EMPLOYMENT TRIBUNALS

Claimant: Mr J Chica Arango

Respondents: Interhigh Education Ltd

Heard at: London Central Employment Tribunal (in public; by CVP)

On: 8, 11, 12 July 2022 (13, 15 July 2022 in chambers)

Before: Employment Judge Adkin
Ms S Plummer
Mrs J Griffiths

Appearances

For the Claimant: represented himself

For the Respondent: Mr L Menzies, solicitor

JUDGMENT

(1) **The claim of unfair dismissal succeeds**. Any compensatory award will be subject to a potential deductions under *Polkey v AE Dayton Services Ltd* [1987] UKHL 8 to reflect any likelihood that the Claimant's employment might have fairly terminated in any event.

(2) **The claim for breach of contract succeeds in a sum to be determined**.

(3) The following claims are not well founded and are dismissed:

a. Claim of discrimination arising from disability (section 15 Equality Act 2010 ("EqA")).

b. Claim of failure to make reasonable adjustments (section 20-21 EqA).

c. Claim of harassment relating to disability (section 26 EqA).

d. Less favourable treatment of a part-time worker (regulation 5(1) part-time workers (prevention of less favourable treatment) regulations 2002)

WRITTEN REASONS

Procedure

1. The hearing took place fully remotely using the CVP video system. It worked well in the main, with occasional glitches, which we were able to resolve.

Evidence

2. We received an agreed bundle of 297 pages. The schedule of loss and a counter schedule were provided separately.

3. We also received witness statements from the Claimant himself. From the Respondent we received witness statements from Tony Knowles and Louise Graham

4. Neither party in this case has produced payslips to us. The facts have been in dispute between the parties the extent to which the Claimant received overtime prior to material events, and the exact basis on which he was paid and for what e.g. for overtime. In the absence of that evidence we have not been able to resolve all of those points of dispute.

Background to claim

5. This short summary is in part a recapitulation of the summary of Employment Judge Gordon Walker, at a case management hearing repeated here for convenience.

6. The Respondent is an online school providing online learning to students based in the UK and globally. The Claimant was employed by the Respondent as a teacher of Spanish from 14 December 2007 to 31 August 2020. The Claimant's employment was terminated as he did not accept the Respondent's proposed variation to his employment contract.

7. The Claimant presented a claim to the Employment Tribunal 9 December 2020. This followed a period of ACAS early conciliation from 20 October to 11 November 2020. The Respondent defends the claim.

8. The Claimant strongly feels that the Respondent's actions have made him ill since 2019. A stress at work claim arising from overwork is not the claim that this Tribunal is dealing with, which are confined to the claims brought. In his claim form the Claimant stated that he brought claims of unfair dismissal, disability discrimination, detrimental treatment as a part-time worker, and for notice and holiday pay.

9. The claim arises from the Respondent's attempts to change the Claimant's contractual terms. The Claimant says that the changes were unreasonable and he was not adequately consulted about them. He says that the new contract was more advantageous to full time workers. He alleges that the new contractual terms about overtime were also less favourable (overtime became compulsory and unpaid) and

that the Respondent tried to enforce the new terms relating to overtime. The Claimant states that this process made him unwell and that he was too unwell to do overtime, or to engage in the consultation process. He says he was subject to disciplinary action because he refused to do overtime. He maintains that it was unfair of the Respondent to continue with the consultation process and to dismiss him when he was unwell and the contractual changes were severe.

10. The Respondent denies that the Claimant was disabled or that it had knowledge of the alleged disability. The Respondent's case is that the Claimant was fairly dismissed for some other substantial reason, namely the need to harmonise the terms and conditions of its workforce. The Respondent says that it conducted a fair consultation process and that it offered several benefits under the new contractual terms. The Respondent says that it followed a fair grievance process following the Claimant raising concerns on 31 May 2020 and that it paid the Claimant statutory sick pay during his notice pay in accordance with his contract. It denies that it discriminated against the Claimant or subjected him to detriment, or that any monies are owed to him.

11. There was a preliminary hearing before EJ Gordon Walker on 15 December 2021 and 16 March 2022. At the preliminary hearing of 16 March 2022, she found that the Claimant was disabled as defined by section 6 EqA from **1 August 2020**.

12. There was a further hearing on 4 April 2022 at which parts of the claim were struck out.

Findings of fact

13. On 14 December 2007 the Claimant commenced work for the Respondent.

Old Contract – April 2016

14. On 22 April 2016 the Claimant signed a contract of employment on 22 April 2016. We shall refer to this as the "Old Contract". The Old Contract contained the following provisions:

> "5. HOURS OF WORK
>
> 5.1. As an online school there are no physical limitations to the hours which the School can operate, including weekends. The School will provide to each Teacher their teaching timetable for the Year ahead, prior to the beginning of each Year. The School will take into account the Teacher's personal circumstances. The teaching timetable may be varied during the Year, with the agreement of both parties.
>
> 5.2. The Teacher's Contact Hours (set out in the teaching timetable) shall be HOURS hours per annum.
>
> 5.3. The Teacher shall spend such further time as may be necessary for the proper performance of the Teacher's duties referred to in clause 4 above.

5.4. The School expressly reserves the right to require the Teacher to work outside the hours set out in the teaching timetable, on reasonable notice and for reasonable periods, in order to ensure proper performance of the Teacher's duties. As the School (or Wey) expands, teaching at weekends and/or at other times which traditionally in England, have been nonteaching periods, i.e. during School Holidays, may be required.

6. HOLIDAYS

6.1. The Teacher shall be entitled to the statutory minimum holiday entitlement under the Working Time Regulations 1998 which is to be taken during the School Holidays, by agreement with the Principal.

15. The definition section contains the following:

"School Holidays means the time after the last Working Day of Term and before the first Working Day of the next Term.

Term means any of the periods in any Year:

(a) beginning on 1st January and ending 30th April (spring Term);

(b) beginning on 1st May and ending on 31st August (summer Term);

(c) beginning on 1st September and ending on 31st December (autumn Term).

16. Clause 8.1 – provides as follows:

8.1.1. (if the Teacher's Employment started at the beginning of a Term) the earlier of:

8.1.1.1. the date of the first Working Day of that Term; or

8.1.1.2. in the case of the autumn Term - 1st September; the spring Term - 1st January; the summer Term - 1st May

8.1.2. (if the Teacher's Employment started during a Term) the date of the Teacher's first Working Day

17. Clause 11 contains this…

"11. ABSENCE OWING TO ILLNESS OR INJURY

11.1. Subject to complying with the notification provisions of this clause and subject to the Teacher earning more than the lower earnings level, the Teacher will be entitled to statutory sick pay (SSP), more details of which are set out in the Employee Handbook.

18. The Claimant's provisional duties as a teacher were set out in Schedule 2 which contained:

SCHEDULE 2

Professional Duties as a Teacher

The following duties shall be deemed to be included in the professional duties which the Teacher may be required to perform:

1. Teaching

1. 1. planning and preparing courses and lessons;

1.2. the setting and marking of work to be carried out by the pupils;

1.3. assessing, recording and reporting on the development, progress and attainment of pupils.

2. Other Activities

2.1. promoting the general progress and well-being of individual pupils and any class or group of pupils assigned to him;

2.2. providing guidance and advice to pupils on educational matters; making relevant records and reports;

2.3. communicating with pupils (and their parents) whether by email or other medium;

2.4. communicating and co-operating with persons or bodies outside the School when required to do so;

2.5. participating in meetings arranged for any of the purposes described above;

2.6. supervising, organising and chaperoning trips and other educational excursions linked to the curriculum;

2.7. participating in InterHigh weekends; and

2.8. involvement in InterHigh clubs and societies.

3. Assessments and Reports

providing or contributing to assessments, reports and references relating to individual pupils and groups of pupils, when requested to do so.

4. Appraisal

participating in any arrangements for the appraisal of the Teacher's performance.

5. Review: Further Training and Development

5.1. reviewing from time to time with the Principal the Teacher's methods and style of teaching and programmes of work;

5.2. participating in arrangements for the Teacher's further training and professional development as a Teacher.

6. Educational Methods

advising and co-operating with the Principal (and other Teachers) on the preparation and development of courses of study, teaching materials, teaching programmes, methods of teaching and assessment.

7. Staff Meetings

participating in meetings at the School which relate to the curriculum for the School or the administration or organisation of the School, including pastoral arrangements.

8. Public Examinations

participating in arrangements for preparing pupils for public examinations and in assessing pupils for the purposes of such examinations.

19. It was unclear from the Old Contract what the basis of payment for these professional duties other than teaching was.

