RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Cunningham**

Respondent: **Financial Conduct Authority**

Heard at: **East London Hearing Centre**

On: **30 April and 1 & 2 May 2019**

Before: **Employment Judge M Warren**

Members: **Mr R Blanco**
Mr M Wood

Representation

Claimant: Mr Crawford (Counsel)

Respondent: Ms Shepherd (Counsel)

RESERVED JUDGMENT

1 The Claimant's claim of disability related discrimination contrary to section 15 of the Equality Act 2010 succeeds.

2 The Claimant's claims of indirect discrimination, (section 19) and failure to make reasonable adjustments, (section 20) fail.

3 The remedy to which the Claimant is entitled shall be determined at a remedy hearing, notice of which together with case management orders will follow in due course.

REASONS

Background

1 By a claim form dated 1 June 2018, Mr Cunningham brings a complaint of

disability discrimination arising out of events in his employment with the Respondent as an Associate Lawyer.

The Issues

2 The parties agreed upon a list of issues. This is set out in italics below by cut and pasting.

A. ***Disability***

*For the purposes of his claim, C relies upon two conditions which are alleged to amount to disabilities: (i) chronic kidney disease; and (ii) right upper limb difficulties [**Further and Better Particulars, para 5**].*

*A1. R accepts that C was disabled at the material time within the meaning of **section 6** of and **Schedule 1 Part 1** of the **Equality Act 2010** by virtue of chronic kidney disease.*

A2. R accepts that R knew or could reasonably have been expected to know that, at the material time C suffered from chronic kidney disease, which had a substantial effect on C's ability to carry out normal day-to-day activities.

*A3. R accepts that C was disabled at the material time within the meaning of **section 6** of and **Schedule 1 Part 1** of the **Equality Act 2010** by virtue of his upper right limb difficulties.*

A4. R accepts that R knew or could reasonably have been expected to know that, at the material time, the right upper limb difficulties had a substantial effect on C's ability to carry out normal day-to-day activities.

B. ***Discrimination Arising From Disability***

B1. R accepts that C suffered from severe fatigue during the 2017-2018 appraisal year.

*B2. R accepts that C's severe fatigue was something arising in consequence of C's alleged disability of chronic kidney disease. [**Further and Better Particulars, para 8**]*

*B3. Was C's performance during the 2017-2018 appraisal year impaired by reason of the said severe fatigue? [**Further and Better Particulars, para 9**]*

*B4. Did R, in awarding C a "1" in his end of year appraisal for 2017-2018, treat C unfavourably because of something arising from C's alleged disability of chronic kidney disease – namely impaired performance caused by severe fatigue? [**Further and Better Particulars, para 9**]*

AND/OR

*B5. R accepts that C's high proportion of sickness absence was something arising in consequence of his chronic kidney disease[1]. [**Further and Better Particulars, para 8**]*

*B6. Did C's high proportion of sickness absence during the 2017 – 2018 appraisal period limit the range of work available for R to assess? C alleges R assessed C's performance based on a single document. [**Further and Better Particulars, para 7, 9 and 16**]*

*B7. Did R, in awarding C a "1" in his end of year appraisal for 2017-2018, treat C unfavourably because of something arising from his alleged disability of chronic kidney disease – namely a high proportion of sickness absence limiting the range of work to assess? [**Further and Better Particulars, para 9]***

B8. If so in relation to B4 and B7, can R show that the unfavourable treatment (if any) found by the Tribunal contrary to questions B4 and B7 was a proportionate means of achieving its legitimate aims including the following:

(i) the effective management of employees' performance and the professional development of employees in its workforce;

(ii) to measure employees' performance against objectives over the performance year;

(iii) to provide performance feedback and ensure that employees meet R's standards when carrying out their duties;

(iv) as a mechanism to inform subsequent pay and bonus review decisions; and

(v) to ensure that R can reward and retain higher performing employees and incentivise good performance by ensuring that its reward review process is linked to its performance review process.

[Amended Grounds of Resistance, para 5.6]

*B9. R accepts that it knew, or could reasonably have been expected to know that C had chronic kidney disease[2] at the material time? **[Amended Grounds of Resistance, para 5.3]***

C. <u>Indirect Disability Discrimination</u>

*C1. Did R adopt the following PCP: "the application of its appraisal process to all members of staff, regardless of how much of the relevant appraisal year an employee had missed and the associated use of those appraisals for the purpose of determining bonuses, pay rises and promotional opportunities (**the PCP**)?" [**Further and Better Particulars, para 11**].*

C2. Did R apply the PCP to the Claimant?

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[1] The Claimant wishes to add the words "and/or his right upper limb difficulties" here but the Respondent disagrees.

[2] As per footnote 1.

C3. Did R apply, or would it have applied, the PCP to persons who do not have chronic kidney disease [3]?

C4. If so, did the application of the PCP put, or would it have put, persons with chronic kidney disease[4] at a particular disadvantage when compared with persons without chronic kidney disease[5]?

C5. If so, did the application of the PCP put C at that particular disadvantage?

*C asserts that the disadvantage is that employees with chronic kidney disease[6], as a group, are more likely to have had significant periods of absence during a relevant appraisal year and that C was placed at a particular disadvantage as C received his lowest ever appraisal score. [**Further and Better Particulars, para 11**].*

C6. If so, can R show that the application of the PCP was a proportionate means of achieving a legitimate aim including the following legitimate aims:

(i) the effective management of employees' performance and the professional development of employees in its workforce;

(ii) to measure employees' performance against objectives over the performance year;

(iii) to provide performance feedback and ensure that employees meet R's standards when carrying out their duties;

(iv) as a mechanism to inform subsequent pay and bonus review decisions; and

(v) to ensure that R can reward and retain higher performing employees and incentivise good performance by ensuring that its reward review process is linked to its performance review process.

[Amended Grounds of Resistance, para 5.16]

D. <u>Failure to Make Reasonable Adjustments</u>

*D1. Did R adopt the following PCP: "the application of its appraisal process to all members of staff, regardless of how much of the relevant appraisal year an employee had missed and the associated use of those appraisals for the purpose of determining bonuses, pay rises and promotional opportunities" (**the PCP**)?" [**Further and Better Particulars, para 14**].*

*D2. Did the application of the PCP place C at a substantial disadvantage when compared with persons who do not have chronic kidney disease[7] because he had taken time off during the year and therefore received his lowest ever appraisal score? [**Further and Better Particulars, para 14**].*

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3 As per footnote 1.
4 As per footnote 1.
5 As per footnote 1.
6 As per footnote 1.
7 As per footnote 1.

D3. If so, did R take such steps as it was reasonable for it to have taken to avoid that substantial disadvantage found by the Tribunal from its application of the PCP?

