fellowship, but probation cannot, practically and logically, extend beyond the end of the fixed term tenure-track fellowship.

17. Within the respondent university the expectations about the minimum contribution of academic staff are set out in the Academic Probation Objectives document. A new academic employee is expected to achieve the minimum contribution described in that document by the end of the probation period, at the latest. The document describes satisfactory achievement in four categories:

    (1) Research;
    (2) Teaching and other student-related activity;
    (3) Knowledge Exchange and External Engagement;
    (4) Service and Leadership.

18. Workload for probationers develops over the course of the probation period. Teaching duties are usually less in the first year and increase year on year until a full teaching workload is reached. Where there is an expectation of an academic role at the end of the fellowship, it is necessary to ensure that an element of teaching is included in the individual's objectives in order to ensure that they are able to progress through the New Academic Programme successfully. New fellows joining the respondent know that at the end of the fellowship it is hoped that they will become a full member of staff with a full teaching and administrative workload. Thus, it is essential that they acquire the necessary skills for this during the course of their fellowship.

19. Whilst it is anticipated that the respondent will provide support and guidance to those on probation, a level of self-reliance is also required

from the probationer. If an individual has difficulties or finds that probation is not working out as anticipated, then it is incumbent on them to raise the matter in good time with their line manager so that it can be addressed. A probationary academic has to take responsibility for their own development and cannot expect to be 'spoon-fed' by their line manager. This is part of the transition from experience of university life as a student to experience of university life as an established member of academic staff. Similarly, whilst a doctoral student may be able to focus solely on their own research interests and output, a member of academic staff has wider responsibilities for the interests of other people within the university, including colleagues and students. Their teaching and administrative responsibilities directly impact upon others. Thus, it is necessary to ensure that they carry out those roles in such a manner that others can plan around them and they can be relied upon to carry out their portion of the work in a timely and competent fashion. For example, where an individual is sharing responsibility for teaching a course with others, it is vital that they can be relied upon to do their share of the tasks or to alert their colleagues and line managers to any likely delays or difficulties in good time so that work can be reallocated in a way which does not unfairly disadvantage others within the University. This could be described as working competently as part of a team rather than in complete isolation from colleagues and students.

20. Academic probation is set at three years by the respondent with the possibility of extending probation into a fourth and final year. The first year of appointment of an employee who assumes duty between 1 August and 31 January inclusive is deemed to end on 31 July immediately following. The claimant commenced employment on 1 October 2017 on a five year fellowship. From such a start date his three year probation period would have ended in July 2020 and a fourth and final year of probation would end in July 2021.

21. The Department Promotion and Probation Committee ("DPPC") meets every year in February to review the progress of each of the academic probationers. Probationary review meetings between an individual probationer and their line manager must be held in time for the paperwork to be submitted to the DPPC. The academic line manager advises the DPPC of the probationer's progress at each year of the probation. In year 3 this will include a recommendation as to whether the appointment should be confirmed or not or whether an extension into a fourth is required.

<u>New Academics Programme ("NAP")</u>

22. New academic staff are also required to complete the respondent's New Academic Programme ("NAP") as part of their probationary objectives. The NAP provides research training and teaching training for academics during the probationary period across the full breadth of duties associated with

their role. Attendance on the NAP is mandatory for all new academic staff because it is essentially a training programme for how to be an academic at the University. The programme is seen as challenging and as requiring a high level of engagement. The probationer has to produce a portfolio consisting of comprehensive essays by the probationer to demonstrate their understanding of teaching approaches. It is mandatory for all the respondent's new academic staff to attend and successfully complete all NAP assessments relevant to their career track. The full NAP consists of teaching, research and social responsibility elements as well as fulfilling various aims relevant to the individual's role.

23. The respondent's academic staff are encouraged to complete the taught aspects of NAP (which are delivered in blocks of a week three times a year) early during their probation as it gives them the tools to carry out their role and meet their probation objectives. In relation to the taught elements of NAP, it is not necessary to do the whole week at once given that the course is repeated. However, probationers are encouraged to complete the course early on as it will help them with their probation of objectives. In the aftermath of Covid some of the units were delivered online and there were also online aspects of the course that had to be completed.

24. The claimant did not complete the NAP program in the early stages of his probation period. This meant that he was under increased time pressure to complete the programme in the run-up to the end of his probation period.

25. The scientific and intellectual abilities of probationers are taken as read but there are other skills to be learnt during the course of the NAP. Whilst many probationers will already have some experience of grant applications as postdoctoral students, the NAP unit covers the skills of translating more ideas into a successful grant proposal, and the procedural and administrative elements of applying for grants at the University of Manchester.

26. In relation to teaching, a probationer will normally start off by teaching a few lectures on a course which is coordinated by a more experienced member of staff. They might teach a fairly basic, generic subject to 1st year students or a high level 3rd year course on their particular specialism. They are expected to gradually take on more of the unit as they progress. NAP also requires probationers to have experience of different types of teaching: lectures; practicals; tutorials; fieldwork, and for the probationer to be independently observed. To pass NAP the probationer must reflect on their teaching (known as the reflective portfolio) which is a reasonably substantial, several thousand word piece of work that includes a description of their teaching, how it was informed by pedagogic literature, how they found it, what they might have done differently, the feedback that they received and how they can improve. The reflective portfolio cannot be completed if teaching and observations have not taken place.

27. In relation to proposals for research, an early career academic will typically require one month of full-time work with a further month of revision

following internal feedback in order to prepare and submit a proposal for research to academic funding bodies.

The Dame Kathleen Ollerenshaw Research Fellowships ("DKOs")

28. The Dame Kathleen Ollerenshaw Research Fellowships are flagship fellowships offered by the Faculty of Science and Engineering and are aimed at outstanding scientists and engineers at an early stage in their academic careers. The respondent offers up to 4 fellowships annually for a five year period which, subject to performance, may lead to full academic tenure on completion. The expectation is that holders of these fellowships will have identified a substantial and significant research challenge, and that this will lead to significant research funding and highly cited publications in subsequent years.

29. The fellows are expected to undertake a limited amount of teaching (up to 6 hours per week). This is to allow them to focus on the development of their research career. Six hours a week is 16% of calculated workload, which is 37.5 hours per week. Full-time academic staff typically contribute 30% of their time to teaching. This is, therefore, effectively half a standard teaching load. Typically, fellows will seek teaching experience, as they know they have to do it and it is preferable to choose teaching rather than have it imposed upon them. The DKO fellows had reduced teaching requirements to give them the time and space to set up their own research groups, to apply for grants and to publish, free from the responsibility of a full teaching load and administration. However, the claimant was still required to teach and to complete this aspect of NAP because, if he took the full academic role that was the expectation at the end of the Fellowship, he would be required to perform the full range of duties, including teaching, research, administration (and service) and academic enterprise.

The claimant

30. The claimant is a palaeontologist. He obtained his bachelor's degree from the University of Portsmouth in 2008 with First Class Honours. He received his Masters with distinction from the University of Bristol in 2009/2010. He completed his PhD from Imperial College London in 2014. He also started a research fellowship at the Oxford University Museum of Natural History in 2013.

31. The claimant successfully obtained his DKO fellowship in 2017 and was issued with terms and conditions of employment [49d]. He started his employment on 1 October 2017. The fellowship was for an initial five year period, hopefully leading to full academic tenure on completion, subject to satisfactory performance. The five year fellowship would expire on 30 September 2022. His terms and conditions stated that he was required to complete a probationary period of four years of the date of commencement of employment to 31 July 2021. During that period his suitability for the

position would assessed. The terms and conditions stated that he was required to attend the teaching and learning course for new academic staff (NAP). Satisfactory completion of the course was a prerequisite for satisfying the probationary period and formed part of the process of assessment of teaching performance prior to confirmation of appointment. The University reserved the right to extend the probationary period if, in its opinion, circumstances so required. Other relevant provisions of the written contract stated a notional minimum of 35 hours per week but the claimant might be required to work overtime as necessary for the proper discharge of his duties without extra remuneration. All annual leave had to be agreed in advance by the claimant's line manager.

32. Professor Burton was the claimant's line manager from October 2017 to January 2020 when Professor Webb took over. During the initial stages of his career with the respondent his mentoring was carried out through academic colleagues in the research group that he belonged to: the Interdisciplinary Centre for Ancient Life ("ICAL"). This is the group of academics who have similar areas of academic research focus and expertise. One member of the group was Dr Russell Garwood. Dr Garwood was one or two years ahead of the claimant in terms of the stage of his academic career and had completed his probation period at the University in 2019. The claimant was personal friends with Dr Garwood prior to his employment at the University. Another member of the group was Dr Rob Sansom, who was an established member of the staff with whom the claimant had a good relationship.

33. During an early meeting the claimant mentioned some health issues (diabetes) to Professor Burton. However, he stated that these were under control and did not interfere with his ability to work. Professor Burton found that the information that the claimant provided about health and his work was vague. He found that the claimant had a lot of medical appointments but Professor Burton was only informed of these in response to a request to meet or to send a piece of work. Whilst he frequently put forward medical explanations for not being able to do a particular task, he did not take sick leave. This meant that, although the claimant continued at work without sickness absence, he was not necessarily performing in his role. From 2019, as a result of Professor Burton referring the claimant to Occupational Health, the respondent adjusted the claimant's duties to enable him to focus on largely desk-based work (writing a research grant application and research papers for publication.)

34. When the claimant's health situation apparently got worse in 2021 and the situation regarding his lack of productivity was becoming acute, Professor Burton encouraged the claimant to take sick leave but he refused to do so. The claimant's position was that he was able to be productive but was just working more slowly. Professor Burton had no issue with the claimant working more slowly or taking the time necessary to produce and complete his work and probationary objectives. However, he was concerned that the claimant was not delivering on probation objectives or producing the quality of work which was required of him.

35. The funding from the DKO Fellowship was due to last for five years. Thereafter the claimant needed to become a permanent member of the Department, funded out of the departmental university budget. The fellowship provided external funding. During the period of the fellowship both the respondent and the claimant could evaluate whether the working relationship between them was successful and could carry on in the longer term.

2018

36. From the outset probation objectives were discussed and set with the claimant's line manager. The first set of probation objectives were discussed and set with Professor Burton [49.1]. Each time that probationary objectives were set or reviewed a written template was completed. The template covered objectives under the following headings: research; teaching; academic enterprise; service; development and 'miscellaneous other.'

37. The claimant's initial record under the research heading indicated that the claimant was expected to produce research papers. This was to be measured by four papers submitted to REF 2020 graded 3*or 4*by internal REF grading panel. This was to be done within three years. At the date the objective was set (9 February 2018) it was noted that the claimant had missed participating in RRE that year due to concerns on ineligibility of work done prior to moving to Manchester. A paper was then currently in review with 'Nature.' It was noted that this objective had not therefore been met technically but would be soon as his papers could be assessed by RRE. Under the heading of research, "Grant submissions to research councils (e.g. NERC) and other bodies" the output measure was recorded as: "Successful submissions that pass internal review and are competitive (for NERC then gradings may be used). The timescale was three years and it was noted at the first meeting that the claimant, "has projects shovel ready and planned." At year one it was recorded that the claimant discussed and agreed the probation criteria and was on track for reaching them.

38. The tribunal accepted the respondent's evidence that it is essential for early-stage career academics to demonstrate their ability to be published in prestigious journals because it is a measure of their ability to produce innovative science and, in turn, attract funding opportunities which will significantly impact upon their ability to obtain academic appointments. A research intensive university, such as the respondent, expects its academic research staff to publish their research in journals with the highest ratings, with high citations, expert peer analysis and good circulation and coverage. This in turn attracts funding to the University.

39. The Tribunal heard (and accepts) that there is an academic convention relating to the listing of authorship. The first of the names on a publication is the person who has made the most significant intellectual contribution to the work in terms of designing the study, acquiring and analysing data from experiments, and writing the manuscript. When evaluating an academic's publications, focus will be on how many papers they are named as first author because it is an indication of their ability to drive the research. The subsequent authors are usually listed as per their contribution to the research but it is much harder to judge their contribution if they are not the first author. The claimant did not publish any first authored papers during the entirety of his employment at the University.

40. In relation to grant submissions the Tribunal understands that the claimant was not expected to win funds but simply to submit a competitive submission to one of the research councils or other grant awarding bodies.

41. Under the heading "Teaching" it was noted that, "as an Ollerenshaw fellow David has no specific teaching requirement, but he sees gaining teaching experience as a requirement for academic success. He will contribute to ongoing and new courses in an ad hoc manner for the next 12 months and then establish a plan for more structured teaching." Output was to be measured by the claimant making a plan for teaching in year one and then delivering it in year two. Once again, the timescale was recorded as three years and it was noted that in year one the claimant and his supervisor discussed a plan for developing teaching and set the objectives.

42. Under the heading 'Academic Enterprise' the objective was stated as "Policult talent developer, training science communications." It was to be measured by developing activity in the UK over a timescale of three years and it was recorded that this was discussed at first probation meeting. Policult is a company which focuses on developing training in science communications. Under the heading "Service" the objective was for the claimant to serve on the Equality and Diversity committee and this would be measured by the claimant supporting the E& D committee. During the meeting the claimant and his supervisor are recorded as having discussed service roles in the school. The claimant's work with the Equality and Diversity committee was also later removed to enable the claimant to focus on research and teaching. Nothing was recorded under the heading "Development & Miscellaneous Other."

43. In October 2018 Professor Burton emailed members of the geoscience research group (a group of about 12 academics, including the claimant) about geoscience research seminars which he considered to be a good way to discuss ongoing research and get suggestions from the wider team. On 19 November 2018 Professor Burton emailed the claimant asking him if he would be able to deliver the geoscience lecture the following week. The claimant replied that he had a visitor from China all week and a packed schedule so suggested the following week. The lectures were delivered every fortnight so it was agreed to the claimant would deliver the lecture on 10 December 2018. On Friday, 7 December Professor Burton emailed

the claimant to check that he was still able to deliver a lecture the following Monday. The claimant's reply was that he wasn't sure at that point as he was currently having issues with his eye and wasn't sure he'd be able to get anything done in preparation for the talk. Professor Burton replied that he was sorry to hear that. In the event, the claimant did not deliver the talk and Professor Burton organised a replacement.

44. On 17 December 2018 Professor Burton emailed the group to see if anyone was planning to submit a grant application in January 2019. He set out the relevant deadlines. If so, Professor Burton would set up the application to ensure that they were all properly supported. This was relevant to the claimant's probationary objective relating to grant applications. The claimant did not reply to this email.

2019

45. On 7 January 2019 Professor Burton was asked to provide an updated CV, publications list and academic probation objectives for the claimant for the purposes of the senior promotions committee meeting that was taking place on 7 February 2019. (This is the committee which later became the Departmental Probation and Promotions Committee, the DPPC). The committee was due to consider the progress of all academic staff on probation as well as academic promotion applications.

46. Professor Burton forwarded the email to the claimant and asked him if he could provide Professor Burton with the information required and indicated that they needed to meet to complete the probation form. The claimant's reply to Professor Burton was that he would track everything down in the next day or two and that he was doing the NAP at that point so was a bit busy that week.

47. Professor Burton and the claimant met on 24 January 2019. The meeting started at 1030. At 1104, as soon as the meeting had finished, Professor Burton emailed the claimant to remind him to send, as soon as possible, a copy of his up-to-date CV, publication list and publications and citation details, his RRE submission papers, data on how many times his work had been cited, titles for a NERC grant in the July round (describing the group and who would be participating), list his planned teaching contributions and his outreach activities. Professor Burton chased the claimant for this information on 31 January and the claimant said he had a doctor's appointment and would get to right afterwards.

48. The claimant sent the information later that day. In relation to teaching, the claimant said that he was still trying to sort out exactly what he would be doing but that he would be doing first year sedimentology, potentially up to 3 lectures. He indicated that he was currently doing "Advances in Palaeontology" for the third years. As a result of this, Professor Burton was reassured that the claimant was making good progress on his teaching.

Professor Burton accepted the claimant's account. He was unable to verify the information as he did not have access to the teaching allocation. Professor Burton subsequently discovered that the claimant taught a single two-hour lecture on his own speciality for a year three "Topics in Palaeobiology" (where lots of staff taught a guest lecture on their own speciality) in 2018 and 2019.

49. With regard to grant submission, the claimant said that the current title for the upcoming NERC submission was "The phylogeny of economically and medically important anthropods." Dr Garwood was down as a collaborator, as well as others in other institutions but the claimant would be submitting it as solo PI. Professor Burton reviewed the claimant's up-to-date CV including his publications and Google scholar details. On the basis of citations, this looked strong but Professor Burton noted that this was largely thanks to work which was done prior to the claimant joining Manchester. Several of the papers listed had not yet been accepted (they were stated as being in review). There was always a possibility that they would be rejected and so they did not count until they were formally accepted. Furthermore, of the publications listed in 2018 (i.e. during his employment with the respondent) he was not listed as first author for any of them.

50. In reflecting on the available information Professor Burton had a number of concerns that the claimant was not really engaging with his objectives for proposals and papers or really engaging with the Department. Professor Burton was concerned that the claimant was developing a pattern of promising a lot and then finding reasons why he could not deliver. Professor Burton emailed the claimant that one of the items on his probation objectives was the Equality and Diversity committee. He asked the claimant if he had been serving on it and how it had gone. The claimant's reply was that he was still on the committee and that it was hard to see progress was being made but it was interesting.

51. Even at this early stage Professor Burton was concerned about the claimant's progress. When he emailed Professor Kevin Taylor to say that he had finished reviewing all the probation cases, he said that they all looked good apart from the claimant's, who was beginning to ring alarm bells for Professor Burton. He said that it was not too late for the claimant to turn things around but he seemed not to be really 'cracking on' with his probation and that lots of ambitious promises seemed to "dribble into nothing." Professor Burton asked Professor Taylor if he had an opinion on the claimant from his role as Head of School. Professor Taylor replied (on 5 February 2019) that he had major concerns about the claimant, who seemed invisible to him. He said that he was aware that the claimant had been ill (although we heard no direct evidence of the claimant taking sick leave in the early part of his probation) but not all of the time, and not in a way that should prevent his work being done. Professor Taylor mentioned that a clear, strong set of probation targets would be very important the claimant and the Department.

52. It is clear that by this stage in the chronology the claimant's progress was already starting to ring alarm bells for the more senior members of the University team. The respondent used the probationary review system to try to raise these issues and concerns with the claimant so that they could be addressed in a timely manner.

The 2019 probationary review

53. The probation review meeting took place between the claimant and Professor Burton on 6 February 2019. Under the heading of "research," Professor Burton wrote that the claimant had "only just submitted to RRE, so no grades were available. Many papers are in progress." Under the probationary objective of Teaching, Professor Burton wrote that the claimant was contributing to discussions about palaeontology teaching. Under the heading "Academic Enterprise," Professor Burton wrote that this activity had ceased due to inactivity from the UK organisation. Professor Burton indicated to the Tribunal that this was a failed probation requirement but did not have the same weight as research papers, funding and teaching experience, and NAP. Indeed, this was later waived to allow the claimant to concentrate on the key areas of research and teaching.

54. Following the probation review meeting with the claimant Professor Burton emailed Professor Taylor to update him on the discussion [81]. He said that he had clarified that the claimant was on track to be a full academic member of staff (pending successful probation) and it was therefore in his interest to understand and engage with the School. Professor Burton had emphasised that it was better for the claimant to be proactive and to push for what he wanted in terms of teaching and administration rather than waiting to be given a job. Professor Burton also mentioned that the claimant was getting a five year plan in place for discussion so had responded well for now. Although Professor Burton still had doubts about the claimant's willingness or ability to engage with its objectives as required, the claimant had assured him that he had every intention of meeting his objectives and Professor Burton was hopeful that the claimant would now focus on delivering these.

55. The Senior Promotions Committee meeting took place on 7 February 2019. Professor Burton's recollection (which was not documented contemporaneously) is that the committee agreed that the claimant was not showing much concrete progress and a concerted effort would be needed to get his probation back on track.

56. On 9 May 2019 Professor Burton emailed the claimant to arrange a catch-up meeting. The original meeting was scheduled for 9 May and was then rescheduled to 16 May 2019. On the morning of the rescheduled meeting the claimant emailed to reschedule it to the following week as he said he was having a tough time with blood sugar levels and didn't know if he would be able to make it into the office. He said that he was busy with

doctors' appointments the following morning. They rescheduled the meeting to 23 May but in the end they were able to meet on 17 May. Professor Burton made a note following the meeting. He noted that he had previously asked the claimant for an action plan to better integrate with the school but that to date he had not sent Professor Burton the draft. This was spoken about at the meeting and the claimant agreed to do it by the end of the following week. Professor Burton also highlighted to the claimant that his two RRE papers received only three stars and he needed to be more strategic in his publication approach to ensure that highly cited, high quality papers were produced regardless of REF. Professor Burton noted that, *"his attitude is still a little 'why do I need to justify my large salary to look at palaeo' and needs to think more pragmatically about getting things done. Also failed to get involved in Devon field trip."* Professor Burton confirmed that the claimant failed to produce the action plan that he had requested and Professor Burton was beginning to feel quite concerned about the claimant's performance.

57. On 14 August 2019 Professor Andrew Chamberlain emailed Professor Burton with a record of the NAP participants who were due to have their faculty peer review of teaching that year. This included the claimant. The senior mentor, Merren Jones, who would have put the necessary observations into place, was copied in on the message. However, the peer review of teaching did not take place because the claimant was not engaged in any teaching by this stage.

58. On 4 September 2019 Professor Burton emailed the claimant to inform him that he was putting the claimant down as available for academic tutoring for the following academic year. This was, thought Professor Burton, a reasonable way to provide the claimant with more teaching experience and integrate him better into the Department.

59. On 12 September 2019, the claimant emailed Professor Burton to say that he had been at the doctor's that morning and had requested to be signed off for the following two weeks. He was undergoing changes in his management of his diabetes. He explained that he was attending a diabetes management course every week and that an action plan had been put in place to adjust to background insulin levels which was unlikely to take more than two weeks. However, it would be a good idea for him to discuss further adjustments with Occupational Health when he returned to work. Professor Burton forwarded the email to the relevant HR partner Benita Jackson.