20. Although the Old Contract does not provide for this, the parties have agreed before us that the requirement was to work 35 weeks per year, with the rest of the year being holiday.

Claimant's hours under the Old Contract

21. According to the witness statement of Mr Knowles, the Claimant was contracted to teach 15.33 hours a week and was treated as 0.41 full-time equivalent (FTE).

22. The Claimant's particulars of claim state that his hours were 15.5 hours per week for the period September 2019 to August 2020. The discrepancy with the number of hours stated by Mr Knowles is small and in circumstances of this case not material.

Claimant's pay under the Whole Contract

23. The Old Contract at clause 8.1 suggests that payment is "EL 2,127.50 per annum". We have found it difficult to reconcile that annual figure to the sums that the parties agree that the Claimant actually received under the Old Contract.

24. The Claimant's Schedule of Loss dated 4 November 2021 and the Respondent's Counter-Schedule of loss both show that the Claimant had a gross weekly pay of £402.41. This is equivalent to an annual gross salary of £402.41 x 52 = **£20,925.32**.

25. (The Respondent's ET3 gives a monthly gross salary of £1,743.79 which suggests a gross annual salary £2.32 a year higher. Nothing turns on this tiny discrepancy).

Overtime

26. The Respondent's position that the Claimant had no contractual entitlement to be paid overtime. That is true in relation to the *written* terms and conditions in relation to the Old Contract.

27. We find however that the Claimant had for a number of years in fact paid *ad hoc* overtime. There might have been a reasonable argument that he had an entitlement by "custom and practice".

28. The practice of paying the Claimant overtime came to an end at the end of the academic year ending July 2019. The Claimant evaluated this as amounting to a reduction in his monthly income of £470. We note this, but it is not relevant for the issues that we have to determine, since this loss of overtime was historic by the date of termination in August 2020.

Contract "harmonisation"

29. In June 2018 the Respondent's contract harmonisation process started.

30. We have seen a PowerPoint document which described and explained some of the proposed changes, including:

    a. A goal of moving towards a higher proportion of full-time contracts (65%); [132]

    b. The key change will be the hours of work and moving away from timetable lesson calculations to annualised pay over a 42 week year; [133]

    c. Enhanced benefits in terms of participation in an Enterprise Management Incentive (Share Options) Company Sick pay;

    d. Salary adjustment for those that sign the new terms. Confirmation of the level of increase will be confirmed during the consultation process;

    e. Teachers will be given time to perform other activities to ensure the quality of teaching and learning is outstanding.

31. We have not seen the enhanced benefits above defined in any document.

32. At that stage in 2018 staff that did not sign the new terms were told that they would remain on existing terms.

33. There was a Questions & Answers guidance document produced for staff which contained the following:

Q13. Given the move to full time contracts, will I need to teach outside the current term times. If so, will I be paid for this.

A13. There will be a requirement to teach as and when required by the business and this could involve teaching outside the normal term times, for example summer school.

There will not be any additional monies paid for this provision as this will now be incorporated as part of your duties and responsibilities within the revised contract.

Q14. What happens if I do not sign the new contract but want to continue working for the company with my existing arrangements

A14. The Company really hopes all staff are able to and willing to sign the new contracts. During the 1-1 and consultation process we can discuss individual needs and requirements. If we can match individual circumstances to the learning timetable that will be the ideal position for both parties. Where this is not possible you will remain on existing terms

34. On 24 July 2018 in response to staff representative questions, Mr Knowles said

> "The Company is proposing a salary adjustment of 10% plus other benefits including EMI and Company sick pay. We believe this is a fair proposal."

Proposed New Contract

35. On 15 August 2018 the Claimant received copy of the proposed new contract ("the New Contract").

36. The New Contract contains the following clauses:

> 4.3 The Employee agrees to undertake any duties which fall within the Employee's capabilities and which may be reasonably required by the Head of School within the context of the businesses of the Group of online companies. Such duties include but are not limited to: the delivery of lessons on behalf of, and as part of the service offered, by any Group company or third party educational establishment to which the Employee is assigned; lesson preparation; setting and marking homework; the delivery and receipt of training; considering and responding to emails and other communications rom pupils and/or their parents and from any third party educational institution to which Wey Education Services or any Group company has agreed to provide Educational Services; participating in Group company weekends which may entail an overnight stay, and involvement in Group company clubs and societies (if requested to do so).

…

5.2 It is expected that 38 out of the 42 weeks worked by the Employee shall be contact time with students and the remaining 4 weeks shall be non-contact time to include (without limitation) preparation work, internal meetings and training. However the Employee understands and accepts that the amount of contact time may increase or decrease from time to time to meet the needs of the business.

…

5.4 Wey Education Services reserves the right to vary the timetable without the Employee's consent in circumstances where such variation is required to meet the needs of the business and/or the Group. Wey Education Services will give the Employee reasonable notice of any such variation.

…

7. REMUNERATION AND REWARD

7.1 The Employee's basic salary is £34,535 payable by equal monthly instalments in arrears by direct credit transfer to their bank or building society account on the last of each month or the nearest working day before/following the last day if this day falls on a weekend or on a public holiday

37. Schedule 2 of the New Contract contained the following:

SCHEDULE 2

The Leader of Learning must expect to be accountable for the quality of learning progress within their classes and agrees to undertake duties contribute toward wider school improvement which fall within their capabilities and which may be reasonably required by Head of School. Such duties include peer appraisal, quality assurance of lesson and courses and mentoring of colleagues.

Professional Duties as a Leader of Learning

The following duties shall be deemed to be included in the professional duties which the Leader of Learning may be required to perform:

1. Learning Leadership

1.1 inspire, motivate and provide purposeful subject leadership within the school

1.2 be up to date on current research and emerging pedagogy and disseminate to staff through active engagement in professional development and the learning community

1.3 take a leading role in maintaining a positive and inspirational learning climate in the subject specialism and, where appropriate, the integration of your subject learning across the curriculum

1.4 support the self-evaluation of the school's effectiveness and the development of priorities for improvement

1.5 make effective use of staff expertise and assist in the appraisal and development of subject staff including provision of mentorship and collaboration

1.6 to assist in maintaining and developing a high-quality school environment and profile and role model learning behaviours and disposition

2. Other Activities

2.1. promoting the general progress and well-being of individual pupils and any class or group of pupils assigned to him;

2.2. providing guidance and advice to pupils on educational matters; making relevant records and reports;

2.3. communicating with pupils (and their parents) whether by email or other medium;

2.4. communicating and co-operating with persons or bodies outside Wey Education Services when required to do so;

2.5. participating in meetings arranged for any of the purposes described above;

2.6. **supervising, organising and chaperoning trips and other educational excursions linked to the curriculum**;

2.7. **participating in Group company weekends**; and

2.8. involvement in Group company clubs and societies.

[Emphasis added]

38. We note that these would seem to require physical attendance. The Claimant spent some of his time in Spain and also had an elderly mother in Spain\F. As someone working as an "online teacher" paragraphs 2.6 and 2.7 might suggest a significant change for the Claimant.

Claimant's pay under the New Contract

39. We have dealt with the Claimant's remuneration under the contract below.

Complaint about reduction in salary – October 2019

40. On 3 October 2019 the Claimant complained to Tony Knowles about the reduction of his salary with no consultation and reduction in his overtime.

41. In this document the Claimant complained about working up to 60 hours a week but only being recognised to be paid for 15.3 hours a week.

42. The Respondent's witnesses were surprised that the Claimant was working so much and their position was that he did not need to do so. We have understood from the contemporaneous documentation and her paragraph 11 of Louise Graham's witness statement that there had been a need to update and rewrite courses as part of a new learning model.

43. The Claimant in his oral evidence to us complained that there were things required to do preparing which included uploading work, writing new schemes of work, emailing parents, creating classrooms for different lesson using adobe connect, creating resources, and checking which students had participated. This new learning model generated a significant amount of additional work for the Claimant. The online mode of working means that hours that he was working was not being closely scrutinised by management. At a much later stage in 2020 Ms Graham introduced a log so she could monitor work what work was being done.

Overwork

44. On 5 December 2019 the Claimant complained to the Headteacher Mr Wayne Owen that he felt overworked and stressed.

45. On 23 January 2020 the Claimant refused to cover a lesson because of the schedule on his busiest day. He attended a disciplinary meeting on 26 February 2020.

46. On 2 March 2020 the Claimant received a final written warning. This was later reduced by Tony Knowles to a first written warning.