D4 C contends that R should have considered, inter alia, the following adjustments:

(i) taking a wider selection of work to assess C's performance;

(ii) delaying the appraisal process to allow C to participate more fully; and

(iii) carry over C's previous score on the basis that there was insufficient work to assess in order to create a true reflection of the performance.

*[**Further and Better Particulars, para 15**]*

*D5. R denies that the adjustments suggested by the Claimant were reasonable in the applicable circumstances. **[Amended Grounds of Resistance, para 5.12]***

The Evidence

Hearing time

3 This matter was originally listed for four days, but set by the administration to be dealt with in three only, due to the unavailability of a member able to sit for four days. At the outset of the hearing, I explored the implications of this with the representatives. Neither thought that the matter could be dealt with within three days. Mr Crawford argued that rather than go part-heard, it would be better that the case was postponed and relisted for four days. Ms Shepherd argued that we should at least make a start; there was always a chance that we would get through the evidence more quickly than anticipated. One of the Tribunal members, (who had never been scheduled to sit on the fourth day) made changes to his personal arrangements at some inconvenience, so as to be available for a fourth day if required. I indicated to the representatives that we would try and complete the evidence within three days, but if the interests of justice required it, we would sit on the fourth day to complete the evidence. We would have to receive written submissions and provide the parties with a reserved judgment.

Application for additional witness evidence

4 After our break to read the witness statements, Mr Crawford made application for the Claimant to have leave to rely upon a second witness statement, from his partner, Mr Mark Ford. It is a three page statement. A copy was provided to Ms Shepherd and the Respondent this morning, during our reading break. Its purported relevance is that Mr Ford states that he was the author of an email dated 23 March 2017 from Mr Cunningham to Ms Varney, expressing disappointment at his lack of success in a promotion application and stating that he henceforth, intended to work only in accordance with his contractual obligations.

5 In accordance with Case Management Orders made by Employment Judge Hyde on 3 September 2018, witness statements were to have been exchanged on 17 December 2018. Solicitors agreed to delay that exchange until four weeks ago, to 2 April 2019.

6 The explanation given for the late production of this witness statement is that Mr Cunningham has reflected upon the significance of the 23 March 2017 email, having considered the emphasis placed upon this by the Respondent's witnesses in their statements.

7 In the first place, I should like to say that in the Employment Tribunal, my colleagues and I order the exchange of witness statement well in advance of a multi-day hearing, for good reason; not only does it encourage the parties to focus on the merits of their case at an earlier stage, it also enables robust case management either of default, or of issues such as this arising. Having said that, witness statements were exchanged four weeks ago and there is no real explanation as to why the further statement has only been produced to the Respondents this morning. That Mr Cunningham is a barrister and he has been represented throughout by reputable solicitors, makes it all the more surprising the statement was not produced to the Respondents until this morning. We were told that the significance of the 23 March email had been much ventilated between the parties before the exchange of witness statements.

8 If we allowed the application, the hearing will take longer whilst we hear another witness, evidence by which the Respondent has been surprised this morning. If we refuse the application, Mr Cunningham is denied relying upon corroborative evidence. That prejudice is ameliorated by the fact that he has had every opportunity to produce the evidence before today. Refusing the application would not in our view be disproportionate nor inflexible nor overly formal: tribunal orders and case management timetables are set to ensure fair opportunity to prepare and present one's evidence. There may be a danger of delay, if the additional evidence is the final straw that means we cannot finish in time. Dealing with this application has not helped in that regard. The parties are on an equal footing, in that both are represented by counsel. Allowing the statement will cause a modest increase in cost. Having regard to the overriding objective and seeking to balance the relative prejudice to the parties, we decided that we would refuse the Claimant permission to rely upon the witness statement of Mr Ford.

Evidence before us

9 The witness statement which we had before us were by:

9.1 Mr Cunningham ;

9.2 Ms Anna Couzens, (a lawyer and manager employed by the Respondent);

9.3 Ms Helena Varney, (a lawyer and manager employed by the Respondent);

9.4 Mr Kevin Thorpe (a lawyer and manager employed by the Respondent), and

9.5 Mr Anthony Monaghan, (a lawyer and head of department for the Respondent).

10 We had before us two bundles, paginated and indexed running to page number 860.

11 In order to protect confidentiality, the identity of certain businesses being investigated by the Respondent are anonymised. We were provided with a confidentiality key.

12 We were also provided with an agreed cast list and an agreed chronology.

13 During an adjournment we read the witness statements. I made it clear to the parties that we had not read or considered the documents referred to because of the pressure of time. I told the representatives that they were to make sure that they took us to the relevant documents during the course of cross-examination.

The Law

14 Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.

15 Section 39(2)(c) proscribes discrimination by an employer by subjecting him to any detriment.

16 Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285: the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

17 Section 39(5) imposes a duty on an employer to make reasonable adjustments.

Reasonable Adjustments

18 Section 20 defines the duty to make reasonable adjustments, which comprises three possible requirements, the first of which is that which might apply in this case set out at subsection (3) as follows:-

> *"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."*

19 Section 21 provides that a failure to comply with that requirement is a failure to make a reasonable adjustment, which amounts to discrimination.

20 There are five steps to establishing a failure to make reasonable adjustments (as identified in the pre-Equality Act 2010 cases of Environment Agency v Rowan [2008] IRLR 20 and HM Prison Service v Johnson [2007] IRLR 951). The Tribunal must identify:

20.1 The relevant provision criterion or practice applied by or on behalf of the employer;

20.2 The identity of non-disabled comparators, (where appropriate);

20.3 The nature and extent of the substantial disadvantage suffered by the disabled employee;

20.4 The steps the employer is said to have failed to take, and

20.5 Whether it was reasonable to take that step.

21 The employer will only be liable if it knew or ought to have known that the Claimant was disabled and that she was likely to be affected in the manner alleged, see Schedule 8 paragraph 20 and Wilcox v Birmingham CAB Services Ltd EAT 0293/10 where Mr Justice Underhill said of the equivalent provision in the Disability Discrimination Act 1995, that an employer will not be liable for a failure to make reasonable adjustments unless it has actual or constructive knowledge both that the employee was disabled and that he or she was disadvantaged by the disability.

22 The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 4.5 suggests that PCP should be construed widely so as to include for example, formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It may also be a decision to do something in the future or a one off decision.

23 The decision of the recent President of the EAT, Mrs Justice Simler DBE, in Lamb v the Business Academy Bexley UKEAT/0226/JOJ assists with identifying what is and what is not, a PCP. The phrase is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer from disability. It may in certain circumstances include one-off decisions, (paragraph 26). She approved though, the comments of the former President, Langstaff J in Nottingham City Transport Ltd v Harvey UKEAT/0032/12 where he referred to, "practice" as having an element of repetition. In the former case, a teacher was dismissed after a long period of absence during which a grievance was investigated and an outcome provided. The PCP was the requirement to return to work without a proper and fair investigation. There were repeated failures to properly investigate and repeated delays; that was a practice. In the latter case, involving a claimant suffering from depression returning from work and confused by a new swipe card system altered his time sheet, the EAT held that the one-off application of a flawed disciplinary procedure did not amount to a, "practice". In Fox v British Airways Plc UKEAT/0315/14, HHJ Eady QC agreed that, "practice" required an element of repetition.