60. The claimant's fit note [91] gave the reason for absence as 'diabetes' and the comments section stated: *"undergoing change in diabetes management requiring change in daily and night time routine."*

61. The claimant returned to work on 7 October 2019 and he met Professor Burton in order to complete a return to work form [95]. The cause of absence was stated to be diabetes. It recorded that the claimant was chronically ill and missing fieldwork but that he was in the office. The

chronic illness referred to was the claimant's diabetes. It stated that no adjustments to hours were required. The underlying medical condition was recorded as diabetes. It confirmed that the absence was not a result of working conditions. It 'ticks the box' for a referral to Occupational Health. Under the heading "Further comments/Actions agreed" it stated: "Monitor impact on performance and review monthly." Having discussed the matter with the claimant, Professor Burton noted that no adjustments to hours of work were required because the claimant was not doing fieldwork and was largely desk-based and in control of his own hours. [95]

62. There was a Performance and Development Review meeting with the claimant on 15 October 2019 (a PDR.) The form was completed in conjunction with the claimant [98-101]. It recorded that the previous year had gone poorly. Progress towards completing probation in July 2021 was stated to be "part met." The objective in relation to high quality research papers was stated to be "not met." There were two non-first author papers in fair journals in the last 12 months. There were low citations. Overall, the last first author paper had been in 2016. In terms of project proposals there had been nothing in the last 12 months the objective was "not met". The objective of establishing a plan to engage more with teaching was recorded as "not met." There was reference to doing first year tutorials for semester one and two of 2019-2020. These were the tutorials that had been allocated to the claimant the previous month in September 2019. Policult outreach work was recorded as 'not met' as it had not been done. Serving on the EDI committee was recorded as "met." The objective to complete the NAP was marked "not met." It was recorded that the claimant had attended NAP lessons but had not yet completed the coursework.

63. The claimant's reflections were that he was feeling part of the department through the EDI committee and tutorials but he noted that illness had limited progress towards his goals. Professor Burton stated that the claimant had underperformed this year due to illness. He was struggling to meet probation goals in research. Professor Burton's comment on the forthcoming year was that the claimant needed "to submit a competitive project as PI to UKRI or similar to meet probation, as well increasing production of first author papers, at least two should be realistic in the next 12 months if he is well. The key question is how to manage his illness. This is under review by OH. [The illness in question was the claimant's diabetes.] Lack of productivity last 12 months is worrying." Professor Burton spelled out what was needed in order to turn things around. The agreed objectives for the forthcoming year (to be achieved by October 2020) were stated as:
    a. Project proposal to UKRI or equivalent as Principal Investigator
    b. Two first author papers published/accepted
    c. Clear plan how to build up teaching in 2021 (this was because the teaching for academic year for 2021 was being allocated in 2020 and early 2021).
    d. Offer 1-2 PhD research projects.

64. In the end claimant did not achieve any of these objectives.

65. On 24 October 2019 Professor Burton emailed the group regarding the internal deadlines for the demand management panel relating to grant projects. He reminded them to produce any project for the internal deadline and let him know if he could help. This was relevant to the claimant's objective in relation to grant applications but the claimant did not contact Professor Burton.

66. On 25 October 2019 Professor Burton emailed the claimant to ask how he was doing and to state that he understood that the Faculty teaching review were chasing the claimant with limited success. There is no evidence of the claimant replying to the message.

Occupational Health report.

67. The claimant attended an occupational health appointment on 23 October 2019. Professor Burton received a copy of the report on 4 November. The report, dated 23 October 2019 [102], recorded the nature of the claimant's employment duties. The claimant had informed the occupational health doctor that he was currently in full-time work and had been absent recently for two weeks whilst having his insulin regime adjusted to improve diabetic control. He had returned to work three weeks beforehand. The diabetes had reportedly impacted vision and the claimant's right eye was now permanently blurred and his left eye had had bouts of blurriness that appear to be related to blood sugar control but which seemed to be improving. The claimant had reported struggling with some psychological symptoms. He was recorded as being on treatment for depression and reported having periods of anxiety, low mood, fatigue and lack of motivation. He advised the occupational health doctor that the symptoms could vary and that he planned to see his GP to review his treatment. The claimant had been experiencing fatigue. He informed the occupational health clinician that he had not got the energy to do any travelling at that time. He was working mostly from home whenever possible but coming into work to attend meetings. It was noted that the claimant had been referred to a kidney specialist for investigations and to a breast specialist as he had found a breast lump. The claimant had mentioned some perceived work stressors and the occupational health clinician recommended that management meet with the claimant to explore these in more detail. Management might wish to complete a stress risk assessment if this had not already been done. This would allow the claimant to formally identify the perceived work stressors and work with management to find solutions to them. Measures could then be put in place to keep stressors as low as reasonably practicable. The report indicated that all of these health conditions were on the claimant's mind. He told the doctor that the ongoing health conditions were impacting his ability to function on a daily basis and impacting on his ability to perform in work. The claimant was finding that it was taking him a lot longer and he was doing the workload at a slower pace with taking breaks. The occupational health doctor recommended that management continued to allow the

claimant flexibility in his hours. It was noted that the claimant had upcoming hospital appointments and it was important that he was able to attend these. The doctor recommended that the claimant meet with management to review his workload and to consider allowing him to miss any non-essential meetings. The report concluded by stating that the claimant was considered fit for work with the support of adjustments as detailed in the earlier parts of the report. It was recommended that the claimant be kept under occupational health review and arrangements had been made to see the claimant again in six weeks' time. the claimant had been given information regarding the University's counselling service, should he wish to use it.

68. Professor Burton was willing to continue with the existing flexibility afforded to the claimant. He had no issue with the claimant taking longer to do his work or with removing the claimant's non-essential duties. However, he was still concerned about the claimant's ability to meet his objectives even with these adjustments. With the removal of the non-essential duties the claimant's workload should have consisted of the following:
    a. Six hours of teaching per week (this was not actually happening at the time and did not subsequently happen.)
    b. Writing research papers.
    c. Preparing a grant application (which would take two months of full-time work and a further month for revisions for an early career academic.) It appears that the claimant never produced any evidence of work on this objective.

69. The claimant met Professor Berton to discuss the report on 7 November 2019. Professor Burton told the claimant that he was happy to remove any non-essential probation duties. However, he did make it clear to the claimant that he was still very worried about the claimant's ability to pass his probation based on his performance to date. Professor Burton said that it was now essential that the claimant focus on his teaching and research objectives, failing which he would fail probation.

70. After the meeting Professor Burton emailed the claimant to confirm the discussion. In order to help the claimant to focus on the priority targets for probation, Professor Burton said the claimant could step back from his role on the EDI committee and that Professor Burton would look into redistributing the claimant's first year tutees [108]. Although the EDI committee and first year tutorials were a very small element of the claimant's workload, at this point it appears that it was the only thing left to remove from claimant apart from the required target in teaching and research.

71. The claimant was notified (via email from Professor Burton on 19 November) that a new management structure was being developed. All tenure- track fellows were to be managed by Professor Ann Webb as a cohort and she would organise training and networking opportunities for them. The claimant would still remain a full member of his existing research group and his direct research mentoring would come from his research

group leader and structure [109]. This change in the line management structure took place in December 2019. At this stage the claimant was already into the third year of his fellowship. The three 'standard' years of probation were due to end in July 2020, or July 2021 if he needed the extension for the additional fourth year.

72. Professor Burton was due to have a further catch-up meeting with the claimant on 2 December but the claimant did not attend. Professor Burton emailed the claimant the next day to check that everything was okay. They did not meet again in 2019.

2020

73. Professor Burton emailed the claimant in early January 2020 to try and arrange a catch-up [112]. The claimant replied that he had a lot of appointments coming up that week and a few the following week and that he would search through all his letters and get back to Professor Burton. They eventually agreed to meet on 9 January.

74. Direct line management responsibility for the claimant had shifted to Professor Webb in 2020 and she was keen to meet with the claimant. She had a series of 'getting to know you' meetings with all of the tenure-track fellows. The claimant and professor Webb met for an in person meeting on 22 January 2020. It turned out to be the only time that Professor Webb would be able to meet the claimant in person during the entirety of his remaining employment with the respondent.

75. Professor Webb made a personal handwritten note following the meeting [112.1]. This was not intended as a formal record of the meeting but rather a record for her own purposes of her impressions of the claimant. It was not written with the expectation that it would be read by others, including the claimant. Some of the pertinent observations made by Professor Webb included that the claimant was a 'non-stop talker' who needed lots of stimulation and did not like silence. She recorded that he is 'not good at finishing tasks.' She noted that he did a lot of name-dropping and she described him as having lots of self-regard and that everyone was his 'best friend.' Regarding his health, she wrote, "Doubtless good at what he does but health issues long-standing diabetes (not, he says, a problem in itself) and now undiagnosed (to date) issue with cysts on kidneys. Lots of tests and hospital appointments." She referred to him having good days and bad days with no energy. He told her that he had got behind both with probation stuff and with multiple commitments made. There was also reference to the fact that he was due to get married in June and so time was being spent on that. She recorded the claimant's fiancée as having taken a job in Dublin for a year and that it had been extended for a year. She noted that the claimant's fiancée was applying for jobs in Manchester and he was applying for jobs in Dublin, "so future rather uncertain." She concluded by noting that the claimant was difficult to tie down. He needed to sort out

medical problems so that he had the energy to realise his potential. She recorded that he then needed to focus on 'the necessary' for a while. She observed that there was no two-way conversation- it was a monologue by the claimant about himself. The claimant was going to tell Occupational Health that the respondent could have details of his meetings and see medical details.

76. The Tribunal notes that the description of the claimant's wife's work situation varied over time. Her job in Dublin was variously described as a 3 year contract, then permanent, then an 8 year term. The Tribunal and the respondent were unsure whether this reflected changes in her employment arrangements over time or a change in the way that they were reported to the respondent by the claimant.

77. Professor Webb's note reflects the way that the claimant presented himself to the respondent. He would confirm that there were problems and that he was behind with his work, he would make general references to his ongoing health problems but would conclude by reassuring them that everything was in hand and that work performance would improve in relatively short order.

78. The day after this meeting, Professor Webb was told that she needed to have more formal probation discussions with each of her line reports. Progress against probation requirements was now reviewed annually at the same time that promotions were considered. Professor Webb sent an email to all her line reports indicating that she needed to meet with each of them to see where they were up to. She explained that she needed to write a sentence or two about each step that they had made towards completing their requirements. She asked them all to come in for a 15 minute discussion so that she could complete that task [115]

<u>Second occupational health report</u>

79. A further occupational health report was produced in relation to the claimant. It was dated 22 January 2020 and was sent to Professor Burton [113]. The report indicated that the claimant had informed the doctor of the adjustments made since the last report. He reported that his responsibilities had reduced and he was no longer required to facilitate tutorials or attend non-essential clinics (presumably this should have read "meetings"). He had stopped taking new projects from outside the University to help reduce his workload. It was noted that the claimant was currently in full-time work and since the last review there had been a significant improvement in diabetic control. The claimant had informed the doctor that he had a supportive line manager and the adjustments had helped him to remain in work. He was still under investigation by the Kidney Specialist for fatigue and kidney symptoms. He reported that his fatigue was getting worse and he was finding it harder to manage at work and at home. He felt that he was playing "catch-up" on his work. Despite

the fatigue the claimant was keen to continue in work as he found that it helped to control his psychological symptoms. The psychological symptoms continued to affect the claimant. Although he had had his medication up-titrated and reported some improvement, he reported that not being in work was contributing to his symptoms. The occupational health doctor had given the claimant further information regarding the University counselling service.

80. The occupational health report recommended that close management support should continue with regular reviews. In the occupational health doctor's opinion, the adjustments were likely to be needed for the foreseeable/visible future (at least a further three months.) A review by Occupational Health was intended within the three months. The occupational health report concluded that the claimant was fit for work with the existing adjustments. It was recommended that the claimant be reviewed in three months' time when it was hoped that he would have further information from the kidney specialist.

81. Professor Burton stated that he had no issue with continuing with the adjustments that had been recommended for the claimant. This meant that the claimant would have plenty of time to meet his probation objectives even if it did take him longer to carry out his work.

82. The Tribunal looked in vain in the hearing bundle for the next occupational health report. It appears that there was no third occupational health report following the planned review of the claimant's case. Having heard evidence from the witnesses, it appears that after this report the claimant may have made self-referrals to make use of the support which occupational health could provide to him. There are repeated references to the claimant's use of "**" to obtain support. As these discussions were part of the support/treatment being provided to the claimant, they did not result in an occupational health report being sent to the respondent. The January 2020 report is therefore the last formal occupational health report which the respondent received in relation to the claimant. It seems that the claimant verbally assured the respondent's managers that he was receiving the support he needed through his consultations with "Sam" from Occupational Health and so the need for a further management referral to Occupational Health was apparently overlooked. Certainly, the claimant did not remind anyone that he was due to see Occupational Health again or that a further review report remained outstanding.

83. This fitted with a pattern that the Tribunal noted in the claimant's approach to his health during the time he was working for the respondent. Whenever the claimant provided an update to the respondent about the state of his health, he would usually conclude by saying that he was getting better. He repeatedly gave a positive, optimistic impression to the respondent. On closer inspection this optimism was often not well placed but the respondent had no reason to challenge it or disbelieve the claimant, especially in the earlier stages of his employment. Whenever the claimant gave a falsely positive impression of the situation it served to throw the

respondent "off the scent." The respondent took the claimant at his word as a highly intelligent and professional man who had obtained a prestigious fellowship. It was only later, when a pattern of behaviour started to emerge, that the respondent attempted to question what the claimant said to it (e.g. about the progress he was making with his work and the arrangements he had actually made to achieve his probation targets.) Thus, in relation to both the claimant's work activities and his health, the respondent did not pick up that there were problems to address from the earliest stages of the chronology. Instead, they took him at his word, gave him the benefit of the doubt and assumed that he would flag up any issues and do the work that he had agreed to do.

84. The claimant sent this Occupational Health report to Professor Webb. He stated that it, 'might still be a while until I am fully fit for work but I will be sure to keep everyone updated." Professor Webb responded on 28 January [117] and said, *"In light of your ongoing health issues I think it is particularly important that we correctly record your progress against your probation criteria this year. Could you spend a few minutes going over that with me in the next week or so, please. Obviously it is best done in person, but if you are struggling to get to campus we can have a telephone call/Skype instead. Just let me know what suits you best."* This email was a follow up to the general email to all her line reports about getting information for Professor Webb to submit to the committee about probation progress (23 January [115]). The claimant and Professor Webb agreed to meet the next day but then the claimant cancelled the meeting on the day as he was "not doing too good." He asked to reschedule.

85. It was apparent to the Tribunal that Professor Webb took her responsibilities seriously and was trying to address the claimant's difficulties as soon as she could once she took over line management responsibility for him in 2020.

<u>February 2020 meeting Claimant and Professor Webb- Probation review.</u>

86. The meeting between Professor Webb and the claimant eventually went ahead on 3 February 2020 and gave the claimant and Professor Webb the opportunity to discuss progress against academic probation objectives. By this stage of the claimant's probation, the respondent would have expected the claimant to have already completed the NAP programme, along with some other objectives. At the meeting Professor Webb and the claimant went through the form at [190.1-190.4]. The version produced to the Tribunal was a composite version showing comments from successive years but it was possible to identify the comments relating to the 2020 meeting.

87. Against the Research objective Professor Webb recorded the claimant's report that there were several papers in press, in review, almost submitted. In relation to grant submissions by February 2020 it was recorded that the claimant "had success with three small grants less than £10,000-planning

for June/July 2020 Dr Legg to update on Co-I application to National Geographic." These small grants were not sufficient to meet the probation objectives. (The NERC grant is around £800,000.)

88. Against the Teaching objective she recorded: *"1 lecture for 3rd year Paleo. each year. S2, starting to teach couple of lectures and practicals for 2nd year Geology. Long term plan to replace some of John Nudds' teaching."* The Tribunal heard evidence that John Nudds was due to retire shortly and his area of expertise fitted well with the claimant's.

89. By this stage in his career with the respondent, the claimant had delivered a single two hour lecture plus discussion to 3rd year palaeontology students each year (2018 and 2019). The claimant told Professor Webb that in Semester 2 he was starting to teach a couple of lectures and practicals for 2nd year Geology (but in the end this teaching was actually covered by other staff.) When the Covid pandemic started in earnest in 2020 the campus closed in March 2020 and teaching was moved online. On campus practicals were not permitted. It appears that the claimant contributed a single recorded lecture ("Cambrian Diversification in Arthropods") to the same 3rd year unit as aforementioned. That was the last year that that unit was delivered.

90. Professor Webb also recorded that the claimant had completed all the NAP contact and just needed to complete the assignments. This was what the claimant told Professor Webb but she subsequently discovered that it was incorrect and that the claimant had actually completed very little of NAP. She had been given a misleading picture by the claimant.

91. Under "academic enterprise" Prof Webb recorded "little activity at present." This activity had ceased due to little activity from the UK organisation in February 2019. As previously mentioned, the claimant was taking a break from involvement in the EDI committee, which would have been recorded under the heading "Service."

92. During this discussion, Professor Webb provided feedback to the claimant that he was falling behind on his probation objectives. Given that this was the third year of the process, completion of NAP and submission of a major grant proposal were imperative. The claimant gave assurances that he had proposals ready to go and he could manage NAP.

93. The contents of these documents indicate that the claimant was forewarned of the timescales that he needed to comply with in order to pass probation. He knew what needed to be done and when it needed to be done by. He knew, or ought to have known, that this could not all be left to the end of the process.

94. The Tribunal notes that the claimant was not operating a vacuum. Whilst his personal research projects might not directly impact upon others, his teaching commitments would impact upon others. He was working with colleagues to provide teaching to students at the appropriate time within

the academic year and the curriculum and taking into account the examination and assessment timetable. Whilst there could be some flexibility in the way that the claimant worked, it did still have to fit within the framework of the department, the university and the academic year. A failure to plan and deliver teaching at the right time would impact on students and the claimant's colleagues. If the claimant did not deliver the teaching as anticipated, a colleague would have to do it instead, would have to have sufficient forewarning to prepare, and would have to fit it within their other pre-existing commitments. Thus, whilst there could be some flexibility in the claimant's working arrangements, there were limits on that flexibility, for good reason. If the claimant could not deliver as planned it was important that he communicated that fact as soon as possible so that alternative arrangements could be made in good time.

95. During the course of the hearing the Tribunal heard evidence from the claimant about his own personal work style. He indicated that he often left tasks to the last minute and that this was alright because he still had the skills and ability to do the necessary, even close to a deadline. He recognised that he had a pattern of not spreading his work over the entirety of a course, for example. Rather, he would do less in the beginning and middle stages of the course but would then manage to cram most of the work in just before the deadline. He said that he had had significant academic success with such a work style. The Tribunal finds that the inherent difficulty with this approach, once the claimant started the DKO fellowship, was that he was not working in isolation. As stated above, his activity and the timing of it, impacted on others. It also meant that the claimant was vulnerable if something unexpected happened close to the final deadline for a task to prevent him doing the necessary work just before the deadline. He would not have a track record of consistent performance to fall back on and demonstrate his abilities. This might be alright if further extensions to a deadline were possible but there was always a risk that it might not be possible to extend a deadline further. The claimant needed to balance his own work style against the requirements and structure of the organisation that he worked for in order to ensure that his probation reached a successful conclusion.

96. The claimant also presented as someone who was prepared to deviate from rules or instructions if they did not fit his personal work style. Thus, he did not always follow rules about living in Ireland when he was supposed to be in Manchester or for getting appropriate permission to be away from Manchester. On other occasions it seemed that the claimant subjectively believed that what he was saying to the respondent was true and that others were effectively 'gaslighting him' when they confronted him with contradictions or inconsistencies in his story over time. The claimant appeared to be unable to remember his past conduct or conversations and so was unable to recognise the contradictions in what he had said to others over time. The claimant's approach presented the respondent with a management problem. On occasion the claimant presented to the Tribunal as requiring considerable help and support from his employer. He presented as needing or wanting to be 'spoon-fed' information. By

contrast, at other times he appeared extremely self-confident and with considerable 'self-regard.' The Tribunal was unable to discern whether these different modes of presentation were conscious or intentional on the claimant's part. To some extent this does not matter as, in either case, the respondent's managers would need to find an appropriate and effective way to manage the claimant. They were trying to find a way to determine whether they could rely on what he was saying to them (e.g. about his NAP progress) and to find a way to manage him accordingly. The respondent's managers had to grapple with these competing demands and ensure that any flexibility afforded to the claimant was consistent with the wider needs of the organisation and other interested parties.

97. By this stage in the chronology the symptoms the claimant complaints of (regarding fatigue) fit with the known diabetes condition and the suspected kidney problems. That fatigue might well impact upon his ability to get work done by a deadline but it would not necessarily mean that the claimant's reliability would fluctuate over time. The claimant did not say or do anything to indicate to the respondent at this stage that there might be some other underlying condition about which they should ask questions or which would require further medical evidence. There was nothing which would reasonably alert the respondent to the possible presence of the sleep apnoea or ADHD (or similar) which should be investigated. The claimant's pattern of behaviour during this time was consistent with someone with diabetes and associated fatigue who also happened to have a style of working at the last minute and whose representations and updates to his employer were not particularly reliable.

98. The Tribunal finds that there was nothing to ring alarm bells for the respondent at this stage to suggest that there was a further underlying condition or disability which needed to be investigated. There was no 'red flag' at this stage. The Tribunal finds that the respondent was not ignoring warning signs or failing to act on the information that it was presented with. Rather, the claimant downplayed the situation or misled the respondent as to the true state of affairs (whether consciously or not.) The respondent was doing the best that it could with the information that it received.