47. In March 2020 the Claimant saw his doctor.

Concerns about work

48. On 8 April 2020 Louise Graham sent an email to the Claimant documenting concerns about the quality of his work.

Contract Harmonisation re-commences – April 2020

49. On 28 April 2020 Mr Tom Price, HRBP (Human Resources Business Partner) sent an email to explain that the reharmonization process would restart for the 13 "Leaders of Learning" remaining on the Old Contract, inviting them to a Teams Meeting the following day.

50. The Claimant attended a Teams Meeting group consultation meeting, held by Sara de Freitas, Director of Education, supported by Mr Price. This meeting was supported by a PowerPoint presentation which we have seen.

51. The updated PowerPoint presentation which provided an update on the harmonisation process by this stage it was said that 86% of the current teaching population had agreed to the new contract. That presentation explained that:

    a. the Respondent was continuing to move toward a higher proportion of full-time contracts (e.g. 65%), although "Flexibility of delivery is key and there will also be opportunities for Part time and Job Share (c35%).

    b. There would be a salary "adjustment" for those new terms with confirmation of the level of increase to be confirmed during the consultation process.

    c. Teachers will be given time to perform other activities to ensure that the quality of teaching and learning is outstanding.

52. Slide 8 [175] contained a "Contract Comparison" which explained a 1.5 factor meaning that 25 hours per week teaching would translate to a 37.5 hours per week contract. This would apply for full time workers and would mean that full time teachers would be paid for 12.5 over and above their 25 hours teaching. This 12.5 hours would include staff training, department meetings and cover periods (up to 3 x 40 minute lessons) "along with other activity as directed by the Senior Education Team". This represented a change from 22 teaching hours and 15.5 contracted hours for other teaching relating activity.

53. Regarding the teaching year the comparison explained as follows:

> "You are paid for 42 weeks of work per year, annualised over 52 weeks.
>
> Of these 42 weeks, there is a maximum of 38 weeks 'contact time' with students. Our current school calendar is based around a 35 week year for students, but in addition to this, there may be teaching duties for our Summer School or Revision classes, to a maximum of 38 weeks.
>
> The remaining 4 weeks (from the paid 42 weeks) are considered directed time and the most likely use of this time is CPD, course-building and lesson preparation. You will be directed in this by your Head of Faculty/ Senior Leader of Learning."

54. Slide 11 of the PowerPoint presentation contained the following guidance in the event that that employees did not want to sign the new contract:

> "In the unlikely event the decision is made not to transfer:-
>
> • Contractual notice will be served
>
> • A new contract will be issued detailing the new terms and conditions of employment for your review, signature and return to HR within a specified time frame offering re engagement whilst maintaining continuity of service
>
> • Failure to sign and re engage the new terms and conditions of employment prior to the expiration of any contractual notice period will bring employment to an end (For some other substantial reason).

Follow up letter

55. On 30 April 2020 the Respondent sent the Claimant a follow up letter which confirmed that the changes included annualised pay over a 42 week year as well as other points including "enhanced benefits, namely company sick pay, discretionary noncontractual bonus arrangement, grading system and career passed to support continual professional development"

56. An FAQs document which contained guidance about the move towards full-time working in similar terms to what had been set in the presentation, confirming the position with regard to not accepting the new contract leading to termination of employment.

57. As to holiday the FAQ contained the following:

> "Q11. 25 days paid holiday seems very short for the teaching profession. The new contract mirroring office based holidays and not the teaching profession holidays?
>
> Whilst 25 days holiday is stated, which is aligned across the business.
>
> However, when you look at the breakdown of the contractual weeks:
>
> - 42 weeks contractual time
>
> - 35 contact weeks
>
> - 7 weeks outside of teaching paid for additional activities
>
> - 25 days holiday and 8 days statutory holiday is a legal obligation however we recognise teachers will have above this due to the contractual weeks worked being 42
>
> Q12. If we are being paid for holidays is this in addition to the pay that we will receive based on the 42 weeks?
>
> You will be paid while on holiday. This is not additional pay. You will be paid an annual salary in 12 monthly installments. Therefore, any holiday is treated as part of the normal paid working day."

New contract

58. On 1 May 2020 a further copy of the New Contract was provided to Claimant. We do not have a copy of this in the agreed bundle, but presume that all terms material to the present claim were in identical terms to the New Contract provided back in 2018.

10% pay increase under New Contract

59. The Claimant objected that what was represented to him by the Respondent as a 10% increase in salary as a result of the proposed contractual change was "fantasy".

This 10% increase was a figure confirmed in July 2018 by Mr Knowles and also reiterated in both his and Ms Graham's witness statements.

60. Tony Knowles gave oral evidence to the Tribunal to explain the basis for the 10% increase in salary contended for. He explained that when he joined in May 2018 there were two salary levels for teachers. A figure of £28,000 FTE was paid to staff with less experience and a higher figure of £30,993 was to more experienced teachers. An increase of 10% to that latter figure gives £34,535.

Claimant's pay under the New Contract

61. Clause 7.1 of in the Claimant proposed New Contract dated 15 August 2018, gives £34,535, which is the annual salary for a full-time employee. That figure corresponds to the figure explained by Mr Knowles. By implication therefore the Claimant was a more experienced teacher (or leader of learning). One of the Claimant's complaints was that his grade under the New Contract was not made clear to him.

62. We understand from Mr Knowles' witness statement [paragraph 17] that the Claimant under the New Contract would be treated working 23 hours a week, or 0.61 FTE. This is based on a full-time teacher 100% FTE teaching 37.5 hours a week.

63. The Claimant's complaint was that he would not receive a 10% increase at all, on the basis of his calculations it was a £14 per month increase, and this against the background of having to work further 7 weeks per year.

64. We have seen no evidence that the Claimant was provided with a clear statement of what his new annual salary would be. Taking Mr Knowles' figures would suggest a new annual salary of 0.61 x £34,535 = **£21,181.47**.

65. Comparing this to the £20,925.32 salary under the Old Contract based on the weekly gross salary figure agreed in the parties' respective schedules, explained above, shows that the increase in pay under the New Contract was (£21,181.47 - £20,925.32 =) **£256.18**. This is not the £14 per month calculated by the Claimant but it is a small increase of a similar order.

66. These figures suggest a 1.2% increase in salary, not a 10% increase in salary.

First consultation meeting

67. On 6 May 2020 the Claimant attended the first individual consultation meeting (187 – 8).

68. In that meeting the Claimant points out that he sees the new Clause 5.2 as being unfair, and spelt out that he believed that he would be receiving less money for doing more work. This in part reflects that the Claimant was continuing to refer to his lost of paid overtime. He said he would embrace change but felt that his length of service should be taken account of and that he felt that he should be treated better.

Second consultation meeting

69. On 13 May 2020 the Claimant's second individual consultation meeting took place (189 – 191). At this meeting the Claimant highlighted that the salary, which was said

to be an increase, only worked out as an extra £14 per month. Mr Price said that the salary would not change. We interpret this to mean that the figure was not up for negotiation. He confirmed that the Claimant was on a higher rate and that this was also based on performance.

70. The notes refer to the Claimant having a problem with clause 2. We consider it more likely than not that this is a reference to 5.2, which came up on the previous meeting. It was suggested to him by Louise Graham and Tom Price at the meeting for the Respondent that the new contract was simply a formalisation of what teachers were already working.

71. The Claimant said that he had reservations about cover. He said that the should be remunerated in addition.

72. The Claimant asked that Mr Price "map out" all the changes from the previous contract. Mr Price did not want to produce a new document, but did go through the main points of the change, specifically the 42 weeks annualised pay, sick pay and health benefits would apply. He highlighted that tax implications may be different in Spain. He highlighted some other points that are relevant for present purposes.

73. The directed 7 weeks in non-term time were identified as "guided time". It was explained to the Claimant that the first week of the summer holidays in July and the last week of the summer holidays in August/September would be working weeks, but other weeks would be negotiated within the Department, taking into account colleagues and "fairness" in terms of the summer school and revision session duties.

74. It is documented in the notes that the claimant was now clear about the additional 7 weeks holiday.

Deadline

75. The general deadline for teachers to indicate agreement to the new terms was 29 May 2020.

Claimant's ill health

76. On the day of the deadline, 29 May 2020 the Claimant made Respondent aware of his poor health (194) and started sick leave.

77. The Respondent says that this is the first time they were aware of his ill-health.

Grievance

78. On 31 May 2020 the Claimant submitted a grievance, in which he:(195)

    a. complained about harassment and lack of meaningful consultation about new contract.

    b. Raised that the new contract has a clause around unpaid overtime.

79. In the grievance the Claimant explained about his workload:

> (198) "I begin work most mornings at 5.00 am – 6.00 am, and sometimes earlier. I consistently work most evenings and sometimes stay up very late. I work most Saturday mornings and for about 4 hours on Sundays. Work has become so overwhelming, I have no respite, and I can no longer make any plans for weekends. I regularly work in excess of 47 hours per week as a part time worker. The Company have failed in their duty of care to look after my health, safety and wellbeing."