24 It is important for the claimant to identify the PCP relied upon and for the Tribunal to makes it decision on the PCP advanced by the claimant, see Secretary of State for Justice v Prospere UKEAT/0412/14.

25 The obligation to make reasonable adjustments is on the employer. That means that it must consider for itself what adjustments can be made. Thus, for example in Cosgrove v Caesar and Howie [2001] IRLR 653 the duty was not discharged simply because the Claimant and her GP had not come up with what adjustments could be made. An employer that does not make enquiries as to what might be done to ameliorate the disabled persons disadvantage, runs the risk that it fails to make a reasonable adjustment. That is not the same as saying that there is an obligation to consult, just that the failure to do so, or to inform oneself of the relevant facts and reflect on them, runs the risk of placing oneself in the position where a breach of the obligation to make reasonable

adjustment occurs, out of ignorance, (see Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664).

26 The duty is to make "reasonable" adjustments, to take such steps as it is reasonable for the employer to take to avoid the disadvantage. The test is objective, (Smith v Churchill Stairlifts plc [2006] ICR 524). Our focus should be not on the process followed by the employer to reach its decision but on whether there is an adjustment that should be considered reasonable.

Indirect discrimination

27 Indirect discrimination is defined at s.19 as follows:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

28 The effect of s.136, (see below) is that it is for the claimant to show *prima facie* the existence of a provision, criterion or practice, (PCP) and that such PCP placed the claimant's group sharing his protected characteristic at a disadvantage as compared to another group that does not share his protected characteristic and that the PCP was applied to the claimant which resulted in her being subjected to that disadvantage. These are primary facts which the tribunal has to find before the burden of proof shifts to the respondent, see Project Management Institute v Latif [2007] IRLR 579 and Bethnal Green and Shoreditch Education Trust v Jeanne Dippenaar UKEAT/0064/15/JOJ.

29 The obligation is on the employer to show that the PCP complained of is a proportionate means of achieving a legitimate aim, the approach to which is discussed below in the context of disability related discrimination.

Disability Related Discrimination

30 Disability Related discrimination is defined at s.15 as follows:

> *(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.

31 As for the difference between making a reasonable adjustment and disability related discrimination, in General Dynamics v Carranza UKEAT 0107/14/1010 HHJ Richardson explained that reasonable adjustments is about preventing disadvantage, disability related discrimination is about making allowances for that persons disability.

32 There are 2 separate causative steps: firstly, the disability has the consequence of causing something and secondly, the treatment complained of as unfavourable must be because of that particular something, (Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN).

33 There is no requirement that the employer was aware that the disability caused the particular something, City of York Council v Grosset [2018] EWCA Civ 1105 although, as the Court of Appeal observed in that case, if the employer knows of the disability, it would be, *"wise to look into the matter more carefully before taking the unfavourable treatment".*

34 Simler P gave helpful guidance on the correct approach to s15 in Pnaiser v NHS England [2016] IRLR 170 as follows:

> *"…the proper approach can be summarised as follows:*
>
> *(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the*

reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport *[1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…*

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

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

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

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

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

s.13 and a discrimination arising from disability claim under s.15.

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

35 If there has been such treatment, we should then go on to ask, as set out at s.15(1)(b), whether the unfavourable treatment can be justified. This requires us to determine:

35.1 Whether there was a legitimate aim, unrelated to discrimination;

35.2 Whether the treatment was capable of achieving that aim, and

35.3 Whether the treatment was a proportionate means of achieving that aim, having regard to the relevant facts and taking into account the possibility of other means of achieving that aim.

36 The test of whether there is a proportionate means of achieving a legitimate aim, (often referred to as the justification test) mirrors similar provisions in other strands of discrimination, such as in respect of indirect discrimination under s19 of the Equality Act, the origins of which lie in European Law.

37 There is guidance in the Equality and Human Rights Commission's Code of Practice on Employment, which reflects case law on objective justification in other strands of discrimination and which can be relied on in the context of disability related discrimination.

38 Thus, in Hensam v Ministry of Defence UKEAT/10067/14/DM the EAT applied the justification test as described in Hardys & Hansons Plc v Lax [2005] EWCA Civ 846. The test is objective. In assessing proportionality, the tribunal uses its own judgment, which must be based on a fair and detailed analysis of the working practices and business considerations involved, particularly the business needs of the employer. It is not a question of whether the view taken by the employer was one a reasonable employer would have taken. The obligation is on the employer to show that the treatment complained of is a proportionate means of achieving a legitimate aim. The employer must establish that it was pursuing a legitimate aim and that the measures it was taking were appropriate and legitimate. To demonstrate proportionality, the employer is not required to show that there was no alternative course of action, but that the measures taken were reasonably necessary.

39 The tribunal has to objectively balance the discriminatory effect of the treatment and the reasonable needs of the employer.

40 "Legitimate aim" and "proportionate means" are 2 separate issues and should not

be conflated.

41 The tribunal must weigh out quantitative and qualitative assessment of the discriminatory effect of the treatment, (University of Manchester v Jones [1993] ICR 474).

42 The tribunal should scrutinise the justification put forward by the Respondent, (per Sedley LJ in Allonby v Accrington & Rosedale College [2001] ICR 189).

Burden of Proof

In respect of the burden of proof, s.136 reads as follows:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

The Court of Appeal gave guidance on how to apply the equivalent provision of s.136 under the previous discrimination legislation, in the case of Igen Ltd v Wong and Others [2005] IRLR 258. There, the Court of Appeal set out a series of guidance steps, that guidance may still be relied upon, see Underhill LJ at paragraph 14 in Greater Manchester Police v Bailey [2017] EWCA Civ 425. We have carefully observed in this case in considering the claim of indirect discrimination, on the basis that those steps assist equally well under the Equality Act 2010.

Facts

43 Mr Cunningham is a qualified barrister. He had practiced in criminal law. He commenced employment with the Respondent as an Associate Lawyer on 28 April 2010. He was employed in the Enforcement and Market Oversight Division, which conducts investigations into suspected breaches of the Respondent's rules and principles by regulated firms and individuals.

44 The Respondent's Enforcement and Market Oversight Division is divided into five groups including: (1) Legal, (2) Market Oversight, (3) Retail and Regulatory Investigations, (4) Wholesale and Unauthorised Business Investigations and (5) Strategy, Policy, International and Intelligence. Mr Cunningham was employed in the Retail group, which itself has three sub groups or teams, named Retail Group 1, Retail Group 2 and Retail Group 3 as well as a Relationship Management and Strategy Team.