99. The Departmental Promotions Probation Committee meeting took place on 14 February 2020. After the meeting, on 17 February, Professor Webb emailed the claimant to tell him what had been discussed in relation to his probation. She noted that the committee was aware that his ill health had slowed his progress. Their greatest concern at this stage was the lack of substantive research proposals. Concerns about NAP completion and funding proposals were also mentioned. She advised the claimant to check submission dates for some of the requirements. Professor Webb explained that there was still over a year left to complete this objective but whether that was feasible depended on health outcomes. She informed him that the Committee had agreed to review case his case in July when he would still have 12 months remaining on maximum probation. At that stage they would consider if mitigation was required (i.e. is more time required.) She hoped that by then there would be a diagnosis and treatment so that an

informed decision could be made about whether/how much mitigation would be required. The Committee was unable to make that judgment call as of February 2020. She closed by stating, *"wanted to let you know what the PC considered you still have to do, and also that we will support you in completing probation where we can and when we are able to do so in an informed way. If you would like to discuss any part of this either in person or by telephone, then do let me know. Meantime, I wish you a swift diagnosis and return to full health."*

100. The Tribunal finds that this was an important email which sought to strike an appropriate balance between supporting the claimant and advising him about what he needed to do, by when, and what the potential outcomes could be. The claimant retained responsibility for his own progress but was told that the respondent would offer support as appropriate and if the claimant indicated that it was needed.

101. On 4 March 2020 the claimant emailed Professors Webb and Burton that he had finally had a diagnosis and that his health was fixable. He had been in the early stages of kidney disease. He informed them that the prognosis was good although it could take a number of months to 'right itself.' [129]

102. The campus closed due to the Covid 19 pandemic on or about 17 March 2020. On or about 2 April there was a Zoom meeting for all fellows. The claimant was unable to attend. On 14 May Professor Webb sent an email entitled "Sanity Check" to the fellows, including the claimant. This was intended to check that everyone was ok and to offer support where it was needed given the situation that everyone found themselves in. She asked for a brief acknowledgement from the recipients even if they did not require her help, as she wanted to be sure that everyone was ok. She did not receive a response from the claimant.

Teaching May 2020

103. In May 2020 Professor Burton found out that a colleague in ICAL was intending to take voluntary severance which created the need for teaching cover. He considered this to be a good opportunity for the claimant because the teaching fell within his research area. Professor Burton understood that the claimant had still not been undertaking any teaching, which was required for NAP. Professor Burton emailed Professor Webb on 27 May and mentioned that Dr Garwood was willing to take on the teaching but that ideally he would have the claimant as a "wingman." Professor Webb replied that the claimant should be able to do this provided his health continued to go in a positive direction and that online teaching was less of an issue in any event. She also said that the claimant was the one person that she had heard very little from [139].

104. Professor Webb 'met' the claimant on 29 May to discuss the teaching opportunity. The claimant said that health wise he was doing well, apart from one little blip but he was now over that and working from home suited

him perfectly. He was happy to assist Russell Garwood with the teaching and the fact that he would not have to be on campus made him more confident about participating fully. Professor Webb updated Professor Burton and thanked the claimant for accepting the teaching. She did not hear anything further from the claimant but assumed that he was liaising with Dr Garwood about teaching on this course. (In the end, the claimant did not do this teaching.) The claimant did not engage with any teaching in semester 1 of 2020. This was despite the fact that he was fully aware of the need to gain teaching experience and that this would have been an ideal opportunity for him to support Dr Garwood. (Ultimately in 2021 Professor Burton had to step in again to secure teaching for The claimant.)

105. On or about 2 June 2020 there was a fellows' meeting to discuss phased re-entry to the building. The claimant did not attend and did not send apologies.

106. In around June 2020 there were discussions between Professors Webb and Burton concerning the claimant's discussion about an extension to his probation period beyond his fourth year (which was due to end in the following July 2021.) The university's probation policy was that the maximum probation period is four years.

Proposed relocation to Ireland

107. On 22 June 2020 the claimant requested a meeting to discuss the possibility of working from abroad. The claimant's wife had been working in Ireland and they had been discussing what would happen after lockdown. As his wife was happy in Dublin, he was looking into the possibility of moving to Dublin and doing his teaching from there and possibly coming back to Manchester when it was particularly necessary for him to do practicals or attend important meetings. The claimant wanted to meet Professor Webb and Professor Burton.

108. Professor Webb and the claimant met on Zoom around 23-25 June 2020 to discuss the possibility of working from abroad. The claimant told her that his kidney problem had resolved in March 2020 and that his health had improved and he was now feeling well. He said he had plenty of energy and had started running "couch to 5k". His self-assessment was that he had lost about a year due to his health. He wanted to apply for an extension to probation to July 2022. The claimant knew that he had not met the research conditions and said that he was planning to apply for a Royal Society Fellowship in September 2020. They also discussed a NERC starter grant application in January or July (their submission dates each year.) The claimant would also check about BBSRC New Investigator Grants and any opportunities there. Professor Webb took the opportunity to be updated on the claimant's progress.

109. On 1 July the claimant emailed Professor Burton about the possibility of him temporarily relocating to Ireland the following semester (commencing

September 2020.) He explained that he had discussed it with Professor Webb and had made the case that his well-being and productivity had increased immensely in the past few months and he thought it would be increasingly good for his mental health to relocate on a long-term basis.

110. Professor Burton's response was that it was up to the claimant where he lived but that living far from work was never a justification for not fulfilling reasonable duties/activities in the Department. It wasn't an issue whilst all of the staff were working remotely, but he asked the claimant to consider the position if he was called on to help with teaching and administration duties as the Department reopened (which might happen in semester one (September 2020) and more likely in semester two (starting January 2021)) [147]. Professor Burton was concerned that if the claimant were in Ireland long term, he would become even less engaged and visible within the Department. At around this time the claimant was considering the possibility of finding another role in Ireland as it was where his fiancée based.

PDR meeting July 2020

111. The claimant and Professor Webb 'met' on 22 July for Dr Legg's annual P&DR. Professor Webb had asked all fellows to upload or send their PDR forms to her five days before the meeting but the claimant had not done so. He explained to her that in the past he had gone over it with Professor Burton and filled it in during the meeting.

112. The meeting focused on what the claimant needed to do to complete probation given that he was in his third year and he would only have one more year if it went into a fourth year. Dr Legg enquired about an extension due to ill health. Whilst this could be explored, the difficulty was that the claimant had not actually taken sickness absence which could have 'stopped the clock' on probation in order help get more time. He had been signed fit to work and had not indicated that he needed to stop work. Indeed, he preferred to be in work as he found it helped him to get out of bed in the morning. In such circumstances, the possibility of getting a further extension for health reasons would depend on the view of the adjustments that had been made to his work and the possible impact of Covid on his progress. At this stage Professor Webb was not aware that the Probation Procedure for Academic Staff limits the probation period to four years.

113. During the meeting Professor Webb asked the claimant to upload the PDR form but he did not do so. She chased return of the completed form on 27 July but received no response. Even though he was reminded again, he failed to send in the completed form.

114. The University issued a message on about 29 July 2020 that said that members of staff on probation would have it automatically extended by a year due to the Covid 19 pandemic. This message was apparently only

intended to apply to those members of staff in their first three years of probation. However, there was some confusion about this and it was not clear to all recipients of the message that it was intended to be limited in this way. At the time it was thought that this would be available to everyone currently on probation. It subsequently changed when the University decided that this would have to be considered on a case by case basis. Apparently, it had never been intended to give a fifth year but rather to give those who had not yet asked for a fourth year, an automatic fourth year.

115. On 9 September 2020 the claimant requested a letter from Professor Webb in order to assist him in getting accommodation in Ireland. Professor Webb took the opportunity to request his completed PDR form. He was indicated that he was sure he had sent it and would check and resubmit it by the end of the week. He had some difficulty with a temporary laptop and files being stored on an external drive. Despite the reminder, he did not send the PDR form to Professor Webb.

116. On 14 September 2020 Professor Webb emailed all fellows in order to gain an understanding of the impact on teaching of a second lockdown. They were asked to use a red/amber/green rating. The claimant responded with a green rating even though he was not actually doing anything to engage with any staff about the teaching elements of any course.

117. On 7 Oct 2020 Professor Webb emailed all fellows to ask if they wished to volunteer for a faculty peer review of their teaching. They needed to be reviewed as part of NAP and so, if that had not already happened, they should consider signing up as they needed to allow time for feedback from the reviewer to include their actions in response in their NAP portfolio. Even though this was particularly relevant for the claimant, Professor Webb got no response from the claimant. He needed to complete his Faculty Peer Review for his NAP in that academic year.

118. Professor Webb had an email discussion with Professor Burton about several fellows on 21 October. In relation to the claimant she noted that he was a concern. She stated, *"while his move to Ireland is not an issue in current circumstances he has certainly mentioned looking elsewhere (in Ireland) for a position, in support of his wife/soon to be wife and her dream job, if he is not allowed to work remotely. Not relevant at present, but he has openly talked about jumping ship should he feel his personal circumstances warrant it. Now I think we have to let things play out, given that none of us are on campus."* She also noted that he was short on probation targets.

119. The tribunal notes that by this stage in the chronology there was still nothing presented to the respondent from the claimant to flag up that his unreliability was in any way connected to a health condition such as ADHD. The respondent would need some material from which to draw such a conclusion. Not all employees who struggle to meet targets and objectives in a timely fashion fail to do so because of a mental health condition or

diagnosis such as ADHD. Sometimes there is a capability or performance issue which is not related to any health condition.

120. On 13 November 2020, Dr Merren Jones emailed all of those who were enrolled in the Department on the NAP to let them know that she was taking over as Senior Mentor for new academics. She said that she would like to meet with each of them to discuss their personal circumstances and to ensure that the data was correct and check that they were on track. She attached an agenda for a meeting the following Wednesday and asked them to send their feedback on any aspect of NAP. There is some suggestion that Dr Jones had three or four virtual meetings with the claimant in 2021 and tried to encourage him to engage with the aspects of the NAP that he still had to do. It appears this process was unsuccessful.

121. On 23 November 2020 Professor Webb emailed the fellows that she would like to have a personal catch-up with each of them at some point in December and she asked them if there was any appetite for a brief/informal meeting of fellows as many have found it invaluable early in the year. She did not hear anything from the claimant so followed up on 1 December asking for his response so that at least she knew he had received the invitation. He could let her know that he was okay. She said she would like to see him on Zoom even if briefly. The claimant's response on 1 December was that he was not taking meetings as he was not feeling too well. He notified Professor Webb that he had recently been informed by his doctor that he had an underactive thyroid which, coupled with his diabetes, was having an effect on his energy levels and making him feel unmotivated. However, he went on to say that this would hopefully be resolved soon but that they were working on the medication. Other than that, he said things were pretty positive and that, as ever, he was exploring funding opportunities and still getting work done "albeit with a lot of self encouragement and the occasional mental kick up the bum." For her part, Professor Webb asked him to let her know when he was feeling better so that they could have a chat. Given the information that the claimant had provided about the state of his health, the respondent was in no position to go behind this and undertake its own further investigations. At that stage it reasonably had to take the claimant at his word and accept that his doctor was looking into the matter and would treat him appropriately. It appears that the thyroid problem combined with his diabetes adversely impacted on his energy levels. If the claimant was attributing those symptoms of fatigue to diabetes and thyroid problems the respondent was in no position to gainsay this. When Professor Webb spoke to him shortly thereafter, he was expecting the medication is to be balanced within 3 to 4 weeks.

122. At this point in time the claimant was not signed off work on sickness absence. Consequently, if he was not taking meetings, he should really have let his line manager, Professor Webb, know this. Whilst she would not have objected to this course of action, his approach lent weight to the perception that he was disengaged and would do his own thing independently without telling line managers at the respondent. It proved difficult to get visibility of what the claimant was or was not doing at any

given point in time and to get an explanation for the situation. Thus, Professor Webb took his suggestion that he was exploring funding opportunities at face value at the time but noted to the Tribunal that she had never seen any evidence of it since. The Occupational Health evidence suggested that it took the claimant longer to do his work but that he was still able to do work. At this point in the chronology the claimant had little to no teaching, no academic enterprise or service duties and, in principle, should therefore have been working on writing papers and preparing research proposals. A review of the contemporaneous evidence suggests that this was not in fact the case.

123. The Tribunal also notes that at this point in time the claimant expected to improve and get better with medication. Whilst in other cases one might expect an Occupational Health referral in the circumstances, the Tribunal notes that this was in the middle of the Covid 19 pandemic and so it was somewhat unrealistic to expect an Occupational Health referral in the same way as would normally be achievable. In addition, the claimant was saying that he expected his medications to be balanced and for things to improve. The Tribunal considers it reasonable for any Occupational Health referral to be delayed in the circumstances as they then were. The respondent would reasonably be waiting to see how the claimant's condition developed before referring him to Occupational Health, if they needed to. We also note that the claimant never suggested that he needed any Occupational Health input at this point in time.

2021

124. On 27 January 2021 Professor Webb received an 'out of office reply' when she sent an email to the claimant. In the body of the reply it stated, *"whilst I get used to a new medication my email replies will be a lot slower than usual. If something requires urgent attention then please use my Hotmail account (unless it is of a confidential nature, in which case try again on this account but be sure to flag your email as urgent.")* Professor Webb had been getting in touch with the claimant to instigate the probation review process as the relevant form needed to be completed by 8 February.

125. On 2 February Professor Webb chased the claimant for the relevant form. She highlighted how important it was that they discuss his probation and that he engage with the exercise as his progress was "languishing somewhat." She stated that she was aware of his health issues but noted that they still needed to present a case to the promotions committee the following week so she needed an up-to-date view of where he was at and how and when he might be able to move forward. She received a response from the claimant on 3 February which referred to his health as being absolutely terrible at that point in time. He pointed out that his thyroid was acting up which had had a knock-on effect on his diabetes and was causing major problems due to blood sugar fluctuations, including a massive bleed in his left eye. He stated that he was trying to work but that

it was hard going so it would be good to talk to somebody. She responded immediately to arrange a meeting for the next day.

126. The meeting took place via Zoom on 4 February 2021. Professor Webb completed a form as part of the meeting [190.1-190.4). Her comments in the form were based on what the claimant said during the meeting.

127. In relation to the objective of research, Professor Webb noted that he had papers with REF gradings 2× 3*(but not all papers are graded). 1 co-author paper in 2020. 3× co-author in 2019 (2 significant). Currently one accepted, two review. With regard to grant applications, she noted that the claimant had applied to SFI (Ireland) for a fellowship (to be held in Ireland.) She referenced no focus to put in grant application just now (health issues). Professor Webb pointed out to the Tribunal that it takes considerable work to apply for a substantive fellowship (i.e. the Irish fellowship) and is similar to applying for a grant.

128. In relation to teaching she wrote, “Check S2 teaching (imminent), what happened to the teaching with Phil? Not had any contact. Also had some potential teaching with Rhodri. Both covering what JN used to teach.” Professor Webb notified the Tribunal that, in the event, Dr Legg did not deliver any teaching.

129. In relation to academic enterprise, Professor Webb noted that there was no outreach activity due to Covid. As against service, she wrote that the claimant would like to return to the EDI committee when his health allowed. Professor Webb wrote “David has an automatic 1 year extension so this year becomes his year 3 again. Struggling to move forward due to ill health. Research publications still progressing but other elements of probation have not progressed due to a combination of Covid and personal health.”

130. During his oral evidence and cross-examination at the Tribunal hearing the claimant accepted that it was fair to say that his progress was languishing at this point.

131. Following the meeting Prof Webb obtained information on the publications that the claimant had proposed for the Research Excellence Framework so that he did not have to search for them himself. These were two 3*publications from 2018. Even taking due account of the time lag between research and publication, Professor Webb would have hoped for more from someone engaged primarily on research. She confirmed that papers are graded from 1-4 *with 4* being the best and internationally excellent. Anything less than grade 3 is viewed negatively within the exercise.

132. Dr Merren Jones contacted the claimant and arranged to meet him on 10 February prior to the probation committee meeting.

133. The departmental promotions and probationary committee meeting took place on 11 February 2021. Professor Webb attended and it was at this

meeting that her understanding (that all probationers automatically received a year's extension) was questioned by the P & OD Partner. She explained at the meeting that she and the claimant both understood that he would be given a further year's extension. The relevant partner was uncertain about the possibility of the claimant having a fifth year of probation and so there was an action opened to check on this. In the meantime, the committee detailed the outstanding requirements for the claimant should an extension be allowed. The feedback from the committee was that there was a lot to do in one year. NAP was to be completed, a major grant submitted and rated competitively, and Professor Webb and Professor Burton were to ensure sufficient teaching in Semester 1 of 2021/22 to cover all NAP requirements and speak to Merren Jones regarding NAP timelines.

134. Professor Webb also commented to the P & OD Partner on 1 June 2021 that this probation discussion had flagged that the claimant was behind on all counts. An excerpt of the minutes of 11 February probation meeting relating to NAP highlighted that the claimant had attended 3/5 of the compulsory attendance elements, had submitted 0/4 assessments and 0/3 observations.

135. The Tribunal was informed that, following Professor Webb advocating on the claimant's behalf, the fifth year extension to his probation was only agreed on 19 July 2021. At that point it was made clear to the claimant that this was an exceptional situation.

136. On 11 February 2021 Prof Webb emailed the fellows to let them know that draft teaching allocations for the following year (beginning in September 2021) had been made and that she needed to check with them that they were happy with their allocation. She asked them to consider their allocation in light of discussions they had recently had about probation objectives and progress.

137. At around the same time, on 19 February, Professor Burton was contacting Dr Garwood by email to enquire whether he would be happy for the claimant to contribute some lectures on course EART22101. Dr Garwood responded that an alternative unit EART27201 would be preferable as a better fit for claimant. Dr Garwood indicated that he would be happy to liaise with the claimant to arrange delivery of the lectures. Professor Burton forwarded Dr Garwood's email to Professor Webb who replied that she would advise the claimant to make contact with Dr Garwood [195.1-195.2]

138. As a follow-up, on 23 February 2021 Professor Webb messaged the claimant with details of his teaching allocation for September 2021 explaining that they would like him to contribute to EART27201 (sedimentary rocks and fossils) with Dr Garwood, who would be happy to speak to him about it. The claimant had previously agreed in May 2020 that he would assist Dr Garwood with this teaching unit in September 2020 but he did not contribute to the teaching that year. At the same time Professor Webb explained to the claimant that it was no longer the case

that everyone got an extra year of probation because of Covid. This had only been intended for those who were in the first three years of probation, granting them an automatic extension of a fourth year. She explained that it might be better to look more holistically at his case if an automatic extension was not possible but that she would update him when she had more guidance from P & OD. She also said that she was in touch with P & OD about his request to work abroad.

139. On 25 February 2021 Professor Webb spoke to 1 of the P & OD partners for FSE, Benita Jackson, about the possibility of the claimant receiving a further year's extension to his probation and about his request to be based in Ireland. Benita Jackson explained that in normal circumstances (i.e. outside the Covid pandemic) any arrangements involving living and working overseas (unless it was a requirement of the role) had to be assessed in advance, and explicit agreement given by the Dean of Faculty and given the administrative burden and cost, there had to be an operational justification or budget to support a request to live and work outside the UK. A member of staff who wish to relocate overseas and continue to work for the respondent therefore had to complete the Staff Working Abroad Form (OW1) and submit it for consideration and approval. Professor Webb understood this to be because the respondent incurred increased risk, liability, and cost in terms of taxation regulations, Social Security liability, employment law and health and safety obligations, GDPR data transfers from a country outside the UK and it also created a significant administrative burden for the respondent.

140. On 1 March 2021 Professor Webb emailed the claimant to let him know that she had discussed his situation with P& OD, initially about whether he should apply for a probation extension on the grounds of Covid or his health or both. She explained that he should have another conversation with Occupational Health since his circumstances had changed since he was last in contact with them in January 2020. This would enable the respondent to set realistic expectations for him, with assistance/adjustments where feasible. This would enable the respondent to justify an extension into fifth year. Secondly, she informed the claimant that he needed to complete the Staff Working Abroad Form which she attached to the email. She repeated what she had been told about the various tax and liability issues from the University's perspective for those people working outside the UK. She also asked the claimant if he could respond to the email regarding teaching commitments for the next academic year.

141. On 4 March 2021 Professor Webb chased the claimant again about the teaching issue. She said she would be happy to chat about it with him if that was easier. The claimant's response was that he was still not well (albeit he was not signed off work on sick leave) but thought he would prefer some different teaching to that which have been suggested. He said that he had spoken to Dr Jones and other members of ICAL about teaching and would be better suited elsewhere. He said he would give a formal response after he had had a proper chat with Rob Sansom about available

teaching. He believed that there were other courses he could join that would be a better fit.

142. On 10 March Professor Webb emailed the claimant again. There were outstanding issues which required his attention. He was not signed off on sick leave at this time. She asked him if he had managed to complete the OW1 form for HR and also asked whether he had managed to make an Occupational Health appointment. It was notable to the Tribunal that the respondent was actively trying to get Occupational Health guidance at this stage. Professor Webb also asked the claimant to let her know when both actions were complete. She also continued that there was no room for debate about the teaching he would be doing in the next academic year, as the respondent needed to finalise the teaching commitments and the claimant needed a reasonably substantial role on a unit to enable him to complete NAP. He would therefore be contributing to EART27201, which was a second year unit in Semester One. The parties also needed to find the most appropriate way to deal with the fact that the claimant's probation period nominally ended in July 2021. Whatever adjustments Occupational Health might suggest, the claimant still had to complete NAP and he would require more time to do so (which would inevitably require an extra year of probation). The decision on the best way forward was best made with all the up-to-date facts and information available to the respondent. Professor Webb ended up by saying that they were doing their best to support the claimant and that if he could do his bit as well it would be a great help.

143. The claimant sent a 'holding response' on 11 March saying that he would respond properly in a few days. He said he was waiting on a doctor's appointment the following day in order to discuss the plan of action. He suggested it might be a case of adjusting the dosage of his medication. With regard to teaching he said he would do what he had to do. He was more concerned about having to do something now and not having the energy to do so. He thanked Professor Webb for the reminder on the other issues as his mind was a complete blank and he would make sure to sort them out.