Information from psychiatrist

80. On 1 June 2020 a sick note was provided by a Psychiatrist, Dr Rivera [201][100] which refers to "an adaptive disorder with anxiety & psychophysiologic insomnia". As to whether he could work it said:

> duration of absence = to be determined according to progress
>
> patient prepared to work in case of any adjustment = no
>
> next date for follow-up – July 27, 2020

81. This came from the psychiatric department of the hospital in Benidorm.

82. This sick note was provided to the Respondent by email on 2 June 2020.

83. On 5 June 2020 Mr Price wrote to the Claimant, and extended the deadline to consider the proposed terms and conditions of employment until 8 June 2020. He went on "I propose we meet next week to discuss the contract as per the attached letter."

Third consultation meeting

84. On 8 June 2020 the Claimant wrote saying that he needed some respite and time away from work, which was important for his mental-health and general well-being. He highlighted that the medical notes said that he was not fit to work until 27 July 2020. He said that he was under a doctor and psychiatrist.

85. He reiterated that as had been stated on the call he was not fit to discuss work matters at this time. He did however say he was well enough to attend work meeting (outside of the welfare process) and said that he hoped that the Respondent's priority would be to deal with the formal grievance in the first instance.

86. By a letter dated 9 June 2020 Mr Price offered of another meeting on 16 June 2020, which was said to have been arranged to allow a further period of time to review the contract. He said he would confirm in writing the date and time of the grievance hearing.

Claimant's request for non-contact

87. The Claimant's GP in Albir, Alicante, Spain, Dr Croonenborghs wrote on 12 June 2020 as follows:

> "in view of the fact that he needs complete rest he cannot present attend any workplace meetings, not physical nor telephonic no nor online
>
> He is not able to go back to work until his leave of absence written out by the psychiatrist is finished." [103]

88. This was sent by the Claimant to Mr Price and Ms Cassandra Millington of the Respondent by an email dated 15 June 2020. In this email the Claimant wrote:

> "The continued persistence about me attending such workplace meetings whilst off sick at this time, is causing further detriment to my health. I trust that as this is now supported by a medical opinion, I will be given the space to focus on my health and recovery. This is my priority at this time."

89. In this email the Claimant reiterated his request that the grievance be dealt with first.

Notice of dismissal

90. Notwithstanding the Claimant's request for a period to recover in his email of 15 June 2020, Mr Price wrote to the Claimant in a letter dated 19 June 2020. This summarised the recent history of the consultation process.

91. This letter contained a notice of dismissal should the Claimant not signed the new contract. The notice was rather buried on the second page, giving last date of employment as 31 August 2020, together with a new terms & conditions which he could sign to commence on 1 September 2020 (213).

92. As to the grievance it was said that this could not be progressed because the Respondent was unable to meet with the Claimant. It said it is important that we meet with you to discuss your points and understand how this matter can be resolved.

Further correspondence

93. The Claimant wrote to Mr Price, copying Mr Knowles on 20 June 2020 stating that he could not attend a meeting until he was well enough and reiterating again that the grievance should be a priority, when he was well enough. He said that the lack of empathy was making him feel worse.

94. The Claimant in this letter said that he was genuinely unwell and under the treatment of the GP and psychiatrist. He said that his health was his priority rather than his work. He wrote:

> "Please I asked that I'm given the respite I need without this continual reference to work matters. I'm not well enough to deal with this."

95. On 27 July 2020 the Claimant's last sick note expired.

96. On 29 July 2020 he explained that a further sicknote had not been obtained due to the school holiday break. He said that he was in a position to return and progress the grievance and asked that this take place after 5 August 2020. He explained that he had sessions with his psychiatrist over the coming week.

Termination confirmed

97. Tom Price emailed the Claimant on 30 July 2020 and extended the deadline for a response to 31 August 2020. He wrote as follows:

> "You are aware the deadline of 29 May 2020 for signature of the new contract of employment has now passed and to date we have not received a signed contract of employment from you, with that in mind contractual notice was served to you on 19 June 2020, your notice period expires on 31 August 2020. On 19 June 2020 we advised that we would be terminating your current contract of employment and repeating our offer of immediate re-hire under the new contract. This is a dismissal for 'some other substantial reason' under section 98 of the Employment Rights Act 1996.
>
> During your notice period you have a further opportunity to re-engage with us in accordance with the new terms and conditions of employment. Should you wish to do so, please provide me with a signed copy of the new contract by 31 August 2020. Your continuity of service will be unaffected if you choose to re-engage by that date and the new terms and conditions of employment become effective on 01 September 2020. My letter dated 19 June 2020 confirms all matters in writing to you." [218]

Disability & Respondent's knowledge of disability

98. The Tribunal (by a finding of EJ Gordon Walker at an open preliminary hearing on 16 March 2022) has determined that the date at which the Claimant's condition satisfied the statutory test so as to amount to a disability was **1 August 2020**.

99. The disability is **adaptive disorder with anxiety**.

100. The Tribunal finds that the Respondent by the date of the meeting of **3 August 2020** (below), had knowledge of this disability, for reasons given in our conclusions below.

Return to work meeting (3 August 2020)

101. On 3 August 2020 a return-to-work meeting took place.

102. On the first page of the notes the following is recorded: [221]

> Medical note stated:
>
> F43.22 Adaptive disorder with anxiety. Work problems.
>
> F51.04 Psychophysiological insomnia

"High levels of stress and still, still having this at current.

Suffering with Insomnia as a result of stress.

Mental Health medical condition – Adaptive disorder with anxiety, psychological insomnia

103. The second page continues:

Jorge was "very bad, very ill." Jorge felt the school did not understand his serious condition by emailing him once his medical note had been received. Tom Price advised Jorge that it is a reasonable request from an employer to make contact with individuals whom are off work due to a period of sickness absence and advised business operation does continue.

…

…Mental health situation ongoing, "I am very nervous and very anxious."

No phased return to work provided by GP – continue with GP and Psychology sessions all that has been advised.

Find difficult to concentrate on small tasks – Teaching hoping to be ok Sept 2020. Taking treatment very serious following treatment, medication, and psychology sessions "hope it will help me be fit." Tom Price advised Jorge to consider the demands of his role as a teacher verses his mental wellbeing. Tom Price advised the role of a teacher remains unchanged and that there will be additional pressure of the role.

Sever[e] dermatitis on face due to insomnia

104. Later on the form has this:

Stress causation factors – last 7 months due to workload, started November 2019. Started noticed I was sleeping less and increase my anxious symptoms, felt frustrated. Tom Price advised Jorge is employed as a teacher and there will be additional pressures. DR's not mentioned anything about the job role to date, nor has Occupational Health support been advised or discussed.

Reactive symptoms provoked at work.

Insomnia could not sleep at the night could not finds a way to sleep, wanted to sleep in the day.

60 hours a week working – doing more than just teaching. Could not cope come May 2020. Tom Price explained to Jorge the role regarding

a teacher going forward and the extra responsibilities expected of the role .

Side effects of medication – sleeping at different hours, rash caused on face.

If so, what action is to be taken to support the employee?

- Jorge is getting all the support he requires at current

- Jorge needs time to rest – treatment and based on GP, Psychology advice, Jorge will keep

School updated on any progress.

- Nothing else to note at this time.

Next GP review – weekly review – 4 August 2020 – still close supervision by GP.

Disputed content of 3 August meeting

105. The Claimant alleges that in this meeting he was pressurised to sign a new contractual term by Mr Price who said that "business is business". We find that Mr Price said something about the the business operation continuing while he was off sick leave, as is documented in the note.

106. The Claimant says he was asked if he had considered changing career as he was not well enough to continue as a teacher. It is clear from the documented discussion that the Claimant was invited to think about the balance between his health and continuing in the role.

107. The Claimant says that the Respondent refused to give medical support unless he signed the new contract. We find that this slightly misrepresents the context and significance of what was said. One of the benefits of signing the New Contract that the Respondent emphasised was EAP. The significance of this we discuss further below.

108. The conversation with Mr Price described by the Claimant as "very polite"

Occupational health

109. No referral was made to occupational health at this time. The Respondent has explained this decision as follows:

a. the Claimant had returned to work, presenting himself fit for work;

b. it being the last few days of his employment; and

c. it was the August summer holiday period and at a peak in the COVID pandemic, when doctors were likely to be on holiday and/or very stretched.