45 The cases which the Retail Groups investigate are categorised in accordance with their importance or complexity, identified as Tier 1, being the most important or complex, followed by Tier 2 and Tier 3.

46 Mr Cunningham's role included interviewing suspects and witnesses, carrying out searches, reviewing evidence and preparing witness statements. An Associate Lawyer

would manage the conduct of a Tier 2 and Tier 3 case and may manage a Tier 1 case.

47 In March 2015, Mr Cunningham underwent surgery on his right hand. Further surgery was necessary in October 2015, which entailed a period of two months away from work to recover. He was then able to take a one year career break, which started immediately after his period of sick leave, lasting from 11 December 2015 through to 5 December 2016. Before he returned to work, the Respondent requested an Occupational Health report, for which Mr Cunningham was assessed on 6 December 2016. The report provided as a consequence of that assessment, (page 116) stated that Mr Cunningham had not fully recovered from his surgery, but he was fit to return to work provided certain adjustments were made, which included working three days in the office and two days at home. Those Occupational Health recommendations were implemented.

48 The first indication on the papers that there may be other health problems developing for Mr Cunningham, in the form of his chronic kidney disease, is in an email dated 11 January 2017 in which he wrote to his manager Ms Couzens:

> *"I need to have my bloods check quite regularly. I saw my doctor yesterday evening and there is now 'cause for concern' regarding my latest blood tests – my doctor's words."*

He goes on to explain that he is visiting the hospital that morning and should be at work by lunch time.

49 On 17 January 2017, Mr Cunningham was provided with a fit note by his GP which refers to the condition, *"renal problems under investigation"* and recommends that he is fit to work provided that he works altered hours; six hours a day, four days a week for the next eight weeks. Mr Cunningham sent this by email to Ms Couzens on 19 January stating:

> *"Unfortunately my condition is deteriorating and I need to look after myself, a point re-emphasised by my doctor in no uncertain terms."*

50 He goes on to propose a working arrangement which broadly speaking is working at home on Mondays, in the office on Tuesdays, resting on Wednesdays, in the office on Thursdays and from home on Fridays. He further writes:

> *"In this regard I propose that I continue to lead with case B and be involved with case D but step out of case G. I say this because of all three cases I am more invested in case B and case D and the work that I am tasked with doing in case G is at an early stage and it can easily be taken forward by someone else."*

51 Ms Couzens discussed this by email with an HR adviser, (Ms Elston) and her Head of Department, (that is head of Retail 2) Mr Monaghan. She refers to Mr Cunningham having a blood disorder and to the proposed reduced hours. With regard to the request to be taken off case G, she proposed that request ought not to be complied with and the position be kept under review. (page 206)

52 Mr Cunningham was referred to Occupational Health. The report was dated 31

January 2017, page 219. Under a heading, "background" it is suggested that the main factor is the work related injury from 2 years earlier to Mr Cunningham's right arm. However, under the heading of, "current situation" the Occupational Health doctor writes:

> "*More recently he has been diagnosed with a separate medical issue. No cause has been found but the results of tests had been significant enough that he now needs relatively urgent specialist attention. The result of this and probably the result of all the other issues is that he reports quite significant levels of fatigue and has struggled to work a full day. I believe his GP has recommended reducing his hours and you have agreed for him to work four days a week, working six hours each day and he uses the middle of each day as a rest period and this includes two days in the office and two from home."*

53 In terms of advice, the OH GP wrote:

> *"At the moment the fatigue is an unknown quantity, hopefully it is something that will resolve in the next few weeks. Unfortunately there is a possibility that it may end up being a long term problem … if as is hoped, he does improve and this was just a transient concern then in approximately six weeks time you can negotiate with him a gradual reintroduction of his hours and I would expect him to be able to build up back to full time within a four week span from then. If there are any ongoing concerns I suggest a referral back to Occupational Health at that stage.*
>
> *At this moment in time the main factors are his fatigue, his difficulty with working within the timescales available and the uncertainty of his diagnosis. … At the moment things are manageable simply because he has reduced his hours. It is worth noting that this reduction in hours is not resolving his medical issues, it is merely getting him through this period. Essentially it is just buying time until either he improves or he receives indication that it may be a long term problem."*

54 On 11 February 2017, in anticipation of the Respondent's annual appraisal process, Ms Couzens wrote by email to Mr Cunningham, noting that he has only been working for her for a short period of time, following his return from the career break. She comments with regard for the work which he has done for her on case B, (of which he was the manager and she was what the Respondents refer to as the, "Sponsor" in other words, the overseeing senior manager):

> *"From the beginning you have embraced any uncertainty around our respective roles with an open mind and have been willing to explore the role with me, to be flexible to lead and seek advice as appropriate. Although the case is now being reclassified as a Tier 1 I see no reason for you to change your approach … you have a nice way of being in charge … your drafting is strong and clear and I have no reason to amend your documents in any substantive way."*

55 The next position up from Associate Lawyer is Advanced Associate. On 1 March 2017, Ms Couzens wrote to Mr Cunningham to tell him that an Advance Associate, Ms Stableforth, was being promoted, leaving a vacancy. She suggested that he may wish to apply for that post and that he might wish to take over from Ms Stableforth as a Project Manager on case G. In due course, Mr Cunningham applied for that position, as did 15 others. Unfortunately, he was not successful. Ms Varney was involved in the recruitment

process and on 14 March she wrote as follows:

> *"The position attracted a very strong field of candidates and I am really sorry to tell you that we have not short-listed you for interview on this occasion (we are interviewing only 4 people). Please don't take this as an indication that you should kerb your ambition. It is very much a decision based around the particular needs of this post at this time and on the strength of the competition. All of these things fluctuate."*

56 On 22 March 2017, Mr Cunningham was provided with a further fit note which refers to, "investigation of kidney failure". The doctor certified that he was fit to work if he was provided with altered hours, as he was unable to work full-time. Mr Cunningham provided that fit note on 24 March to Ms Couzens commenting, *"I would benefit from continuing the same work pattern as the past 8 weeks. Although this is serious, it is manageable."*

57 In the meantime, unhappy that he had been unsuccessful in his promotion application, Mr Cunningham wrote a lengthy email to Ms Varney, copied to Ms Couzens and to Mr Monaghan**.** We do not disbelieve Mr Cunningham when he says that his partner actually wrote this email for him. However, we find that it broadly reflects his sentiments at the time. He acknowledges that he sent the email. It is an email which features large in the Respondent's thinking over the coming year and therefore warrants extensive quotation, (page 228):