144. If the claimant did in fact attend a doctor's appointment the next day, the respondent never received any information from him or his doctor regarding the suggested plan of action discussed with the doctor.

145. On 22 March the claimant requested a meeting to discuss various things relating to Occupational Health, NAP etc. Professor Webb offered a meeting on 23 March and arrangements were made for a Zoom meeting at 3pm. The claimant emailed again on 23 March asking to reschedule the meeting for later in the week as he had just discovered that his laptop camera and mic were broken. They agreed to meet on 25 March instead.

146. Professor Webb and the claimant met over Zoom on 25 March 2021 to discuss probation extension and working abroad. Professor Webb made a note of the meeting which she wrote up in her record of interactions document. She noted that the claimant was aware of and understood the

general situation. Legally, he should be in the UK for a minimum of six months per year (whether in one block or several) and that would equate to both teaching semesters plus induction weeks, for example. She made it clear to him that the respondent expected him to be in Manchester during teaching semesters. She also explained that she was not a decision-maker and that they would have to wait for this to go through the proper channels. The claimant told her that he was feeling better and another tweak to his medication should hopefully see him back to full capacity, albeit any change set him back for a week or two. He said he had had an appointment with Occupational Health who had determined that the main support he needed was managing his mood when his physical health was poor, so something will be put in place, possibly by a request for a managerial push to speed things up. By this Professor Webb understood that it was felt by Occupational Health that support/insistence from Professor Burton might speed up the allocation of support the claimant. However she found it a little vague and she understood that the claimant was in fact able to access counselling support.

147. In the meeting the claimant also said that he had talked to Dr Sansom about the teaching and they had come to an agreement with the claimant taking on some of his load on the second year course he had been allocated (although in the event claimant did not do so. The claimant also informed Professor Webb that he had enough material to do some of the NAP assignments and planned to complete them over summer and then do the other assignments when he had completed more of his teaching. He also said that he would like to apply for a one-year extension to probation based on ill-health, which would mean that he would complete probation by the end of his fellowship in 2022. He said that he was currently having a range of research meetings and was thinking about NERC/BBSRC grant applications in the summer. Professor Webb noted that he looked and sounded very much better and had clearly found the drive to start addressing work again. She also wrote that she was going to follow up with Dr Jones and Ms Jackson about extending NAP/probation and that they would see what came of the living outside UK process. She subsequently did this.

148. In relation to the occupational health discussion that the claimant discussed at the meeting on 25 March, the Tribunal understands that no occupational health report was actually produced as a result of this consultation. This fitted with the Tribunal's understanding that after the initial two occupational health reports, consultation with Occupational Health by claimant did not result in written reports for management. Rather, the claimant utilised Occupational Health to get support for himself as he needed it. This did not produce an audit trail or series of reports which the occupational health provider could send to the respondent. The respondent was not kept 'in the loop' as to the contents or detail of the discussions between Occupational Health and the claimant. This was not due to a lack of action on the respondent's part but seems to have been the parties' preferred way of using Occupational Health thereafter. The claimant had got the necessary counselling support. Professor Webb was,

in effect, reliant upon the claimant to update her as to Occupational Health views. The responsibility seems to have shifted. From this point onwards the respondent thought that the Occupational Health measures were in hand and had no reason to think that it was not under control or that they needed to intervene further with Occupational Health and take control of the process again. The Tribunal found, on balance, that the claimant could (and should) have told the respondent if there was something outstanding regarding Occupational Health which needed to be addressed or if the respondent was lacking information that it needed to have about the claimant's health conditions.

149. During April and May 2021 there was further correspondence between various interested parties about the claimant's request to work from abroad. For example, on 27 April Helena Gittins became involved in the claimant's request being submitted to the School Board for approval. Ms Gittins also involved Professor Webb because the claimant had submitted so little information on his form so Professor Webb tried to give some additional context.

150. The Tribunal noted the claimant's apparent priorities during this period. He was willing and able to push back and delay the grant applications that he was required to submit until the summer, whereas he was prioritising efforts to get permission to work from abroad.

151. Between 9 and 11 May 2021 Professor Webb was informed that the claimant had still not clarified his role in the lecture unit for Semester one of 2021. His colleagues had been told that he must be given teaching for NAP purposes and that it had to be the specified unit. The claimant should have made contact with his colleagues about this teaching but they had not been able to clarify the position with him. Professor Webb was becoming increasingly concerned that the claimant did not appear to understand the urgency of the situation. She informed Professor Burton of the situation and he agreed to intervene. Professor Burton agreed to meet the claimant together with Professor Webb.

152. The meeting took place on 18 May 2021. The purpose of the meeting was to spell out the urgency of the claimant's situation since he had still not done any teaching (as required) and there was uncertainty about the units that he was supposed to be teaching the following academic year which was creating additional uncertainty for his colleagues. During the course of the meeting Professor Burton asked the claimant if he still saw himself in an academic career (at Manchester) or whether he was considering other options (or locations.) The claimant replied that he saw his future at Manchester. They discussed the practicalities of his overseas working request (if he was a member of academic staff with in-person teaching duties.) The claimant confirmed that he could make it work but he would return to Manchester if requested. He said that his fiancée's job was fixed term so she could move to Manchester with him. The option of sick leave was also raised. The claimant had not taken advantage of either sick leave or an interruption to his probation on the basis of ill health. The claimant

was initially reluctant to consider it saying that the job got him out of bed in the morning.

153. After the meeting Professor Burton emailed the claimant with some of the proposed actions that had been discussed and with a forward look to the coming academic year. He explained that the claimant would need to:

a. Contact Dr Sansom to define precisely which 3-4 lectures he was delivering in Semester One of 2021 and let Professors Webb and Burton and Dr Jones know so that they could setup the teaching observation for NAP.
b. Request permission from the University to be based in Ireland whilst employed from Manchester.
c. Request an extension to his July 2021 deadline for probation. He should request a one-year extension but recognise that this would mean he would have to submit his portfolio by April 2022 for completion in July 2022. It was therefore imperative that he completed the practical teaching that underpinned his portfolio in Semester One of 2021.
d. Submit a competitive (grade 7 or above) NERC proposal by January 2022 at the absolute latest.

From January 2022 he would be assigned teaching and administrative duties which were consistent with a full member of academic staff. On the basis of the claimant's current research portfolio, this would consist of 50-60% of his time and would include daily face-to-face meetings which would require him to be in Manchester on a permanent basis during both semester one and semester two.

154. On 21 May Professor Burton emailed the claimant a detailed plan regarding the teaching. The email even indicated that the respondent would share materials from previous versions of the course so that the claimant did not have to come up with his own materials from scratch. He just had to update them. This perhaps required less from the claimant than would otherwise have been the case.

155. On 21 May 2021 the claimant emailed Professors Webb and Burton to inform them that he had been at the diabetic clinic that morning and that the doctor had recommended that he take a couple of weeks off to recalibrate his insulin. He said that he was also being put on various medications for kidneys, eyes etc. In terms of teaching, he spoke to Dr Sansom and now needed to contact Dr Jerrett (who was on academic probation also involved in the EART27201 unit.) The claimant said that he had looked over the outline and thought he could do a good job on the unit. He still needed to speak to the palaeontologists at large to sort out the teaching to achieve a reasonable teaching workload. He said that he would try to get the extension forms in that day so that he could comfortably take time away.

156. Professor Burton replied that taking medical leave was very sensible and he wished the claimant a speedy recovery. He also mentioned that he was speaking to Dr Jerrett later to define the best lectures and practicals for the claimant to deliver and would report back to Dr Legg to enable him to initiate the development/refinement of teaching once he had returned from sick leave [209].

157. On 21 May 2021 Professor Burton spoke to Dr Jerrett about the teaching on unit EART 27201 and the best units for the claimant to teach in Semester One, with a view to the claimant taking over the fossil content of the course. There was a concern, given the claimant's lack of engagement and perceived unreliability to date, that the claimant would not follow through on the teaching delivery. Dr Jerrett said that the claimant would need to provide a three hour lecture/practical combination. He mentioned the name of a colleague who had delivered it in 2020 who would be able to provide material to the claimant. He also said that he had a two hour lecture and associated practicals which he could give to the claimant if he required inspiration. The claimant would also be required to deliver two separate three-hour sessions and Dr Jerrett included links to what he had done in 2020, including the video lectures that he had delivered. Dr Jerrett also mentioned that he was happy to share the underlying materials with the claimant if he would like a copy.

158. This message was forwarded to the claimant explaining that it represented a detailed plan of teaching the 27201 unit, which would provide him with the teaching experience that he required for NAP. Professor Burton asked the claimant to reach out to Dr Jerrett or Dr Garwood if he had any questions. The claimant replied positively and felt that he would be in contact properly after two weeks of "medical stuff" [210].

159. The claimant took his two weeks of medical leave and return to work on 7 June 2021. In the meantime Professor Webb discussed the extension to the claimant's probation with Benita Jackson of HR.

160. In the meantime the claimant's application to work overseas had been declined. Professor Burton was asked to convey this information to the claimant at a meeting.

<u>Meeting 7 June 2021</u>

161. The claimant and Professor Burton met via Zoom on & June 2021 together with Professor Webb. It was explained that his application to work overseas had been declined and that he therefore had to be back in Manchester by September 1, 2021. They also explained the need for the claimant to be present within the Department to contribute fully and to receive support from the Department. The claimant also wanted clarity on how to request an extension to probation. Professor Webb agreed to pass

this on to Ms Jackson. They also discussed his health. The claimant said that blood sugars were "all over the place" and he told them that he had an Occupational Health meeting the following day. They also asked the claimant to produce a sick note regarding his current state of health. The said sick note never materialised.

162. On 18 June Professor Webb emailed all fellows that she needed to complete two informal line management tasks with them in the near future. The first related to the faculty contribution model (FCM) which should capture all the major things that they were doing. This required her to meet with them individually to ensure that the data was correct. This would also mean that she had much of the necessary information to form the basis of a good PDR meeting. She intended to add the PDR meeting onto the end of the FCM meeting. She asked each fellow to let know their availability. She had to chase the claimant about this on 23 June and they arranged to meet the following Monday (28th June).

163. On 28 June Professor Webb she met the claimant via Zoom. The claimant reported that he was feeling better and was trying the "Couch to 5K" again. He said that he was seeing Occupational Health (Sam) on Wednesdays, mainly about his mental health, to ensure that he was working steadily and not being derailed by medical issues. The Tribunal concludes from this that Professor Webb had not lost sight of the claimant's health concerns and was continuing to monitor the situation. The claimant's conversation with Professor Webb indicated that he was obtaining the support he felt necessary at that time.

164. During the conversation they discussed the need for the claimant to have sufficient teaching to complete his NAP portfolio and considered the FCM data relating to the claimant. The claimant also queried what was happening in relation to his probation extension and asked if it was possible to appeal the decision to decline his request to work outside the UK. Professor Webb said she would follow this up with P& OD. They also agreed to have a PDR on 21 July in person, if possible.

165. The next day Professor Webb followed up the HR queries with Benita Jackson. She emailed the claimant with a summary of the information on 1 July. She explained that there was no right to appeal against the decision refusing the right to work outside the UK. With regard to the extension to the claimant's probation, she explained that there was still no formal answer to the request to extend beyond four years. However, she felt that he would probably be granted an extension because the deadline had already past and there was no other course of action. She also stated that he needed to be aware that there would be clear goals for him to meet the next academic year and it was highly unlikely that there would be any further extension beyond what he might get now, so getting on with grant proposals and publications would be a good move in the meantime. She also asked the claimant to let her know when he had clarified any role that he might have in Dr Sansom's course.

166. On 7 July Professor Webb sent the claimant's extended probation objectives to Benita Jackson and Professor Burton and asked for confirmation of the extension. She finally received confirmation of this on 19 July 2021. Benita Jackson informed Professor Webb on 20 July that it was essential there was a clear set of probation objectives and a timeline and that the claimant understood that failure to pass probation would result in termination of his contract. Professor Webb therefore prepared with the intention of discussing this at the claimant's PDR on 21 July 2021.

167. The claimant's preference was to have his PDR meeting online rather than in person. He did not send the completed forms to Professor Webb before the meeting. On 21July the claimant emailed Professor Webb shortly before the PDR meeting asking if it could be pushed back as he had had a bad night with his blood sugar and was feeling groggy. He felt that he needed a bit of time to stabilise and finish the form. He then asked if he could do the meeting later in the afternoon or preferably on another day. As Professor Webb was going on holiday the following day, she needed to do the meeting that day, although she would push it back later that morning or to 4:30pm. The claimant asked to push it back to 4:30pm in order to get things sorted out. He then emailed her after 3pm to say that he still could not do the meeting as his ketones had increased throughout the day and he was unable to get things done. He asked if it was possible to do it by email or get it postponed to a later date. The claimant was not signed off sick from work that day but, to all intents and purposes, he was not able to work.

168. Professor Webb was aware that she needed to communicate clearly with the claimant about his objectives during the final year of his probation. In particular, she needed to communicate clearly what the consequences of him failing to meet his objectives would be. Given that she was due to go on vacation for two weeks she decided that it was important to summarise the situation in writing and send it to the claimant in order to avoid any further delay. She wanted to avoid delay and ambiguity. She sent an email entitled: "Confidential, please read when you are feeling well." This was clearly intended so that the claimant did not receive bad or alarming news when he was not well enough to cope with it. She started the email by explaining that it was not ideal to convey the information by email but there was little success in arranging a face-to-face meeting and she did not want to spend several more weeks with the claimant potentially unaware of the full situation. She explained that the extension to his probation beyond the fourth year was unusual and had required high-level approval. She made the point that the claimant had not wished to take an interruption of his fellowship on the grounds of ill-health which would have stopped the clock running on his probation. As a result the time constraints would continue to apply to his fifth year of probation and there would be no further extension if he did not pass his probation in the fifth year. If the claimant did not pass probation the following year, the alternative was dismissal. She apologised for being blunt but felt that the claimant needed to understand the full consequences of the current situation.

169. The Tribunal can see from the contents of this email that, if there was any uncertainty on the claimant's part before this email, there was no room for uncertainty thereafter. It should have been abundantly clear to him that the probation period could not go beyond the fifth year.

170. In the course of the email Professor Webb explained that they would support him as much as they could in achieving his objectives to continue in his role in Manchester. However, he must also work to fulfil a number of commitments which had been clear since he had started in the role. The most important objectives were for him to complete and pass NAP and to submit a high-quality proposal for substantial external funding. Both of these objectives required him to have completed the task by January/February 2022. This was because he needed to complete his NAP portfolio in time to have it examined and any additions/corrections made before July 2022. Additionally, if the claimant was applying for a NERC grant, the January 2022 deadline would be his last chance to have a response before July 2022 (given that it took six months to come through) and the respondent would need to have this feedback, or better still, the funding by July 2022. The first hurdle for a proposal would be to pass Demand Management, which took place before Christmas, so that his proposal could be submitted.

171. Professor Webb attached a document to the email that she had prepared Dr Legg entitled "Probation Requirements (with year extension to probation to July 2022)". She had set out her commentary in relation to each of his five probation objectives and left spaces in the document for the claimant to identify any support required in order to work towards his objectives and a timeline for him to identify what needed to be done in the time available. She asked him to think about them before a face-to-face meeting in August so that they could have a constructive discussion. She also explained that the first level of support would be to have a detailed meeting on a monthly basis with the claimant to see what he had achieved each month and what remained in order to ensure that there was no slippage. She also explained that they were all willing him on to succeed. Passing probation was a big deadline for early career staff and the claimant had to be able to show that he had what was necessary to be a permanent member of academic staff.

172. The deadlines in the attachment to the email were first of all that the claimant should complete and pass the NAP. She explained how important it was for him to complete the teaching requirements in Semester One. In the commentary she stated that the claimant had completed all the taught contact hours for NAP as this is what the claimant had informed her (she later found out this was not correct). She explained that he still needed to complete the teaching observation and the NAP portfolio. He needed to arrange teaching observation and be proactive regarding the completion of his NAP portfolio as time was limited. She stated, in terms, that leaving anything requiring input from the NAP team or faculty peer review of teaching until Semester 2 would likely be too late to enable his NAP submission to be evaluated before July 2022. She therefore made it

abundantly clear that the teaching needed to take place in Semester One in order for it to have the desired effect on his probation. In relation to high quality grant applications she stated that this was imperative. The claimant needed to submit a competitive NERC grant for the January 2022 funding round or equivalent. She stated that the claimant had not applied for any substantial funding during his time as a fellow and that this was a clear requirement for passing probation. He needed to submit a substantial UKRI proposal that was of a competitive standard. Ideally it would be funded but she stated that this was not a requirement of the claimant's probation. The January NERC round was the latest possible opportunity for a proposal that could be considered for probation purposes. Other funder deadlines in the same timeframe could also be considered.

173. In relation to a "sustained record of high quality publications" this was referred to as partially met and she indicated that he needed to boost output. She stated that the original probation objective had been to submit 4 papers graded 3* or 4* for REF 2021. In the event he had submitted two papers graded 3*. She stated that a record of sustained high quality publications, including a good proportion as first author, would be a suitable alternative target. She stated that the claimant had three co-authored papers published in 2019 and one in 2020. At the last probation review he had three more in the pipeline. In relation to academic enterprise this was referred to as "needs action, but no target." All activities with Policult had been on hold due to Covid. The claimant should start to engage again. This was an area where ICAL was strong and it would help to maintain momentum. The target was to show engagement with Policult or any alternative academic enterprise activity. In relation to service, it was recorded as "needs action, easily remedied." In the commentary Professor Webb stated that the claimant had no service roles at present. He had been a member of the EDI committee but had relinquished that role due to ill health. He had expressed a desire to return to that committee and use his personal experience to represent others with health issues. She suggested putting him back on the committee in the new academic year to enable him to engage and fulfil this criterion.

174. Professor Webb never received a response to this email which the Tribunal finds surprising given how important it was and how clear Professor Webb was trying to be about the situation that the claimant found himself in. Some form of response might have been expected in the circumstances.

175. It was not only Professor Webb who was attempting to make the claimant's situation clear to him. Merren Jones also emailed him on 6 August [237]. This was a broadly supportive email where she attempted to empathise with his thyroid symptoms. She shared her own experiences with him in terms of what she had found useful what she did not. In the final paragraph of the email she attempted to explain that fellows needed to manage their own work and that, in essence, this was never going to be a 9-to-5 job. She indicated that the claimant needed to take a realistic view of the lifestyle and requirements of academia and then decide whether it was the sort of career he truly wanted. It looks as though she was attempting to

give him something of a reality check to explain that there was a limit to the flexibility that the system could facilitate. The claimant needed to decide whether this career was really for him given that the respondent had flexed the system as much as it could to accommodate his situation.

176. On 10 August Merren Jones emailed the fellows chasing up on arrangements for teaching observations.

177. On 16 August the claimant got married and went on leave until 24 August. This was in the middle of the summer when he had previously said he planned to catch up on his work commitments with a view to passing probation.

178. On 24 August Professor Webb emailed the claimant welcoming him back to work and suggesting a catch-up to ensure that the claimant had everything in place in the coming academic year. She reminded him that it was critical that he not miss any teaching observations and explained that they still had to go through his PDR. They agreed to meet on 27August. This was not an example of Professor Webb threatening him about his probation. Rather, she was just stating the reality of the situation in an effort to keep him 'on track.'

179. On 27 August the claimant emailed Dr Jerrett asking him exactly what he would be required to teach because he was going to be away for a couple of weeks in October on honeymoon. The claimant had not informed Professor Webb at the time that he was taking annual leave during October. It would not normally be permitted for academic staff to take annual leave during term time. It might have been assumed that his leave during August was taken for his honeymoon.

180. The PDR meeting took place on 27 August. The claimant had not completed his paperwork for the meeting. The claimant had been in Ireland since his wedding and would be returning to Manchester on 24 September and would live with his in-laws until after Christmas. The claimant reported that he had seen Occupational Health in July and that Sam was helping with mental health issues. He said that there was nothing anyone else could do but that Sam was very helpful. He explained that he had been taken off thyroid medication because it was causing too many hypos. He could go on to new medication but not until he was in Manchester where he could be monitored and managed.

181. During the meeting Professor Webb unequivocally reiterated that the claimant had to complete NAP and put in a substantial grant application or he would fail probation. She told him to contact Dr Jones and Cassandra Kennedy for internal deadlines.

182. During the meeting the claimant was open about the longer term uncertainties that he was having about wishing to be in Ireland with his wife whilst working at Manchester. He referred to a "two body problem" of his wife with a job in Ireland and him with a job in Manchester and that they

wanted to start a family and be together. He asked if grants were transferable. Professor Webb explained that it depended on the terms of the grant. He queried whether, if grants were not transferable, he should spend his time applying for grants in Ireland rather than focus on the NERC grant application which may not be transferable if he obtained a job in Ireland. If he sacrificed the NERC grant application in favour of an Irish grant this would mean he failed probation. They discussed that this was not a problem if he succeeded in Ireland but that his wife's job was then said to be for a fixed term so it was a risky strategy. The claimant suggested that he had a lot of connections in Ireland and that it would not be difficult for him to obtain a new role in Ireland. The claimant stated that he wanted to be honest about his options.

183. Professor Webb followed up after the meeting with an email. She reiterated the requirements and the objectives for the year and noted that the "big ticket items were to complete NAP and put in a substantial competitive research grant. She reiterated the steps that he should take and who he should speak to. She mentioned that she was happy to help if he wished to talk through his personal timeline once they had the necessary information. She repeated that regular meetings (a minimum of once a month) were required to ensure that nothing was forgotten.

184. The claimant did not respond to the email. He failed to upload his PDR form again for that year.

185. In September 2021 concerns began to emerge about the claimant and teaching. On 3 September Professor Webb received an email from Dr Jones who explained that she was contacting Professor Webb in her capacity as senior mentor and also because she was a mentor to Dr Jerrett. Dr Jerrett was finalising his NAP portfolio to complete probation. Dr Jones was concerned about how far the claimant had got in preparing to deliver his unit. She indicated that the claimant had been poor in communicating with Dr Jerrett about the teaching. She asked if they were able to tactfully assure themselves that he was on track. She explained that the unit was a core unit for all pathways on the Earth and planetary science degree and would have significant consequences for colleagues if it was not delivered.