110. We have dealt with these points below.

Grievance hearing

111. On 6 August 2020 there was a grievance hearing held on Microsoft Teams by Cass Millington, Head of Faculty MFL, with Sian Roper as a note taker.

112. It was confirmed in this meeting that the earlier disciplinary sanction had been reduced to a verbal warning.

113. The detail of the grievance was discussed. He explained that he had not been treated correctly.

114. The grievance outcome was communicated to the Claimant by letter dated 18 August 2020.

Letter requesting reasonable adjustments

115. By a email dated 17 August 2020 sent to Tom Price the Claimant made a request for reasonable adjustments in the following terms:

> "5. I am happy to confirm that I am fit at this time to be in work, albeit I haven't recovered given my mental health condition is ongoing and has to be managed daily. I'm still under a psychiatrist and on medication. A reasonable adjustment would be that I'm supported in returning back to work, and lessons are learnt in terms of managing the employment relationship and an empathetic approach would also support me. Also to not apply unnecessary pressure."

Work activity log

116. On Sunday 23rd of August 2020 Graham sent out an email to Learning Leaders within the Department giving an update and requesting work activity to be completed in a log.

Grievance appeal

117. On 24 August 2020 Claimant submitted an appeal against the grievance outcome. He specifically complained in this about his treatment following a sick note provided by his psychiatrist on 1 June 2020 which stated "no contact for work related matters". He is asked why Tom Price ignored these leading to him to attend his GP.

118. On 28 August 2020 there was grievance appeal hearing held by Sara De Freitas, Director of Education.

Termination of employment

119. On 31 August 2020 Claimant's employment ended by virtue of notice he had already been served and his decision not to sign a new contract.

120. The Termination of his contract was confirmed by a letter dated 1 September 2020 (253).

Appeal

121. On 3 September 2020 Claimant appealed against dismissal, supporting this with additional points on 7 September 2020.

122. His grounds of appeal included the following:

a. That the extent and nature of the contractual changes were unreasonable and vague and the Respondent failed to assist in providing a clear understanding. Specifically with regard to vague wording he suggested that there off was no restriction on his hours, which might be at weekends; and that hours might vary from term to term and that the timetable might be varied without his consent;

b. That the original contract was legally binding and cannot be varied without the consent of both parties;

c. That there was not a reasonable period of warning for the new contract to be reviewed and considered;

d. That he had ongoing mental health conditions and there was a failure to make reasonable adjustments respect of consultation, short timescales and deadlines. Further that the changes in the contract should have been mapped out in an accessible format. That his mental-health conditions was viewed as a nuisance;

e. That there was unlawful and unreasonable pressure, in particular making contact with him while he was under a sick note which said “no contact about work matters”, which was ignored;

f. That there was not a meaningful or full consultation process;

g. That he was dismissed before the grievance appeal process concluded;

h. That the Respondent had failed to pay his full contractual notice pay;

i. That the New Contract would have left him at a severe financial detriment as well as an increase in his working hours. He contended that this was less favourable treatment of a part-time worker;

j. That dismissal was not a last resort option and that there was a failure to explore other options or come to a compromise.

123. On 25 September 2020 a hearing of the appeal against dismissal hearing was held by Dr Chris Enos, Associate Dean.

124. By a letter dated 30 September 2020 Dr Enos confirmed that the appeal against dismissal was refused.

Claim

125. On 20 October 2020 the ACAS notification received and a certificate was issued on 11 November 2020.

126. The claim was presented to the Tribunal on 9 December 2020.

The Law

Section 15 claim

127. The Equality Act 2010 contains the following:

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

128. The Respondent referred us to **Really Easy Credit Ltd v Thompson** UKEAT/0197/17/DA in support of its contention that the appropriate date at which the unlawful treatment occurred was when notice of dismissal was given, not when that dismissal took effect.

Harassment

129. Section 26 of the EqA provides:

> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

130. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 the EAT (Underhill, P) emphasised both the subjective and objective elements of a claim of harassment under section 26. There is a minimum threshold and following guidance was given at paragraph 22:

> "it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"

Reasonable adjustments

131. In considering reasonable adjustments claims, tribunals are required to have an analytical approach (*Environment Agency v Rowan* [2008] ICR 218). The correct approach is to identify (i) the PCP; (ii) non-disabled comparators, where appropriate, (iii) the nature & extent of substantial disadvantage. This is in order to consider the extent to which taking the step would prevent the effect in relation to which a duty was imposed.

Unfair dismissal

132. Section 98 of the Employment Rights Act 1996 provides as follows:

> 98 General
>
> (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.
>
> …
>
> (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 a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

133. As to dismissal for some other substantial reason, and in particular a termination with notice and offer of a new contract, IDS Employment Handbook on Contracts of Employment contains the following guidance:

> "In **Garside and Laycock Ltd v Booth** 2011 IRLR 735, EAT, the EAT held that an employment tribunal had wrongly concentrated on the reasonableness of the employee's decision to reject a pay cut, rather than whether the employer was reasonable to have dismissed him for not accepting it, in determining the fairness of the employee's dismissal.
>
> In **St John of God (Care Services) Ltd v Brooks and ors** 1992 ICR 715, EAT, the employer was obliged to carry out a reorganisation following cuts in funding. Employees were offered new contracts that included reduced pay and less favourable holiday entitlement. Of 170 employees, 140 accepted the new terms. Those employees who did not accept the new contracts were dismissed. The employment tribunal hearing their claims decided that the dismissals were for SOSR, but were unfair as the terms offered were not those that a reasonable employer would offer and therefore a reasonable employer could not have expected the employees to accept the offer. The EAT held that the tribunal's decision was wrong. It stressed that the reasonableness of a dismissal must be looked at in the full context of a business reorganisation and no one factor should be concentrated on to the exclusion of others. By focusing on the terms of the offer, the tribunal had excluded from consideration everything that had happened between the offer and the dismissals. The tribunal had of necessity, therefore, missed one potentially significant factor — that before the dismissals a very large proportion of employees had accepted the terms — which could have rendered the dismissals fair."

The complaints

134. The Claimant is making the following complaints:

a. Unfair dismissal (section 94 Employment Rights Act 1996 ("ERA");
b. Discrimination arising from disability (section 15 EA);
c. Failure to make reasonable adjustments (sections 20-21 EA);
d. Harassment related to disability (section 26 EA);
e. Less favourable treatment of a part term worker (regulation 5(1) part-time workers (prevention of less favourable treatment) regulations 2002); and
f. Breach of contract (notice pay).

Conclusions

Time limits

135. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **21 July 2020** was not brought in time in the absence of a continuing act.

136. [**Issue 1.2**] Were the discrimination complaints made within the time limit in section 123 EA? The Tribunal will decide:

137. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

138. The Tribunal found that the claims brought in relation to all of the following matters were in time:

a. The termination of the Claimant's employment which took effect on 31 August 2020.

b. Alleged harassment in August 2020.

c. Reasonable adjustment given that the Claimant made a last request for reasonable adjustments on 17 August 2020.

139. [**Issue 1.3**] Were the complaints under part-time workers (prevention of less favourable treatment) regulations 2002 presented within the time limit in regulation 8?

140. The Tribunal considered that this claim was not well founded on its merits and did not separately consider the question of time.

UNFAIR DISMISSAL

141. [**2.1**] What was the reason or principal reason for dismissal?

142. The Tribunal accepts the Respondent's case that there was a substantial reason capable of justifying dismissal, namely the need to harmonise the terms and conditions of its workforce.

143. [**2.3**] Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

144. The Tribunal accepts that harmonisation was potentially a sound business reason. We have received evidence in which the PowerPoint presentations set out a rationale. The Claimant has not contended before us that there was no underlying business case.

145. The Claimant asserts that the Respondent acted unreasonably, and his dismissal was unfair, because he alleges that the proposed changes to his contractual terms were unreasonable because of the following:

Reduction in holiday

146. [Issue **2.4.1.1**] He was required to work over 42 weeks instead of 35 weeks.

147. This was an increase of 7 weeks in working time. It seems that 4 of 7 of these weeks were "non-contact" but "directed". I.e. these weeks did not require teaching students, but did require a degree of direction from the Claimant's line manager.

148. It is not the law that a change to less advantageous terms in itself will make a resulting dismissal unfair. The Tribunal must look at the entire picture concerning a business change (**St John of God**).

Overtime

149. [Issue **2.4.1.2**] Overtime was compulsory and unpaid overtime, whereas it was voluntary and paid under the old contractual terms;

150. This is a historic change regarding overtime which the Claimant conflated with the introduction of the New Contract. Overtime had ceased by the latest September 2019. The Claimant did not bring a claim at that time.