> *"… I am disappointed by this decision. Whilst you say Helena that I should not allow this to 'curb' my ambition I feel somewhat disappointed by the constant thwarts of promotion not to mention undervalued by your/the above decision…*
>
> *This year I received a pay rise of 1 percent, bringing my salary to £68,680. This is not encouraging.*
>
> *I achieved a Grade 3 in February 2012 but have been unable to achieve anything higher than a 2 since then being stuck in a circular motion, as anything higher than a 2 might suggest promotion. This, despite my work ethic and contributions to the organisation. Today I was told that I had been awarded a 'medium 2' (I have never heard of the 'medium' before in any of my appraisals throughout my time at the FCA) and this means that I get a 10% bonus. This is the lowest bonus percentage I have ever received in my eight years at the FCA. It also means that despite my pay rise, I am now financially worse off …*
>
> *Regardless of the effort I make or my experience I have been unable to progress above the role of associate. I am often told that it is good for me to raise my profile by taking on more responsibilities and to demonstrate that I am doing the role of an 'advance associate'. I have done this on many occasions leading cases and being a good 'team' player but when it matters (by way of being promoted) it appears to count for nothing. However, in spite of this, I continue to enjoy my job, working with some very nice, hardworking but regrettably undervalued people.*
>
> *With the above in mind there is no incentive for me, financial or otherwise to*

continue acting up nor for me to strive to meet the expectations of anything other than an associate. From this point forward I wish to do what I am contractually employed to do and work as an associate. ..

…I felt the need to write this email to state my position going forward"

58 Ms Varney met with Mr Cunningham on 30 March 2017, making a note of their conversation by emailing herself, page 249.3. She noted that Mr Cunningham had said he did not wish to continue as manager on Case G, suggesting that the new Advanced Associate should take that on. She noted that she had asked him, why? He had replied that, "he feels better when tasks are delegated to him". She asked him why that was? He had replied that he, *"got more satisfaction that way".* She goes on to note:

"I said that he is currently Project Manager and that that was the role I expected him to perform.

He said that in that case he needed to know exactly what was expected of him and for exactly how long.

I said that I expect him to project manage the case until further notice.

I asked him if he understood what the role of a project manager was. He said he did not. I said that a reference point for him was the ENO Governance arrangements for SDLT and HOD Project Boards."

She says that she explained in detail how she saw the role of Project Manager being carried out He is recorded as having said that was a lot to think about and he would think about it.

59 Mr Cunningham in fact emailed Ms Varney on 30 March 2017, to say that he felt it was best if the new Advanced Associate took over Case G on his understanding that the person who had been successful in the job application was to take on that role**.**

60 Mr Cunningham further wrote on 31 March 2017:

"As I said yesterday in our meeting and I reiterate in this email, I do not feel comfortable being case leader on Case G. I remain a team player but I do not wish to lead the team."

61 In an email of 31 March 2017, Mr Monaghan asked Ms Varney and Ms Couzens to get to the bottom of why Mr Cunningham did not wish to lead the team, referring to that as being a standard task for an associate on a Tier 2 case, or any case, observing that he knew there were health issues but that these did not explain Mr Cunningham's statement. He wrote that he felt they were doing the right thing by following the current medical advice.

62 Ms Couzens spoke to Mr Cunningham on 4 April 2017 and noted this conversation by emailing herself, (page 255.4). She wrote:

"BC feels that this puts him under unnecessary pressure at work at a time when he is unwell

AC asked again why this means that BC does not wish to act as a case lead on case G? BC said that he does not feel comfortable …"

63 Periodically, the manager of a case has to prepare a report called a Project Board update. On 4 April 2017, Ms Varney emailed Ms Couzens to say that she had reviewed the draft Project Board update prepared by Mr Cunningham for Case G and that it was disappointing. She wrote to Mr Cunningham that day with a written critique of his draft, (page 256).

64 After an email exchange with Mr Cunningham on 4 April 2017, Ms Couzens set about making a further referral to Occupational Health. She sent a consent form for him to sign. He replied on 6 April querying the scope of the consent he was being asked to sign. By way of explanation, the Respondent had just changed its Occupational Health advisers to Axa and therefore, both Ms Couzens and Mr Cunningham were unfamiliar with the new process. Mr Cunningham was concerned that the consent referred to providing relevant medical information to the employer and also as to who would determine what was relevant and on what basis.

65 On 10 April 2017, Ms Couzens wrote to Mr Cunningham to explain that she had spoken to Axa and confirmed that he would be provided with a copy of the report before it was released. He would have two days to review it, he could ask for factual changes, he could ask for an addendum to be added if he disputed the opinion and he could withdraw his consent at any time.

66 On 11 April 2017, Mr Cunningham replied to Ms Couzens and explained that he had signed the consent form which he had apparently amended to make it clear that his consent was restricted. In particular for example, he did not consent to the Occupational Health adviser applying for medical information from his GP, or from any specialist treating him.

67 Also on 11 April 2017, there was an email conversation between Mr Monaghan, Mr Varney, Ms Elston and Ms Couzens. They had been drafting a communication for Mr Cunningham with regard to his request to step down as case lead. In this email conversation Mr Monaghan wrote:

"Aren't we effectively saying here that it is the fact of his illness that is why we are agreeing to this request when he has said his request is not to do with the illness but rather what he should have to do as an associate? Aren't we just ducking the issue rather than addressing it?

68 Ms Elston replied:

"*As I understand it, although he hasn't made the link in the majority of conversations, at one point he did link case lead work to his illness by saying being case lead brings additional pressure which is not good for him at the moment. In addition I am aware that there have been concerns as to his rest time*

coinciding with these responsibilities in regards to the project boards.

As we are waiting to receive new advice, my recommendation is that we agree "temporarily" to his request. If you would rather not, you can say no and that you will review only when we get OH advice. The reason I think we should agree to the request is that other people can, and would be happy to, take this role on instead in the short term."

69 On 10 April 2017, Mr Cunningham had been provided with a further fit note from his doctor, (page 291) for *"renal disease under investigation, causing extreme tiredness".* He was certified as fit to work for the next three months on the basis he is given altered hours, namely six hours a day with one day mid week for rest, working from home as much as possible.

70 12 April 2017, Ms Couzens wrote to Mr Cunningham in the terms agreed in the earlier email conversation. She wrote:

"I recognise that, due to current health issues, you are working reduced hours and that it might not be appropriate for you to be performing a full associate role – which includes acting as a case lead. As your tier 2 case is currently paused it makes sense for you to continue to lead this, as to do so will not be particularly onerous. I will release you as case lead on the tier 1 case but I want you to remain on the team as the case lawyer.

In the longer term I do expect you to move back into a fuller role as required to bring you back in line with your peers. I will review the position with you regularly and in particular when there is some more clarity from the OH about the number of hours you are able to work in the long term."

71 The tier 2 case which she proposed he continued to lead but which was paused, was Case G.

72 Mr Cunningham made a project board report on 11 April 2017, notes on which appear at page 293.1 – 292.3, prepared by a combination of Mr Cunningham and Ms Varney, who was on the board panel.