186. Drs Sansom, Garwood and Jerrett were junior colleagues with Dr Jerrett being the most junior and going through probation at a similar time to the claimant. They all had considerably higher workloads than the claimant both in terms of teaching and administration. They also had to complete academic research requirements without the research protection afforded to fellows.

187. On 9 September Professor Webb emailed all the fellows with the title "getting back to teaching." She reminded them that the respondent currently had two timetables prepared: one for in-person teaching which would be the default start of the semester; and a backup plan that incorporated the need for more social distancing. She asked that anyone

who had medical concerns about teaching in person (especially teaching in Semester One) let her know in confidence as soon as possible. They would need a letter from their GP detailing vulnerabilities to support any request not to teach face-to-face on campus. She also included some information about an informal social for the fellows. The social took place on 30 September and the claimant did not attend or send apologies. At around this time another fellow informed Professor Webb that the claimant was in fact living in Ireland. Whether this was accurate or not is unknown.

188. Around this time there were a number of emails between the claimant and his colleagues Dr Jerrett and Dr Garwood concerning the teaching that the claimant was due to deliver. An overview of the emails shows his colleagues' attempts to support him and the claimant's general lack of engagement with them.

189. On 29 September 2021 Emma Woodward from the Disability Advisory and Support Services (DASS) contacted the claimant. She explained that Benita Jackson had asked her to contact him about support from DASS. The conversation left matters so that that the claimant was going to get an up to date doctor's note as he had been diagnosed with additional issues since he last spoke to Occupational Health. He said that he hoped to be in touch shortly.

190. The record of interactions with Professor Webb in October indicates that the claimant's core concern was getting an adjustment to let him work from Ireland. He was considering an appeal against this decision and had discussed this with DASS [399]. Aside from appealing the decision regarding Ireland the claimant never really clarified what he thought DASS was going to be able to do to help him or what he wanted them to do.

191. On 4 October Professor Webb sent an email to the claimant chasing him up about teaching, NAP and the grant. The claimant had not responded to her query about his comfort in teaching in person on campus. She therefore assumed that he felt safe to do so but she asked, if not, that he let her know. Any request not to teach in person would have to go through the correct procedures. She hoped that he had managed to arrange his NAP teaching observations as they were vital to passing NAP and, therefore, his probation. She wanted to know how he was progressing with preparing the grant application given that the next call for NERC standard and starter Grants had just come out. She also asked him, again, to upload his PDR form on the online system.

192. The claimant responded apologising for the lack of communication and stated he hadn't been feeling too well. However, he had not been signed off work sick and there was no medical information about his health at this stage. He said that this also reminded him that he needed to get a doctor's note over to DASS

193. On 5 October Professor Webb emailed Dr Jones to say that she had offered the claimant a series of times for a meeting and was awaiting a

response. She asked Dr Jones to let her know if there was anything she wished to raise regarding NAP. Dr Jones replied with various practicalities. She contacted Professor Webb later to say that she was concerned that the claimant was not engaging with teaching requirements. She also mentioned that the claimant was again allegedly still living in Ireland was about to go on honeymoon and was putting in an appeal through DASS regarding the application to work abroad. The claimant had not mentioned that he was taking annual leave to Professor Webb and it was not usual for academic staff to take leave during term time. The claimant's approach was somewhat frustrating given how hard others were working to ensure that he was able to meet his objectives.

194. Professor Webb emailed the claimant on 7 October because he had not responded to her email about venues for a meeting. When she proposed a meeting at her office the claimant replied to say that he was not feeling great and asked if they could via Zoom. The meeting did in fact go ahead via Zoom. During the meeting they discussed teaching. The claimant expressed the view that he was confident he could deliver. He was going to teach four weekly sessions of Dr Jerrett's course taking over much of Dr Garwood's content, teaching weeks 9-12 with Russell delivering the final week 13. The claimant had been working on the lectures based on previous content but had made changes. Practicals were still to be developed and discussed to ensure that resources were available. It was agreed that all material would be available online one week before it has to be delivered. The client reported that he had sat in on Rhodri's lecture and felt comfortable lecturing in G. 03. He considered the distancing in the classrooms was adequate for health purposes. He did not plan to apply for a dispensation from teaching in person.

195. In relation to NAP Linda Mulvey (Faculty Peer Review) had been in touch about arranging teaching observations and he would now finalise those arrangements. He confirmed that he still needed to complete his portfolio and was working on it. In relation to research Professor Webb asked about a substantive research proposal and alerted the claimant to the recent NERC call. He asked for details on who to talk to in the Department. Professor Webb sent him the relevant details.

196. As various people had told Professor Webb that the claimant was living in Ireland, she asked him about this. He said he was with his in-laws in Manchester. The claimant was due to attend a respiratory clinic (probably thyroid related) and was awaiting his appointment in Salford (for his thyroid) at the end of the month. He was not being treated for thyroid but attending respiratory clinic (having breathing/asthma (?) Problems). He had to go to an endocrine clinic at the end of the month to see if he was eligible for new thyroid medication. This would require him to be in the UK and negate his health argument to be allowed to live in Ireland. The appeal to live in Ireland was on hold whilst the thyroid medication was pursued. However, an appeal conversation had been started through DASS. He was sending a GP note to DASS so that he could be registered and receive recommendations on what was required to enable him to fulfil his job

requirements. He was no longer meeting with Sam at Occupational Health as this was a temporary arrangement. He was considering an appeal against the refusal to let him work from Ireland and had discussed this with DASS. The appeal was based on the fact that his complex healthcare was currently based in Ireland but he could only get the new thyroid medications in the UK. In order to be prescribed those he would have to move his care to the UK. Any appeal was on hold until the outcome of his medical visit later that month. Professor Webb noted that all of the home and health information seemed very confused.

197. The claimant was reminded once again to upload the PDR form. He confirmed that he was taking 10 days leave for his honeymoon beginning on 8 October. He was reminded that he should log annual leave with his line manager and not generally take it during the teaching semesters. He noted the many rearrangements of his wedding and honeymoon and the fact that he was not currently teaching.

198. From 8 to 21 October the claimant was on honeymoon.

199. On 25 October Dr Jones emailed Professor Webb because NAP was chasing her about the claimant as he had not submitted his final portfolio (or any other assessment). She replied that the claimant had been given an extension to his probation until the end of the academic year. She said that she had discussed this with the claimant and that he was of the opinion that (barring his portfolio) he had done everything necessary for NAP. Professor Webb said that if this was not correct could Dr Jones please advise the claimant. Professor Webb thought it would be better coming from Dr Jones as she could speak with confidence about what had been done what was required given that Professor Webb's information came primarily from the claimant himself.

200. Dr Jones later emailed Professor Webb that the claimant had only attended Teaching parts one and two and Research part one and had not done any of the three assessments. She said that she had just sent the claimant an email copying in Professor Webb.

201. The email from Dr Jones to the claimant on 25 October outlined the NAP requirements under the extended probation. It listed all the outstanding sessions that he had to attend and the assessment he had to complete. She explained that two of the assessments should be submitted prior to the submission of the "reflective portfolio of evidence." The portfolio had to be submitted by 31 January 2022 so he should aim to complete these by the end of Semester One. With regard to peer observation of teaching, she informed him that he should already have been in touch with his external and internal reviewers to agree the sessions that would be observed. She ended the email noting that there was a lot for the claimant to do in the next few months and indicating that planning his time was key. She strongly advised him not to underestimate the time that the assessments would take. She said that he would be assigned a portfolio supervisor and

she strongly recommended that he speak with them about the assignments and seek feedback on drafts.

202. The claimant replied that this was all correct (even though it contradicted what he had previously said to Professor Webb about only needing to complete his reflective portfolio.) Lindsay Foster, the Teaching Learning and Student Administrator also emailed the claimant on 25 October to confirm the identity of his portfolio adviser. She reiterated the relevant deadlines and what the portfolio adviser would be expecting to do with the claimant. She set out various things that the claimant should consider doing to complete the requirements.

203. On the claimant's return from honeymoon Professor Webb had also emailed him (22 October). She had forwarded the information concerning the NERC demand management including the timescales. It set out the requirements for an application. She asked him to keep her updated about his progress.

204. Unfortunately further concerns arose concerning the claimant's ability to deliver the required teaching. On 29 October Professor Webb received an email from Dr Jones in which she stated "see below for Monday. As predicted." Professor Webb also saw an email from Dr Jerrett to Dr Jones in which he had stated that he was hoping that the claimant would make contact with Dr Jones separately. Dr Jerrett said that he was away on fieldwork, holiday and a research stay over the following month and that, whilst he was available at all times to support Dr Garwood, it would not be possible for him to do any of the lectures or practicals. Dr Jerrett had forwarded an email trail to Dr Jones which showed correspondence between the claimant and Dr Garwood and Dr Jerrett. In a nutshell, on 21 October there was an email exchange between Dr Jerrett, Dr Garwood and the claimant regarding the exam to be submitted by the end of the month in respect of the 27201 unit. Dr Jerrett noted that there were two weeks to prepare the questions. There are exchanges regarding meetings. On 25 October the claimant had stated that he was back in Dublin so there would be no in-person meetings for a while despite the fact that he had told Professor Webb he would be living in Stockport in Semester One.

205. On 26 October Dr Jerrett sent two exam questions and model answers and asked the claimant and Dr Garwood to contact him if they wanted to discuss their questions over the next few days. There was then an exchange of emails between the three of them which suggested that the claimant was preparing his questions. On 29 October the claimant emailed to say that he might have to get the final exam question to them a bit late because he would have to spend the day in a respiratory clinic. He said that they hadn't been able to find him an appointment which is why he needed to spend his day there. He indicated that he had been up most of the night and had to head off shortly so that it was not going to be the best day to get hold of him. He apologised to them for another episode of "David's broken body." Dr Garwood asked if the claimant could send what he had prepared before he went and Dr Jerrett said that it should not be a

problem to get an extension to the following Monday. Later that day the claimant emailed them both giving various details of his medical experiences. He indicated that a "big spanner in the works" was that the consultant had recommended that he isolate until they knew what the problem was so he would have to avoid teaching in person. He assumed he would be able to give lectures easily remotely but had no idea how to handle the practicals. He said he was still going to produce them but didn't know if they could be delivered remotely. He would need to speak to Professors Webb and Dr Jones and various other people about what this meant for his NAP teaching observation. He said that the doctor suggested that a major trigger could be stress.

206. Dr Garwood had replied that Dr Jerrett was about to go on fieldwork and could not be expected to become too involved in the situation. He suggested that the claimant explain the situation to Professor Webb and Dr Jones and seek their guidance. Dr Garwood did not think that the practicals could be delivered remotely.

207. On 1 November Dr Garwood had emailed the claimant to ask him if he was better whether he had managed to speak to Professor Webb or Dr Jones. He explained that the most pressing thing was the exam and that there was limited leeway. The claimant replied that he'd had a terrible weekend and that the inhalers had not improved his breathing. He said he would get things done as soon as he could. He thought it was going to have to come back to the UK in any event (as he would be treated by the NHS) so might not need to speak to Professor Webb or Dr Jones just yet.

208. The Tribunal notes the claimant's references to breathing difficulties and inhalers. However, we also note that the use of an inhaler is not necessarily an indicator of disability given that many members of the population are prescribed inhalers. There was nothing in what the claimant was saying to the respondent at around this time to suggest that claimant's breathing difficulties constituted a disability. There was nothing to suggest that the problem was long-standing rather than a recent development and no indication that it had any particular adverse effect on his ability to carry out normal day-to-day activities.

209. On 3 November Dr Jones emailed Professor Webb to say that Dr Jerrett and Dr Garwood were both asking about what was going on and whether they could get some clarity. On 3 November Professor Webb emailed the claimant that she understood there were some additional health problems and that she had seen a copy of his correspondence with Drs Garwood and Jerrett from Friday. She noted that she and Dr Jones had not received any update and that they need to sort out where they went from here "with some alacrity." She asked the claimant if he could let her know his status. She was happy to meet by Zoom if that was more efficient. Regarding academic matters she asked if he had completed and submitted his exam questions. If not, was he able to do so soon (the deadline had already passed). She asked whether his lectures were already prepared. If not, was he able to do this in the timeframe required (as the claimant was due

to be teaching from week nine and they were already in week seven)? She asked whether his practicals were prepared and requirements passed on so that they could be set up. She asked whether he was able to deliver his lectures remotely. She understood that he had been advised to isolate for now although the respondent had not received any medical information to that effect. She continued that she did not think practicals could be delivered remotely and so, unless there had been an improvement over the weekend, they would have to line someone else up to do this. She asked for his view. They also need to think about what this meant for his NAP teaching review. Whilst his online lecture delivery could be observed, he would only have one element of teaching reviewed if he could not deliver practicals and he needed at least two elements. She also explained that if someone else had to take over his teaching responsibilities they should be given as much warming as possible.

210. The claimant replied that he would give a full update by the end of the week. He noted that if Professor Webb had seen the email she would understand had a respiratory issue and that he had been given inhalers. Whilst they were helping he was still experiencing problems. His biggest problem was his inability to breathing in certain positions which made sleeping a problem. He was still planning to deliver 'in person' as he didn't see that he had much choice. He said that he was still waiting for DASS to contact him and that the last correspondence he had from them was that someone would be in touch but he had heard nothing since. He said that it was difficult for him to know what to do as he had so much to complete for NAP, grants, teaching etc which was causing him a lot of stress, exacerbating health conditions and taking the huge mental toll. He said that, ideally, he would take time off, get well and then do everything he had to do. However, he would like a job the following year so felt that he needed to push through. Shortly after, he emailed to apologise for not keeping Professor Webb in the loop saying that it was because most days he wanted to wait and see how things went as he thought they were bound to get better.

211. Professor Webb also received an email from Dr Garwood which was also addressed to Dr Jones. He wanted to touch base regarding the teaching situation on the module in the hope that they could avoid issues impacting on the delivery of the course. He had asked the client several times to fill everyone in on the situation but it was not appropriate for him to disclose what is going on at the claimant's end. However the decision was required imminently over how the course was being delivered. He explained that the deadline for the exam had been missed. Dr Garwood had blocked out the next day if he needed to write the questions last minute. However, given that writing assessments were part of NAP, his stepping in would have implications for the claimant so he did not want to do this without a steer from Professor Webb. In relation to teaching, Dr Garwood explained that he had more or less finished preparing his materials for the unit and outlined what would be required from the claimant. He said that he had also provided access to the website he had used for delivering the previous year. The biggest undertaking in delivery was the practicals, which he

estimated would take the best part of the working week per practical to prepare from scratch. The claimant was down to deliver two practicals on the unit. Dr Garwood said he was sending the information to them now for two reasons. Firstly, it would allow them to have an informed conversation with the claimant to work out the best approach for him. Secondly, if Dr Garwood had to step in, he would not be able to do so with anything less than a week's notice given his work commitments. He did not want the situation to drag on only to find out with two days' notice or less that cover was required. He had avoided booking trips for the half term in case he had to step in.

212. Following receipt of this email Professor Webb emailed the claimant on 4 November. She expressed concern for his health but went on to say that they needed to discuss his teaching commitments in more detail to ensure everything was covered, whatever the state of his health. They needed a contingency plan. She explained she was meeting with HR the following day to discuss the ramifications and would like to follow that with an online meeting with the claimant to take a fully informed look at his situation to find the best way forward. She asked him to make every effort to attend a meeting and find a slot. She would need to know exactly where he was with the exam questions, lectures and practical preparation. She explained that delivery of content to students had to go ahead even if delivered by someone else and they would need to give that person fair warning. The claimant replied that he completely understood and agreed to meet Professor Webb at 3pm the following day (5 November).

5 November 'forfeit probation' meeting

213. Prior to the meeting with Professor Webb on 5 November the claimant sent an email to Drs Garwood and Jerrett [319]. He notified them that the email was on a "need to know basis." He apologised for the delays and any trouble he had caused in trying to get the work done. He stated, *"I am still struggling and think that the time is overdue for us to discuss me leaving the teaching to you guys. I feel like I have made things worse and more stressful for you both by asking you to be patient and now some urgent action is needed. Today during my meeting with Ann I will be discussing forfeiting my probation and ultimately leaving Manchester at the end of my contract. I'm just not well enough to work at the moment and the stress of trying to get teaching, NAP, grants, reviewers' comments, etc, done (all on a tight deadline) is only confounding the matter. This also helps make my decision about whether or not I should stay in Ireland or uproot again and find somewhere in Manchester, potentially leaving Elspeth behind. She has an amazing job and one she really enjoys so I don't want to ask her to leave and come back to Manchester with me, however, I am not well enough to be left alone for too long. Again, I can only say sorry for keeping you on the hook for so long."*

214. The content of the email to Drs Garwood and Jerrett shows that the claimant went into the meeting with Professor Webb on 5 November with

a clear view that he was likely to, in his words, forfeit probation. He clearly knew that he was not going to be able to pass probation and stay on in the department in Manchester and he was already considering his other options. The text of this email is also important because it shows that the terminology of "forfeiting probation" was used for the first time by the claimant rather than by Professor Webb and that he used it before the meeting of 5 November actually took place.

215. The meeting went ahead as planned on 5 November 2021. The Tribunal finds that at the meeting the claimant told Prof Webb that he had decided to forfeit his role in Manchester to focus on his health. He was intending to concentrate on finding a job in Ireland to be with his wife. He said, therefore, that he would not be submitting a competitive grant to NERC in January (which was one of his probation objectives) but may try to win some funding in Ireland. In relation to teaching, he had not been able to prepare any materials for the exam, teaching or practicals. He did not feel that he could carry out the teaching and they discussed the possibility of Dr Garwood taking over from him. Professor Webb explained to the claimant once again that he would not be able to pass probation if he did not complete NAP and if he didn't submit a competitive grant application.

216. The Tribunal finds that it was the claimant who indicated that he had decided to "forfeit probation" notwithstanding that he later said that this came from Professor Webb. It was clearly the claimant's decision, made before the meeting, and communicated to Professor Webb at that meeting. In reality, it was a recognition of the inevitable. The claimant's circumstances meant that he would be unable to meet the requirements of his probation within the required timeframe and would thereby fail probation. He could not, therefore, be made a permanent member of staff at the conclusion of his fellowship. All that the claimant did during this meeting was to recognise that he would not do the necessary teaching in order to preserve his chance of passing probation. He went on to recognise this by deciding to focus his grant applications on Irish grants with a view to a future career in Ireland, rather than on NERC grants or others which would help him to pass his probation at Manchester.

217. Once the claimant had introduced the terminology of "forfeiting probation" this was adopted by Professor Webb in her follow-up email after the meeting of 5 November [321]. In her email she summarised the position as it then stood (e.g. in relation to teaching commitments etc). She continued, "you have decided to forfeit your ongoing role at Manchester to concentrate on your health, and finding a role in Ireland where your wife's job is located. You will not be submitting a competitive grant to NERC in January, preferring to concentrate on finding a role and/or with funding in Ireland." She concludes by asking the claimant to confirm that she has correctly recorded the discussion.

218. In the claimant's response of the same date he does not correct her usage of forfeit terminology or suggest that the substance of his decision, as recorded in her email, is wrong. All he does is to confirm that, although his

probation will not be completed, he will still be working for the respondent until the end of his DKO fellowship (which ended in September 2022.) Professor Webb replied to confirm that the probation committee would be held in January with a final decision being made in February 2022. As the claimant was allowed an extension of one year due to Covid, this would take his probation beyond the fourth year. This meant that there would be no option for the probation committee to authorise a further extension. She confirmed that the options open to the probation committee would be to confirm the appointment (should he have met all his objectives to a satisfactory standard) or to recommend that his employment is terminated. She confirmed that, given the discussion they had had earlier that day (5 November), it was clear that the only option would be to terminate employment. She indicated that she would ask HR to clarify all the timelines for the claimant as his current contract ran until end September 2022. She indicated that she would then share this information with HR and those who would be taking over the claimant's teaching and other interested parties. She concluded by hoping that the reduction in stress and expectations would improve the claimant's health and she reminded him to keep in touch as he remained a member of the Department.

219. So, by the afternoon of 5 November, the claimant had introduced the 'forfeit' terminology, Professor Webb had summarised what he had said and got him to confirm the record of the meeting. The claimant did not contradict her account, and she then set out the necessary consequence i.e. that he would fail probation and his contract would be terminated at the end of the period.

220. Professor Webb emailed Professor Burton and Dr Jones later that afternoon to confirm that the result of the meeting with the claimant was that he would not attempt to pass probation. She summarised the position regarding the claimant's lack of preparation for the teaching and she indicated that Dr Garwood should be formally asked to cover the claimant's work at short notice. She summarised what now needed to be done from the Department's point of view.

221. In the days that followed the claimant also started to confirm the position with other people. For example, on 8 November he confirmed to Ms Murtagh that it looked as though he would be leaving Manchester at the end of September [325].

222. On 9 November Professor Webb emailed the claimant to confirm that his teaching had been reassigned. She hoped this would remove some stress from him. She reiterated that his inability to fulfil his teaching commitments meant that he would not be able to complete NAP and therefore would not pass probation. She asked him to keep them updated with regard to his progress and health. The claimant responded that he had been for a blood test which would hopefully come back with some answers so that he could get on with feeling better.

223. In December 2021 Professor Webb copied the claimant into general emails to all fellows including one to all on probation asking them to make an appointment to update progress ahead of the probation assessment in the New Year. Given the claimant's own particular circumstances she sent a personal email to him on 20 December including: "given that you have elected not to complete probation, there is no great need to discuss your probation progress and associated form for early next year. Are you content for me simply to explain to the committee that you will not be completing probation? We can of course discuss things if you would prefer. Let me know." Essentially, the contents of the New Year probation meeting would be something of a formality in the claimant's case given his lack of completion of the requirements. However, she still wished to give the claimant the opportunity to provide his comments and make any representations that he saw fit. The tone of the evidence from the claimant to the Tribunal was that he could not see the point of making any contribution at this point. In light of his failure to complete his teaching commitments the claimant opted to stop work on any grants which would have formed part of his other probation requirements. Essentially, if he was going to fail probation anyway because of his lack of teaching, it would be a waste of time and energy to chase grants for an institution that he would no longer be a part of after the end of probation.