151. We do not find that this aspect made dismissal unfair.

Terms vague

152. [Issue **2.4.1.2**] The terms about availability were vague and implied that he had to be available seven days a week, 24 hours a day, and at different branches.

153. It seems that the Claimant had a particular concern about "2. Other Activities" – clauses 2.6-2.8 [169], read together with clause 4.3 [153] which might required him to attend trips and other educational excursions, group company weekends and group company clubs and societies, which represented a significant change for someone who was used delivering online teaching.

154. We find that the Claimant's suggestion that he might be working 24 as a day seven days a week is somewhat far-fetched, although we acknowledge that he had genuine reasons for his concern given that he was a part-time worker and had responsibilities regarding his mother.

155. We have dealt with some of the other uncertainties in relation to pay below.

PROCESS

Consultation process alleged to be unreasonable

156. The Claimant contends that the consultation process was unreasonable because:

157. [**2.4.2.1**] The Respondent did not take into account that the Claimant was unwell.

158. The Claimant contends that the Respondent should have delayed the process and given the Claimant more time. Instead, they applied pressure on him to sign the

new contract and refused to provide him with medical support unless he signed the new contract.

159. Taking the second point first, this slightly misrepresents the situation regarding EAP, which was a benefit which the Claimant would receive if he agrees to the new terms. As to "refusal to provide medical support", the Claimant had been under the treatment of psychiatrist in a Spanish hospital. It is somewhat unclear what support it would be appropriate for an employer to give in the circumstances. The Claimant said that the return to work meeting on 3 August 2020 that he needed time to rest and was "getting all the support he needed".

<u>OH</u>

160. One step which an employer might have taken would be an Occupational Health referral, the lack of which the Tribunal finds a little surprising and somewhat unsatisfactory. The Claimant had been off work from 29 May to 3 August and was returning seemingly not fully well based on the content of the return to work meeting.

161. The Respondent submitted on this point that a reasonable employer in this situation would have been unlikely to feel it was necessary or good timing to commission an occupational health report on the Claimant's condition, to investigate whether he might have a disability, at that point, given that:

a. the Claimant had returned to work, presenting himself fit for work;

b. it being the last few days of his employment; and

c. it was the August summer holiday period and at a peak in the COVID pandemic, when doctors were likely to be on holiday and/or very stretched.

162. None of these arguments are compelling.

163. As to (a) fit to work, the Claimant had returned to work but was clearly still under treatment and saying that he needed to rest.

164. As to (b) it being the last few days of his employment, that was not a foregone conclusion at all. In the letter of 19 June, the Respondent had given the Claimant the opportunity to provide a signed copy of the new terms so as to continue his employment at any time until 31 August 2020.

165. Regarding (c) that doctors were likely to be on holiday or very stretched appears to be a *post facto* rationalisation. There is no written contemporaneous evidence that occupational health was not available. Based on the Tribunal's experience, what was likely needed was a short telephone consultation with an occupational health advisor.

166. Had this been the only concern about the process, the Tribunal would not have found that this in itself made the process whole unfair. We do find however that it did contribute something to what we find was procedurally unfair dismissal for reasons given below.

Contact while ill

167. In Summer 2020 the Claimant was unwell. On 1 June 2020 the psychiatrist Dr Rivera advised that the Claimant could not work even with an adjustments until 27 July 2020. On 12 June Dr Croonenborghs advised that there should be no meetings by whatever format. By his covering email of 15 June 2020 the Claimant complained about the continuing assistance about attending meetings and requested space to focus on his health and recovery.

168. Nevertheless the Respondent wrote a letter on 15 June 2020 containing a summary of events to date, in which notice of termination given and the Claimant told that his grievance could not progress without meeting. We found that this added unnecessarily to the pressure that the Claimant was experienced at a time when he was trying to rest and recover.

169. Again, we would not have found that this in isolation made the dismissal unfair, but we do find that it contributed somewhat to the procedural unfairness of the dismissal.

[**2.4.2.2**] The Respondent did not adequately explain the vague contractual terms nor answer the Claimant's questions.

170. We have considered whether a lack of clarity about the proposed new contractual terms or answering the Claimant's questions about the New Contract took the process outside of the range of reasonable responses.

Respondent's submissions

171. We have borne in mind the submissions put forward on behalf of the Respondent. First, that the Claimant had been provided with contract two years earlier, so had had plenty of time to consider it. Second, that the Claimant had been given a lengthy period even before he was ill to contemplate whether or not he wanted to sign. Thirdly, as to the consultation process, there were two consultation meetings. The Claimant did not attend a further consultation meeting. There is some force in all of these arguments.

172. The Respondent's fourth submission is that the proper interpretation of the Claimant's participation in this process was that he was "taking a stand". The Respondent argues that the Claimant understood the terms that he was being offered, but did not sign because he did not like the terms. In essence, it is argued, the Claimant's questions of clarification and the like through the process were no more than a protest, not because of a genuine lack of understanding.

Claimant's complaints about unclear terms

173. By his grievance letter dated 31 May 2020, the Claimant set out that he considered the following points were still unclear. He said that information was requested and was outstanding [199]. We deal with each of six points in turn.

174. First, the Claimant had requesting a "mapping" of the contractual provisions in the old contract onto the new contract. We find in view of the PowerPoint slides

which provide some detail on the change in contract, the contract itself and the various consultation meetings that there was no requirement on an employer acting reasonably to provide a "mapping" simply because an employee had requested.

175. Second, that only two working weeks notice to review and sign the new contract. Although that was originally sent to the Claimant in fact he was provided with an extension of the deadlines.

176. Third, as to working 42 weeks compared to 35 weeks. The new contract provided for 7 weeks' extra working, of which 4 weeks were non-contact time, e.g. preparation work, internal meetings and training. In a meeting with Ms Graham and Mr Price on 13 May 2020 [191] it is minuted that the Claimant was "now clear about the additional weeks". The Claimant queried whether there was there any financial compensation for this. The Tribunal finds that the Claimant understood the position. This position was simply no more than a negotiating position. On balance we find that this is evidence that he was sufficiently clear about the additional weeks to be worked.

177. Fourth, the Claimant asked how the new contract would apply to his part-time hours in terms of pay, overtime requirements and unpaid work. This is dealt with under the heading 'Pay, overtime & unpaid work' below.

178. Fifth bullet, this relates to different clauses including PILON, covering additional subjects, requirement on training and paying monies back and if flexible benefits applied to the Claimant based in Spain. There is also an additional question about an incentive to sign up to such a detriment change. We find that this demonstrates that the Claimant was engaging with the new contractual terms. The part about the incentive to sign up is again simply a negotiating position on the Claimant's part.

179. Sixth bullet relates to the grading of the role. The Claimant is asking whether this can be shared how does this impact on the employment contract pay and benefits. It seems that Mr Price did explain that he was on the upper rate.

180. Leaving pay aside, which is dealt with below, we do not find that any of these matters made the process unfair.

<u>Pay, overtime & unpaid work</u>

181. In the grievance the Claimant complained that he did not understand how the New Contract would apply to his part-time hours in terms of pay, overtime requirements and unpaid work. He pointed out that he did 15.5 hours of non-teaching which was all that was being offered for full-time workers.

182. This comprises several elements.

183. As to *overtime*, viewed fairly this was not part of the new contractual terms. This was a historic change, which took effect in Autumn 2019, albeit one that the Claimant was still plainly unhappy about.

184. As to *overwork* – the loss of paid overtime was something that the Claimant had complained about the number of occasions, including the return to work 3 August 2020. This was not however part of the new contractual terms, but seems to have

been the result of the new teaching model. To reiterate he did not bring a claim in respect of this time.

185. As to *hours*, it was clear from the material supplied to the Claimant as part of the consultation surrounding the changing contractual terms that there was an allowance made of 50% hours for non-teaching time over and above teaching hours. This is described in the FAQs as a 1.5 factor. For a full-time worker this was 25 hours per week, with 12.5 hours non-teaching time to make a 37.5 hour week for a full-time worker. That was clear from the documentation.

186. What is not clear from the evidence that the Tribunal has is exactly what teaching/non-teaching hours the Claimant was contracted to work. We have not seen a document that set out for the Claimant personally what his hours were going to be.

187. As to *pay*, the Respondent did not provide to him a personalised contract containing his pay. We have not seen a document which documented the figures set out by Mr Knowles in his witness statement at paragraph 17.

188. The Claimant maintained that the 10% pay rise he had told that he was receiving as part of the contractual change was "fantasy". Based on the figures provided by Mr Knowles for the new role and the agreed figures for the Claimant's pay under the Old Contract, the figure of 10% was significantly misleading. Based on our calculations the increase was a little over 1%.