73 On 13 April 2017, Mr Cunningham replied to Ms Couzens' email about his stepping down as a lead, (Page 295). As he was on leave until 25 April, he said that he would respond and meet in more detail on his return to the office:

"…but in the meantime, for the avoidance of doubt and in the interest of clarity, it would be helpful if you could please provide me with a clear, detailed breakdown of the duties of an associate, as per the role specification, including to the specific reference that an associate should act as a case lead".

74 On 25 April 2017, Mr Cunningham emailed Ms Couzens to say that he had tried calling the Occupational Health advisers to arrange an appointment, but the person to speak to could not take his call and he was waiting for a call back. Ms Couzens replied saying that she had not heard anything either. (page 612). On 28 April she chased Axa**,**

(page 614).

75 Ms Couzens replied on 27 April 2017, referring Mr Cunningham to the ENO review guidance, saying that Associate Lawyers are expected to lead tier 2 and tier 3 cases and they can sponsor, (project manage) tier 3 cases. The documents she refers to are in the bundle at page 300, which shows tier 1 cases should be sponsored by a head of department and managed by managers, tier 2 cases should be sponsored by managers and managed by associates or advanced associates and that tier 3 cases should be sponsored and managed by an associate or an advanced associate.

76 On 28 April 2017, Ms Couzens chased Axa for progress on the Occupational Health report. They replied on 2 May to say that they had been unable to progress the report, because Mr Cunningham had ticked the box to say he did not agree to Axa processing and storing his data. They had telephoned and spoken to Mr Cunningham. He had expressed concerns. They recommended he reviewed information on their website and invited him to call them back when he returned from annual leave, on 25 April, if he had further queries. Axa reported that they had tried calling Mr Cunningham again, but had only been able to obtain his voice mail and leave a message.

77 The same day, Ms Couzens emailed Mr Cunningham to explain the foregoing and suggested they discuss these matters at their next one-to-one.

78 Ms Couzens held a one-to-one with Mr Cunningham on 4 May 2017. A note of this is contained in an email to Ms Elston of that date, page 321. It is reported that Mr Cunningham had said he did not wish to be the lead on Case G and that he will not be the lead. Ms Couzens wrote to Ms Elston that she had provided him with EMO governance and that although he accepted that associate lawyers can perform these roles, he wanted to see where it says that he must perform these roles. She asked Ms Elston for assistance.

79 On 9 May 2017, Mr Cunningham emailed Ms Couzens to reiterate his request not to be case lead on Case G, (page 342). He said that Case G was soon to resume and would no longer be a paused investigation. He wrote:

> *"I feel it is unreasonable to expect me as an Associate to step in to cover the role of Advanced Associates simply because the department has permitted the necessary human resources to leave the Department without ensuring adequate cover. It also places unnecessary pressure on others in the Department to cover these vacancies."*

He goes on to refer to managing expectations, repeating his request to be taken off Case G and moved to another case.

80 Ms Couzens met with Mr Cunningham on 9 May. She subsequently wrote to him an email to summarise their conversation, (page 349). In this email, she records asking Mr Cunningham why he would not case lead on Case G and that his reply had been that he felt it unreasonable to expect him as an Associate, to step in to cover the role of an Advanced Associate, simply because the department had been left without adequate cover. Her response was that it was within the discretion of the management team to

resource cases as they considered appropriate and the request that he lead on Case G was not unreasonable. They also discussed the Occupational Health referral. She gave him feedback on a draft project board update for case B, expressing disappointment with it. The email concludes with her making clear she was waiting to hear from him with his response to acting as case lead on Case G and whether he would reconsider his position with respect to the Occupational Health assessment.

81 On 11 May 2017, Mr Cunningham provided an updated signed consent form, (page 360). Also on 11 May, Mr Cunningham was taken ill. He was reported as being in tears, having been accompanied to the exit to catch a taxi home, (page 366). Ms Couzens emailed him to ask if he was okay and whether there was anything that she could do. He replied to thank her for her, "kind offer" and assured her that he was being looked after.

82 On 15 May 2017, Ms Couzens emailed Mr Cunningham to chase him for his response to their expectation that he act as Case G case lead, (page 372).

83 Mr Cunningham wrote to Ms Couzens on 5 June 2017, (page 386) in respect of whether he would act as case lead on Case G. His response included the following:

> *"Case G is a tier 2 case. All emails (one example is attached for ease of referencing) which had been circulated from RMST (including emails which you have circulated) stated, "As a reminder, the guidance for management of these cases is that for a … tier 2 case, the project manager should be an AA and the sponsor a manager or HOD…*
>
> *I am not an AA nor am I acting up as one…*
>
> *… in our one-to-one on 6 April I said I was worried that being a case lead would affect my health and make it worse and you asked if that was my concern. I confirmed to you as my manager that it was.*
>
> *… in view of my ill health, which you, the R2 HOD and HR have all been aware of, the decision to make me lead the tier 2 case (which is now no longer paused and require significant management) is not only inconsistent with your email but the added pressure of leading a case does risk exacerbating my ill health … you will recall that at the end of March I offered to ask my doctor to provide more information on my condition but it was decided that I should wait to be seen by OH."*

In respect of the OH referral, Mr Cunningham confirmed that it he had an appointment to see the doctor on 15 June. He went on to discuss the feedback provided in relation to the draft board paper.

84 On 15 June 2017, Mr Cunningham commenced a period of sick leave from which he did not return until 2 February 2018.

85 Ms Couzens prepared to take disciplinary action against Mr Cunningham for his refusal to act as manager on Case G. This preparation went so far as drafting a letter inviting him to a disciplinary hearing that would have taken place on 22 June. This did not

progress.

86 On 20 June 2017, the long awaited Occupational Health report at last arrived. A copy is at page 409. It is confirmed that Mr Cunningham had been diagnosed with severe kidney disease, that his condition appeared to be deteriorating and that, "he is currently experiencing significant symptoms which impact upon all aspects of his normal functioning, including profound fatigue and poor concentration". As to his fitness for work, he was certified as not being fit to work.

87 Mr Cunningham's continuing ill health was confirmed by a series of further Occupational Health report between June 2017 and January 2018. He was finally able to return to work on 2 February 2018. On doing so, he was to have a new manager, Mr Kevin Thorpe, as Ms Couzens had moved on. Appropriate steps were taken to provide Mr Cunningham with a phased return to work; he worked reduced hours. Mr Thorpe appraised himself of Mr Cunningham's health issues and discussed the same with him.

88 The Respondent carries out appraisals of its staff every year. It has a matrix management system, in that individuals have a number of managers, depending upon which case they are working on and who the project manager on that case is.

89 There are 4 potential scores for an appraisal: 1 for, "below standards"; 2 for, "meets standards"; 3 means, "exceed standards" and 4 is, "exceptional". These scores can influence whether an individual receives a pay rise within their pay band, a bonus and the amount of any such bonus. Somebody who receives a score of 1 will not receive a pay rise or a bonus. Each year, a department will have a budget for bonuses and pay rises. The managers will determine how that is to be divided up, once they have everybody's appraisal scores.