224. The claimant replied to the email on 21 December and indicated that he would email more fully in January. He felt that there were some important considerations to make. The email was somewhat cryptic and left Professor Webb not really knowing what the claimant meant by it [337.1]

<u>2022</u>

225. In January 2022 there was some correspondence from DASS to the claimant regarding the provision of an outstanding up-to-date GP letter from the claimant.

226. On 7 February 2022 Professor Webb emailed the probation documents for all her probationers to the Department Promotions and Probation Committee. Dr Jones also emailed the claimant with some paperwork to be completed relating to the NAP component of his probation. The claimant asked if he needed to do anything for it stating that, "as I was asked to forfeit my probation in November is there anything to discuss?" [352] This is the first time that the Tribunal can locate a reference to the claimant "being asked to" forfeit probation. The evidence up to this point suggests that *he* introduced the concept of forfeiting probation and that this was a recognition of the fact that he would not be meeting the probation requirements. He is now representing it as him being asked by the respondent to give up on his probation. The Tribunal finds that this is not an accurate representation of what happened. Indeed Professor Webb replied the next day (8 February) and referred to the comment about being "asked to forfeit" saying that this was not what happened. The claimant had asked to withdraw from teaching duties in Semester One which had

been carefully set up to enable him to do the teaching required to complete NAP. The ramifications of withdrawal had been made clear to him (i.e. that he would not complete NAP in time to complete his already extended probation) and that he had confirmed that he understood the consequences. He had been advised that in following his own requested course of action he would be forfeiting his probation, which was rather different to being "asked to" forfeit. She said that she had updated his probation form to note that he had not completed NAP and had not submitted a competitive grant proposal. The decision on what to do with that information was with the committee, which was meeting on 17 February. She asked him to let her know if he wished to have any further input into the paperwork that would go forward [352]. Clearly, Professor Webb pushed back on the claimant's mischaracterisation of the 5 November meeting at the earliest opportunity and put on record her view of what had actually happened.

227. The claimant replied that, whilst he did not agree with everything that Professor Webb had said in her email, he did not feel that they needed to discuss probation any further at that point. He asked her to submit the form if she agreed that they didn't require any further discussion, asking her to send him the version that she was intending to submit. She replied with a copy of the statement that she had put at the top of the form which he had from previous years with a running tally of his progress. She asked him to let her know if he wished her to make any other statement on the form or to identify any successes he'd had in publication, grant income in any form or other activities since last year. Failing which, the statement was the only update to his form for this year. She also asked him to let her have the latest information and supporting evidence for the Committee if he wished her to make a statement to the Committee on his behalf regarding his health situation. The proposed additional wording to put on the claimant's form was: "David was offered sufficient teaching in semester one of AY 2021/22 to enable him to complete his NAP portfolio. Teaching observations were also scheduled. David was also required to submit a competitive grant as PI to fulfil his probation objectives, with NERC January grant round 2022 his last viable chance to do this before the end of his extended probation period (no further extension permitted). In early November 2021 David declared himself unable to fulfil his teaching duties. He did this with the documented understanding that he would then fail to complete NAP and would not pass probation. He has also chosen not to submit a research grant in the immediate future, but rather concentrate on finding a role for himself elsewhere when his DKO Fellowship ends. The Committee is asked to consider whether David Legg has met (or will meet by July 2022) his probation objectives, and whether he should be considered to have passed probation."

228. The claimant replied on 9 February that Professor Webb's earlier email had left him confused. He wanted to know what the purpose of a statement to the committee would be, which would help him to know what he could potentially supply. He asked if there was a chance that he could still pass the probation and, if so, what he needed to do. Professor Webb replied

that she did not want to mislead him and that as things stood, she did not consider that he would pass probation, but this was a decision for the Committee to make. She confirmed that she had to present all probation cases for which he was a line manager and would always try to do her best for those that she represented. She asked the claimant if he had any academic achievements to add so that the Committee had all the evidence in front of them in order to ensure that no positives were missed. In addition, the claimant's case could not be discussed without reference to his health issues. She could tell the Committee what she understood the situation to be but this was only based on what the claimant had told her. She might struggle to represent this fully as she was not a medical expert. She also mentioned that the claimant's own explanations were at times incomplete and, by his own admission, confusing. She understood that this was often because he was awaiting the outcome of various tests but in hindsight Dr Legg might now be able to provide a succinct summary of the problems he had faced. She said that it was unlikely that it would change anything and that she did not wish to give the claimant false hope. Nevertheless, any decision was best made in view of all the facts [350]. The claimant's reply was that in that case he would send some information later to add.

229. The DPPC meeting was due to take place on 17 February. On 15 February the claimant emailed Professor Webb asking her what time it was going to take place as he had requested a doctor's note which could be ready as late as 2pm on the Thursday afternoon. She replied that it was taking place at 2pm.

230. On 16 February claimant emailed Professor Webb with a doctor's letter dated 15 February 2022. It gave limited information. It was addressed to "to whom it may concern" and confirmed that the claimant had an appointment with the doctors in November 2020 (i.e. over 12 months beforehand) where his thyroid stimulating hormone was elevated and thus needed to start taking medication and this was prescribed early January 2021. He also had an appointment with them on 29 October 2021 because of ongoing breathing difficulties and he was diagnosed with asthma for what the doctor understood was not the first time in his life and prescribed becotide and Ventolin inhalers.

231. Professor Webb was surprised by the lack of detail in the doctor's note given the various appointments and tests that the claimant had notified her of during the period when she line managed him. She also noted that there was nothing in the letter about the claimant not being able to work or requiring to isolate. There was nothing in the letter to suggest that the claimant was disabled or that the information it contained had had any impact on his ability to pass probation.

232. The claimant also passed details of his most recent publication and the link for the press release to Professor Webb on 16 February.

DPPC meeting 17 February 2022

233. Professor Burton chaired the DPPC committee in 2022 as he was the Head of the Department. In advance of the meeting, the attendees had received the CV and probation objectives and notes from probationary meetings for each probationer. Each line manager presented their probationers' cases followed by discussion and collective agreement of actions arising.

234. The claimant was now in his fifth year of probation, which was exceptional. The minutes of the meeting refer to remarks from a line manager relating to the claimant: "Fellow on the tenure track path in final year of fellowship who should have finished probation in July 2021. Due to health issues, Covid, etc he was granted additional year to finish July 2022. Didn't complete NERC proposal and due to withdrawal from teaching could no longer complete NAP and therefore pass probation. Proposal: committee concluded that DL has failed to pass probationary requirements." In addition to the case presented by Professor Webb she referred the committee to the medical evidence that the claimant had provided and to his recent paper.

235. All members of the Committee agreed that failing the probation was the only possible outcome as the claimant had failed to meet his objectives even with the exceptional extension to the probation period. They also felt that, despite support and accommodation he had received, he was not able to demonstrate suitability to be appointed as a permanent member of academic staff and that he would immediately and profoundly struggle to perform as an academic.

236. A letter confirming the outcome of the meeting was sent to the claimant dated 14 April 2022 [368-369]. The letter referred to the documents that had been submitted to the Committee including Professor Webb statement to the committee. It referred to Dr Legg's online meeting with Professor Webb on 5 November 2021 where the claimant had asked to relinquish his upcoming teaching which would mean that he would not complete NAP and his probation. It also noted that the claimant had had an opportunity to put forward any points he wished to be considered and that he had produced his most recent paper. It was confirmed that the committee had received all the paperwork provided in relation to the claimant's progression against objectives and had recommended that confirmation in post be declined. Ordinarily the claimant's appointment would terminate on 31 July 2022 but it had been agreed that the claimant would remain in his DKO post until 30 September 2022 at which point post would terminate. The letter then set out the reasons for that decision. The letter outlined each of the NAP elements that the claimant had not met: attendance at Research Part 2 and Social Responsibility (did not attend for opportunities for each); assessments FSE60001 Intro to Teaching Practice, FSE60002-

Assessment and Feedback; FSE60003 Social Responsibility (online test), FSE60005 Academic Advising (online test), NAP teaching observations (Department and faculty), FSE 60003 Reflective Portfolio.

237. In the letter Professor Burton stated that the Committee had acknowledged that Covid 19 might have negatively affected the claimant's work on NAP. However, the probation trajectory was not on track towards NAP completion notwithstanding that the committee had approved an extension in 2021 to assist the claimant to achieve probation objectives. In relation to the claimant's medical issues, Professor Burton stated that the Committee was aware of these but given the extensive period of time that he had had to complete his objectives, the Committee had concluded that if he could not complete his objectives within a five year period, he simply wasn't going to be the academic with a full teaching load. The Committee had also noted NAP was not the only probation objective that the claimant failed to meet and had also been concerned about the lack of independent research income and lack of a track record of submitted grant proposals as PI across a five year period. The Committee acknowledged that the claimant's publication record was sufficient to meet the probation criteria but commented that it was not outstanding. There was little activity on Academic Enterprise, and a small level of service to the department (referring to the claimant's period on the EDI committee) but the committee had accepted that these minor requirements had been impacted by Covid 19 in the last two years. It was explained that the Committee was unanimous in its decision not to extend the claimant's probation any further in order to confirm the claimant to post due to the significance of objectives in the areas of research, teaching and NAP. They had also noted that the research objectives required a sustained positive trajectory over the years to complete them (which had not been achieved) [368-369].

238. Following on from the DPP C meeting, given that the claimant was on a fixed term contract that was due to expire at the end of September 2022, the standard, automated HR procedure was activated sending the claimant and Professor Webb information about convening meetings to discuss the end of his fixed term contract. Professor Webb emailed the claimant on 29 March 2022 that she understood he had been issued with a six-month fixed term contract expiry letter relating to his DKO fellowship. It was her role to offer him an appointment to discuss his situation and any support that they could provide him for alternative employment opportunities. She asked the claimant to let him know if he would like such an appointment or to meet and discuss any other issues. [360] The claimant indicated that he did not think there was any need for a follow-up meeting before his contract ended. [361].

239. Professor Webb emailed the claimant again on 10 May stating that, as required by the procedure, she was inviting him to formally meet with her in person to discuss the impending expiry of his contract. She said she was aware of the legal process between him and the University (i.e. that he had contacted ACAS) and that he may choose not to engage with standard procedures, but she was following procedure and offering him a

meeting. She also hoped his health had improved [362]. The claimant's reply was that because of the legal action he would need to take some time to work out the right way of engaging and he would get back to her in a few days' time with his decision.

Appeal

240. The claimant had a right of appeal which he exercised by email dated 14 April 2022[372]. The basis of his appeal was that he had provided a doctor's note prior to the Committee meeting that stated why he was unable to undertake the required work and had evidence to contest the other points raised.

241. The appeal hearing was scheduled for 8 June 2022 to be heard by the Faculty Promotions Committee which consists of members of the faculty leadership team. Professor Webb was asked to attend the appeal hearing as his line manager.

242. Prior to the appeal hearing taking place, Benita Jackson emailed the claimant on 24 May asking him if he had any evidence for the appeal hearing as she needed to submit a response by management by 26 May and she was unsure what his grounds of appeal were. The claimant responded apologising for the delay but saying that his laptop was broken so he was having to access documents on his phone, which was taking time and that there were some emails he couldn't access. However, he said that the main brunt of his new evidence was that it had been claimed that he was not seeking additional funding, which he said one of his attached emails refuted. Also, the claim that he was not publishing could be refuted by emails which demonstrated that, although he was submitting papers, they often went through a long review/editorial process, this leading to a "demonised number of papers currently out." He said that in 2019 he had submitted seven papers for publication but only two were accepted. It was not for lack of trying but there was a notorious reviewer who seemed to receive Dr Legg's papers and reject them out of hand. He said that he could provide statements from others about the reviewer if necessary. He also mentioned that he had presented a doctor's note for the initial hearing and obviously believed that that should have been enough. Finally, he said that he would like the appeal hearing to be recorded because he was prone to forgetfulness. He was worried that previous interactions with staff regarding his probation had not been "too open/visible" with "some denying things were said or taken out of context." He had asked a member of staff to attend and that his wife would be acting as a McKenzie friend and taking notes [375, 377-390].

243. Benita Jackson forwarded the email and attachments to Professor Webb. After reviewing these she replied to Benita Jackson that it was never claimed that the claimant was not publishing but that his publications were barely reaching the minimum bar set for fellows in probation (average of two quality papers per year). However, she said that there was no

outstanding trajectory and nothing to imply that publications could in any way compensate for his lack in other areas of probation. She said he had now provided evidence of one accepted paper (2020), one submitted in 2019 (outcome not provided), several submissions of the same paper to a number of journals (February-November 2021) until finally accepted in December 2021, and one of the submissions in 2021 (outcome not provided). For most, if not all, the claimant was not first author. Professor Webb explained that they were well aware of the time and effort it takes to get to publication especially when initially aiming for the highest quality journals. As already mentioned, probation was not failed on publications but on lack of any competitive grant proposal and failing to complete NAP. His only evidence of applying for a grant showed that he had expressed an interest, was chased for funding details, and withdrew [386-389]. None of this would prove he had a proposal written and he certainly had not submitted anything. The emails were also from October 2021 when he was already in his extended 5th year probation, having already had four years in which to submit a proposal.

244. In advance of the appeal hearing Professor Webb prepared a "record of interactions" based on her correspondence and notes of meetings with the claimant. [391-402].

245. On 30 May Ms March (the head of HR for the Faculty of Science and Engineering) emailed the claimant to let him know that he would need to provide an overview of his appeal to the panel and also any information that he felt supported the case he would be putting forward which would be key to explain why the decision was reasonable. She also attached the material that she had received from management.

246. The appeal hearing took place on 8 June and minutes were taken [449]. The appeal meeting the first time that the claimant asserted that his respiratory problem was a reason why he could not do the teaching. He took issue with being asked to forfeit probation on 4 or 5 November. He felt that this affected the decisions that he made regarding probation after that. He felt that he should not have been asked to forfeit his probation and anything subsequent to that date should not have been used against him with regards to deciding whether or not he passed probation. He took issue with the lack of grants being held against him. He said, effectively, that if he had not been asked to forfeit probation then he would have carried on applying for grants. He asserted that he was 'set up to fail.' The claimant also took issue with the teaching requirements. He took the view that he should do the teaching in the January or have the requirement removed altogether.

247. The Tribunal finds that the claimant's comments during the appeal hearing put a remarkably different spin on what we find had happened up to that date. It could be said that the claimant was seeking to rewrite history to some extent. However, the respondent went back to consider the contemporaneous evidence and concluded that his appeal case was not accurate. It is notable that the claimant ignored the first four years of his

probation period and merely focused on November 2021 onwards. It also ignored the fact that there was nothing to prevent the claimant from carrying on trying to meet the probation objectives pending the appeal. He could have attended the appeal hearing saying that in the time since the decision was made, he had "fixed" the problems which it was in his power to fix e.g. by carrying on with his grant applications etc. He had done nothing to improve his own circumstances in the time leading up to the appeal hearing. Nothing had changed in the interim to make his claim to continue in employment any stronger. The Tribunal also notes that, whilst the claimant gave an account of his health problems at the hearing, there was little evidence to substantiate those health problems.

248. When asked to summarise his position, the claimant repeated that there should have been more options in November 2021, whether that be to amend probation to extend it, or to change the target, rather than simply being told that there was no way he could pass. He said that all decisions after that in relation to his probation should fall. If he had known that there was a possibility of passing probation, he would have continued working on his probation objectives.

249. Professor Webb summarised that it was not her decision whether the claimant passed probation but that of the probation committee in February 2022. However, she had also been clear that, given it was the claimant's fifth year of probation, it would be hard to see how he could pass (if he didn't complete his teaching). With regard to the objectives relating to research proposals she said that the claimant had had five years to submit one. It wasn't that he had been given a very short time to complete all his objectives. Matters had become difficult because he hadn't done anything in the previous four years. He had also been given an extra year beyond the four years. Professor Webb stated that whilst it was incumbent on her to make clear to the claimant that it was going to be very difficult for him to meet his targets if he gave up his teaching, she had not asked him to forfeit his probation.

250. During the appeal meeting the claimant stated that when Covid started he went into isolation which sent his immune system into overdrive. This is not something that he apparently told Professor Webb before the appeal hearing stage. During the hearing the claimant stated that he felt very "gaslit" by a lot of what was going on. The claimant said that his illness had come on very fast and very badly and that he thought, right up until the last minute, that he was going to be able to do the teaching. He said that when he had spoken to the doctor, she had recommended that he take some time off and he had scheduled the meeting with Professor Webb on 5 November to inform her. However, this was not how the meeting had actually come about and we accept that the claimant never told Professor Webb that his doctor had told him to take time off. The letter that he produced retrospectively from his doctor did not state this either.

251. The claimant essentially said that he felt goaded by Professor Webb and that Professor Webb was trying to get him to 'doubt his own reality.' In her

evidence to the Tribunal Professor Webb indicated that, in fact, it felt as though this was actually what the claimant was attempting to do to her.

252. During the course of the appeal hearing the claimant was asked questions about the absence of evidence relating to grant applications before 2021. The claimant gave reasons for highlighting the 2021 grant rather than others and said that he had applied for other things but had not been successful. The claimant was asked what other options he felt should have been given and replied that he should have been given a further extension because the extension that he had received was based on Covid which everyone had been given. However, he stated he had extenuating circumstances, namely extreme illness, which required a second extension. When he had said that he couldn't do the teaching in November he should have been offered teaching in January, prior to the probation meeting. Alternatively, his probation could have been amended so that teaching wasn't a requirement and he could have been asked to do something else instead.

253. During the course of the Tribunal hearing we looked into the potential for teaching after the November dates. However, there was no evidence of any other teaching opportunities which the claimant could have taken up following November which would have been suitable for him and which would have been completed in time for him to meet the requirements of his probation for the February meeting. Semester One runs till the end of January and Semester Two teaching would not be done before the February meeting. Furthermore, it was not just a question of the claimant doing the teaching. He also had to be observed and to complete his reflective portfolio in order to complete the requirement. We heard no evidence to suggest that there were other teaching options available that the claimant could have been given with a view to meeting the requirements for probation in time for the decision to be made.

254. During the appeal hearing the claimant was also asked to expand on other grant applications he had previously submitted and he explained that they were fellowship applications in Ireland because he was trying to stay in Ireland and had been applying for money that would allow him to work in Ireland but still be combined with people at the University. The claimant was asked about the outstanding elements of NAP and he stated that the only outstanding elements were the teaching observations. He said that he had until January 2022 to complete his portfolio.

255. The claimant was asked what procedural aspects he was appealing against. The claimant replied that he should not have been asked to forfeit his probation in the first place. He alleged that that was an act of discrimination because it was directly related to his illness. Any decision made after November should, therefore, be dismissed because it was predicated on the idea that he had already forfeited probation.

256. The claimant was also asked what he had done since January 2022 to pass probation. The claimant replied that he hadn't done anything because

he didn't think he had a choice, that the decision has been made in November. Some follow-up questions were asked about what the claimant had done since April when he submitted the appeal. The claimant replied that he had not done anything. He was still not well and he could not spend two months expending a lot of energy for no potential gain. If he heard that he was going to be put back on probation for another year he would spend the year working towards passing but he wasn't going to do anything until that point. Professor Dixon replied that he was sorry that the claimant was unwell but assumed that if the claimant hoped that his appeal would be successful that he would have started to work on the outstanding items to pass probation.

257. Professor Webb was asked to comment on the points that the claimant had made. She confirmed that she had never asked the claimant to forfeit probation. She confirmed that she and the claimant did have a long conversation about the fact that the claimant was in his fifth year of probation and that he knew that this extra, extended year was his final year and he had to complete NAP and submit a competitive grant. She confirmed that she had set up teaching for the claimant in Semester One which would have given him time to complete his portfolio. She said that everyone had recognised that it was going to be hard work for the claimant to complete NAP and submit a competitive grant application but these were the conditions of the extended probation. She confirmed that when the claimant instead, very shortly before he was due to teach, realised that he wasn't able to, Professor Webb had had a long conversation about the consequences of not teaching and had discussed whether, for example, the claimant could at least do his lectures online. Regarding grant applications Professor Webb explained that the claimant had informed her that he was aiming for the NERC round in January and this was effectively the "last chance saloon." She stated that the claimant hadn't done anything in the previous four years despite telling her that he had "shovel ready proposals." With regards to the claimant's reference to fellowships, Professor Webb explained that he had put in a proposal for a fellowship in Ireland because he had been telling her for some time that he wanted to be in Ireland with his family. However, it wasn't a proposal as principal investigator at Manchester as a DKO fellow. The claimant's colleagues were very concerned that they were going to be "dropped in it at a moment notice" which is how the conversation had come about in November. The claimant had not contacted her in advance. Regarding the extension of probation into the fifth year, the claimant was incorrect that everybody had been given an extra year because of Covid. Professor Webb had made a case for him based on his health to be granted an extraordinary 5 year probation.

258. Professor Webb was asked, given that she had identified that a number of units on an AP was still outstanding, if there had been any discussion about how the claimant could be supported to meet them because some units were independent of the teaching observation that needed to be completed. Professor Webb replied that she had not because the claimant had always told her that he had completed everything, which she had

taken at face value. It was only recently, when the new NAP mentor went through the information in detail, that it became apparent how much was outstanding.

259. Professor Webb was also asked about medical information and confirmed that there was very little formal medical evidence. The claimant had always been open with her about his health problems. Initially there had been issues with his blood sugar, then his thyroid and more recently it was asthma or breathing difficulties. She said that there were periods when he was feeling good and periods where he was clearly not so well. She knew that the claimant had been seeing Occupational Health and that he was getting psychological support. Prior to her becoming line manager, on advice from Occupational Health, they had relieved the claimant of tutorial work. She also explained that the claimant never wanted to take time off for sickness. She had suggested that he do so on a number of occasions to get on top of his health. She referred to the doctor's note that the claimant had submitted prior to the probation committee meeting (which stated he had a thyroid problem in November 2020 and some breathing difficulties in October 2021) but that was the extent of any actual medical information that she had received.