Range of reasonable responses

189. We have considered the process followed by reference to the range of reasonable responses.

190. Most of the objections raised by the Claimant regarding insufficient clarity of terms set out above we have rejected. Ultimately the consultation process we find made most the Claimant's terms under the New Contract sufficiently clear.

191. When it comes to hours and pay however, we find that the process followed did fall outside of the range of reasonable responses.

192. Hours was an important consideration and pay was especially important. These were not mere details. The Claimant was expressing confusion about the "vague" terms of his contract, a concern that the 10% pay increase promised was not accurate and expressing a concern about the adequacy of non-teaching hours provided. In these circumstances we consider it was important that he received clear documentation setting out the basic elements of his pay, i.e. his salary and his hours. He did not receive this. At the very least he should have received candid, transparent and accurate information about the effect on his pay.

193. We find that the 10% pay increase promise, based on the information we have, was misleading. Taking this together with the failure to spell out for the Claimant in clear terms what his hours and salary were going to be meant that the process followed as part of consultation viewed procedurally as the process leading to the Claimant's dismissal fell outside of the range of reasonable responses. We cannot

see how any reasonable employer, acting reasonably, would represent to an employee was to receive a 10% increase in salary under a change of contractual terms when this was not accurate.

194. We also find that the communications with the Claimant during his sick absence, and the failure to make a referral to Occupational Health contributed something to the unfairness of the process, although we would not have found that these matters in isolation made the process unfair.

195. It follows that our finding is that the dismissal was unfair.

Mitigation

196. [**Issue 2.4.3**] The Respondent did not take into account the Claimant's good performance and long service.

197. Factors such as "good performance" and long service were not relevant in the context of harmonisation. These might be 'mitigation' e.g. in a dismissal for misconduct, where in perhaps more of a marginal case of misconduct a good record might be sufficient to mean an employer gave an employee one last chance.

198. This was not that sort of situation. It was a harmonisation applied to the whole workforce, or at least the remainder of the workforce who had not already signed up to the new contract.

Remedy for unfair dismissal

199. This will be determined at a remedy hearing if the parties are unable to settle this claim.

200. This will require consideration of the principle in *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, to reflect the likelihood of dismissal in the event that a fair process might have led to a fair dismissal in any event. If a deduction to the compensatory award under this principle is made it will be on a percentage basis. For example if the Tribunal concluded that a fair process would have certainly led to a termination on 31 August 2020 in any event, it may be fair to reduce the compensatory award by as much as 100%.

201. This reduction would not affect the basic award for unfair dismissal.

Disability discrimination claims

Disability

202. The Claimant had a disability as defined in section 6 of the Equality Act 2010 from 1 August 2020, but not before.

203. The impairment relied upon is the mental impairment of **adaptive or adjustment disorder with anxiety**.

Knowledge of disability

204. The Tribunal finds that the Respondent by the date of the meeting of **3 August 2020**, had knowledge of the Claimant's disability.

205. We have made this decision based on the information provided to the Respondent from his general practitioner, his psychiatrist, and the information the Claimant provided directly to the Respondent by email and in the return to work meeting on 3 August 2020, in which the detail given about the severity of his symptoms was significant.

Discrimination arising from disability (section 15 EqA)

206. The Respondent admits that the Claimant was dismissed on 31 August 2020, at a time when the Claimant was a disabled person.

207. The decision to dismiss the Claimant was made in June 2020, as per the dismissal letter of 19 June 2020, and therefore before the Claimant was a disabled person. Following **Really Easy Credit**, we find that the decision to give notice of termination was before the Claimant was disabled.

208. [**Issue 5.2**] Did the following things arise in consequence of the Claimant's disability: the Claimant says he was unable to understand or meaningfully take part in the consultation process, or to sign the new contractual terms.

209. The Tribunal does not accept that an inability to understand or meaningfully take part in the consultation process or that he was unable to sign the new contractual terms was arising from disability.

210. We find that on the basis of what the Claimant understood, he did not want to sign the proposed new contract. We note that he was well enough to participate in grievance process and raise concerns. Insofar as there was a lack of clarity about hours and pay, we find that this was due to the communication that was being provided by the Respondent, not something arising from the Claimant's disability.

211. This claim therefore cannot succeed.

Causation

212. [**Issue 5.3**] Was the unfavourable treatment because of this? Did the Respondent dismiss the Claimant because he did not sign the new contractual terms?

213. It is not strictly necessary for us to deal with this point, since we do not find under issue 5.2 that those matters were arising from disability. We have dealt with the question of causation, should we be wrong about the earlier issue.

214. We find that the Respondent did dismiss the Claimant because of the Claimant not signing the contractual terms.

Justification

215. [**Issue 5.**4] Was the treatment a proportionate means of achieving a legitimate aim?

216. In view of our findings above, it has not been necessary to deal with this.

Reasonable Adjustments

217. The Claimant was a disabled person from 1 August 2020 only.

Do the PCP's pre-date disability?

218. The Respondent says that the reasonable adjustments claim relates to a period before 1 August 2020, as the alleged PCPs and consultation process occurred before this date.

219. We do not accept that this is the correct date to take, given that as late as **17 August 2020** the Claimant was still asking for adjustments.

Knowledge of disability

220. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

221. We find that the Respondent already knew that the Claimant had the condition he had from 1 or 2 June 2022.

222. As set out above we find that Respondent knew that the Claimant was disabled almost from the onset of disability, i.e. 3 August 2020.

PCP

223. [**Issue 6.3**] A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: the requirement to sign the new terms and conditions before 31 August 2020.

224. We find that this PCP was ongoing into the period from 1 August 2020 when the Claimant was disabled. We do not accept the Respondent's primary case advanced in the skeleton argument at paragraph 28.

225. It was open to the Claimant to accept the new contract at any time until 31 August 2020 [**214**]. It follows that the PCP was ongoing throughout this period.

Substantial disadvantage

226. [**Issue 6.4**] Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was unable to meaningfully participate in the consultation process or sign the new terms within the Respondent's deadline.

227. We are satisfied, in part because of the content of the detailed grievance process that the Claimant involved himself in that he was capable of meaningfully participating in the consultation process, certainly in August 2020.

228. We do not find that he was at a substantial disadvantage.

Knowledge of substantial disadvantage

229. [**Issue 6.5**] Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

230. We do not find that the PCP did place the Claimant at a substantial disadvantage by comparison with a non-disabled person.

Adjustments

231. [**Issue 6.6**] What steps could have been taken to avoid the disadvantage? The Claimant suggests that: R accepts that it stretches into disability period -

232. It has not been necessary for us to consider this point.

233. Had we done so, we would have had some doubts as to whether the adjustments contended for would have ameliorated the disadvantage contended for.

Harassment related to disability

234. We have reminded ourselves that following the guidance of the Employment Appeal Tribunal in the case of **Dhaliwal v Richmond**, not every unfortunate phrase should found legal liability in cases of harassment.

Business is business

235. [**Issue 7.1.1**] In August 2020 put pressure on him to sign the new contractual terms by stating “business is business”

236. We find that the comment made was something about the business operation continuing in the Claimant’s absence.

237. The Claimant was at pains to say that Mr Price had been courteous in his dealings with him, although of course that is only part of the context we must consider.

238. We do not find that this comment had the purpose or effect of creating a hostile, intimidating, degrading humiliating or offensive environment. It was an appropriate conversation in the context of a return to work discussion following sick absence.

239. This part of the claim does not succeed.

Career change

240. [**Issue 7.1.2**] In an email in August 2020 from an HRBP, ask the Claimant if he had considered changing career as he was not well enough to continue as a teacher;

241. The Tribunal finds that some words were said which gently queried the Claimant continuing in this role, although in a nuanced and appropriate way.

242. We found that this did relate to the Claimant's disability.

243. We found that this was unwanted conduct.

244. Considering the circumstances generally, and objectively as we are required to do, the context is important here as well as the manner in which these words were said. It was a fact that the Claimant was unwell. It seems from the background that he had been struggling for some time.

245. We again remind ourselves that Mr Price was said to be courteous. We find that these comments were made in a supportive way and did not have the purpose or effect of creating a hostile environment for the Claimant nor any of the other elements of the statutory test (intimidating, degrading, humiliating or offensive).

246. This part of the claim does not succeed.

Refusal of medical support

247. [**Issue 7.1.3**] In August 2020 refused to give the Claimant medical support unless he signed the new contract

248. We find that the Claimant has presented this in a slightly misleading way, albeit not deliberately. We find that the Respondent was merely emphasising the medical benefits of signing the new contract, which included EAP among other things. The Claimant accepted this in evidence. This is somewhat different in emphasis to saying that he could not have medical support unless he signed the contract.