90 The managers meet for an initial discussion about what appraisal score they have in mind for each individual. At the conclusion of that informal discussion, scores are, "pencilled in". The managers then meet with the individuals to discuss their appraisal. The individuals are expected to prepare for the appraisal by providing their own assessment of their performance and any feedback from others they wish to present. After the individual meetings, the managers' report back to the Heads of Department with their thoughts on whether the pencilled in appraisal scores should be altered in any way. The process is concluded at a moderation meeting; the appraisal scores are finalised and the individuals subsequently informed of the outcome, as well as any bonus or pay rise.

91 Mr Cunningham's new manager, Mr Thorpe, was responsible for his appraisal, but Mr Cunningham had not really carried out any significant work for Mr Thorpe. Ms Couzens was therefore incorporated into the appraisal process. At the initial manager's meeting, Mr Cunningham was pencilled in for a score of 1.

92 Mr Cunningham received a diary invitation to attend an appraisal meeting on 23 February 2018. In anticipation of that, he emailed Mr Thorpe and Ms Couzens on 15 February, to ask them if he needed to prepare anything in advance and whether there was anything in particular he should be aware of for discussion, (page 516).

93 Mr Thorpe replied to say that the format would be as usual, that he would be

provided with feedback from Ms Couzens and himself. Ms Couzens would primarily be speaking about his historic work, before Mr Thorpe became Mr Cunningham's manager. In terms of preparation, he suggested that Mr Cunningham revisited his objectives from last year, remind himself of the work that he had done and come prepared to discuss that. He referred to the Respondent's detailed Appraisal Discussion Guidance attached to the email.

94 Mr Cunningham was concerned about the appraisal process and so arranged a meeting with the Respondent's Executive Director, Mr Steward, at what is known as a surgery session. Mr Steward wrote to Ms Elston of HR about that meeting on 16 February 2018:

> *"Bob told me about his illness last year and explained how it was exacerbated by his manager requiring him to take on stressful work even though he was on reduced hours because of his illness. He said there were issues because the matrix structure in R2 meant different managers may not have been aware of all his issues; he had assumed they did but he was not sure. He mentioned the issue he notes below about the time taken for him to receive attention. The bottom line, I think, is that he said his appraisal is coming up next week and he is afraid these issues will resurface against him. I said his appraisal is an assessment of his work not an assessment of his illness and he agreed."*

95 The email referred to by Mr Steward, received from Mr Cunningham earlier that day, reads:

> *"I first made my manager/HOD aware of my illness in my fit note dated 16 January 2017 but I was not seen by Occupational Health until 15 June, five months later"*

96 On 20 February 2018, Ms Couzens wrote to Mr Thorpe. She referred to feedback she had given Mr Cunningham on his poor draft board paper. She went on to refer to the disciplinary issue which had not been progressed, namely Mr Cunningham not being willing to act as case lead on Case G.

97 In an email to Ms Couzens, Mr Monaghan and Ms Elston dated 22 February 2018, (page 541). Mr Thorpe indicated the feedback to be given would appear to be that the work undertaken during April to June 2017 did not meet standards/expectations, that they were conscious Mr Cunningham had been absent on sickness since 15 June and that had been taken into account, but that there had to be an assessment of the work he had done when he was in the office.

98 The appraisal with Mr Thorpe and Ms Couzens took place on 23 February 2018. Ms Couzens' notes are at page 547. It is interesting to note she commented, *"trying to play sickness card – but I was fully aware of his ill health, we were following what his GP was saying".* In evidence, she acknowledged that was a note of her thoughts, not something that she said in the meeting.

99 Mr Thorpe's notes start at page 548.8 and are more detailed. He noted that when they discussed feedback on the reports for the board, Mr Cunningham replied that he did

not think it fair to raise those matters, he had spoken to Mr Steward who had said it would be unfair if they were to mention his drafting, as it refers to a period during which he was unwell. Further, during the conversation Mr Cunningham referred to the email quoted above of 5 June, (page 386).

100 On 23 February 2018, Mr Thorpe wrote to Ms Elston to report that Mr Cunningham had challenged as unfair, (page 727) Ms Couzens' raising feedback in relation to the board reports. He reported that Mr Cunningham and argued that this related to a period when he was unwell and claimed that Mr Steward had confirmed this to him in a meeting. That email had been copied in to Mr Monaghan, who wrote on 26 February, (page 730) quoting the Performance, Pay and Bonus Review Guidelines for someone who had been on long term sick leave, to the effect that managers are to use judgment and base rating on time spent in the office. To that Ms Elston replied that she agreed, there were moderations made for him to allow him to continue work, including reducing his workload, the feedback relates to the quality of his work during this period, (page 730).

101 Mr Monaghan checked with Mr Steward what he might have said to Mr Cunningham. He relayed what Mr Steward had said, to Mr Thorpe. This is noted at page 732.2 to the effect that Mr Steward had told Mr Cunningham he would not be judged on his illness i.e. his time out of work, but on his performance in the role in the office.

102 On 27 February 2018, Mr Thorpe emailed Mr Monaghan with a report on the various appraisals he had conducted. In respect of Mr Cunningham, the report confirmed a score of 1, based upon work carried out whilst Mr Cunningham was in the office, in particular in respect of a project board paper and the issue with regard to his declining to act as case lead on Case G.

103 On 28 February 2018, Mr Thorpe wrote to Mr Cunningham as follows:

> *"As promised, I had checked the position in relation to the correct end of year report to be adopted when a colleague has been absent on sick leave for a substantial part of the year. The FCA approach to the end of year performance and moderation reviews in such circumstances is that these should be a matter for the manager's judgment and a rating based on the work performed during the year in the office."*

104 On 2 March 2018, Ms Couzens wrote to Mr Cunningham, copied to Mr Thorpe, with written feedback on his appraisal, (page 738). She summarised as his having made a good contribution to team meetings and supporting junior staff, but that had to be balanced against her concerns with regard to the board paper she had reviewed, (regarding case B) and the board paper Ms Varney had reviewed, (regarding case G). She further made reference to his refusal to follow her reasonable instruction to manage a tier 2 case between April and June 2017.

105 Mr Cunningham's performance rating was confirmed in a formal letter dated 21 March 2018; his rating was 1 and therefore, there was no change to his salary and he was awarded no bonus.

Conclusions

106 We approach our conclusions by following the structure of the list of issues agreed by the parties.

107 The Respondent accepts that Mr Cunningham was disabled and that it knew or could reasonably be expected to know that he was disabled by reason of his chronic kidney disease and his upper right arm difficulties, (issues A1 to A4). Only his kidney disease is relevant.

Discrimination arising from disability

108 The Respondent accepts that Mr Cunningham suffered from severe fatigue during its 2017/18 appraisal year and that this was something arising in consequence of the Mr Cunningham's chronic kidney disease, (issues B1 and B2).

109 Issue B3 asks whether Mr Cunningham's performance in the 2017/18 appraisal year was impaired by that fatigue:

109.1 Mr Cunningham's evidence, which we accept, was that from when he returned to work in December 2016, he was feeling very unwell and very tired.

109.2 The Occupational Health report of 31 January 2017 referred to, "quite significant levels of fatigue" and to the reduction in hours not resolving the medical issues, but just, *"getting him through this period".*

109.3 The fit note of 10 April 2017 described him as suffering from extreme tiredness

109.4 The Occupational Health report of June 2017 confirmed that the poor kidney function had caused symptoms from the end of 2016. Mr Cunningham is described in that context as suffering from significant symptoms, including profound fatigue and poor concentration.

109.5 He was absent from work due to the kidney disease between June 2018 and 2 February 2018. The appraisal was carried out almost immediately following his return.

109.6 Mr Cunningham's performance had hitherto been good: he had previously received appraisal scores of 2, (never a 1) and had been encouraged to apply for promotion.

110 Mr Cunningham's performance was impaired by the symptoms of his kidney disease; adjusting his hours made it possible for him to continue to work for a period, but his performance whilst he was working was without doubt, impaired by his profound fatigue and his poor concentration.

111 Issue B4 asks whether during the 2017/18 appraisal year, the Respondent treated Mr Cunningham unfavourably because of something arising in consequence of his kidney disease, namely impaired performance caused by severe fatigue?;

111.1 An appraisal score of 1 results in no prospect of a pay rise or of a bonus. Such a score is unfavourable treatment.

111.2 His poor board reporting was uncharacteristic, (on 11 February 2017 Ms Couzens had described his drafting as, "strong and clear") it was in our view on the balance of probabilities, caused by the symptoms of his kidney disease;

111.3 Whilst his initial chagrin at not being successful in his promotion application made Mr Cunningham reluctant to act up as and manage a case, at the time in question his refusal to manage a tier 2 case, (case G,) which was within the ambit of an Associate Lawyer, was we find, his profound fatigue and poor concentration, evidenced by his email to Ms Couzens of 5 June 2017. The Respondent began to prepare for disciplinary action in respect of his refusal to manage case G. Had that proceeded, in light of his email of 5 June followed swiftly by the very clear Occupational Health report of 20 June, it would have been very surprising if the outcome had been some disciplinary sanction. We find that Mr Cunningham's refusal to manage case G was caused by the symptoms of his kidney disease.

111.4 The poor board reports and his refusal to manage case G were the 2 factors that resulted in Mr Cunningham's appraisal score of 1 and therefore he was treated unfavourably because of something arising from his kidney disease, namely impaired performance caused by severe fatigue.

112 At issues B5, the Respondent accepts that Mr Cunningham's sickness absence, was a consequence arising from his kidney disease.

113 Issue B6 asks whether the sickness absence limits the range of work available for the Respondent to assess? Clearly, it did. Mr Cunningham says that he was assessed on a single document, that is not so, he was assessed on 2 documents, the board report for case G and the board report for case B.

114 Issue B7 asks whether the score of 1 amounted to less favourable treatment because of something, (the high proportion of sickness absence) arising from his chronic kidney disease, because it limited the range of work to assess? We find not, because the limited range of work did not cause the score of 1, it was the poor quality of the work that caused the score of 1.

115 As the answer to the question posed at Issue B4 is positive, the question then arises whether that unfavourable treatment, (the score of 1) was a proportionate means of achieving a legitimate aim. All 5 aims set out at Issue 8 are legitimate aims. However, we find the means adopted; not taking any account of the effect of Mr Cunningham's profound fatigue and poor concentration on his performance, was not a proportionate means of achieving those aims. The discriminatory effect is considerable; because of his illness he

performs poorly and because he performs poorly, he does not get a pay rise, does not get a bonus and loses the prestige of being regarded as a good performer. Acknowledging those significant barriers to his erstwhile good performance and making allowance for, taking into account the same, would not have obstructed or hindered those aims. Ignoring them was disproportionate.

116 The Respondent argues in its submissions on objective justification, that Mr Cunningham made an active choice to perform at a lower level in protest at not being promoted. We do not accept that. His poor performance was caused by his ill health.

117 At B9, the Respondent accepts that it knew or could reasonably to have known that C had chronic kidney disease. It could also reasonably have been expected to know in February 2018, the effect of that on his performance in February to June 2017, (not that there is a strict requirement for such knowledge in the context of section 15 claims).

118 The complaint of disability related discrimination therefore succeeds.

Indirect disability discrimination

119 The PCP relied upon is, *"the application of its appraisal process to all members of staff, regardless of how much of the relevant appraisal year an employee had missed and the associated use of those appraisals for the purpose of determining bonuses, pay rises and promotional opportunities"*. The Respondent did adopt this PCP, it was applied to Mr Cunningham, and it was applied to persons who did not have chronic kidney disease, (issues C1, C2 and C3).

120 The application of this PCP does not put people who have chronic kidney disease at a disadvantage, in that such people are only assessed on the work that they do whilst that they are at work. The disadvantage would follow if the symptoms of their disability impaired their ability to perform whilst they were at work, which results from a PCP which is different to that proposed in the agreed list of issues. The PCP relied on is the disregard of periods of absence. The PCP that placed Mr Cunningham at a disadvantage is that of assessing performance disregarding the effect of symptoms of illness on performance whilst at work. The answer to the questions posed at issues C4 and C5 is therefore, "no": persons with chronic kidney disease and Mr Cunningham in particular, are not disadvantaged by the PCP relied on, set out at C1.

121 The question of legitimate aim posed at issue C6 does not arise.

122 The complaint of indirect disability discrimination fails.

Failure to make reasonable adjustments

123 The Claimant's difficulty with his indirect discrimination claim is repeated with his reasonable adjustments claim, because he relies on the same PCP which has the same flaw, (issue D1). The premise posed at D2 is flawed when it says, "*because he had taken time off during the year and therefore received his lowest ever appraisal score"*. Mr Cunningham did not receive his lowest ever score because he had taken time off during the year. He received his lowest ever score because he was ill during the period at work

when his work was assessed, that affected his performance and resulted in his lowest ever score.

124 As the answer to the question posed at issue D2 is, “no” the question posed at D3 does not arise.

125 The further adjustments contended for at D4 do not arise and are not apt because they are aimed at widening or delaying the appraisal process or relying on an earlier score, whereas what would have been called for, had the Claimant’s case been put differently, might have been an adjustment that took into account he was unwell at the time the work on which he was assessed was undertaken.

126 The question at issue D5 does not arise.

127 The Claimant’s claim for failure to make reasonable adjustments therefore fails.

Employment Judge M Warren

18 July 2019