260. The claimant replied that he hadn't wished to take any time off sick because the work would still be there when he returned and given that many of his conditions were affected by stress, he was better doing things as he went along. However, when it came to the teaching, he said that he had become really sick and it had become too much work all at once.

261. The appeal panel deliberated immediately after the hearing. The discussion considered whether the claimant had been given clear indications of the risk of failing to meet the probation requirements and whether the claimant had submitted documentary evidence of his medical conditions (since appointment) and whether they had taken advantage of services such as Occupational Health. The panel considered the claimant not continuing to engage with activities that were probation requirements and the absence of evidence of grant applications. The decision not to uphold the appeal was unanimous.

262. An outcome letter from the appeal was drafted and sent on 21 June 2022 [411-412]. It reflected the basis of the decision not to uphold the appeal. In particular, the panel believed that the process for determining the probation outcome had been followed correctly. The earlier decision made by the Department Probation Committee was based on information provided by the claimant and Professor Webb and was correct and objectively reasonable. The claimant had been made fully aware of the objectives that he was required to meet for successful completion of probation and the impact of not completing specific objectives to an acceptable standard (for example, teaching). The panel also felt that the claimant had received support during his probationary period and that he had been given opportunities to help him achieve the required objectives. Unfortunately, despite extending his probation to an additional fifth year

(which was exceptional) the claimant was not able to meet those objectives. The panel was also satisfied that Professor Webb had explained the consequences to the claimant if he did not achieve his objectives. Furthermore, she had not misled the claimant in their discussions in November 2021. The panel was also satisfied that the Probation Committee had considered the evidence that the claimant had submitted relating to his health and the impact of the pandemic. It had been reasonable for the Probation Committee to conclude that progress in the claimant's fifth and final year had not been sufficient and key objectives had still not been met and, given the claimant's lack of progress to date, that a further extension to his probation period would not change the situation. As such, the panel upheld the decision of the Probation Committee.

263. Ordinarily the claimant's appointment would terminate on 31 July in accordance with the probationary arrangements for newly appointed academic staff. This was discussed by the appeal panel but they did not reach a conclusion and it was left to the Dean to take advice from HR. It was agreed that the claimant would remain in his DKO post until 30 September 2022 at which point his employment would terminate.

264. After the outcome of the appeal, it appears that the claimant consulted his doctor [505] on 27 June 2022. Someone had suggested that he get a referral for an ADHD assessment. There is a query in relation to ADHD and reference to an increase in medication. However, the Tribunal was not provided with details of the medications he had been prescribed over the relevant period, what they were prescribed for and what effect they had. The level of dosage over time was also not provided. This was a single excerpt from the claimant's medical records. The full medical records were not provided, even in redacted format.

<u>Evidence after end of employment.</u>

265. After the claimant left his employment with the respondent, he obviously continued to see medical professionals. Hence there is a GP letter of 19 January 2023 [490] where the doctor confirms that the claimant has been seen in the practice for respiratory issues and issues with diabetes and his breathing over the last two years and it has severely compromised his functioning. He has done numerous covid tests and was concerned about face-to-face consults due to the risk of being exposed to respiratory pathogens. He found working difficult and could not work during this time, according to the GP letter. The only other excerpt from the GP notes is at [505] and relates to 1 September 2021 where it states *"not breathing well at night? For sleep studies."* The other entry on the same page relates to 29 October 2021 and it states *"Coughing ++ covid neg had asthma as a child. Apyrexial chest sounds clearer to try Ventolin and becotide and if no improvement to attend accident and emergency letter given."*

266. The diagnosis of severe obstructive sleep apnoea apparently dates from around 24 July 2023 as per the letter from the Respiratory Sleep Disorders Unit [514]. This is a two line letter which confirms the results of a recent sleep study and confirms that the claimant was due to have a trial of CPAP therapy. It does not elaborate further.

The Law

Unfair dismissal

267. The relevant part of the Employment Rights Act 1996 is section 98 which states (so far as relevant):

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show-*
> *(a) the reason (or if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.*
>
> *….*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

268. It is for the respondent to prove the reason or principal reason for the dismissal. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' (Abernethy v Mott, Hay and Anderson 1974 ICR 323). Thereafter, the burden of proof is neutral as to the fairness of the dismissal (Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT).

269. Capability is defined in section 98(3)(a) as 'capability assessed by reference to skill, aptitude, health or any other physical or mental quality'. The employee's alleged incapability must relate to the 'work of the kind which [the employee] was employed by the employer to do' (section

98(2)(a)). However, a dismissal for incapacity may be fair even though the employee can still perform some of his contractual duties.

270. Part of a fair dismissal procedure entails providing the employee with an opportunity to improve. In the absence of specific timescales set out in a formal capability procedure, the quality and length of the employee's past service, as well as the extent of the underperformance, may be relevant factors in assessing the overall fairness of any decision to dismiss.

271. With regard to the employee's performance, it may be legitimate to characterise lack of confidence in an employee's ability to do the job as some other substantial reason ("SOSR") rather than capability.

272. In line with section 98(4) it is not enough that the employer has a reason that is capable of justifying dismissal. The tribunal must be satisfied that the employer was actually justified in dismissing for that reason.

273. The test of whether or not the employer acted reasonably is usually expressed as an objective one i.e. whether it was 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' (NC Watling and Co Ltd v Richardson [1978] ICR 1049, EAT.) There is also a subjective element in that account should be taken of the genuinely held beliefs of the employer at the time of the dismissal. However, a tribunal must not put itself in the position of the employer and consider how it would have responded to the established reason for dismissal (the 'substitution mindset.')

274. In considering the so-called 'band of reasonable responses' the tribunal must not substitute its own view for that of the reasonable employer *(*Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*;* Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*)*. 'The band of reasonable responses applies to the question of the procedural fairness of the dismissal as well as the substantive fairness of the dismissal (J Sainsbury plc v Hitt 2003 ICR 111, CA*;* Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA*.)*

275. Dismissal does not have to be the last resort before it can fall within the range of reasonable responses.

276. The reasonableness test is based on the facts or beliefs known to the employer at the time of the dismissal. A dismissal will not be made reasonable by events which occur after the dismissal has taken place *(*W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.*)*

277. In determining whether the employer acted reasonably in the circumstances, the tribunal must have regard to the 'size and administrative resources of the employer's undertaking' (section 98(4)).

Disability

278. Section 6 of the Equality Act 2010 states:

(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.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability-

(a) A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) A reference to persons who share a protected characteristic is a reference to persons who have the same disability.

…

279. The definition set out in section 6, as supplemented by provisions in Schedule 1 to the Act, poses four essential questions:

a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

c. Is that effect substantial?

d. Is that effect long-term?

280. The time at which to assess whether the definition of disability is met is at the date of the alleged discriminatory act. The Tribunal should consider the evidential position as at the date of the alleged discriminatory act (McDougall v Richmond Adult Community College [2008] ICR 431.)

281. The activities affected must be "normal". The Equality Act 2010 "Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011" states (D3):

"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."

282. It is not intended to include activities which are only normal for a particular person or group of people. The indirect effects of an impairment should also be considered. Tribunals are entitled, in appropriate circumstances,

to take into account the effect on an employee of circumstances which arise at work. Work performed by an employee may include some normal day-to-day activities (Law Hospital NHS Trust v Rush [2001] IRLR 611; Cruickshank v VAW Motorcast [2002] IRLR 24).

283. In looking at the impact of the impairment the focus should be on what an individual cannot do or can only do with difficulty rather than on the things he or she can do.

284. Paragraph 5 of Schedule 1 to the Act deals with the effects of medical treatment. The impairment is to be treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. Thus, unless the treatment is completely curative of the underlying impairment, the treatment or measures are disregarded in terms of whether the impairment has a substantial adverse effect on the claimant. The tribunal seeks to determine what the position would be for the claimant in the absence of the treatment, the 'deduced effect.'

285. "Substantial" means "more than minor or trivial" (section 212).

286. "More than minor or trivial" is a relatively low standard (Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19.) In Leonard, the EAT gave the following guidance:

- The focus should be on what an employee cannot do or can do only with difficulty, and not on what they can do easily.
- The decision-maker should look at the whole picture but should not attempt to balance what an employee can do against what they cannot do.
- The statutory Guidance should not be used too literally and, in particular, its examples are illustrative only. They should not be used as a checklist.
- The fact that an employee is able to mitigate the effects of an impairment, for example, by carrying things in small quantities, does not prevent there being a disability.

287. An impairment will have a long-term effect only if:

- It has lasted at least 12 months;
- The period for which it lasts is likely to be 12 months; or
- It is likely to last for the rest of the life of the person affected. (Paragraph 2(1)(a) -(c), Schedule 1, Equality Act 2010.)

The Equality Act 2010 Guidance on disability states: *"Likely should be interpreted as meaning that it could well happen." (Paragraph C3.)*

288. The likelihood of the recurrence must be assessed as at the 'relevant time', the date of the alleged act of discrimination (McDougall v Richmond Adult Community College [2008] IRLR 227) If an impairment ceases to have a

substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if that effect is likely to recur (paragraph 2(2), Schedule 1, Equality Act 2010). The test is whether the particular effect is likely to recur. In Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540, the EAT suggested that four questions should be asked:

- Was there at some stage an impairment which had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- Did the impairment cease to have such an effect and, if so, when?
- What was the substantial adverse effect?
- Is that substantial adverse effect likely to recur?

289. Where a substantial adverse effect is deemed to exist because it is likely to recur, the tribunal will take into account the whole period (whether the substantial adverse effect is deemed or actual) in assessing whether it is long-term.

290. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is 'likely to recur.' 'Likely' has been defined for the purposes of the Act as 'could well happen.' (See e.g. Boyle v SCA Packaging Ltd and also the 2011 'Guidance on matters to be taken into account in determining questions in relation to the definition of disability.')

291. There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause (see para 7 Appendix 1 EHRC Employment Code).

Knowledge of Disability

292. The issue of knowledge of disability arises in both reasonable adjustment claims and section 15 claims.

293. Pursuant to paragraph 20(1) of Schedule 8 to the Equality Act 2010, the employer will only come under the duty to make reasonable adjustments if it knows, not just that the relevant person is disabled, but also that the relevant person's disability is likely to put him or her at the relevant substantial disadvantage in comparison with non-disabled persons in relation to the PCP. Knowledge is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). The EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

(1) Did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?
(2) If not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

294. In Wilcox v Birmingham CAB Services Ltd EAT 0293/10, the then President of the EAT took the view that the effect of the knowledge defence in the predecessor Disability Discrimination Act was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the disability in the way set out in section 4A(1) (i.e. by a PCP or physical feature of the workplace). The second element of this test will not come into play if the employer does not know the first element.

295. An employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser, HR officer or line manager) knows in that capacity of the disability. The EHRC Employment Code indicates that such knowledge is imputed to the employer (see paragraph 6.21). The duty to make reasonable adjustments would still apply even if the disabled person asked the agent or employee to keep the information confidential. This means that employers must have a suitable confidential means of collating information about employees to ensure that they adhere to their duty to make reasonable adjustments. However, the Code confirms that information will not be imputed to the employer if it is gained by a person providing services to employees independently of the employer, even if the employer arranged for those services to be provided (see paragraph 6.22). The case law also shows that, depending on the particular circumstances of a given case and the way in which the adviser was instructed, there may be circumstances where the information/knowledge passed to the adviser will not be imputed to the respondent *(* Hammersmith and Fulham London Borough Council v Farnsworth [2000] IRLR 691, EAT, Q v L EAT 0209/18 and Hartman v South Essex Mental Health Community Care NHS Trust and other cases [2005] IRLR 293) In Hartman v South Essex Mental Health Community Care NHS Trust [2005] IRLR the Court of Appeal held that if an employee discloses *confidential* information about their health to their employer's occupational health provider, the employer should only be deemed to have knowledge of the information *actually* provided to it by the occupational health provider.

296. Paragraph 6.20 of the EHRC Employment Code indicates that the Act does not prevent an employee from keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employee could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer (or someone acting on their behalf) with sufficient information to carry out that adjustment.

297. When considering whether an employer is to be regarded as having constructive knowledge of a worker's disability so as to trigger the duty to make reasonable adjustments, it is irrelevant that a formal diagnosis has yet to be made, so long as there are other circumstances from which a long term and substantial adverse effect of a mental or physical impairment can reasonably be deduced. While knowledge of the disability places a burden on employers to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for doing so (*Ridout v TC Group 1998 IRLR 628, EAT*)

298. A failure by an employee to cooperate with an employer's reasonable attempts to find out whether he or she has a disability could lead to a finding that the employer did not know, and could not be expected to know, that the employee or job applicant was disabled.

299. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage (paragraph 20(1)(b), Schedule 8 Equality Act)

300. In the context of a claim of discrimination because of something arising from disability, section 15(2) means that an employer will not be liable for section 15 discrimination if it did not know and could not reasonably have been expected to know of the employee's disability. The EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (paragraph 5.15). What is reasonable will depend on the circumstances. This is an objective assessment. It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' (paragraph 5.14)

301. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know if it had made such an enquiry. A Ltd v Z [2020] ICR 199 shows that determining whether an employer had constructive knowledge involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that he had a disability, namely that he was suffering a physical or mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. In A Ltd v Z the tribunal had failed to apply the correct test, asking itself only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know. Given the tribunal's finding that Z would have concealed her disability, if the employer had taken the additional steps that the tribunal considered would have been reasonable, it could not reasonably have known of the employee's disability.

302. The burden is on the respondent to make reasonable enquiries based on the information given to it. It does not require them to make every possible enquiry even where there is no basis for doing so. The failure by an employee to co-operate with the employer's reasonable attempts to find out whether the employee is disabled could lead to a finding that the employer did not know and 'could not reasonably be expected' to know that the employee was disabled.

303. The employer must have the requisite knowledge of disability *at the time it treats the employee unfavourably* for the purposes of the section 15 claim. If the treatment complained of is made up of a series of distinct acts occurring over a period, it is necessary to consider not only whether the employer had the requisite knowledge at the outset but also, whether it gained that knowledge at any subsequent stage when the treatment was ongoing.

304. While lack of knowledge of the disability itself is a potential defence to a section 15 claim, lack of knowledge that a known disability caused the 'something' in response to which the employer subjected the employee to unfavourable treatment is not (*City of York Council v Grosset [2018] ICR 1492, CA).*

Section 15: Discrimination arising from disability.

305. Section 15 Equality Act 2010 states:

> *(1) A person (A) discriminates against a disabled person (B) if-*

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

306. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability.' The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

307. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

308. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

309. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.

(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability.' That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(e) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).

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

310. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability," which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

311. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

312. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

313. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of

achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

314. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

315. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

316. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Section 20/21: reasonable adjustments.

317. Section 20 (so far as relevant) states:

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

…

318. Section 21 states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) …

319. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

(a) Identify the PCP applied by or on behalf of the employer,
(b) Identify comparators (if necessary),
(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

320. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

321. In Ishola v Transport for London [2020] EWCA Civ 112 it was noted that the phrase PCP should be construed widely but remarks were made about the legislator's choice of language (as opposed to the words "act" or "decision".) Simler LJ stated, *"I find it difficult to see what the word "practice" adds to the words if all one off decisions and acts necessarily qualify as PCPs…. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice." It is just done; and the words "in practice" add nothing….The function of the*

PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee…To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply…. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. …In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP of "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one. …in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of an element of repetition about it."

322. A 'substantial disadvantage' is one which is 'more than minor or trivial.'

323. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one.

324. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

325. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable him to be more efficient would indeed relate to the substantial disadvantage he would

otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

326. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry.

Burden of Proof

327. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act. Although similar principles apply, what needs to be proved depends, to a certain extent, on the nature of the legal test set out in the respective statutory sections.

328. The wording of section 136 of the Act should remain the touchstone.

329. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

330. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

331. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

    a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
    b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.

c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.

d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.

e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.

f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

332. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

333. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent,

it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

334. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

335. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

336. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

337. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

338. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this

"something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

339. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

CONCLUSIONS

Unfair dismissal

340. The fact of the dismissal is not disputed.

341. The respondent says that the reason for the dismissal can be characterised as either capability or "some other substantial reason." The "some other substantial reason" is the breakdown of the relationship between the claimant and the respondent. In essence, the respondent says that the claimant was not able to demonstrate his competence and capability in performing the role. He did not pass probation. The requirements of probation were designed to demonstrate that the claimant was competent and 'had what it takes' to become a permanent member of the University. When the claimant failed to pass probation despite an exceptional number of extensions to the probationary period, the respondent lost all confidence in the claimant's ability to turn things around and prove his suitability and ability to perform in the role as a permanent member of staff. The relationship was not reparable because the claimant did not (or could not) do what was needed to demonstrate competence by passing probation.

342. The Tribunal is satisfied, as a matter of fact, that the above facts and matters were the genuine reason for the dismissal. On balance, the correct legal label for the reason for dismissal is 'some other substantial reason.' The claimant may or may not have had the intrinsic skills and abilities to

do the job but he was unable to substantiate this within a reasonable period by passing probation requirements (despite being given every opportunity to do so.) The respondent made various adjustments to the claimant's work and extended probation into an exceptional fifth year. By the date of termination, the respondent had lost faith in the claimant's ability to deliver on his assurances. The respondent had already made adjustments and extended probation and the claimant had still not made good on his assurances that he would complete the probation requirements. Eventually the claimant ran out of second chances. The respondent had no confidence that one last extension or adjustment would 'do the trick' so that that the claimant would pass probation. They could no longer rely on the assurances the claimant gave as they had repeatedly turned out to be unreliable in the past. The relationship between the parties had completely broken down as a result of the way that the claimant had conducted himself throughout the five year probation period, particularly in the final year of his probation. Furthermore, there were a number of examples of the claimant misleading his line managers (whether deliberately or not). They understandably lacked trust in what he was saying to them. They could not rely on it. For example, he had repeatedly assured them that he had done more to complete NAP than he actually had. He gave them a misleading impression of what tasks remained outstanding for completion. They only discovered relatively late in the chronology that the claimant had more to do to complete probation than he had suggested. Likewise, there was some reasonable doubt on the respondent's part about whether the claimant was actually present and living in Manchester when he said that he was, or whether he was actually in Ireland and attending meetings with his managers remotely.

343. Taking account of the totality of the evidence in the case, the Tribunal is satisfied that the respondent has established that it had a fair reason for dismissal. If, contrary to our view, the reason for dismissal is properly to be labelled as capability, then it is still a fair reason for dismissal and is based on the same facts and matters as the 'some other substantial reason' label.

344. The Tribunal then went on to consider whether the dismissal was fair within the meaning of section 98(4). Was it within the range of reasonable responses in the circumstances of this case? The Tribunal concluded that this was a fair dismissal within the meaning of section 98(4). The claimant knew what he needed to do in order to pass probation and become a permanent employee. The probation process, including the annual reviews, meant that he was left in no doubt as to what the requirements were. He was given fair warning.

345. The respondent allowed the claimant a significant amount of flexibility. Right from the early stages of the claimant's probation, the respondent made adjustments to ease the burden on the claimant. For example, his teaching obligations were reduced and he was not required to continue his work in Equality and Diversity. When these adjustments were made or the probation period was extended, it did not result in an improvement in the

claimant's performance. Instead, there were further delays to the claimant meeting his commitments. Thus, the claimant agreed to teach a particular unit in two consecutive academic years as a way of completing his teaching requirement. He failed to do the teaching in either of those years. The removal of obligations from the claimant did not result in improvements in the claimant's performance.

346. The claimant was given every reasonable opportunity to improve his performance. He was also told in advance that there could be no extension of probation past a fifth year. This did not come as a surprise to him. He had adequate time to meet the probation requirements in time for the probation decision to be taken according to the University's process and timeline in 2022. The respondent did not base its decision solely on the events of late 2021/early 2022. The claimant was only in the situation of having to work extra hard to pass probation in 2022 because he had not managed to pass probation in the previous four years.

347. The respondent did all it could to accommodate the claimant save for removing the requirement to have its permanent employees pass probation at all. The respondent was reasonably entitled to have a quality control probation system in place to ensure that academics were not offered permanent employment without proving competence across the range of areas required by the respondent. Fairness did not require the respondent to remove the requirement to pass probation from the claimant altogether.

348. The imminent expiry of the DKO fellowship (and the funding which went with it) meant that the respondent did not have the option of extending probation into a sixth year. There were only two available options: pass the claimant's probation and make him a permanent employee; or fail the claimant's probation and terminate his employment at the end of his fellowship. It was firmly within the range of reasonable responses for the respondent to take the latter option.

349. Furthermore, the procedure used was fair. The claimant was warned and consulted at every stage. He had all necessary information to make a reasoned decision about what he wanted to do. He had the opportunity to make representations each time a decision was to be made in relation to his probation. He had numerous meetings with his line manager to review probation progress. Professor Webb even consulted him in advance of the meeting on 17 February 2022 to make sure that she put forward everything on his behalf that she could and that he wanted her to. Once the decision was taken, he was permitted to appeal. There was a fair appeal process. The claimant was permitted to attend an appeal hearing and make the representations that he wanted. He was also allowed to question Professor Webb at that hearing. He was also accompanied at that hearing.

350. The Tribunal finds that the procedure used to dismiss the claimant also fell squarely within the range of reasonable responses. The decision to dismiss was both procedurally and substantively fair.

351. In light of the above the claimant's claim of unfair dismissal fails and is dismissed.

Disability

352. The claimant had a number of medical conditions at various stages throughout his employment. However, the two disabilities that he chose to rely on for the purposes of the discrimination claim were: breathing/ respiratory problems/severe sleep apnoea; and ADHD. The Tribunal had to apply the statutory test to those conditions. It had to consider whether there was an impairment with the necessary substantial and long-term adverse effect upon the claimant's ability to do normal day to day activities. We had to consider whether the definition of disability was satisfied as at the date of the alleged discrimination.

353. The claimant did not produce a section 6 disability impact statement. There was no clear source of witness evidence detailing the nature of the impairments, the nature of the substantial adverse effect, the types of normal day-to-day activities impacted and the likely longevity of the problem. The Tribunal therefore took a considerable amount of time to comb through the other evidence that it had been directed to by the parties in order to see if it established the disabilities contended for.

354. The claimant did not provide anything approaching a comprehensive copy of his GP records. There were some GP documents and medical letters in the bundle and we considered these carefully. We took into account the substance of the medical evidence and also the date on the evidence. Did it relate to the relevant period in this case or did it post-date the termination of the claimant's employment?

355. In relation to the breathing issues we noted that there was a record of him having some breathing issues in around September 2021. He is noted to have been prescribed inhalers. However, there was no real evidence of how the breathing difficulties impacted upon him during the relevant period. The mere fact that the claimant had the use of inhalers did not necessarily mean that he would otherwise suffer a substantial adverse effect on his normal day to day activities. The use of inhalers is widespread throughout the population. It is not every person who uses an inhaler that is considered disabled within the meaning of the Equality Act 2010. Indeed, the inhaler is merely the mode of delivery for certain drugs. We had no real information about the dosage of the drugs or what state the claimant would be in without the inhaler treatments. We were not able to assess the deduced effect in the absence of treatment.

356. The claimant gave no clear or cogent evidence of the impact of the breathing difficulties upon his normal day to day activities. Nor did he explain what state he would be in in the absence of his inhaler. The claimant referred to grogginess and fatigue. However, it is not clear

whether this could be attributed to his breathing problems or to his diabetes/fluctuating blood sugars or to his thyroid condition. Both of those conditions could also result in fatigue, grogginess, brain fog, memory problems but he did not rely on diabetes or thyroid problems as his disabilities for the purposes of his claim. That was the claimant's choice. It meant that the Tribunal needed to work out what symptoms and impairments were attributable to the putative disabilities and which were related to other medical conditions. We could not just assume that fatigue was related to respiratory problems when it could just as likely be related to the thyroid condition, for example.

357. Nor did we receive evidence to show the likely longevity of any substantial adverse effect. Although the claimant says that the treatment was not, in the end, curative of the condition, we do not know whether the impairment was seen as likely to last for at least 12 months (or likely to recur) on the information which was (or would have been) available from September 2021 until the end of the employment. We have no evidence of the extent to which the symptoms were likely to fluctuate during the relevant period either. The Tribunal has to be careful not to act with the benefit of hindsight and use evidence from after the relevant time period to establish that the claimant was disabled (as defined) *during* the relevant time period (McDougall v Richmond Adult Community College [2008] IRLR 227).

358. The Tribunal also noted that there was no record of sick leave attributed to breathing difficulties. We could not use a record of sickness absence from work as a basis to infer the necessary elements of a disability. We were left to speculate. Indeed, the claimant never actually indicated that he was unable to teach because of breathing problems prior to the appeal hearing. Some of the medical letters were significantly after the event (e.g. [490, 19/01/23]) and so did not provide good information about the manifestation of his symptoms during the relevant period for the purposes of his Tribunal claim.

359. Further, the issue of sleep apnoea did not arise until after the claimant's employment terminated. Even if he has subsequently obtained a sleep apnoea diagnosis, this does not necessarily mean that he was suffering from the effects of the condition during the material period of time for the purposes of his claim. Whilst sleep apnoea may be a permanent condition once it develops (although we have no evidence on which to base such an assertion) if it has not yet developed at the material time, it does not assist him in this claim. The label of sleep apnoea does not add a great deal to the available evidence of impairment, substantial adverse effect on day to day activities and longevity etc.

360. The Tribunal notes that it is for the claimant to prove that he was disabled in the manner that he asserts during the relevant period of time for the purposes of his claim. The Tribunal lacks the evidence to conclude that he was disabled by reason of breathing/respiratory problems/severe sleep apnoea during the material period of time for the purposes of the claim.

361. In relation to ADHD there was even less evidence for the Tribunal to rely on. We did not see a letter of diagnosis or a full description of how the condition manifests itself in the claimant's case. Although we saw a referral letter from 'ADAPT' [528] dated 15/02/23, this seems to be a referral to a clinic to get a diagnosis rather than the resulting diagnosis itself. It gives the impression that the claimant was waiting for an assessment and/or diagnosis at this point in time. This is further supported by the letter to the claimant on 03/02/23 [527].

362. During various parts of his evidence the claimant suggested that difficulties with organisation and motivation were part of the ADHD that he now knows that he has. He says that this had an impact on his ability to manage his workload. However, how is the Tribunal able to make the link between his inability to manage his workload and a mental impairment such as ADHD? An inability (or lack of motivation) to manage workload could be a personality trait rather than a manifestation of a disability. Alternatively, it could be related to the problems arising from thyroid problems or diabetes (which he does not rely upon as his disabilities). Further, it is just as possible that the claimant had poor organisational skills (as some employees do). Hence the respondent's need for employees to be assessed and pass probation. The claimant did not provide us with the relevant evidence for the relevant period of time which would enable the Tribunal to consider him disabled by reason of ADHD at the time of the alleged discrimination.

363. The claimant also suggested that there was a mental impairment that required counselling and which was referred to as depression during his employment. He says to the Tribunal that it was mislabelled at the time and he now knows that it is part of his ADHD. The difficulty is that there is no really cogent evidence on which the Tribunal could base such a finding.

364. There is no medical evidence explaining how apparent symptoms of depression could be part of the ADHD in the claimant's case. In any event, the evidence in the case shows that he received six months' worth of counselling support via Occupational Health and that he found this helpful. (Had he recovered from the depressive episode?) Nor is there any evidence of any medication being prescribed in relation to this mental health impairment. The Tribunal is left without a diagnosis, without being able to attribute it to ADHD (as opposed to other, non-disability factors) and without evidence to show what its impact was and how long it was likely to endure for. The Tribunal is being asked to make a lot of assumptions.

365. On balance, the Tribunal does not find that the claimant was disabled by reason of ADHD during this relevant period. Thyroid problems and diabetes are not relied upon as disabilities and we are not able to 'add in' non-disability related symptoms in order to create a whole disability which meets the statutory definition. It *might* be different if the claimant sought to aggregate symptoms of diabetes, thyroid and ADHD to come to a disability based on all the conditions considered holistically but that is not how he

has put his case. He squarely relied on ADHD as a 'standalone' impairment and disability.

366. In light of the above, the Tribunal was not persuaded that the claimant was disabled during the relevant period of time (within the meaning of the Act) by either the stated respiratory impairments/sleep apnoea or by ADHD.

367. Although the claimant needed to satisfy us that he was disabled in order for his claims to succeed, we have nevertheless gone on to address what our findings would have been in relation to the specific section 15 and section 20/21 claims if disability had been established.

Section 15 discrimination

368. Did the respondent know that the claimant had the alleged disabilities or could it reasonably have been expected to know? If so, from what date? The Tribunal considered the available evidence again. The earliest that the respondent was made aware of the breathing issues was in October/November 2021. The contemporaneous emails [e.g. 301, 308] would not reasonably lead the respondent to conclude that there might be an underlying long-term condition which could amount to a disability. At this stage it was a breathing problem which the claimant notified the respondent of. He did not actually know what the problem was. It had not been diagnosed and he had not been told it was long-term. If the respondent had asked more questions of the claimant at this stage, they would not have received any more information than they already had, largely because the claimant did not know what it was himself at that point in time.

369. In relation to the ADHD, the respondent knew that the claimant had received relatively short term mental health support/counselling and that he had reported difficulties in motivating himself. However, they did not have access to any more information than that. Indeed, the claimant did not have any more information than that. Even if they had asked more questions, they would have been none the wiser because the claimant was unaware of the underlying problem. In addition, the claimant always sought to reassure the respondent that it would all be alright and that things would get better.

370. In light of the above, the Tribunal is not persuaded that the respondent had actual *or* constructive knowledge of either of the alleged disabilities.

371. In any event, the Tribunal considered whether the respondent treated the claimant unfavourably by failing/refusing to allow the claimant an extended opportunity from November 2021 until the formal probationary review panel met in February 2022 to complete the required in person teaching.

372. As a matter of fact, there was no teaching available for the claimant to do during this period. The details of the available teaching were recorded by

one of the claimant's former colleagues [496.1] and show that all the units (bar one) took place in Semester 1 (when the claimant was not able to teach). The Semester 2 unit was not relevant to the claimant. Rob Sansom confirmed that there weren't really any opportunities in the department for the claimant to do some relevant teaching in Semester 2. This was not by design, just a consequence of the way that the students' timetable worked.

373. Arguably, it is not unfavourable treatment to fail to offer the claimant something which is not available to be offered. It is not within their gift to give if there is no available teaching- so is it unfavourable treatment? In reality, the respondent was just telling the claimant what was and was not available. However, as a result of the respondent not extending the time for teaching the claimant failed probation and was dismissed. In such circumstances it is possible to characterise the failure to offer an extended period to do the teaching as unfavourable treatment.

374. The list of issues required the Tribunal to consider: did the claimant's failure to complete the necessary period of in person teaching arise in consequence of his disability? We concluded that this link was only partially established. Given the evidence the Tribunal heard, it is only towards the end of the employment (in 2021/2022) that there might be a link between the alleged disabilities and the claimant's inability to teach. The failure to teach in the previous four years of the probationary period was not said (or demonstrated) to be linked to the alleged disabilities. That said, the Tribunal is aware that there may be more than one 'link in the chain' between the disability and the 'something arising from disability.' The disability does not need to be the whole explanation for the claimant's failure to complete the necessary period of in person teaching in order for it to be considered 'something arising in consequence of disability.' The necessary link was still present.

375. The list of issues required the Tribunal to consider the link between the unfavourable treatment and the 'something arising from disability.' The list of issues stated: *"Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things? The claimant says that he was failed on his probationary period and dismissed by the respondent for failing to perform the necessary in person teaching and therefore failing his probationary period."* This was the way the claimant's case was put.

376. The Tribunal accepts that the claimant was dismissed because he failed probation. He failed probation partly because he had not met the teaching requirement. The respondent failed to extend the period of opportunity to do the teaching because he had failed to do the required teaching by the due deadline and the respondent felt that he had had more than adequate opportunity to meet the teaching requirement by the due date. The respondent decided that no further extensions were appropriate in the circumstances (even if other teaching opportunities could have been found.) When phrased in this way, the chain of causation works in the claimant's favour and suggests that the unfavourable treatment was at

least partly because of the 'something arising' from the claimant's disability. If put this way (in line with the agreed list of issues) this means that *if* the claimant had established that he had a disability and the respondent had the required knowledge of the disability, the burden would then pass to the respondent to establish its legitimate aim defence.

377. The legitimate aim relied upon by the respondent was: *"to ensure that the claimant complied with the requirements of his contractual probationary objectives in order that he pass probation and be appointed as a permanent member of academic staff having demonstrated that he had the requisite skills to fulfil that role and that he wasn't being set up to fail."*

378. The respondent's central aim was to ensure that permanent members of academic staff had the necessary and appropriate skills for the job such that they were likely to succeed during their tenure. The probation system was designed to assess that suitability and aptitude during the early years of employment. If an employee passed probation there was a lower risk associated with taking them into the department permanently. Those who did not have the necessary skills or who were not likely to succeed in all necessary areas of the job would already have been sifted out by the probation process. This reduced the likelihood that permanent members of staff would be found to have performance or capability issues once in post. Given the nature of the respondent organisation and the purpose of the academic department, this was clearly a legitimate aim for the respondent. The respondent aimed to ensure that permanent members of staff had a proven track record of success or competence in post and were not being 'set up to fail' by being given a job when they were unlikely to be able to cope with the full demands of the role and perform to a suitable standard.

379. The probation process and the requirement to satisfy the teaching requirements of probation were clearly in furtherance of that aim, particularly as permanent academic staff would have a full teaching workload as part of their employment. Further, there had to be an appropriate deadline for staff to complete the requirements of probation (including teaching) in order for probation to be assessed. The respondent had to have the opportunity to decide whether an employee had passed or failed probation and whether they should be offered permanent employment. The probation requirements had to have a timeframe attached to them in order to be workable.

380. The Tribunal accepts that the alleged unfavourable treatment was in furtherance of the legitimate aim. The respondent had a process in place to measure whether individuals had passed probation by the appropriate point in the academic year so that necessary workforce planning could take place in a timely manner for the following year. The respondent needed to know in good time who was going to be on the staff and would be available to contribute to the teaching and research activities of the department. Such decisions could not be left to the last minute and still be properly and appropriately actioned.

381. Even though the unfavourable treatment was in furtherance of the legitimate aim, we had to consider whether it was a proportionate means of achieving that aim. Was the treatment an appropriate and reasonably necessary way to achieve those aims? Could something less discriminatory have been done instead? How should the needs of the claimant and the respondent be balanced?

382. The Tribunal found that over time the respondent reduced the claimant's probation requirements to the bare minimum. During the course of the five years they had removed or reduced many of the requirements applicable in the claimant's case with a view to helping him to pass probation. The teaching requirement was really the last requirement that they actively enforced.

383. The respondent could not realistically push the deadline for the teaching requirement back any further because there was nothing suitable for the claimant to teach on in Semester 2. There was nothing to be gained from extending the deadline further for the claimant.

384. Furthermore, the assessment of whether employees had passed or failed probation had to be taken at an appropriate time within the academic year. It had to be taken by the relevant committee which only met once a year. To alter the process would be necessitate a significant amount of upheaval within the respondent and the Tribunal is not sure that this was achievable in the circumstances. In addition, the decision had to be made early enough in the year so that the respondent could do effective workforce planning. Which academics would be in post for the start of the academic year? Who would be available to provide the relevant teaching to the student cohort? Which teaching would they do? A further extension for the claimant to do the necessary teaching would have significant knock-on effects on the department and the respondent's staff.

385. It is also relevant that this was not the first extension to a deadline which the claimant had asked for and been granted. It may not have been appropriate and proportionate to refuse an extension if this had been the first time of asking. However, this was not the first time. The standard time for completion of probation requirements was 3 to 4 years. This was the claimant's fifth year and he had been told all of the deadlines in good time. He had also been told that there could be no further extension of probation into a sixth year. Furthermore, the fellowship funding would not extend beyond the fifth year. The respondent's only choice was to dismiss the claimant as not having passed probation or to make him a permanent member of staff. There was no middle option.

386. The only other potential option would be for the respondent to remove the teaching requirement from the claimant's probation altogether. If the respondent did that it would mean that it would be effectively removing the requirement to pass probation from the claimant altogether. The probation process would effectively have been meaningless. The respondent had

already reduced or removed the probation requirements on the claimant to a bare minimum over the course of five years. To remove the teaching requirement would have been to render the requirement to pass probation effectively meaningless.

387. In all the circumstances, the respondent was entitled to require its permanent staff to pass some form of probation. They could not reduce the requirements of probation any further without de facto removing probation altogether. In such circumstances the Tribunal finds that the alleged unfavourable treatment was a proportionate means of achieving the legitimate aim. By extending the length of probation and reducing the probation requirements, the respondent had already balanced its own needs against those of the claimant in a proportionate way. There was no suitable teaching for the claimant to do during the period of extension he was asking for and the respondent's committee structure and procedures would not really accommodate any further extensions either. The Tribunal would therefore have found, had it remained a live issue, that the respondent had successfully established its 'proportionate means of achieving a legitimate aim' defence.

388. In light of the above, the claimant's section 15 claim fails and is dismissed.

Reasonable adjustments

389. This Tribunal has already concluded that the respondent did not have the relevant knowledge of the alleged disabilities and that the claimant was not disabled at the material time. In any event, we went on to consider the rest of the legal test.

390. The Tribunal was asked to consider whether the relevant PCP had been established. The PCP relied upon was: "*the requirement for the claimant to complete a period of in person teaching by the end of November 2021 and refusing to allow any extension to that period of time.*" We are persuaded that the PCP has been established. The reality was that there was a requirement to do the teaching by the end of November in order for the probation assessment to be made at the February meeting. There was no extension to the deadline. This was clearly applied to the claimant. Furthermore, it was not a 'one off' act or decision. It was the application of the settled timetable for probation assessments to the claimant's case. All probation requirements needed to be completed and documented in time for the employee's case to be presented at the February meeting. This timetable was applied to all probationers. The particular mechanics of the process in the claimant's case would have been repeated if another employee found themselves in similar circumstances. It was capable of repetition if similar circumstances arose in future.

391. The next stage of the legal test was to consider: *"did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that the claimant was unable to complete the period*

of in person teaching because of the consequences of his breathing/respiratory problems?" If the claimant had established the existence of the disability, then it is likely he would have established that the PCP put him at that disadvantage. It is less clear that the ADHD, if proved, would have meant that he was unable to do the teaching within the relevant period.

392. The Tribunal then had to consider: *did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at that disadvantage?* In answering this question the Tribunal is considering a hypothetical, as the Tribunal has already determined that the claimant was not disabled by either impairment and the respondent did not have actual or constructive knowledge of the alleged disabilities.

393. If the breathing difficulties had been established as a disability and if the respondent had been found to have knowledge of the disability, the Tribunal may well have concluded that that the impairment was such that the respondent ought reasonably to have understood that the claimant could not do the teaching in time as a result of breathing problems. He was clearly raising the fact that he was having respiratory difficulties in November 2021 and that this was having an impact on his preparations for teaching the relevant units on the course. On the other hand, the Tribunal is not satisfied that the respondent would know or could reasonably be expected to know that the claimant would be unable to do the teaching on time because of problems caused by the alleged ADHD. The chronology of events during the relevant time period would not have put the respondent on notice that the claimant was at the relevant disadvantage in relation to the PCP and the ADHD.

394. In reality, the question of whether the respondent failed to make reasonable adjustments does not arise for determination in this case because the claimant has failed at various prior stages in the legal test. However, even if the duty to make reasonable adjustments had been triggered on the facts of this case, the Tribunal concluded that there was no reasonable adjustment that the respondent should have made. The list of issues asked us to consider whether the respondent should have provided an extension of the period of time in which the claimant was allowed to complete a period of in person teaching prior to the official probationary review meeting in February 2022.

395. It would not have been a reasonable adjustment to allow a further extension to the period of time which the claimant was allowed to complete the teaching before the probation review in February 2022.There was no teaching available for him to do between November 2021 and February 2022 in any event. The respondent could not have created it for him in order to facilitate him passing probation. The proposed adjustment had no prospect of alleviating the claimant's disadvantage. Furthermore, he would still have needed to complete his reflective portfolio following the teaching. The evidence suggests that this would not have been feasible within the proposed time frame.

396. Further, the claimant had already had a period of five years to do the required teaching. This was exceptional. The reasonable adjustments claim has to be looked at in the context of the adjustments which the respondent had already made for the claimant in the previous years of his probation. There has to come a point where the respondent is permitted to draw a line and say that no further extensions to the deadline are allowed. The number of extensions cannot be unlimited. Given the impending end of the fellowship and the need to decide whether to terminate or to make the employment permanent, the respondent was entitled to conclude that on this occasion a further extension would not be possible let alone reasonable. It would not be reasonable to place a legal requirement on the respondent to keep extending the deadline in this way. The decision had to be taken in the fifth year because the claimant had to pass or fail probation at the end of the DKO fellowship. There could be no extension into a sixth year.

397. The way the decision was to be taken was dictated by the timetable of the academic year. The procedure gave employees the necessary time to demonstrate a pass or fail but allowed the respondent to make a decision early enough in the year for it to be implemented for the purposes of workforce planning and timetable planning. The respondent needed to know what staff it had in advance of the academic year. It could not really push the February meeting back as that committee had to make a recommendation to be ratified at the July meeting.

398. It is also not just a question of the claimant doing the teaching. The claimant also needed to complete his portfolio. The teaching had to be done far enough in advance that the portfolio could be completed and assessed.

399. The claimant knew well in advance what the deadlines were and why. The respondent warned him that it was likely that there would be no further extension.

400. The respondent needed to have some proof of the claimant's ability to teach before they made him a permanent employee because that was part of the permanent job role.

401. The Tribunal also noted that the claimant effectively 'downed tools' before the February meeting. He did not attempt to pass any other aspects of probation. So, even if the respondent had decided to 'let him off' the teaching requirements, he would still have had problems with passing the requirements relating to grant applications etc. It was not just about the teaching. The claimant did not have to take this approach. He could have decided to do as much as possible to pass or work towards passing the other elements of probation in the hope that the respondent would give him the benefit of the doubt. It becomes less reasonable to expect the respondent to give the claimant additional time to do the teaching component of probation if, even after this, he would still need to work to be

able to pass the other probation requirements. On the facts of this case, even if an adjustment was made in relation to the teaching requirement, it would not have meant that the claimant would necessarily have passed probation or that he would have met the other requirements within the relevant timeframe.

402. The Tribunal also heard evidence that if the claimant had done particularly good or impressive work in other areas (e.g. research) this might have compensated for his failure in other areas such as teaching. However, the claimant's performance across the board meant that the respondent could not reasonably be expected to compensate in this way for the deficiencies in his teaching performance.

403. During the course of the Tribunal hearing the claimant confirmed that he was not amending his claim to suggest that there should have been an extension to the teaching deadline until July 2022. Even if he had sought to make this amendment, it would not have been a reasonable adjustment to require the respondent to make. It would not have fitted in with the needs of the organisation for proper workforce planning. It would have had an adverse impact on the claimant's other colleagues and students who would have had to adapt and work around the claimant's needs again. The respondent would not have been able to make a decision that late in the year without some adverse impact on staffing for the University and the department. The respondent's decisions about the claimant would have an impact on the whole department.

404. In light of the above, the claimant's reasonable adjustments claim fails. Several of the necessary components of the claim are not made out but the Tribunal, for the sake of completeness, has sought to address all the questions posed by the list of issues in this case.

405. All of the claimant's claims herein therefore fail and are dismissed.

Employment Judge Eeley

Date: 1 October 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 3 October 2024

FOR EMPLOYMENT TRIBUNALS

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