249. We do not find that this was harassment.

250. Again, considering the context, we find that these comments were made in a supportive way and did not have the purpose or effect of creating a hostile environment for the Claimant nor any of the other elements of the statutory test (intimidating, degrading, humiliating or offensive).

251. This part of the claim does not succeed.

Less favourable treatment of a part-time worker

Salary/bonus

252. [**Issue 8.1**] The Claimant asserts that he was treated less favourably than the Respondent treated a comparable full-time worker as regards the terms of the new contract, in respect of the contractual terms relating to salary and bonus

253. We did not find that the Claimant has proven less favourable treatment, i.e. that he was being treated less favourably than full-time workers.

254. The evidence to demonstrate alleged differential payment of bonus was not sufficient for the Claimant to prove this claim on the balance of probabilities.

255. [**Issue 8.1**] The Claimant asserts that he was subject to a **detriment** by the Respondent's requirement that he sign new contractual terms that were less favourable to him as a part-time worker, in relation to salary and bonus.

256. The Claimant's belief was that the same amount of allowance was to be paid for non-contact time. In fact there was a 50% allowance to reflect non-contact time, which was pro-rata'd which was clear from the PowerPoint presentation if not perhaps the contractual document supplied.

257. In other words we find that the allowance of pay for non-teaching noncontact time was 50% of teaching time and that this was pro rata'd. It follows that the Claimant did not lose out when compared to a full-time employee on a *pro rata* basis.

258. This claim does not succeed.

Breach of Contract

Notice period

259. [**Issue 10.1**] What was the Claimant's notice period?

260. The particulars of claim suggest that there was a 12 week contractual notice period (paragraph 19 of the particulars of claim; page 14 of the agreed bundle). That 12 weeks corresponds to the Claimant's statutory entitlement to notice pay under section 86 of the Employment Rights Act 1996.

261. In the Respondent's Response: Amended Grounds of Resistance (dated 24 February 2022), paragraph 65 reads as follows:

> 65. It is denied that the provisions of section 88(1)(b) of the 1996 Act were engaged in respect of the Claimant's period of notice so as to render him an entitlement to full pay. The Claimant's contractual notice entitlement was considerably longer than the statutory minimum period of notice to which he was entitled.

262. A list of agreed facts presented to the Tribunal on the first day of the final hearing read as follows:

> The dispute between the parties in the breach of contract claim is whether the Claimant should have been paid SSP or his full salary during the period of sick leave that coincided his notice period, namely 19 June to 27 July 2020.

263. The Tribunal has received in evidence the contract of employment, clauses 3.3 & 3.4 of which [117] provide that either party may terminate the agreement on the written notice of one Term. "Term" is defined in Schedule 1 [128] as either meaning spring Term (1 January – 30 April); Summer Term (one May – 31 August) or Autumn Term (1 September – 31 December). The year is thereby divided into three Terms of four months in length (i.e. approximately 17.33 weeks in length).

Further submissions from the parties

264. The Tribunal by email invited written submissions following on from the end of the close of oral submissions on the notice point. The Claimant has not applied to amend his claim. The Respondent contends that the only point in dispute between the parties is whether the Claimant should have been paid SSP or the full salary, and emphasises that this is the product of three previous preliminary hearings. Mr Menzies wrote:

> It came to the Respondent's attention, when preparing for this main hearing, that the Claimant's contractual notice period was in fact expressed as you have set out in your email, Sir, and that 31 August 2020 as a termination date was not consistent with the contractual terms. This appears to have been an error committed by the HRBP who dealt with the termination of the Claimant's employment, which was not picked up at the time. He left the business shortly thereafter.
>
> The Respondent's position is that it has been clear right from the outset - from the particulars of claim onwards - that the Claimant did not intend to bring a claim for payment of any notice period beyond 31 August 2020, and he may not be aware, until now, of the said error. It has always been the agreed position between the parties and also with the Employment Judge at the Preliminary Hearings that the claim under this head is limited to the single issue set out above (10.3 of list of issues and point 4 of List of Agreed Facts). 10.3 of the list of issues was drafted by the Employment Judge at the PH after having heard oral submissions from both parties as to what the claim amounted to.
>
> We submit that it is too late now for the Claimant, should he apply, to expand the claim beyond that limited dispute as to the correct rate of pay during his sick leave. The Claimant had the opportunity at three Preliminary Hearings and during this current main hearing to do so, and the overriding objective would see it as now being too late for an additional claim relating to additional notice pay to fairly or justly be added to the proceedings.

265. The difficulty with the Respondent's position is that the Claimant has not put forward a claim for notice pay confined to the period before 31 August 2020. The particulars of claim are silent on the end date, but simply say the Claimant was not paid full contractual notice pay of 12 weeks. It seems as a matter of fact that he was not, as we have concluded below.

266. The parties have not put forward an agreed position on what the Claimant's notice period is. There is no agreement within the agreed facts. The pleaded case of each

party is different. This is a question that the Tribunal needs to resolve under 10.1 of the list of issues.

267. As to the overriding objective argument, this is not an additional claim. The claim is for notice pay. That is the claim we are determining. We have reminded ourselves that the overriding objective includes a requirement for the Tribunal to place the parties on an equal footing as far as is practicable.

268. It is clear from the contract that the notice period is one Term and that each Term is four months in length. In other words we find that the Amended Grounds of Resistance correctly stated that the contractual notice entitlement was considerably longer than the statutory minimum period of notice.

269. It might have been open to the Claimant to argue that the notice given to him on 19 June 2020 was not adequate to terminate on 31 August since it was less than one Term's notice. He might have argued that is notice period should therefore run from 1 September-31 December 2020. The Claimant has not run that argument and we consider it would be unjust to allow him to run an argument about the validity of notice at this stage.

270. Focusing narrowly on the length of the notice period, which the list of issues directs the Tribunal to consider, we agree with the amended Response the notice period is considerably longer than the statutory minimum period of 12 weeks, it is a Term or 4 months.

Payment

271. [**10.2**] Was the Claimant paid for that notice period?

272. It is common ground that the Claimant was paid his full salary until the termination of his employment on 31 August 2020 save for a period when he was on sick leave during which he was paid statutory sick pay (SSP) for the period 29 May 2020 to 3 August 2020.

273. During his notice period, as we understand it from the agreement of the parties the Claimant was paid from 19 June 2020 until 31 August 2020 i.e. approximately 10 ½ weeks, which is less than statutory or contractual notice pay.

274. It follows that he was not paid the full four months' notice pay under the contract.

275. There was therefore a breach of contract.

SSP or full salary

276. [**10.3**] The dispute between the parties is whether the Claimant should have been paid SSP or his full salary for his notice period.

277. Had the Claimant been paid for the whole of his contractual notice period, we would have agreed with the Respondent's pleaded position on this point, which is that, given that the contractual notice period is longer than the minimum statutory notice period, he would only be entitled to SSP during the period that he was ill. That

only applies in the event that the Claimant is paid his full contractual notice period, which he has not been.

278. We have not been provided with payslips that would enable us to satisfactorily calculate this. If the parties cannot agree this, it will have to be determined at a remedy hearing.

Overlap

279. The parties are reminded that a successful claimant cannot double recover, and therefore cannot recover sums for a compensatory award in a claim of unfair dismissal and a claim for breach of contract for the same period of time.

REMEDY HEARING

280. The parties are reminded of the benefits of settlement.

281. By **14 October 2022** the Claimant shall provide to the Respondent an updated Schedule of Loss, or confirmation that the existing schedule still stands, together with any supporting documents. Such documents must include evidence of attempts to find work in the period after termination if appropriate, any medical evidence suggesting that he was unable to work in the period after termination if appropriate, and evidence of any income received from any source since termination.

282. By **31 October 2022** the Respondent shall produce an electronic remedy bundle, including an updated counter schedule of loss if appropriate and any of its own documents relevant to remedy. The parties are reminded that the Tribunal will retain the liability bundles.

283. By **14 November 2022** the parties shall exchange any witness statements on which they rely. The Claimant must deal in his witness statement with any attempts that he has made to find work immediately following on from termination. If he was too ill to work he should state this, and clearly state which period he was too ill to work in.

284. The parties are requested to exchange any brief written submissions on which they rely by **23 November 2022**.

285. The Respondent is requested to provide to the Tribunal, copying the Claimant copies of all updating documentation relevant to remedy by **24 November 2022**.

286. A 1 day remedy hearing will take place by CVP (video hearing) on **Monday 28 November 2022**.

Employment Judge Adkin

29 September 2022

Sent to the parties on:
30/09/2022

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For the Tribunal Office: