Neutral Citation Number: [2024] EWHC 299 (KB)

Case No: KA-2022-BRS-000012

IN THE HIGH COURT OF JUSTICE
KING'S BENCH APPEALS
BRISTOL DISTRICT REGISTRY
ON APPEAL FROM THE BRISTOL COUNTY COURT (His Honour Judge Ralton and Mrs Christine Price)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2024

Before :

MR JUSTICE LINDEN

- -

Between :

THE UNIVERSITY OF BRISTOL	**Appellant/ Defendant**
- and -	
DR ROBERT ABRAHART (Administrator of the estate of Natasha Abrahart, deceased)	**Claimant/ Respondent**
-and-	
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

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Aileen McColgan KC and Paul Stagg (instructed by Kennedys Law LLP) for the Appellant
Jamie Burton KC and Sarah Steinhardt (instructed by Deighton Pierce Glynn) for the Respondent
Catherine Casserley (instructed by The Equality and Human Rights Commission's Litigation and Advisory Team) for the Intervener (written submissions only)

Hearing dates: 11-13 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.45am on 14 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE LINDEN

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MR JUSTICE LINDEN:

INTRODUCTION

1. Tragically, on 30 April 2018 Natasha Abrahart took her own life. At the time, she was 20 years of age and a student at Bristol University ("the University") in the second year of the MSci degree programme in Physics. She was suffering from depression and Social Anxiety Disorder, the effects of which amounted to a *"disability"* for the purposes of the Equality Act 2010 ("the 2010 Act"). Her conditions substantially impaired, amongst other things, her ability to participate in oral assessments and, in particular, interviews and a laboratory conference about experiments which she was required to carry out as part of a mandatory module called "Practical Physics 203" ("the Module"). She died on the day of the laboratory conference.

2. On 20 January 2020, these proceedings were issued in the County Court Money Claims Centre by Ms Abrahart's father, Dr Robert Abrahart, who brought the Claim under the Law Reform (Miscellaneous Provisions) Act 1934 as her personal representative and administrator of her estate. The proceedings were subsequently transferred to the Bristol County Court. They followed an Inquest into Ms Abrahart's death which resulted, on 16 May 2019, in criticism of the mental health team at the Avon and Wiltshire Mental Health Partnership NHS Trust ("the NHS Trust") which had been responsible for her care from February 2018. Dr Abrahart settled proposed proceedings against the NHS Trust pre-action in April 2019.

3. In summary, Dr Abrahart's case against the University was that it unlawfully discriminated against Ms Abrahart contrary to sections 15 (discrimination arising from disability), 19 (indirect discrimination) and 20 (duty to make reasonable adjustments) of the Equality Act 2010, read with section 91(2)(a) and/or (f). He also alleged negligence. At the heart of these causes of action was the contention that the University should have removed or adjusted the oral assessment requirements of Practical Physics 203 so that they no longer caused Ms Abrahart the level of anxiety and distress which they caused, rather than continue to require her to participate, marking her down when she performed badly and penalising her when she did not attend. The failure of the University to do this, and other deficiencies in its handling of Ms Abrahart's situation, caused her psychiatric injury and injury to feelings, and contributed to her suicide.

4. This is an appeal from a decision of His Honour Judge Ralton sitting at the Bristol County Court with an assessor, Mrs Christine Price, who was appointed pursuant to section 114(7) Equality Act 2010 (though I refer to "the Judge" below, given that he wrote the Judgment). The trial took place between 1 and 8 March 2022 and a reserved judgment was handed down on 20 May 2022. The Court's Order declared that the University had breached each of the statutory duties relied on by Dr Abrahart under the 2010 Act. Damages in the sum of £50,000 for pain suffering and loss of amenity and injury to feelings were therefore awarded, and the parties were invited to agree a sum in respect of funeral expenses.

5. However, Dr Abrahart's claim in negligence was dismissed on the basis that the University did not owe Ms Abrahart any relevant common law duty of care. The Judge characterised this claim as based on an allegation of negligent omission(s) – failure to take action to protect Ms Abrahart from harm or, *"in a sense"* from herself – and held that this case was not in any of the recognised exceptional categories in which a duty

of care may nevertheless arise. He said, however, that if such a duty had arisen he would have found that it was breached by the University for the reasons which amounted to the breaches of the 2010 Act which the Court had found:

> *"the main breach would be continuing to require [Ms Abrahart] to give interviews and attend the conference and marking her down if she did not participate when [the university] knew that [she] was unable to participate for mental health reasons beyond her control."*

OUTLINE OF THE APPEAL/CROSS APPEAL

6. In this appeal the University, represented by Ms Aileen McColgan KC and by Mr Paul Stagg (who appeared below), challenges all of the County Court's findings of breach of the 2010 Act and the finding that, if there had been a relevant duty of care, that duty was breached in this case. It also argues that if the Judge had considered causation in relation to negligence, the right conclusion would have been that any breach of any duty of care owed to Ms Abrahart did not cause her death.

7. In broad terms, the University's case in the appeal (although the arguments were not presented in this order) is that it had no duty to adjust the requirements of Practical Physics 203 because the oral assessments were a *"competence standard"* within the meaning of [4(3)] of Schedule 13 to the 2010 Act. The County Court was wrong to find otherwise. In the alternative, it was also wrong to find that the University knew or ought to have known enough about Ms Abrahart's situation to be obliged to make the adjustments to the requirements of the Module which the Judge held would have been reasonable. The disability discrimination claims should also have been dismissed on the basis that the University acted reasonably and/or was justified in its approach given the importance of maintaining academic standards, and fairness to other students. Ms Abrahart had not provided sufficient evidence through the relevant procedures for the University to be in a position to do more than it had done. Moreover, the Judge did not adopt a reasoned approach to the question of adjustments, and he made various other errors in setting out his Reasons.

8. On behalf of Dr Abrahart, Mr Jamie Burton KC and Ms Sarah Steinhardt (both of whom appeared below) support the Court's conclusions under the 2010 Act for the reasons which the Judge gave, and certain additional reasons pleaded in the Respondent's Notice. Their case is that the Court was entitled to find that the oral assessments were not a *"competence standard"*. There was therefore a duty to make reasonable adjustments to them given that it was common ground that they put Ms Abrahart at a substantial disadvantage in comparison with students who were not disabled. The Judge was also entitled to find that the University had, or ought to have had, sufficient knowledge of Ms Abrahart's situation for it to have been reasonable to make the adjustments in question. And, in this connection, the Judge was entitled to take account of the fact Ms Abrahart did not engage fully with the University's processes *because of* her disability. The Judge considered the University's case that it acted reasonably and/or was justified in its approach, and rejected it. He was entitled to do so on the evidence in this case. Whilst the Judge's Reasons were economical, he addressed the relevant statutory questions under the 2010 Act and made findings which were open to him. I should not interfere with those findings.

9. Dr Abrahart also challenges the Judge's finding that there was no relevant duty of care. He supports the Judge's alternative finding that there was a breach of any duty of care which was owed to Ms Abrahart, and argues that causation was conceded by the University at trial and/or that the Judge's findings on causation were sufficient.

10. Although Dr Abrahart's challenge to the Judge's dismissal of his claim in negligence may strictly be an appeal, I will refer to the University's Grounds of challenge to the Judge's decision as "the Appeal" and Dr Abrahart's Grounds as "the Cross Appeal".

11. By Order dated 20 March 2023, Mrs Justice Cockerill gave permission to appeal in respect of Grounds 1-6 of the Appeal on the papers but refused it in respect of Ground 7. On the University renewing its application for permission in respect of Ground 7, this was subsequently directed, by letter dated 6 April 2023, to be considered on a rolled up basis at the substantive hearing of the Appeal. I gave permission in respect of the Cross Appeal on 10 November 2023. There was then an application by the University to amend its Grounds of Appeal to add Grounds which challenge the Judge's alternative finding that there was a breach of any relevant common law duty of care which was owed to Ms Abrahart and which raise the issue of causation. These points were argued at the hearing before me without objection.

12. I also note that, by Order of His Honour Judge Blohm KC dated 2 November 2023, the Equality and Human Rights Commission ("EHRC") was given permission to intervene by way of written submissions. Those submissions, dated 10 November 2023, were written by Ms Catherine Casserley. They confirmed my provisional view that the heart of the disability discrimination issues in the Appeal lies in the question whether the Court reached a permissible conclusion that the University breached the duty to make reasonable adjustments under section 20(3) of the 2010 Act. This was also Mr Burton's position. I found Ms Casserley's submissions very helpful in bringing focus to the Appeal and I am grateful to her and the EHRC.

SUMMARY OF THE FACTS

Introduction

13. Although the trial lasted six working days and the bundle included materials from the Inquest and ran to well over 4000 pages, the Judge said that *"the facts are generally not in issue at all"*. Dr Abrahart had been put to proof on matters which were not within the knowledge of the University but the only factually contentious area related to the extent of the University's actual or constructive knowledge of Ms Abrahart's *"problems"*. This was not a case which turned on credibility, and the witnesses on both sides had genuinely sought to assist the Court.

14. This may be part of the reason for a degree of economy on the part of the Judge in setting out the facts and his conclusions. However, it is fair to say that there were details in the evidence which were not included in the Judgment and that this made my task of summarising the facts more difficult. Both parties considered that, for their arguments to be effective, it was necessary to undertake a significant amount of "archaeology" in relation to the evidence and the arguments at the trial. This was understandable given that the Appeal includes challenges to the findings of fact on, for example, the extent of the University's actual or constructive knowledge of Ms Abrahart's disability, to the adequacy of the Judge's reasoning and, indeed, to the Court's view of the

reasonableness of the parties' respective approaches at the relevant time and whether the University's approach was justified. There was, however, a degree of "spin" applied to the materials by both sides, which further complicated matters.

15. It is important to note that it was not suggested that I could or should re-try the case. The whole of the evidence which was before the County Court was not put before me and, indeed, I was only referred to some of the material in the bundles for the hearing which I conducted. Surprisingly, the parties had also been unable to agree a joint bundle of materials (or authorities for that matter), which was unhelpful. Instead, they submitted bundles of c700 and c750 pages of materials respectively.

16. So I have sought to provide a fair account which is sufficient for the purposes of explaining my conclusions on the issues in the appeal, and with a focus on what the School of Physics knew or ought to have known about Ms Abrahart's needs. This account is based on the findings in the Judgment, and evidence to which I was specifically referred by the parties and which did not appear to be in dispute.

Pre University

17. The Judge found that Ms Abrahart had been shy as a child, at school, and as a young adult, but there was nothing that had caused anyone to think that she had special needs. She had a circle of friends, and she had worked part time as a cashier in a supermarket. She did well in her GCSEs and her A levels.

18. Ms Abrahart had carefully researched and analysed the universities which offer degree courses in physics, and had chosen the 4 year Master of Science course at Bristol. She experienced what appeared to be normal levels of anxiety about leaving home and starting at university, but there was nothing which caused anyone, including her parents, to be concerned that she would not be able to cope.

Ms Abrahart's first year at the University

19. When Ms Abrahart began at the University in around October 2016 it had no reason to suspect that she would be any different to any other undergraduate aged nearly 19. No relevant disability or characteristic was disclosed to the University and no member of its staff would have considered her to have a disability or would have known that she would have difficulties with oral assessments in the future.

20. Ms Abrahart's first academic year passed without incident from the University's point of view. She lived with flatmates and, whilst they were aware that she suffered social anxiety, there was no evidence before the County Court of any significant stressors during this year. Her average marks at the end of the first year, in July 2017, were at the level of a 2:1.

The first term of Ms Abrahart's second year

21. The Judge found that at the beginning of her second year, in September 2017, Ms Abrahart moved into a flat in Bristol with Rajan Palan and Matthew Wilkes who were also physics students. Mr Wilkes was her laboratory partner and he was romantically interested in Ms Abrahart, although she did not reciprocate his feelings. She also had a boyfriend, Arjun Gunawardane, who was at Gloucester University.

22. There was evidence that Mr Wilkes put emotional pressure on Ms Abrahart. She confided in Mr Palan and he told the Inquest that, in mid-October 2017, she had spoken of hanging herself and that she had deliberately self-harmed by cutting herself. This caused tension in the flat, and between Mr Wilkes and Mr Gunawardane, which culminated in a fight between Mr Wilkes and Mr Palan on 22 November 2017. Mr Wilkes then suspended his studies. He moved out of the flat on 8 December 2017. It was common ground that he did not return to the University that academic year.

23. It was against this background that Ms Abrahart began Practical Physics 203. This module accounted for 25% of the marks for the second year of the physics course. The marking for the Module was apportioned as follows: laboratory experiments (45%), laboratory formal report (20%), computing (25%) and laboratory conference (10%). It was common ground that the Module had to be passed if Ms Abrahart was to remain on the physics course, and the pass mark was 40%.

24. The Module required five laboratory experiments to be carried out. The 45% share of the marks was assessed partly on the basis of the student's laboratory notebook and partly by way of post-laboratory formal interview after each experiment ("the laboratory interview"). Each interview could last up to 25 minutes. If a student was late or absent for a laboratory interview without good reason this would be classed as a late submission and would result in penalty marks being imposed.

25. The laboratory conference was an end of year presentation. It involved a 12-minute PowerPoint (or equivalent) presentation by groups of 4 or 5 students based on an experiment which they had written up as a formal report. There were then three minutes of follow up questions from amongst a group of around 43 other students who attended the conference, watched by two academic markers. Laboratory conferences were held in a 329-seat lecture theatre.

26. Ms Abrahart's first laboratory interview, which was about Experiment L, took place on 24 October 2017. It was with Mr Wilkes, and the interviewer was Witek Szeremeta, a laboratory demonstrator at the University. Ms Abrahart's work on the Experiment, in all respects other than the interview, was satisfactory. She attended the interview but she did not respond at all to any questions. The parties agree that she did not in fact speak, and that she left the interview unexpectedly. As a result, Ms Abrahart was marked only on the content of her laboratory notebook and scored 8/20.

27. Ms McColgan noted that, in his feedback sheet, Mr Szeremeta strongly encouraged Ms Abrahart to speak to Dr Christopher Bell (Senior lecturer and Unit Director for Practical Physics 203), her personal tutor, or another member of the physics staff, to discuss any issues which she was facing. The parties agree that Mr Szeremeta also contacted Dr Bell himself.

28. On 25 October 2017, Dr Bell sent an email to Ms Abrahart which said that he wanted to *"check in"* with her to see *"if you are having any concerns, problems with your partner, anxiety or other circumstances which might be making the interview difficult to carry out"*. He made the point that the interviews were a key way in which laboratory work was assessed, and said that since this was the first interview of the year he would be willing to rearrange it if that would help. He also encouraged her to raise any possible issues so that the School could support her appropriately. He said that she could speak

to the laboratory manager, Ms Gemma Winter, her tutor or the Undergraduate office instead of him if she preferred.

29. The Judge noted that the University's Personal Tutor Handbook provided that a student with personal issues could first make contact with the Student Administration Manager whose role would then be to refer the student to appropriate experts. The Student Administration Manager for the School of Physics was Ms Barbara Perks. On 25 October 2017, she called Ms Abrahart unsuccessfully and then emailed saying that she was *"a bit concerned"* about her. She asked Ms Abrahart to get in touch if she was around.

30. Also on 25 October 2017, Dr Bell emailed Ms Abrahart's personal tutor, Professor Steven Phillipps, to let him know that there had been a problem of being unable to get Ms Abrahart *"to say anything at all"*. The email said that this was a *"heads up"* in case she came to see him to discuss the matter, and that Ms Perks had contacted Ms Abrahart.

31. On the morning of 26 October 2017, Professor Phillipps replied to Dr Bell's email (cc Ms Perks) stating that he had not seen Ms Abrahart that term and that she had ignored promptings to arrange a second year tutorial meeting *"I don't know if something is going on"*. According to [52] of the Judgment, he was also reporting that she was missing certain classes.

32. Ms Perks then contacted Ms Abrahart again, noting that she had had absences and *"hadn't really engaged with quite a few things"* and asking her to call or to come and see them *"If you could do so – by Tuesday of next week – that would be a great relief"*. She suggested various ways of getting in contact, seeing Professor Phillipps or Dr Adrian Barnes (the Senior Tutor for the School of Physics) and/or contacting Student Services if Ms Abrahart needed help. The Judge noted that the University's Personal Tutor Handbook states that the Senior Tutor has a responsibility to refer students with disability needs or health problems to relevant specialist services and to keep in touch with such students to check that progress is being made. The student's academic personal tutor should also be kept informed.

33. Ms Perks then forwarded this email to Dr Barnes and Professor Phillipps with the message:

> *"I have started the [Vulnerable Student Service/Student Welfare Service] process….if anyone should hear from her, please let me know"*.

34. Shortly after this, Dr Bell and Ms Perks received information from Ms Winter that Ms Abrahart was *"very quiet"* in her first year. The email said that both she and her lab partner were very quiet, and it was sometimes quite difficult to motivate them to carry out the experiments. They would give up very easily if something was going wrong. Ms Winter said *"Looks like it is not a new development at least…"*.

35. In the early evening of 26 October 2017, Ms Abrahart responded to Ms Perks simply asking to reschedule the interview. The email apologised for the late response and said that she was particularly bad at answering phone calls.

36. On 30 October 2017, Ms Perks replied to Ms Abrahart, asking her to contact Peter Kessel (teaching laboratories technician) to re-schedule the laboratory interview. Ms

Perks also said: *"I am a bit concerned about the other things though, so please pop to see me"*.

37. Entries for 31 October 2017, made by Ms Perks on the *"Student Summary"*, which was effectively a log of actions taken in relation to Ms Abrahart's case, state that Mr Kessell brought Ms Abrahart to see Ms Perks and they had a *"chat re arrangements for group work etc"*. At [54] of the Judgment, in a passage which is challenged by the University under Grounds 1 and 2, the Court found that:

> *"It seems that Natasha did attend the re-arranged interview on 31st October 2017; oddly the University have little information in circumstances where one would have thought that Natasha's ability to engage in this interview would have been carefully scrutinised. Ms Perks was told that Natasha did not do well in interview on 31st October 2017 and Ms Perks e-mailed Natasha with some links to counselling. Natasha had made contact and she was offered an initial assessment with the University's Student Counselling Service but she replied saying she no longer needed an appointment. It must follow that from about this point in time Ms Perks knew that Natasha was suffering some injury to her mental health connected to the interviews."* (emphasis added)

38. The penultimate sentence of this paragraph appears to be a reference to the fact that, on 6 November 2017, Student Counselling Services (which Ms Abrahart had contacted on 12 October 2017, following which there had been exchanges with her about her availability for an appointment) offered Ms Abrahart an initial assessment on 11 November 2017. She replied that she no longer required an appointment and was happy for her appointment to be allocated to another student.

39. By 21 November 2017, Ms Perks appears to have become aware of the *"flatmate issues"* referred to at [21]-[22] above, and on that day she emailed Ms Abrahart to see if she was okay. She said that Ms Abrahart was welcome to come in for a chat if she wished.

40. The second laboratory interview took place on the afternoon of 28 November 2017. Ms Abrahart did not attend. She therefore scored 0/100 for that experiment, Experiment A. Mr Kessell informed Ms Perks, Dr Bell and Dr Barnes of her non-attendance. I was referred to his email dated 29 November 2017 which said:

> *"After speaking with Natasha yesterday morning about her lab partner (Matty Wilkes) suspending studies, she seemed relatively happy with the lab. I also reminded her of her interview after lunch. At 2pm (her scheduled interview time) there was no sign of her in the lab, and she failed to attend for the afternoon session. This is a concern as you know, as she struggled with her last interview but failed to request any further help."* (emphasis added)

41. At [89], the Judge found that Ms Abrahart's behaviour in not engaging with her personal tutor, not speaking at the first interview, performing poorly at the rearranged first interview and not attending the second interview on 28 November 2017:

> *"was objectively bizarre given she was otherwise a diligent student and, in my judgment, would have informed anyone considering Natasha that there was something seriously amiss with her."*

42. Ms Perks made an appointment for Ms Abrahart to meet with Dr Barnes on 1st December 2017 but she did not attend. However, she did attend a meeting with him on 5 December 2017, of which Dr Barnes made a note. At [56] of the Judgment, which is also challenged under Grounds 1 and 2, the Court made the following finding:

> *"Dr Barnes noted in his summary:*
>
> > *'However, she does have a problem what looks like panic and anxiety issues with the interview assessment format. [Dr Barnes] has asked her to see her GP and/or Student Counselling Services to see whether they can diagnose a particular issue and then to see if we can get a Disability Support Summary (if necessary).'*
>
> *It must follow that from about this point in time Dr Barnes knew that Natasha was suffering some injury to her mental health connected to the interviews."* (emphasis added)

43. I was shown an example of a Disability Support Summary ("DSS"). This sets out the support requirements for the disabled student based on a Disability Adviser's professional judgement and review of relevant supporting evidence from other professionals such as doctors or psychologists. When it has been completed, the DSS is circulated to the Disability Coordinator at the relevant School who, with the student's consent, is expected to circulate it to all relevant staff in the School who are involved in the teaching or support of the student.

44. The Judge noted that a DSS may take time to be completed and that the University's Quick Guide to Disability Support Summary, in his view correctly, provided that the duty to support the student arose at the point when an issue was disclosed. It also gave, as an example of interim support, *"Offering alternatives to group or presentation work where this is possible"* [27]. Moreover, at [28], he noted that there were examples in the evidence of adjustments being made for students on the same or a similar course to Ms Abrahart where alternatives to group work and presentations had been recommended by the Disability Support Service.

45. I was also taken to the whole of Dr Barnes' note and to what he said about the meeting of 5 December 2017 in his witness statement. In short, this was that Ms Abrahart came across as being shy. She was quite communicative, kept eye contact and was able to speak, but was a little reserved. They discussed the course. She was doing well in general and no issues were indicated by Ms Abrahart, other than the oral assessments. It was difficult to obtain any clear explanation for her behaviour on 24 October 2017 and her non-attendance on 28 November 2017, but Dr Barnes' views were as recorded at [56] of the Judgment. He encouraged her to take the steps which he had suggested so as to identify the root cause of her difficulties, to obtain support as soon as possible, and to ensure that she was not facing pressure at the end of the year. He also asked her to make sure that she attended the rest of the experiments that term *"even if we don't do interviews"* on the basis that the position could be reviewed in the light of medical guidance as to any underlying explanation for difficulties which she was experiencing, and what was needed to address these difficulties. Further interviews and assessments could be arranged in the light of that guidance. He asked about her general health and well-being and she indicated that she was "OK".

46. I was referred to evidence given by Dr Bell that, later that day, he and Dr Barnes had a meeting about the issue, at which alternative methods of assessing Ms Abrahart were discussed, including providing written questions to her in advance.

> *"There was a recognition that Natasha might have had an underlying issue that needed to be addressed by way of support, but we did not know if that was the case, or if so what it was, or what support would be necessary or appropriate for any underlying but unknown issue."*.

47. On 12 December 2017, Dr Barnes made a note in Ms Abrahart's Student Summary that she was still unwilling to do the laboratory interview and that he agreed with Mr Kessell that they needed to address this with urgency after she completed her January exams.

The second term of Ms Abrahart's second year

48. Immediately after the Christmas holidays, Ms Abrahart took the exams referred to. On 23 January 2018, Dr Bell then emailed Dr Barnes to find out whether she had completed any paperwork and indicated that, if she had not, she should be pushed to do so. As the Judge noted, Dr Bell explained: *"Otherwise I worry that things will just continue badly for the other interviews this year – I don't want to adapt the procedure without any 'official' reason."*.

49. The third laboratory interview was to take place on 30 January 2018, in respect of Experiment D. Ms Abrahart did not attend. She was marked 0 out of 100.

50. The Judge noted that, on 1st February 2018, Dr Barnes e-mailed Ms Abrahart asking her to arrange a meeting to see whether she had been to her GP or Student Counselling Services, and whether she had taken any action in getting a support plan in place. Both parties drew attention to what he said in this email, which concluded:

> "*When we met before Christmas we discussed issues of panic and anxiety and I recommend[ed] that you went to see your GP. I also explained that you should enquire whether it was appropriate to get a disability support statement (DSS) in place. I think it is very important that we meet as soon as possible now as I am concerned about how you will be able to complete the laboratory this year if we are unable to get suitable support in place.."* (emphasis added)

51. The Judge found that Dr Barnes and Dr Bell then met with Ms Abrahart on 13 February 2018 and discovered that she was still avoiding interviews and had not sought help or support. On this occasion Dr Barnes took the lead in contacting Disability Services on Ms Abrahart's behalf noting that this appeared to be a genuine case of some form of social anxiety.

52. I was referred to Dr Barnes' entry in the Student Summary which said:

> *"13/02/2018… With her agreement ACB [Dr Barnes]has emailed Disability Services in attempt to foster contact between them. ACB has also emailed and phoned Disability Services explaining the situation. ACB hopes that she will engage with them soon. If not we may be back to square one in a few weeks time. Natasha is doing the labs, keeping notebooks and has submitted her formal report.*

> *This does seem to be a genuine case of some form of social anxiety. ACB"* (emphasis added)

53. I was also referred to two emails from Dr Barnes to Disability Services. The first was copied to Ms Abrahart and it said:

> *"In our second year laboratory, part of our assessment is through oral interviews on the laboratory experiments and these are an important component of the assessment for the unit. Natasha has expressed to me that she understands the importance of these assessments but finds it very difficult coping with an interview situation. We have also discussed presentations in future and she explained that she may have similar difficulties with these.*
>
> *I have suggested that she contacts you for support and advice and to discuss the possibility of arranging a disability support plan. I think she was a little nervous about contacting you herself in the first instance and she agreed to me writing this email as the first point of contact."* (emphasis added)

54. The Judge found that, on the same day, Dr Barnes wrote a supplemental email to Disability Services which included the following:

> *"… We are willing to help her and to consider modified or alternative forms of assessment but without any recommendations it is difficult to see what reasonable adjustments we can make.*
>
> *I asked her today whether she had tried to contact you and she nervously said no. We discussed this a little bit and I suspect the thought of visiting you in person may be equally difficult for her. I am hoping that following my email she will at least be able to engage in written correspondence in the first instance.*
>
> *As I explained earlier, Natasha is doing well on the course and has coped with exams etc. However these assessments are an important part of the laboratory unit and I do not wish to see her failing the unit because she is unable to get any support in place"* (emphasis added).

55. Mr Burton highlighted that this email also said, before the passages cited by the Judge:

> *"Natasha is struggling to attend the assessment interviews in our second year laboratory. She has good attendance in the laboratory overall but has been absent on the days when the assessments are due to take place. We have discussed this with her and stressed the importance of completing the assessment if she wishes to pass the unit"* (emphasis added).

56. The Judge found that, on 14th February 2018, Disability Services emailed Ms Abrahart asking her for further information and to make an appointment. She did not respond. Mr Burton noted that Disability Services did not contact her again.

57. At [64] the Judge found that:

> *"On 16th February Ms [Harvey-Lindon] received a telephone call from Ms Perks who informed her that Mr Palan had seen Ms Perks because of Natasha's self-harming. Natasha was aware of this meeting and she emailed Ms Perks with*

permission to talk about her with Mr Palan. Mr Palan is reported as having uppermost in his mind ongoing pressure on Natasha from Mr Wilkes. Later that day Ms Perks emailed Natasha to say that Ms Perks had sought advice from the Student Wellbeing Service."

58. I was referred to Mr Palan's email to Ms Perks of Friday 16 February 2018, requesting a conversation about Ms Abrahart. This said: *"she's been very depressed recently and is too awkward/shy to do something herself about it*". It is common ground that, at the meeting that day, Mr Palan also told Ms Perks that Ms Abrahart was self-harming. He said he had been supporting her but he also needed support. Ms Perks' entry in the Student Summary about Mr Palan coming to see her said that Ms Abrahart had *"mental health"* issues.

59. Karen Harvey-Lindon was a Student Wellbeing Manager in the Student Wellbeing Service whom Ms Perks' phoned for advice. Ms Perks evidence was that she told Ms Harvey-Lindon that "*One of Natasha's flatmates had reported to me…..that she was cutting herself and that he was worried about her self-harming behaviour".* She mentioned *"by way of background"* the issues that there had been with Mr Wilkes in the previous term and mentioned that Ms Abrahart *"appeared to suffer from social anxiety"*. Later that afternoon, Ms Harvey-Lindon phoned Ms Perks again and advised her to ensure that Ms Abrahart was aware of how to access the NHS 111 service in the event that she self-harmed.

60. Ms Perks' email to Ms Abrahart on 16 February 2018 was an update which, among other things, confirmed that she had met with Mr Palan and said that it was really good that Ms Abrahart had given her consent to this. She reminded Ms Abrahart of the NHS 111 service, should she need it over the weekend, and she asked whether Ms Abrahart was open to more support and, if so, to let her know – by email would be fine. Ms Perks said she was expecting a colleague to call her on Monday to see how Ms Abrahart was.

61. The Judge found that, on 19 February 2018, Ms Abrahart wrote a note detailing plans to end her life and went as far as tying a ligature to the shower rail. She then sought help from Mr Palan. I was referred by Mr Burton to Ms Abrahart's Students' Health Service records which recounted that she had written a suicide note and had put her head into the noose before seeking out Mr Palan. Mr Burton said that this appeared to be her first suicide attempt.

62. The Judge found that, on 20 February 2018, Mr Palan wrote and sent an email to Ms Perks from Ms Abrahart's email account and in her name. The email said:

> *"I wanted to tell you that the past few days have been really hard, I've been having suicidal thoughts and to a certain degree attempted it.*
>
> *I want help to go to the student health clinic or wherever you think is a good place to go to help me through this, and I would like someone to go with me as I will find it very hard to talk to people about these issues."* (emphasis added)

63. To her credit, Ms Perks offered to meet with Ms Abrahart and to go with her to the clinic but, at [66], the Judge found that: *"No other action seems to have been taken by Ms Perks with respect to the e-mail."*

64. At [67], the Judge found that, on 20 February 2018, Ms Abrahart went with Mr Palan and Ms Perks to the Students' Health Service. Ms Abrahart and Mr Palan:

> *"(who did most of the talking) saw a General Practitioner with respect to her mental health and the events of the previous day. [Her] problem was recorded as "mixed anxiety and depressive disorder chronic social anxiety with suicidal ideation"; a referral was made to the Crisis Team at Bristol Mental Health. Further to that referral Natasha was seen by Dr Annear of Avon and Wiltshire Mental Health Partnership NHS Trust on 23rd February 2018 with a follow up appointment arranged for 5th March 2018."*

65. Mr Burton noted that, in her evidence, Ms Perks described Ms Abrahart as communicating *"through"* Mr Palan. The GP who saw Ms Abrahart noted that she was *"unable to really engage w patient to discuss as so anxious/shy….long hair over face, turned away from me at most times. When directly questioned she will occasionally answer w yes/no answers – looking to [Mr Palan] to answer".* Mr Burton also emphasised the parts of the GP record of this consultation which assess the risk of suicide as *"High"* and refer to her having a *"clear intent and method"* in relation to suicide; as well as the decision to refer her to the Bristol Crisis Team. Ms McColgan points out that no health information was shared with the School of Physics by the GP or the NHS Trust but Mr Burton makes the point that the GP notes give a further indication of how serious matters were and of what, he says, must or ought to have been apparent to Ms Perks or anyone else who had dealings with Ms Abrahart at this point.

66. The Judge noted that Ms Perks emailed Ms Abrahart on 20 February 2018 to find out how the appointment had gone and that she had replied, on 22 February 2018:

> *"Sorry for the late reply. My appointment with the doctor went ok and I am having an assessment on Friday with the mental health team. Thank you so much for your support."*

67. Meanwhile, on 21st February 2018, Ms Harvey-Lindon had sent Ms Perks an email *"touching base"* about Ms Abrahart. Ms Perks said, in response, that she had left Ms Abrahart with Mr Palan at the Students' Health Service and that Ms Perks had heard, later, that Ms Abrahart had been seen working in the laboratory that afternoon *"She is off my danger list and back to my worry list…"*. Mr Burton submitted that this was surprising given Ms Perks' dealings with Ms Abrahart over the preceding 5 days; Ms McColgan submitted that it was an indication of the lack of knowledge of Ms Abrahart's situation on the part of Ms Perks and the University more generally.

68. At [90] the Judge found:

> *"Natasha's email (written by Mr Palan) of 20th February would reveal to anyone reading the same a worrying emergency situation as Natasha was now known to be having (at least) suicidal thoughts. Ms Perks was unable to explain why she did not mention the suicide attempt to others notably Dr Barnes, Ms Harvey-Lyndon (Student Well-being Manager to whom Ms Perks had turned for advice when she was informed of Natasha's self-harming) or Natasha's tutor."*

69. On 26 February 2018, Mr Gunawardane telephoned the NHS Trust to inform them that Ms Abrahart had had a panic attack and had attempted to asphyxiate herself. Mr Burton referred to this as her second suicide attempt.

70. Unaware of this, on the same day Ms Perks sent an email to Ms Abrahart to which I was referred. This encouraged her to access the Student Wellbeing Service for support. Ms McColgan emphasised that it is apparent from this email, and from Student Wellbeing Service records, that Ms Perks and others were under the impression that the situation with Mr Wilkes was an important contributory factor to her mental state. Although he was no longer her lab partner and had suspended his studies, Mr Palan had reported that he was still putting pressure on her, as I have noted. In her email Ms Perks said that she was aware that Ms Abrahart would find it difficult to talk about her issues and sought to reassure her that she would not be bombarded with questions and would be able to go at her own pace and to say as much or as little as she wanted.

71. On 27 February 2018, Ms Abrahart did not attend her fourth laboratory interview, in relation to Schedule E. She was marked 0 out of 100. I was told that she also incurred a penalty of 2/20 in relation to two late morning registrations for the laboratory on 20 and 27 February. Mr Burton points out that in evidence Dr Barnes said that, although this was not recorded in the Student Summary, his recollection was that he had a discussion with Ms Perks about this at the time, and whether they thought that there was anything further they should be doing. However, it was considered that it might be counterproductive to require Ms Abrahart to take steps. She seemed more engaged and it was decided that *"as Barbara was involved with Natasha, it would be best for her to continue to use her guiding hand with her.*"

72. The Judge found that, on 6 March 2018, Ms Abrahart spoke with Ms Perks and the latter suggested alternative strategies to oral assessment, such as a scripted discussion. Ms McColgan noted that Ms Perks followed up with Ms Abrahart by email offering assistance: *"Don't worry about asking for whatever you need"*.

73. Mr Burton referred to Ms Perks' entry for 6 March 2018 on the Student Summary which included the following: *"I've suggested ways in which participation can take pressure off, such as a scripted discussion with prewritten questions, or lab conference where she contributes to the group but not on stage for the presentation"*. He also drew attention to an email to Ms Harvey-Lindon which Ms Perks sent that day, after the meeting with Ms Abrahart. This said that Ms Abrahart seemed better than before but was still:

> *"very very quiet…I cannot find out if she has followed up with the doctor… I have concerns that some of the course will be difficult for her to do though - she finds it impossible to answer questions on her lab work, for example, and will be part of a group doing presentations at the end of the year. I suggested that she might think about alternatives if they would help.."* (emphasis added)

74. Mr Burton notes that the Student Wellbeing Service did not make contact with Ms Abrahart.

75. As the Judge noted, there was a further follow up email from Ms Perks to Ms Abrahart on 12 March 2018 asking her to drop in for a chat about practical ways to help her in

presentations and laboratory interviews, and asking if she had had a chance to think about Ms Perks' suggestions.

76. The Judge found that, on 20 March 2018, Ms Abrahart did not attend her laboratory session. Mr Burton pointed out that Ms Perks met with Dr Bell and Dr Kessell about Ms Abrahart's failure to attend. The evidence was that they discussed the fact that she had missed 3 out of 4 interviews, the forthcoming laboratory conference and the fact that Ms Perks had not had a reply to her suggestions made on 6 March 2018.

77. The Judge found that, also on 20 March 2018, Ms Perks emailed an "extenuating circumstances" form to Ms Abrahart for her to complete and suggested that a doctor's letter would be needed. He noted that Ms Abrahart would have to arrange this and that Ms Perks informed her that the form and evidence would enable Dr Barnes to facilitate alternative arrangements. The extenuating circumstances process was effectively an application by the student which went to the Extenuating Circumstances Committee in the first instance. This Committee would then submit a report to the School Board of Examiners for a decision as to the effect of the extenuating circumstances on the student's results. Ms Perks' email also suggested that they discuss Ms Perks' previous suggestions about what might be arranged in relation to oral assessments. Ms Perks also asked Mr Palan to draw Ms Abrahart's attention to her email.

78. That evening, the Judge found:

> *"Mr Palan discovered Natasha with a belt tied around her neck, placed over the top of her bedroom door and tied to the handle on the other side with her feet just touching the ground. Mr Palan rescued Natasha and took her to the Student Health Service the next day."*

79. It was not suggested that the School of Physics was aware of this at the time. Ms McColgan notes that Mr Palan informed Ms Abrahart's parents of what had happened.

80. The Judge found that, on the following day, Mr Palan went to the GP with Ms Abrahart, where he did most of the talking. She was visited at home on the 22 March 2018 by the mental health team from the Trust, and Mr Gunawardane mentioned to them that there was an assessment on her course which was in interview format and which she was finding very difficult. Mr Burton points out that the two members of the Trust's Crisis Team who saw Ms Abrahart noted in her records that *"Natasha was unable to engage in the assessment process due to anxiety and struggling to verbally communicate which appears to be a chronic issue for her."* Again, it is not suggested that the School of Physics was aware of these particular events or of what was recorded in Ms Abrahart's medical records. As I understood it, they were relied on by Mr Burton to indicate how serious matters were as part of his argument that more might have been discovered by the University had further inquiries been made.

81. Mr Burton notes that, on 23 March 2018, students on Practical Physics 203 were sent a document entitled *"Second Year Laboratory Conference – Preliminary Information"*. This set out expectations for the upcoming laboratory conference. It stated that *"All members of the group must participate in the presentation"* and confirmed that *"You will be assessed on the quality of your presentation, not your performance in the original experiment"*.

82. Ms Abrahart was collected by her mother to go home for the Easter break on 24 March and she returned to the University on 15 April 2018.

83. The Judge found that, on 17 April 2018, Ms Abrahart's cohort were emailed with their groups for the forthcoming laboratory presentation, to be given on 30 April 2018. They were also given information which emphasised the need to participate in the presentation, *"the obvious inference being that it would involve public speaking"*.

84. At [80] the Judge found that, on 26 April 2018, Ms Abrahart did attend her fifth laboratory interview but scored only 8 out of 20 for the interview i.e. the same score as she achieved on 24 October 2018 when she did not speak at all during the interview; *"her poor performance would likely have been down to being unable to orally answer questions"*. He noted that, on the same day, Ms Abrahart was *"communicating with her student colleagues about the presentation within an electronic messaging system"*. In other words, rather than discuss the matter orally and face to face, she was doing so in real time remotely and in writing.

85. The Judge found that, on 27th April 2018:

> *"Ms Perks was emailing Dr Bell asking that if Natasha was quiet at the forthcoming conference that they take extenuating circumstances into account. It is apparent from Dr Bell's email of 30th April 2018 that by this time Natasha might scrape through Practical Physics 203 "but it's going to be tight" and Dr Barnes replied to wait and see what happened at the conference. Ms Perks spoke with Natasha and told her that she did not have to speak at the conference if she did not wish to do so provided her contribution was clear. Natasha said she would participate in delivery of the presentation."* (emphasis added)

86. Mr Burton notes that Ms Perks told the Inquest that *"we have had students who have had anxiety issues before... this is not an unknown. and that has been one of the things that we have been able to offer to students."*. She also agreed that Ms Abrahart was going to really struggle with the laboratory conference and that it is would put her under *"really significant stress"*.

87. Ms McColgan notes that Ms Perks provided Ms Abrahart with some handwritten notes to help with filling in the extenuating circumstances form. Ms Perks' entry in the Student Summary says:

> *"27/04/2018 Saw B, asked for EC form. Will see Dr, ask ACB to defer some assessment in May/June to Sept. Has 1st counselling appt next wk, is working with lab conf group for Monday presentation. B raised with ACB, emailed TMcM and Chris Bell. BDP."*

88. Ms Perks' email to Drs Bell and McMaster (referred to by the Judge in the passage cited at [85] above) asked the assessors at the laboratory conference to *"please take [extenuating circumstances] into consideration when marking her group if that is permissible*". Dr McMaster also replied saying that they would be *"duly sensitive"*.

89. However, although Ms Perks had said that Ms Abrahart need not speak at the laboratory conference, no changes were made to the form of assessment or the marking criteria

which would be applied. As the Judge noted at [101] of the Judgment, Dr Bell explained to the Inquest that this was because:

> *"there had been no request to do so either by Ms Abrahart or under a Disability Support Summary."*

90. Mr Burton notes that, as 30 April 2018, Ms Abrahart's marks for Practical Physics 203 were only 27.4%. The bulk of the marks that she had obtained came from her scores for computing and for formal reports. In Dr Bell's email to Dr Barnes of 30 April (referred to by the Judge in the passage cited at [85] above), he referred to her having missed three post-laboratory interviews. He noted that she had the following outstanding in terms of potential marks that could yet be gained: final formal report (10%), laboratory conference (10%) and two computing items (5%). He observed *"So if she gets 50% on each of these she just scrapes through, but it's going to be tight"*. Mr Burton submits that this confirms, and Ms Abrahart would have been aware of this, that if she was unable to participate in the laboratory conference presentation there was a very strong prospect that she would not achieve the pass mark.

91. Dr Barnes replied on the same morning that they should see what happened that day. He added: *"Hopefully she will be able to pass with what she has or we do what we need to do to complete the lab. this year*".

92. Ms Abrahart did not attend the laboratory conference on 30 April 2018. At around 2.30pm, shortly after it had started, Mr Palan discovered that she had locked herself in her bedroom and had fed a belt over the top of her door with one end tied to the exterior handle. When the emergency services forced their way into her room she was found to be dead.

OVERVIEW OF THE COURT'S JUDGMENT IN RELATION TO DISABILITY DISCRIMINATION

93. In view of the University's contention that the Court's conclusions on the question of reasonable adjustments were inadequately reasoned, I set an overview of the Judgment before coming to the specifics of the Judge's conclusions on the disability discrimination claims.

94. After an Introduction, and *"General Observations"* about the evidence which I have summarised at [13] above, so far as material, the Judge began with findings under the heading *"The Physics Course"*. I will come back to these findings, particularly in connection with the issue between the parties as to whether the adjustments which the Judge found ought reasonably to have been made were in fact adjustments to a *"competence standard"* as defined in [4(3)] of Schedule 13 to the Equality Act 2010 (Ground 4).

95. There is then a section on *"Disability Support"* in which the Judge noted the position under the Academic Personal Tutor Handbook and made findings about Disability Support Summaries and interim measures which I have summarised, so far as material at [29], [32] and [43]-[44] above. He also noted that the final say with respect to adjustments lay with the School.

96. There is then a section on *"Confidentiality"* which I will return to in relation to Ground 7. This is followed by a chronological narrative of events, which I have summarised above, and then a short section on certain notes which Ms Abrahart had written. In this section, at [86], the Judge noted that in evidence the medical experts had agreed that:

> *"the primary stressor and cause of Natasha's depressive illness was oral assessment."*.

97. The Judge then made observations about the witnesses of fact at [88]-[100] which included important findings about the merits of the case. These are covered elsewhere in my judgment, so far as material.

98. The Judge then dealt with the expert medical evidence. Here he preferred the evidence of Dr Braithwaite, on behalf of the Claimant, that Ms Abrahart had Social Anxiety Disorder in addition to her depression. This was the second basis on which he went on to find that she had a disability for the purposes of the 2010 Act.

99. The Judge then went on to address "*The Equality Act 2010 Claims"* under a series of sub-headings. Essentially, this was a statement of his conclusions on the key issues between the parties in the light of his earlier findings.

100. Under the first of these sub-headings, *"Fact of Disability"*, he noted that it was common ground that, at all material times, Ms Abrahart had at least one condition which amounted to a disability for the purposes of the 2010 Act, and that he had found that she had two.

101. A single paragraph under the next sub-heading, *"Knowledge of Disability"*, [116], recorded the following finding, which is challenged by the University under Grounds 1 and 2:

> *"The Claimant must prove that the University had actual or constructive notice of Natasha's disability. The simple point is that from October 2017 it manifested itself – it was there to be seen – in contrast, perhaps, to disabilities which can be hidden or only be discerned with expert technical skill. To put this another way, following Gallop v Newport City Council [2013] EWCA Civ 1583, the University's staff could see for themselves that Natasha had a mental impairment which had a substantial and long-term adverse effect on her ability to carry out an otherwise normal task within her course from October 2017. However, I do not think that there was sufficient manifestation of any disability in year 1 to put the University on notice of anything."*

102. At [120], the Judge then listed *"The claims"* under the 2010 Act, which he said were *"discrete albeit overlapping"*.

103. The next sub-heading was "*Reasonable adjustments, competency standard & Natasha's engagement (sections 20 and 91(9)).*" At [121], the Judge set out the reasonable adjustments pleaded in the Particulars of Claim as follows:

> *"(1) With respect to the laboratory interviews:*
>
> *(a) Removing the need for oral assessment altogether and or;*

(b) Providing written questions in advance.

(2) With respect to the conference:

(a) removing the need for oral assessment;

(b) Providing written questions in advance;

(c) Assessing Natasha in the absence of her peers;

(d) Using a smaller venue."

104. He added:

> *"…and in the hearing communication via a text or remote type service was also identified. Objectively, and on the available evidence, I assess those adjustments as reasonable. I consider justification a little later in this judgment."* (emphasis added)

105. At [122], he said the following:

> *"122. For the avoidance of doubt it was not necessary for Natasha to identify reasonable adjustments at the time; if there was a duty to make reasonable adjustments in the first place then it was for the University to apply its mind to the adjustments that could be made; see Cosgrove v Caesar & Howie[2001] IRLR653 Lindsay P at 654-7."*

106. And at [123], which is challenged by the University, at least in its pleaded case, under Ground 5.1:

> *"123. Insofar as the University argues that it made any adjustments (and as covered earlier in this judgment I find that the University did not get that far) we know that Natasha's substantial disadvantage (the same having been conceded by Mr Stagg) compared to a non-disabled person remained so the duty to make reasonable adjustments could not be said to have been complied with per Archibald v Fife Council [2004] ICR 954."*

107. At [124], the Judge then summarised the statutory duty to make reasonable adjustments which was in issue and noted that a competence standard is not a PCP for these purposes. He also set out the definition of a competence standard under [4(3)] of Schedule 13, which I discuss below.

108. The Judge went on, at [125]-[127], to find that the requirement to attend oral assessments put Ms Abrahart at a substantial disadvantage and he found that that disadvantage was as pleaded by the Claimant:

> *"The PCP caused her profound anxiety and stress, affecting her ability to attend, speak and communicate. In turn, such matters caused her to avoid the post-laboratory interviews and laboratory conference altogether and to perform extremely poorly on the occasions that she did attend, resulting in low attainment/performance and an increased prospect of non-progression on her course."*

109. At [128], he also noted Mr Stagg's concession that Ms Abrahart's *"inability to cope with speaking amounted to a substantial disadvantage for the purpose of section 20."*

110. At [128]-[132] the Judge then addressed the University's argument that *"the oral assessments comprise the application of a competence standard and thus are not a PCP"*. At [129] in a passage which is challenged by the University under Ground 4, the Judge said that:

> *"The first and fundamental difficulty the University faces here is the evidence I was given that Natasha had a chance of scraping through Practical Physics 203 without undertaking the laboratory interviews at all."*

111. At [130] he said *"I suspect that the question whether a PCP comprises the application of a competency standard will be obvious most of the time and very case specific"* and he referred to the decision of the Employment Appeal Tribunal, in *Burke v College of Law* UKEAT/0301/10/SM, that the requirement to complete a legal examination within a set time was a competence standard.

112. At [131] the Judge then said:

> *"131. It is obvious to me that the fundamental purpose of the oral assessments was to elicit from Natasha answers to questions put to her following the experiments and it is a statement of the obvious that such a process does not automatically require face to face oral interaction and there are other ways of achieving the same. This seems to have been accepted in any event by Dr Bell in cross examination."*
>
> *132. Therefore I reject [the University's] 'competency standard' argument."*

113. At [133]-[135] he then said:

> *"133. It is not the disabled student who is under a duty to identify reasonable adjustments and it is common ground (I think) between counsel that the duty is anticipatory (and see the Technical Guidance paragraph 7.17 ff). There is no evidence that Natasha refused to engage with any reasonable adjustments because whilst a few ideas were floated none were implemented. The greatest criticism that could be made of Natasha is that she did not engage with Disability Services but that non-engagement resulted from the disability. Unfortunately in the absence of a Disability Support Summary the University seemed to simply stall in its consideration of reasonable adjustments. In those circumstances it cannot rely on lack of knowledge on its part to make reasonable adjustments (applying Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664).*
>
> *134. We will never know whether the reasonable adjustments suggested would have worked for certain but they are reasonable and appear to address Natasha's difficulties.*
>
> *135. I conclude that this claim is made out."*

114. The next sub-heading in the Judgment is *"Indirect discrimination (section 19)"*. Under this heading there is a single paragraph, [136], which is difficult to follow but which

appears to address the question of particular disadvantage for the purposes of the indirect discrimination claim. This question was not in issue in the Appeal.

115. There is then a sub-heading *"Disability discrimination (section 15)"*. At [137] the Judge identified the unfavourable treatment as being *"the marking down of her oral assessment work/imposition of penalty marks"*. At [138] he said:

> *"138. In my judgment there can be no doubt that there was direct discrimination especially once the University knew or should have known that a mental health disability of some sort was preventing [Ms Abrahart] from performing (and causation is not in issue)."* (emphasis added)

116. (I note that, although it is clear enough that the Judge was finding that there was unfavourable treatment which fell within section 15(1) – and there is no challenge in the Appeal to the finding that there was unfavourable treatment – the reference to *"direct discrimination"* is inaccurate. Unfavourable treatment is not the same as direct discrimination – less favourable treatment because of a protected characteristic – which is defined by section 13 and is not in issue in this case.)

117. There is then a final sub-heading –*"Justification"*- where the Judge said this:

> *"139. Essentially Mr Stagg argues that there must be a level playing field for students in that there is a limit to any adjustments that can be made. He points to the University's Regulations and Codes of Practice for Taught Programmes part B9 which deals with assessments and paragraph 9.38 which reads:*
>
> *"If an oral examination is part of the assessment of a unit, it must apply to every student taking that unit"*
>
> *But, inevitably, that argument means that paragraph 9.38 must be seen as another PCP. In any event:*
>
> *(1) Part B10 deals with disability stating that any student who discloses a disability should be signposted to disability services but that whether a student goes to such services or not, the school still has a responsibility to make anticipatory and reasonable adjustments;*
>
> *(2) Part B17 addresses extenuating circumstances and paragraph 17.38 deals expressly with disability and extenuating circumstances. In particular paragraph 17.41 notes that the making of a reasonable adjustment may require relaxation or setting aside the relevant provisions in the Regulations and Guidance;*
>
> *(3) In the event of doubt about how evidence of a disability should be treated and over the course of action to be taken paragraph 17.48 requires advice to be taken from the University's Equality and Diversity Manager.*
>
> *140. I pause to observe that Annexe 5 of the same document and sections 4 and 5 seem to place some expectation of a disabled student to disclose a disability and to assume some personal responsibility to ensure that adjustments work. Again there is a danger that if the University relies on the expectation the same becomes a PCP.*

> *141. I conclude that the University has not justified the lack of adjustments."* (emphasis added)

THE UNIVERSITY'S APPEAL IN RELATION TO THE FINDINGS OF DISABILITY DISCRIMINATION

Overview

118. The Grounds of Appeal are set out in an Appendix to this judgment. There was some reformulation of the University's case between the permission stage and the full hearing and appeared from Ms McColgan's written and oral arguments that not all of the pleaded Grounds were pursued or, at least, pursued as originally pleaded.

119. I will set out the University's contentions in the order in which they appear in the Amended Grounds of Appeal and Ms McColgan's skeleton argument. The latter states, by way of an overview of the Appeal, that:

> *"The core of [the University's] case is that it did not at any relevant time have actual or constructive knowledge of [Ms Abrahart's] disability so as to found the breaches of the [2010] Act which were found below".*

The finding of breach of section 15 of the 2010 Act

120. Grounds 1 and 2 allege that the Judge misapplied the law in finding that the University had actual or (if this was his finding) constructive knowledge of Ms Abrahart's disability *"from October 2017"*. However, Ms McColgan went on to argue in detail that, on the evidence, the Judge had been wrong to find that the duty under section 15(1) of the 2010 Act had arisen at any point prior to the death of Ms Abrahart.

121. Under Ground 3 Ms McColgan argued that the Judge failed to consider the question of justification at all in relation to the section 15 claim (Ground 3.1). If he did consider this question, he had failed to ask whether the oral mode of examination pursued a legitimate aim and, if so, whether the means used were proportionate (Ground 3.1). Nor did he consider the question in light of the state of the University's knowledge of Ms Abrahart's disability at the material times, and the fact that the extenuating circumstances process was open to her (Ground 3.3). Contrary to the submission of the EHRC, knowledge was a relevant consideration under section 15(1)(b) – justification - as well as section 15(2) and *York City Council v Grosset* [2018] EWCA Civ 1105, [2018] ICR 42 did not establish the contrary as the EHRC submitted.

122. Ms McColgan submitted that the marks awarded, and the penalty points for non attendance imposed, pursued a legitimate aim, i.e. the promotion of rigorous academic standards. The means were proportionate. In relation to the marks awarded to Ms Abrahart, it had been made clear to her on 5 December 2017 that adjustments could be made to how she was assessed and to how marks awarded, if necessary after the event. The marks awarded were academically appropriate based on Ms Abrahart's performance but any marks were subject to consideration by the Faculty Examination Board and she could make an extenuating circumstances request. The Judge had been wrong to find, at [98], that this procedure would not have applied to Ms Abrahart (in fact, he found that the process would not have been appropriate to her).

123. Ms Abrahart could also self-certify in relation to her non/late attendances, including after the event, and thereby avoid a penalty. The penalties which were imposed were necessarily proportionate in that they followed automatically from her non/late attendance. The fair assessment of academic performance requires that there is a level playing field and that any modifications to the playing field are made after a process has been followed which ensures that there is an evidential case for the adjustment, that it is suitable and that it does not impact on the integrity of the assessment of the student in question.

The finding of breach of the duty to make reasonable adjustments

124. Under Ground 4 – the finding that the relevant PCP in this case was not a competence standard - Ms McColgan argued that the laboratory interviews and conference involved the application of standards applied for the purpose of determining whether or not students had a particular level of competence, i.e. *"being able to 'present the results of an experiment in a manner appropriate to a professional physicist' and 'to collaborate with others in the presentation of experimental results in a conference setting*"'. That being the case, the interviews and conference involved the application of competence standards. In this connection, she relied on [7.36] of the Technical Guidance referred to at [188] below to argue that in this case the method of assessment and the competence standard itself were inextricably linked. She argued that the Judge erred:

i) at [129] of the Judgment, in finding that a fundamental difficulty with the University's case is that Practical Physics 203 could in principle be passed despite undertaking the interviews. There is no justification for treating competence as an all or nothing, pass or fail, question: students may be more or less competent physicists, lawyers or mathematicians at any particular time.

ii) at [131], in reaching an unreasoned conclusion that the fundamental purpose of the oral assessments was to elicit from Ms Abrahart answers to questions put to her following the experiments, and such a process does not automatically require face to face oral interaction. This ignored his own findings at [18]-[21] (set out below) that the intended learning outcomes of the Module included the ability '*to present the results of an experiment in a manner appropriate to a professional physicist'* and *'to collaborate with others in the presentation of experimental results in a conference setting.'*. It also ignored the evidence of Dr Bell and Dr Barnes.

125. In relation to Ground 5, the specific assertion in Ground 5.1 – that the Judge *"wrongly accepted the Claimant's submission that, if any disadvantage to Ms Abrahart remained, it followed that the duty had not been complied with"* – did not appear to be pursued. Under the heading *"General"* Ms McColgan made submissions that:

i) The Judge was wrong to find, at [123], that the University had not made any adjustments. In addition to telling Ms Abrahart that she need not speak at the laboratory presentation and the discussion with Dr Barnes on 5 December 2017, the University's arrangements for the assessment and consideration of disabilities and extenuating circumstances were part of its compliance with the anticipatory aspects of this duty. *"It is clearly a reasonable approach that, before changes are made to the system of assessment, expert assessment confirms that such changes are necessary"*. This appeared to be a modified

version of Ground 5.4 which contended that, insofar any duty to make adjustments had arisen in connection with the laboratory conference presentation, the University had complied with that duty.

ii) In assessing the question of reasonableness, the Court was required to take into account the University's actual or constructive knowledge of Ms Abrahart's disability, its effects on her ability to engage with the assessment process, what steps might be taken and what the effects of taking them was likely to be. Only with this information would the University be in a position to assess what was necessary and reasonable. In this connection Ms McColgan relied on Laws LJ in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734 and its application in *Aecom Ltd v Mallon* [2023] EAT 104. She also relied on [7.23] and [7.25] of the Technical Guidance (referred to below at [161]). It was precisely for this reason that there was a process which had to be undertaken given the importance of academic integrity and fairness to all students.

iii) The Judge had also wrongly cited *Tarbuck v Sainsbury's Supermarkets Limited* (supra) at [133] as supporting his view that the University could not rely on lack of knowledge on its part. *Tarbuck* did not consider this issue. Ms McColgan's arguments in this regard appeared to retreat from the contention, in Ground 5.2, that the Judge *"wrongly found the [University's] lack of knowledge was irrelevant to the extent of its duty to make reasonable adjustments"*.

126. On the Judge's finding that the adjustments contended for by the Claimant were reasonable, presumably under Ground 5.3 Ms McColgan argued that:

i) The Judge did not address any of the factors which were relevant to this issue as set out in the Technical Guidance at [7.61].

ii) The University had no evidence as to the effect of Ms Abrahart's disability on her (or indeed of her disability) such that it could have considered particular adjustments to its assessment processes on a reasoned basis.

iii) At [27] the Judge wrongly concluded from statements in the University's Quick Guide to Disability Support and Interim Support guide that adjustments in examination arrangements required no more than disclosure from a student (in fact, he found that the duty to support the student arises at this point, as I have noted.)

iv) It was manifestly wrong to conclude that in the circumstances extant at the material time, the University could simply have exempted Ms Abrahart from requirement to undergo oral assessments.

v) Supplying Ms Abrahart with the questions in advance would have fundamentally altered the nature and utility of the oral assessment process. Nor would it have been practicable in the laboratory conference, in which many of the questions would be put by students. The evidence of Dr Braithwaite under cross-examination did not indicate that providing Ms Abrahart with written questions in advance would have materially assisted her, and there was no evidence before the Court that assessing her in the absence of her peers or in a smaller venue would have assisted. The October 2017 assessment in which Ms

Abrahart had scored badly was conducted one-to-one. Dr Braithwaite's evidence concerning Ms Abrahart's inability to speak in public, and the evidence concerning her inability to respond to questions in the laboratory conferences, should have led the Judge to conclude that such measures would have been ineffective.

vi) Allowing Ms Abrahart to communicate by text or similar would not have been reasonable Nor was there any evidence before the Judge as to the practicality of allowing Ms Abrahart to do so, which had not been suggested as a reasonable adjustment prior to the trial.

127. Importantly, Ms McColgan accepted that:

> *"None of this is to say that one or more of these adjustments could not have been made following reasoned consideration of [Ms Abrahart's] evidenced needs (and to the extent that they would have been compatible with the assessment of relevant competences)…"* (emphasis in the original)

128. Ms McColgan also accepted the Judge's statement at [122], applying *Cosgrove v Ceasar & Howie* [2001] IRLR 653 EAT at [7] (see [105], above) that there was no burden on Ms Abrahart to identify reasonable adjustments at the time of the relevant events. And she said that no criticism was made of Ms Abrahart's failure to engage with Student Disability Services. But she submitted that the Judge was wrong to assert (at [134]) that the University *"seemed to simply stall in its consideration of reasonable adjustments"* in the absence of a Disability Support Summary. On the contrary, Ms McColgan argued, the University continued to encourage her to fill in an extenuating circumstances form and to provide medical evidence, as well as to offer her support and to seek to avoid a situation in which she would fail her second year.

> *"At no relevant time did [the University] have the necessary information about [Ms Abrahart] to undertake the necessary evaluation."*

Indirect discrimination

129. Ms McColgan argued that the Judge's discussion of justification at [139]-[141] appeared only to relate to the reasonable adjustments claim (Ground 6.1). The Judge was wrong to have rejected the University's argument on justification and had not applied the statutory test under section 19(1)(d) of the 2010 Act (Ground 6.2). Moreover, the Judge did not appear to appreciate that, whereas the duty to make reasonable adjustment applies by requiring exceptions to the general rule, indirect discrimination is concerned with the lawfulness of the general rule itself (Ground 6.3).

130. Had the Judge applied the statutory test, he would have concluded that it was satisfied. The oral assessments were a test of the student's presentational skills, and they pursued the legitimate aims of assessing the acquisition of skills as a scientist, in a manner which was fair to all. It was proportionate not to change the method of oral assessment in response to a case in which there was no objective evidence from Student Disability Services or from medical advisers as to what modified or alternative assessment processes would have been appropriate.

Ground 7: confidentiality

131. This Ground contended that:

> *"The Judge erred in law in concluding that it would have been legitimate for Ms Perks and/or other members of staff to breach confidentiality concerning Ms Abrahart's suicidality (§§32-34, 95-96). He should have held that, in the absence of an imminent threat to Ms Abrahart's life or health, such a breach of confidentiality would have been unlawful and/or inappropriate, and in any event was not required in order to comply with the 2010 Act."*

132. Under the heading *"Confidentiality"* the Judge had said:

> *"32. I mention the matter of confidentiality because at times during Ms Perks' evidence there seemed to be concern about sharing information provided by Natasha notably her suicide attempts.*
>
> *33. The University's Student Services Confidentiality Policy makes provision for preserving confidentiality but paragraph 9 does say: "If a member of Student Services staff takes the view that a student is at risk of harming themselves or others then they can make a decision to break confidentiality without consent"*
>
> *34. This is consistent with paragraph 4 of Schedule 2 to the Data Protection Act 1998..."*

133. In the section of his Judgment on the witnesses, the Judge had said in his comments on Ms Hocking (Disability Services Manager):

> *"95. Ms Hocking did say it was regrettable that in Natasha's case the service did not send her a second email to try to persuade Natasha to make contact. More strikingly Ms Hocking told me that if the service had been told of the student being at risk of suicide or self-harm they would have told the responsible academic member of staff that the referral had not been taken up.*
>
> *96. Accordingly it seems that much more would have been done to engage with Natasha, her disability and the adjustments she needed if the service (and the academics) had been told of Natasha's <u>suicide attempts</u> and self-harm."* (emphasis added)

134. In her skeleton argument, Ms McColgan interpreted [96] as a criticism of Ms Perks for failing to pass the information to Ms Hocking. She criticised the reference to suicide *"attempts"* (plural) which, she said, reflected a profound misunderstanding on the part of the Judge given that, at its highest, the University was aware of one attempt. Ms Perks was entitled to think, on 21 February 2018, that Ms Abrahart was no longer in danger and the Judge had failed to articulate how events might have unfolded differently if the information had been passed to Ms Hocking. *"Contrary to the Judge's ruling"* the processing of information about Ms Abrahart's self-harming and suicidal ideation would have breached the Data Protection Act 1998 (which was in force at the time and the University's policies). The policy referred to by the Judge at [33] of the Judgment was not applicable to Ms Perks who did not work in the School Services Division. Although Ground 7 was apparently concerned with the duty of confidentiality

and so was the University's skeleton argument at the permission stage, the argument that disclosure of this sensitive personal data would be contrary to the 1998 Act was then developed.

THE JURISDICTION OF THE HIGH COURT IN AN APPEAL FROM THE COUNTY COURT

135. CPR r52.21 (1) provides that every appeal will be limited to a review of the decision of the lower court unless it falls into specific categories of case in which a Practice Direction makes different provision, or the court considers that it would be in the interests of justice to hold a re-hearing. As I have noted, none of the parties suggested that I should do anything other than review the decision of the County Court.

136. As is well known, CPR rules 52.21 (3) and (4) provide:

> *"(3) The appeal court will allow an appeal where the decision of the lower court was—*
>
> *(a) wrong;…*
>
> *(4) The appeal court may draw any inference of fact which it considers justified on the evidence."*

137. Mr Burton referred to the well-known caselaw which emphasises that an appellate court will only interfere with a finding of primary fact by the court of first instance where it concludes that the finding is not supported by the evidence or where the decision is one which no reasonable judge could have reached: see e.g. *Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861 at [29]-[31].

138. He also reminded me of the helpful summary, in *Prescott v Sprintroom Limited* [2019] EWCA Civ 932; [2019] BCC 1031 at [76]-[78(vi)], of the position where an appellate court is asked to interfere with an evaluative judgement such as the question whether, on the evidence, a decision or a step was or was not reasonable. I do not need to set this out in full but, the following points are particularly important in the present case:

i) *"On a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency or a failure to take into account some material factor, which undermines the cogency of the conclusion'"* [76].

ii) The appellate judge should also bear in mind that the factual findings of even the most meticulous judge will still represent a distillation of the evidence and will not reveal all of the nuances, the precise emphasis or degree of weight which was given to the various factors in the mind of the judge. It would be wrong to take the view that an appellate court is authorised to undertake a fresh evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as reasonableness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation[77].

iii) The reasons for the principle that the appellate court should not interfere with the findings of fact of the trial judge – whether primary facts or evaluative findings - unless compelled to do so include (per Lewison LJ in *Fage UK Ltd. & anor. v Chobani UK Ltd* [2014] EWCA Civ 5,[114]), the expertise of the trial judge, the efficient use of resources on the basis that the trial *"is not a dress rehearsal. It is the first and last night of the show"* and that:

> *"iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

139. Mr Burton also made the point that it may be important to have regard to how the case was argued at first instance: see *King v Telegraph Group Limited* [2004] EWCA Civ 613, [2005] 1 WLR 2282. And he referred me to *English v Emery Reinbold and Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 and *Harris v CDMR Purfleet Ltd* [2009] EWCA Civ 1645 for the well-known principles applicable to appeals based on the contention that the court below gave inadequate reasons for its decision. At [21] of her judgment in *Harris*, Lady Justice Smith said:

> *"a judgment should not be upset on the ground of inadequacy of reasons, unless, despite the advantage of considering the judgment with knowledge of the evidence and submissions made at the trial, the losing party is still unable to understand why it is that the judge reached his conclusion… It is always desirable that a judgment should be comprehensible for the first-time reader… However, that is not the test of the adequacy of the judge's reasons. The adequacy of the reasons must be tested in the context of the knowledge and understanding of those who were present at the trial. In the present case, once one reads the pleadings, the relevant extracts of the transcript and the submissions of counsel, the judge's reasons can be understood."*

GROUNDS 4 AND 5 - THE CHALLENGE TO THE COURT'S FINDING THAT THE UNIVERSITY BREACHED THE DUTY TO MAKE REASONABLE ADJUSTMENTS

Introduction

140. Notwithstanding the way in which the Appeal was pleaded, I will start with the challenge to the Court's finding that the University breached its duty to make reasonable adjustments. I note that this was the order in which the claims were pleaded and presented at the trial and addressed in the Judgment, and with good reason. For reasons which I will explain, the duty to make reasonable adjustments is likely to be the beginning and end of many disability discrimination claims and the present case is in this category. I was told that, no doubt for this reason, the focus of the trial was also on this issue. Again, this is reflected in the Judgment.

The legal framework

The application of the 2010 Act to the provision of education

141. As is well known, the Equality Act 2010 replaced a number of pieces of anti-discrimination legislation, which it brought together in one Act of Parliament. These included the Disability Discrimination Act 1995. The 2010 Act prohibits various types of discrimination and imposes duties in a number of specific areas of social or economic activity including the provision of services (Part 3), the management and disposal of premises (Part 4), and work (Part 5).

142. Part 6 of the 2010 Act deals with its application to the provision of education, and Chapter 2 of this Part is concerned with further and higher education. It is common ground that the University is an institution to which Chapter 2 applies (see section 91(10)(a)). Section 91 therefore sets out the duties to which its *"responsible body"* (i.e. its governing body: section 91(12)(a)) is and was subject at all material times. Section 91(1)(a) provides, so far as material, as follows:

> *"(2) The responsible body of such an institution must not discriminate against a student—*
>
> *(a) in the way it provides education for the student;*
>
> *....*
>
> *(f) by subjecting the student to any other detriment."*

143. Section 91(9) provides that:

> *"(9) A duty to make reasonable adjustments applies to the responsible body of such an institution."*

144. The nature of this duty and the other relevant types of discrimination for present purposes are defined in Part 2, Chapter 2 of the 2010 Act, to which I will return.

The EHRC's Technical Guidance

145. On 1 April 2014 the EHRC published *"Technical guidance on further and higher education"* ("the Technical Guidance") to which I was referred by the parties. As is acknowledged at [1.5] of this document, it is not a statutory code of practice issued pursuant to section 14 of the Equality Act 2006. [1.5] states that the Technical Guidance may be used as evidence in legal proceedings and that, if it is followed by education providers, it may help them to avoid an adverse decision in such proceedings. The parties and the EHRC did not make detailed submissions on the status of the Technical Guidance but I agree that it may be useful, in a given case, to understand the views of the EHRC as the statutory body with responsibility for equality and human rights. The Technical Guidance is also the result of extensive consultation and discussions across the education sector including with *"providers, stakeholders, government department and trade unions"* (see the Foreword to the Technical Guidance). However, obviously, it is not a source of law.

Having a disability

146. Having a disability is a *"protected characteristic"* under the 2010 Act. This concept is defined under section 6 and Schedule 1 to the Act. It is not in dispute that the definition was satisfied in the present case at all material times. However, it is relevant to note that section 6(1) provides that:

> *"(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

147. Where it appears in the 2010 Act, *"substantial"* means more that minor or trivial: section 212. A *"long term adverse effect"* is one which has lasted or *"is likely to last for at least 12 months"* (paragraph 2(1)(b) of Schedule 1 to the 2010 Act) or likely to last for the rest of the life of the person affected. *"Likely"* for these purposes means *"could well happen"*: *Boyle v SCA Packaging Ltd* [2009] UKHL 37, [2009] ICR 1056.

The duty to make reasonable adjustments: general provisions and principles

148. As Baroness Hale said in *Archibald v Fife Council* [2004] UKHL 32, [2004] All ER 303 at [47], in contrast to other areas of the law against discrimination, the disability discrimination legislation:

> *"does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment. The question…is when that obligation arises and how far it goes".* (emphasis added)

149. Under section 20 of the 2010 Act:

> *"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements….."*

150. The first of these three requirements is at issue in the present case. Section 20(3) provides that:

> *"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

151. For completeness, I note that the second requirement is, in broad terms, to make reasonable adjustments where a *physical feature* puts a disabled person at a substantial disadvantage: section 20(4). The third is to take such steps as are reasonable to have to

take to provide an *auxiliary aid* where the disabled person would be put at a substantial disadvantage if it were not provided: section 20(5).

152. Sections 21(1) and (2) of the 2010 Act provide that failure to comply with any of the three requirements under section 20(3)-(5) is a failure to comply with the duty to make reasonable adjustments, and that such a failure amounts to discrimination against a disabled person.

153. Under section 20(3), a sequence of questions requires to be answered:

i) What is the provision, criterion or practice ("PCP") complained of?

ii) Does it put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and, if so, what is the nature and extent of that disadvantage?

iii) What are the steps which it is reasonable for A to have to take to avoid that disadvantage?

154. These questions are focussed on the adverse effect of the PCP on the individual as compared with others who are not disabled, and on the steps which ought reasonably to have been taken to address that effect. This involves consideration of the extent to which the steps would avoid the disadvantage, but it does not mean that a defendant need not take any steps if they would not avoid the disadvantage altogether: see *Noor v Foreign and Commonwealth Office* [2011] ICR 695 at [33]. In principle, it could be reasonable to take steps which would merely reduce the disadvantage, or where there was *"at least a real prospect"* that the adjustment will make a difference: *First Group plc v Paulley* [2017] UKSC 4, [2017] 1 WLR 423 at [60].

The duty to make reasonable adjustments: institutions of further or higher education

155. The *"applicable Schedule"* under section 20(1), for present purposes, is Schedule 13 to the 2010 Act, which deals with reasonable adjustments in education cases (see section 98 and [1] of Schedule 13). [3] and [4] of this Schedule apply to further or higher education institutions.

156. [3(2)] of Schedule 13 states that responsible bodies which are subject to section 91 (as the University is) must comply with all three requirements, under sections 20(3)-(5), to make reasonable adjustments. [3(4)] also identifies the *"relevant matters"* for the purposes of these requirements as follows:

> *"(4) In relation to each requirement, the relevant matters are—*
>
> *(a) deciding who is offered admission as a student;*
>
> *(b) provision of education;*
>
> *(c) access to a benefit, facility or service;*
>
> *(d) deciding on whom a qualification is conferred;*
>
> *(e) a qualification that A confers."*

The duty to make reasonable adjustments: the relevance, under Schedule 13, of what the defendant knew or ought to have known about the claimant

157. [3(3)(c)(i) and (ii)] of Schedule 13 provide that, for the purposes of the relevant matters at [(4)(a)-(c)], references to *"a disabled person"* who is placed at a substantial disadvantage in the formulation of the three requirements under sections 20(3)-(5) are to disabled persons or students *"generally"*. The effect of this is that the duty to make reasonable adjustments in relation to these matters – admissions decisions, provision of education, and access to benefits, facilities or services – may be owed to people who were not known to the educational institution before the issue arose in relation to them. In the case of decisions about the conferral of qualifications ([3(4)(d) and (e)])), the question is whether the PCP places *"an interested disabled person"* at a substantial disadvantage: see [3(3)(iii)].

158. For these reasons, in this context the duty to make reasonable adjustments has been described as an *"anticipatory"* duty, i.e. the expectation on the educational institution is that its responsible body will proactively consider what adjustments might be reasonable whether or not an issue has (yet) arisen in relation to a particular individual and a relevant matter or adjustments have been requested. In *Keith Roads v Central Trains Ltd* [2004] EWCA Civ 1541 at [11] Sedley LJ said this about the analogous position of service providers under what was then section 21 of the Disability Discrimination Act 1995:

> *"they cannot be expected to anticipate the needs of every individual who may use their service, but what they are required to think about and provide for are features which may impede persons with particular kinds of disability — impaired vision, impaired mobility and so on."*

159. Consistently with this, the Technical Guidance offers the following advice at [7.20]:

> *"Education providers should therefore not wait until a disabled person approaches them before they give consideration to their duty to make reasonable adjustments. They should anticipate the requirements of disabled students and the adjustments that may have to be made for them. Failure to anticipate the need for an adjustment may create additional expense, or may render it too late to comply with the duty to make the adjustment. Furthermore, it may not in itself provide a defence to a claim of a failure to make a reasonable adjustment."*

160. Whether failure to anticipate a particular disadvantage resulting from a PCP, physical feature or lack of an auxiliary aid, does or does not result in a breach of the duty will depend on the circumstances of the case which inform what I will call the reasonableness question: i.e. whether there were steps which it would have been reasonable for the responsible body to have taken to avoid the disadvantage. The more obvious and impactful the particular disadvantage, the stronger will be the case that it would be reasonable for an institution to anticipate it and take action. This point then feeds in to the reasonableness analysis in the event of a complaint of failure to make reasonable adjustments.

161. Reflecting this position, [7.23] of the Technical Guidance reiterates the point, made by Sedley LJ in *Roads*, that providers of education are not expected to anticipate the needs of every prospective student but are required to think about, and take, reasonable steps

to overcome barriers which may impede people with different kinds of disability. At [7.25], the Guidance makes the points (though, perhaps contrary to the EHRC's submissions, as an observation rather than an exhaustive statement of when the duty arises in law) that:

> *"Once an education provider has become aware of the requirements of a particular disabled student it might then be reasonable for the education provider to take a particular step to meet these requirements. This is especially so where a disabled student has pointed out the difficulty that they face or has suggested a reasonable solution to that difficulty."* (emphasis added)

162. Taking these two points from [7.25] in turn, there is no specific requirement, if the duty is to arise in the case of a further or higher education institution qua education provider, that the responsible body knew or ought to have known of the claimant's disability or its effects. This is apparent from the absence of any statutory provision which identifies such a pre-condition under Schedule 13. But the point is reinforced by the contrast with the position under the Disability Discrimination Act 1995 (see section 28S(2) and (3)) which did impose such a condition. The legislative silence under Schedule 13 is also in contrast to the duty under section 15 of the 2010 Act (discussed below) and indeed, for example, the duty on *an employer* to make reasonable adjustments (see [20] of Schedule 8 to the 2010 Act). However, again, in my view what the further or higher education institution knew or ought to have known about the student or prospective student will be relevant to the question whether it was reasonable to take a given step or steps.

163. Secondly, as the Judge understandably emphasised in the present case given the University's reliance on Ms Abrahart's non engagement with its procedures, neither is there any requirement, if a duty to make reasonable adjustments is to arise, for the claimant to have identified, at the relevant time, the adjustments which ought to have been made: *Cosgrove v Ceasar & Howie* (supra) at [7]. This is because the duty, if it arises, is on the defendant and it arises by operation of law provided the terms of the relevant subsection of section 20 are satisfied. As *Cosgrove*, which concerned an employee who was off work with depression, illustrates, there may be cases where the claimant, because of their disability or lack of information or otherwise, is not able to suggest adjustments whereas the defendant is in a position to consider and/or take steps. The Judge clearly considered that this was such a case. Again, however, in my view the fact that a claimant did not, or was unable to, suggest steps which are subsequently argued for at the hearing may be relevant to the question whether they were reasonable steps for the defendant to take.

164. Thirdly, by the time of the hearing of the claim the claimant must have set out their case as to the adjustments which they say ought to have made. There must also be at least some evidence of an apparently reasonable adjustment from which the court could conclude that the duty was breached. If there is, however, applying the burden of proof provisions under section 136 of the 2010 Act, the burden shifts to the defendant to prove that the duty was not breached i.e. that any reasonable steps were taken and/or that the steps proposed by the claimant were not reasonable ones for it to take: see, e.g. *Project Management Institute v Latif* [2007] IRLR 579 EAT at [52]-[54], approved in *Finnegan v Chief Constable of Northumbria Police* [2013] EWCA Civ 1191, [2014] 1 WLR 445 at [38].

165. These three points reflect the position that, in the provision of education, the duty to make reasonable adjustments arises from the facts of the PCP, feature or lack of an auxiliary aid, and its effect (in relation to a relevant matter) on a person who has a disability, in comparison to its effect on a person who does not. Contrary to the implication of some of the University's submissions and, it appears, [42] of the EHRC's submissions, the *existence* of the duty does not depend on the education institution's actual or constructive knowledge of the claimant's disability and its effects.

166. However, whether the duty, having arisen, has been complied with depends on the reasonableness question, as to which, in my view, the court is entitled to take into account all of the relevant circumstances of the case including what was known or anticipated, or ought to have been known or anticipated, by the defendant. Moreover, as will be seen, in contrast to the position under section 15(2), the knowledge question in this context is also a broad, factual question, rather than a technical one. The overall legislative approach therefore gives the court the flexibility to reach sensible conclusions about what steps ought reasonably to have been taken to address the disadvantage experienced by the disabled person, taking account of the interests and issues on both sides of the particular dispute.

167. I did not understand Mr Burton to dispute the proposition that what the University knew or ought to have known about Ms Abrahart was relevant to the reasonableness question. But I was not absolutely clear, from [58] of Ms Casserley's submissions, whether it was disputed by the EHRC. For the avoidance of doubt, it is well established that the test of reasonableness is an objective one for the court (*Allen v Royal Bank of Scotland* [2009] EWCA Civ 1213 at [40]). Possibly contrary to [58], the fact that the knowledge of the defendant is relevant does not mean that the test becomes a subjective one. The objective question for the court, where a point is taken on knowledge, would be: given what the defendant knew or ought to have known, was the proposed step one which it was reasonable for it to take? I agree, however, that the question whether the defendant *thought* that it was a reasonable step would not be a relevant consideration precisely because the question is an objective one for the court, and not the defendant, to determine: *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220, [2006] ICR 524 at [45].

168. I also add this in relation to Ms McColgan's reliance on Laws LJ in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734 at [14] where he said:

> *"In my judgment these three aspects of the case — nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments — necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage."* (emphasis added)

169. This statement was made in the context of section 4A of the Disability Discrimination Act 1995 which included, as a pre-condition for the duty to make reasonable adjustments arising, a requirement that the employer had actual or constructive knowledge of the facts constituting the employee's disability (see the discussion of *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211 below).

Even in that context it is clear that, whilst accepting that the employer's knowledge was relevant to the question of reasonableness, Laws LJ was not suggesting that the statutory test was whether an employer was in a position to make an objective assessment of the reasonableness of proposed adjustments. The statutory test, to which I accept this question may be relevant, is whether the step was a reasonable one for the employer to take to avoid the disadvantage. The decision of *Aecom Limited v Mallon* [2023] EAT 104, on which Ms McColgan also relied, also concerned the Schedule 8 to the 2010 Act (employment), where the actual or constructive knowledge of the disability is expressly required.

170. Finally, the Technical Guidance contains a non-exhaustive list of factors which may be relevant to the reasonableness question at [7.61] followed by a discussion of these factors and useful examples. Given the University's reliance on fairness to other students as a reason for not making the adjustments contended for by Dr Abrahart, it is relevant to note that one of these factors is *"the relevant interests of other people, including other students"*. The discussion of this factor at [7.80] says:

> *"Ordinarily the interests of other students regarding the reasonable adjustments required by a disabled student will be irrelevant. However, there are limited circumstances where the provision of a particular reasonable adjustment for a disabled student will disadvantage other students. This is only relevant where the adjustment results in significant disadvantage for other students. In such a case, it may not be reasonable to expect the education provider to make the adjustment."*

171. This reflects the point, made in *Archibald v Fife Council* (at [148] above) that the duty to make reasonable adjustments may well result in more favourable treatment for the disabled person in a particular respect, as compared with their peers, if it is reasonable to do so in order to mitigate the disadvantage experienced by the disabled person as a result of their disability.

No duty to make adjustments to competence standards

172. [4] of Schedule 13 provides that:

> *"(2) A provision, criterion or practice does not include the application of a competence standard.*
>
> *(3) A competence standard is an academic, medical or other standard applied for the purpose of determining whether or not a person has a particular level of competence or ability."* (emphasis added)

173. This is for the purposes of the duty to make reasonable adjustments only. There can be no requirement to make adjustments or exceptions to a competence standard based on the circumstances of a particular case, but this does not mean that the question whether such a standard should be applied by a given educational institution in assessing levels of competence or ability is beyond the reach of the law. If a competence standard operates in a way which is indirectly discriminatory, an education institution will be required to show that it is a proportionate means of achieving a legitimate aim: see section 19 of the 2010 Act. I deal with the concept of indirect discrimination below.

174. Subject to this, the principle which [4(3)] expresses is clear. A standard which is being applied to measure whether a person has a particular level of competence or ability cannot be required to be adjusted in an individual case, even if the disabled person cannot meet the standard because of their disability. On the other hand, methods of assessment of standards of competence are in principle subject to the duty to make reasonable adjustments which might facilitate the person's ability to demonstrate that they have met the standard: see *Hart v Chief Constable for Derbyshire* UKEAT/0403/07 at [20] and [7.38] of the Technical Guidance.

175. I also agree with Mr Burton that [4(2) and (3)] of Schedule 13 should be read on the basis that they enact an exception, and taking account of the point that the fact that a given PCP does not fall within this exception does not mean that a given adjustment will necessarily be required to be made. Whether it is will depend on whether the substantial disadvantage test is satisfied and, if so, whether it is reasonable for the adjustment to be made in all the circumstances. On this basis the legislation permits sensible conclusions on the facts of each case notwithstanding a narrow reading of the exception.

176. [7.34] of the Technical Guidance observes:

> *"7.34 Education providers are likely to impose various requirements and conditions in respect of courses. However, any such requirement or condition only amounts to a competence standard if its purpose is to demonstrate a particular level of a relevant competence or ability such as a requirement that a person has a particular level of relevant knowledge of a subject."*

177. The examples given in [7.34] illustrate that, in a given case, there may therefore be an issue about whether a requirement or condition of a course is being applied to measure a level of competence at all, e.g. an admissions requirement to demonstrate a high level of physical fitness would be unlikely to be being applied to measure levels of competence to undertake a course which did not involve strenuous physical activity. The question whether the requirement or condition is in fact being applied to measure whether a person has a particular level of competence is an evidential one for the court.

178. In the present case, the issue at the trial was whether the relevant requirements of Practical Physics 203 were competence standards or methods of assessing whether those standards have been met. A useful example is given at [7.35] of the Technical Guidance:

> *"A requirement that a person completes a test in a certain time period is not a competence standard unless the competence being tested is the ability to do something within a limited time period."*

179. This is consistent with *Burke v College of Law* UKEAT/0301/10/SM, referred to by the Judge, where the exam was held to be measuring levels of performance under time pressure (permission was granted to challenge this finding but ultimately the Court of Appeal did not need to determine this issue: [2012] EWCA Civ 37 at [39]). A requirement to complete an exam within a specified period of time would otherwise be likely to be a method of assessing the competence of the examinee in the subject (e.g. their knowledge of the subject) and would be subject to the duty to make reasonable adjustments. Again, the nature of the requirement in a given case is an evidential matter.

180. There was a dispute between Mr Burton, on the one hand, and Ms McColgan and the EHRC, on the other about the correctness of the following passage at [7.36] of the Technical Guidance and its application to the present case:

> *"7.36 Sometimes the process of assessing whether a competence standard has been achieved is inextricably linked to the standard itself. The passing of an assessment may be conditional upon having a practical skill or ability which must be demonstrated by completing a practical test. Therefore, in relatively rare circumstances, the ability to take the test may itself amount to a competence standard."*

181. The example given is:

> *"An assessment for a practical course in car maintenance cannot be done solely as a written test, because the purpose of the test is to ascertain whether someone can complete car repairs."*

182. Ms Casserley also made the following submission on behalf of the EHRC:

> *"…the use of the word "standard" does not envisage that the means of assessment of that standard are exempt from the duty to make adjustments save for those exceptional circumstances in which the means of assessment equate to (or is in effect inextricably linked) to the standard itself. For example, if the competence standard is the ability to communicate orally in French at a particular level as part of a language degree then, leaving aside that this would impact on those who use BSL, or who for some other reason are unable to speak, this would have to be tested by means of an oral examination. The means of assessment insofar as requiring the student to speak would be part of the competence standard."*

183. For reasons which will become apparent, I am not convinced that I need to resolve this dispute. But I was inclined to agree with Mr Burton at least to the extent that that these passages should be treated with caution. As a result of [4(3)] of Schedule 13, what may not be required to be adjusted is the *standard* by which the person's level of competence is measured. In the car maintenance example given in the Technical Guidance, if the evidence was that the competency being measured was simply whether a given task – changing a wheel, for example - could be performed at all by the examinee then I would agree that the method of assessment, the competence being measured and the competence standard would be one and the same thing. But this seems an unlikely example. Even in this type of case, typically the test will involve standards or criteria which measure whether the task is deemed to have been completed. These are the standards by which the particular level of competence - the ability to change a wheel in this example - are measured, and the practical test is the method of assessing whether the examinee has the required level of competence. The former may not be required to be adjusted, but the latter may be. Similarly, if the purpose of the practical test was also to assess whether the wheel could be changed at speed then the time allocated for the performance of this task would be an additional standard by which this competence was measured. The disabled person could not, for example, ask for more time to complete the task.

184. I appreciate that, in these examples, the relevant standards of competence could not be measured without the examinee actually changing the wheel. But it does seem to me to

be important to keep the limits of the [4(3)] exclusion zone in sharp focus so as to avoid results which are contrary to the inclusive purpose of the disability discrimination legislation. The legislation allows for a common sense solution in the examples which I have given thus far, namely that it would not be a reasonable step for the requirement for the practical test to be dispensed with altogether. But, depending on what is being measured, it may be reasonable for the format of the practical test to be adjusted.

185. Turning to Ms Casserley's example, essentially the same points apply. If what was being measured was simply the ability of the candidate physically to speak in French then the competency standard and the method of assessment would be one and the same. But if what was sought to be measured was a person's *fluency* in oral French, the oral exam would be a method of assessment and the competence standard would be the criteria for assessing levels of fluency. If the ability to communicate face to face in French was being tested, the oral exam would be the method of assessment and there might be a question as to whether it would be reasonable for a deaf student to be permitted, by way of an adjustment, to demonstrate the requisite level of competence using sign language, for example. The required levels of competence could not be required to be adjusted, however. In another case there might be a duty to make reasonable adjustments, for example by providing questions in advance of the oral exam, or to where it took place, to the number of people who are present, and so on. Whether there was would depend on the reasonableness question.

186. These points tend to illustrate the importance, where these types of issue arise in relation to a given assessment or examination, of identifying, on the evidence:

i) what competence or ability is being measured?

ii) what are the standards which are being applied to determine whether a person has met the relevant level of competence?

iii) what aspect of the process are methods of assessment of whether those standards have been met?

Discussion and conclusions on Ground 4: the competence standard point

The PCP

187. The important starting point is that the PCP which was said to put Ms Abrahart at a substantial disadvantage was the requirement to be assessed orally by way of the laboratory interviews and the laboratory conference presentation including the format, structure and venue for the assessments (see [70] of the Particulars of Claim). The question was whether these requirements, in whole or in part, amounted to the application of competence standards or were methods of assessment.

The arguments of the parties in the County Court

188. Secondly, it is relevant to note the competing arguments which were before the Court. The University's case was that *"the assessment of a student's ability to explain laboratory work orally, to defend it and to answer questions on it was a competence standard"* because this "*is a core competency of a professional scientist"* (see [11]-[13] and [64(1)] of the Amended Defence). Their pleaded case relied on passages from *"The*

physics degree: graduate skills base and the core of physics" (Institute of Physics 2014) and the *"Level 5 Handbook for the Practical Physics Laboratory for 2017-2018"* ("the Handbook"), referred to at [195] below, which identified the need to be able to explain and present work to others. The University also relied on the evidence of Drs Bell and Barnes who emphasised the importance, for a practising scientist, of being able to communicate one's results through written work and orally. They supported their evidence by reference to the documents relied on in the University's pleaded case, and a wider survey of the requirements of physics degrees at other universities and institutions, which showed that oral assessments were common in this context.

189. In his oral submissions, Mr Stagg relied on [7.36] of the Technical Guidance to argue that this was a case in which there was "*an inextricable link between the assessment of the standard and the standard itself….because a professional physicist must be able to explain ideas orally as a core skill, …the requirement to perform oral assessments does involve… the achievement of a competence standard"*. The competencies which were being taught and tested were the ability to present scientific ideas and results orally, to discuss one's work and to defend it. He submitted that Mr Burton's approach, which he characterised as involving *"a fairly minute analysis of the various skill matching documentation"*, was inappropriate. The matter should be looked at broadly and in a commonsense manner, asking *"why were those oral assessments part of this course?"*.

190. Dr Abrahart's case, on the other hand, was that the laboratory interviews and the conference were methods of assessment of the student's knowledge and comprehension, their laboratory practice and their ability to explain and defend their work and answer questions on it. They were not measuring oral communication skills as such and they were not, of themselves, competence standards. The University's pleaded case did not even identify a standard which was being applied and neither did the documents on which it relied. Nor did those documents state that the process of explaining, defending, presenting etc laboratory experiments could only be an oral one. Even if oral assessment was a competence standard, the format of the interviews and the conference presentation were, nevertheless, methods of assessment.

191. Mr Burton carried out a detailed analysis of the course documentation including the rubric for Practical Physics 203 with a view to identifying what, precisely, was being assessed in the laboratory interviews and the conference. This showed that there were 31 Intended Learning Outcomes ("ILOs") for the physics course as a whole, only one of which concerned oral (referred to as "verbal") communication/presentation skills. This was P25: "*Accurately and clearly present complex issues to others at an appropriate level in written and verbal presentations".* However, the documentation which set out the ILOs which were being taught and assessed on Practical Physics 203 itself, including the Unit specification, did not include P25. Mr Burton therefore submitted that the ILOs for the Module were not directed towards oral presentation skills *"in any way"*.

192. Mr Burton went on to analyse the marking criteria for the "Experiment" component of the Module which, he submitted, did not test for presentation skills at all, still less oral presentation skills. The marking scheme awarded marks for 13 criteria under the headings *"Understanding, Experimental results, Notebook and organisation, and critical sense and creativity"*. None of the 13 marks was awarded for the quality of the oral exposition per se i.e. there was no particular mark for the quality of the student's oral communication. It followed from this that the marking scheme was not measuring

standards of oral communication. Moreover, the University's own position was that it was not necessary for Ms Abrahart to speak at the conference provided she contributed to the presentation in other ways. This was fatal to the University's case on this point.

The decision of the County Court

193. Thirdly, seen against this background it is quite apparent that Ground 4 of the Appeal is no more than an attempt to reargue a factual issue - about what was and was not being measured by the relevant aspects of Practical Physics 203 – which the University lost on the evidence. As I have noted, the Judge made specific findings about Practical Physics 203 early in his Judgment. At [18], for example, he noted that the code for the module was PHYS29030 and that the description of the unit included the following:

> *"…This unit consists of laboratory work, computer workshop and laboratory conference presentation. It continues the development of key experimental skills, the use of various standard pieces of apparatus and analysis of data. The experiments allow for student input into design and measurement. Transferable skills are included by having formal write-up of experiments, an assessment viva for each experiment, a group presentation within a class conference structure …"*

194. He went on to note that the ILO was described as follows:

> *"Able to use apparatus appropriately in order to allow meaningful results to be obtained. Understand some of the principles underlying the design of experiments. Understand the significance of a laboratory notebook, and the measurement and interpretation of data. Able to present the results of an experiment in a manner appropriate to a professional physicist. Able to collaborate with others in the presentation of experimental results in a conference setting. Able to use computational methods appropriately."* (emphasis added)

195. One of the objectives of the course was *"explanation of your work to others"* and marking was explained in the Handbook as follows:

> *"In the fourth and last week of your experiment you will be assigned a time-slot for your marking in the following week. During the marking the demonstrators will usually quiz you rather deeply on many aspects of the experiment, and not only the technique: you will be expected to understand the physics you are supposed to have learned by carrying out the experiment. You should be prepared for such questioning, and be prepared to defend your ideas and your results. We want to know how well you have understood the experiment, how deeply you have thought about it, and how coherently you can talk about it. At the same time, if there are aspects of the experiment you do not understand this is a good opportunity to clear them up. This is especially important if you subsequently write up the experiment as a formal report."* (emphasis added)

196. Importantly in relation to the question what, precisely, was being assessed, at [24] and [25] the Judgment concluded this section with the following findings:

> *"24. The University's template for mapping programme learning outcomes to mandatory units for Msci Physics is within its Level 5 handbook at page G(i) 454 of the trial bundle and at page 456 we see that knowledge and understanding of*

> *"P25 Accurately and clearly present complex issues to others at an appropriate level in written and verbal presentations" is not mapped through to PHYS290304. Likewise the intended learning outcomes mapping does not link verbal presentation with PHYS29030.*
>
> *25. Clearly, post laboratory interviews and the conference form important parts of the course for the purpose of the student displaying or evidencing knowledge. However, I have not found anything within the course literature to say that the interviews and or the presentation can **only** be carried out orally. There is nothing to suggest, for example, that an interview cannot be conducted by text or a presentation conducted remotely."* (underlining added, bold in the original)

197. In addition to this, at [103], in his observations on the witnesses, the Judge recorded:

> *"On the different matter of the course itself and the competencies engaged, Dr Bell told me (and I accept) that it was a core competence for a Practical Physics 203 student to speak critically of their own work and this required communication but not necessarily in an oral way."* (emphasis added)

198. The finding at [24] accepted the submission made by Mr Burton that, in the University's documentation mapping course learning outcomes to mandatory units, there was no ILO in the case of Practical Physics 203 which referred to oral communication skills. On the contrary P25, which referred to oral proficiency, was left out of the ILOs for the module and the marking scheme did not award marks for this competency.

199. Perhaps appreciating the problem for this part of the Appeal which this finding presents, albeit somewhat late in the day, in her oral submissions Ms McColgan challenged [24] of the Judgment. She did not dispute that P25 was not mapped to Practical Physics 203 in the documentation but she said that this was not a reliable basis for the Judge's finding that P25 was not one of the ILOs which was taught and assessed through the Module. However, as Mr Burton pointed out, Mr Stagg did not dispute the contents or reliability of the University's documentation at the trial. His argument was that, rather than analyse the course documentation closely, a broad commonsense approach should be taken. Nor was the point raised in the Grounds of Appeal or Ms McColgan's skeleton argument. Moreover, even if this challenge was open to her at this late stage of the proceedings (see CPR rule 52.21(5)), the Judge's finding was clearly one which he was entitled to reach on the evidence including the University's own documents. So was his finding, at [25], that the purpose of the interviews was to elicit information from the student about the experiment which they had carried out and to test knowledge and understanding, rather than oral competency as such.

200. It was in this context that the Judge found, at [131], that the fundamental purpose of the oral assessments was to elicit answers to questions put to the student and that such a process does not automatically require face to face oral interaction: there were other ways of achieving this, as Dr Bell appeared to accept. I therefore do not accept that his conclusion was *"unreasoned*". It followed from the Judge's findings of fact that the laboratory interviews and the conference were not a method of testing proficiency in oral communication/presentation. Nor were they a competence standard for oral communication in themselves and nor, therefore, was this a case in which the competence standard and the method of assessment were inextricably linked. And nor

were the marks awarded – the standards which were being applied – measuring levels of proficiency in oral communication.

201. I agree that the passage from [129] of the Judgment, cited at [110] above, does not make a particularly compelling point. The fact that Ms Abrahart could have passed the Module without undertaking laboratory interviews at all did not, of itself, mean that the oral assessments were not the application of a competence standard. It is perfectly possible for a person to fail to meet a particular standard of competence in an aspect of a course but pass the course overall. But this fact did tend to undermine the University's argument that a core competency of a professional scientist is the ability to present results orally: if so, one might think, it ought to have been necessary to complete the oral assessments in order to pass Practical Physics 203.

202. In any event, on analysis the Judge's conclusion was clearly open to him on the evidence and right on his findings of fact. Ground 4 therefore fails.

Discussion and conclusions on Ground 5: whether the Court was wrong to find that there had been a breach of the duty to make reasonable adjustments

Initial observation

203. Of course, the Judge's findings as to what was being tested in the laboratory interviews and the conference – i.e. knowledge rather than oral communication – were an important part of the context in which the question whether, for example, it would be reasonable to remove the requirement for a face to face interview, fell to be analysed. If what was being tested was knowledge, the suggestion that it might be tested by other means than orally could not be regarded as extreme or surprising.

204. Moreover, when one looks at the arguments put forward by the University at the trial as to why Dr Abahart's proposed adjustments would not be reasonable steps for it to take, it becomes apparent that the issue for the Judge was a fairly narrow one. He addressed the key arguments of the parties, and Ms McColgan's complaint that the Judge did not go through all of the factors listed at [7.61] of the Technical Guidance is unconvincing because these factors were addressed in substance insofar as they were relevant.

Outline of the arguments before the County Court

205. Here, the starting point is that, subject to the competence standard point, it was ultimately common ground that there was the PCP alleged by Dr Abrahart and that it put Ms Abrahart at a substantial disadvantage in comparison with persons who are not disabled. The duty to make reasonable adjustments therefore arose.

206. Importantly, the University did not, and does not, submit that the adjustments proposed by Dr Abrahart, including dispensing with the interview and the presentation, were out of the question or inherently unreasonable. Indeed, part of its case was that a number of his proposed adjustments had been mooted between October 2017 and the end of April 2018. Its central argument was that, although the proposed adjustments could in principle have been made, due process required to be observed and there had to be sufficient evidence available to the University to justify making them.

207. The University argued, and argues, that it was therefore reasonable to require proper expert advice in the form of a DSS and/or medical evidence before taking steps that had the effect of reducing the rigour of the academic assessment. It was necessary to identify the source of Ms Abrahart's difficulties and to receive recommendations as to the changes which should be made. This was said to be a matter of fairness to other students and necessary in order to maintain the academic integrity of the course. This was not a case in which the needs of the student might be more obvious - e.g. because they were dyslexic or a wheel chair user – and the relevant staff did not have medical or psychiatric expertise. There was always the risk of doing the wrong thing and making matters worse. In circumstances where, despite being repeatedly encouraged to do so, Ms Abrahart was not engaging with the University's processes for obtaining such advice/evidence it was not reasonable for the University to do more than it had done.

208. In his closing submissions, Mr Stagg supported this argument by taking the Court through the University's Regulations and policy documentation in some detail (as Ms McColgan did at the appeal hearing) with a view to demonstrating the procedures which were required to be followed if adjustments were sought and/or a student wished their results to be modified on grounds of extenuating circumstances. These regulations and procedures, he submitted, reflected what was reasonable and were therefore in accordance with section 20 of the 2010 Act.

209. Ms Stagg submitted that the court was also required to consider the efficacy and feasibility of the suggested adjustments:

    i) He did not dispute that dispensing with the laboratory interviews would be efficacious, nor that this was a step which could in principle be reasonable. His submission was that, because it would involve the removal of a significant part of the assessment of laboratory work, such a step was required to be justified by medical or other expert evidence and was not a reasonable one to take absent such evidence. As far as the lesser adjustment of providing questions in advance was concerned, Mr Stagg relied on Dr Braithwaite's evidence that it would have helped but that attending the interview would still have been difficult for Ms Abrahart. Dr Braithwaite had said: *"It's not impossible….she could have done it but …I think it would be difficult"* and Mr Stagg submitted that it was unlikely that Ms Abrahart would have attended.

    ii) Mr Stagg said that informal adjustments had been made to the laboratory conference in that Ms Abrahart had been told that she did not have to speak as long as her contribution to the presentation was clear. The lesser measures of providing questions in advance and assessing her in the absence of her peers would fundamentally change the nature of the exercise and there was no evidence that a smaller venue would have made any difference.

    iii) It was also relevant to consider what Ms Abrahart's reaction might have been. When she had been told that she need not speak at the laboratory conference, she had not reacted well and had said that she was going to participate. She would probably have reacted equally reluctantly in response to other suggestions that she should be treated differently from other students.

Analysis of the Judgment

210. Ultimately Ms McColgan's principal complaint about the finding that the University had breached the duty to make reasonable adjustments, at least in terms of the pleaded Grounds, was that the Court had not adopted a reasoned approach (Ground 5.3). Even this argument was, to a considerable extent, an attempt to reargue the case which the Judge had rejected on the facts.

The need to look at the Judgment as a whole

211. The first, and obvious, point is that the Judgment should be read as a whole. The section on *"The Claims"* states the Court's conclusions based on its earlier findings. These findings, in turn, have certain key themes which address the arguments of the parties, and particularly the arguments of the University. Fatally to a number of the University's arguments in the Appeal, they are findings of fact and/or evaluative judgments which the Judge was entitled to make on the evidence before him.

212. As far as knowledge is concerned, it was implicit in the University's case that it did not have sufficient knowledge, in the sense of expertise or expert evidence, to be required to do more. It was therefore for the Judge to assess whether, taking into account the University's level of knowledge, and the lack of medical evidence, its failure to make the proposed adjustments was reasonable:

    i) In this connection the Judge's findings, including his chronological narrative of events, traced how the University's level of knowledge of Ms Abrahart's mental health and its effects developed over the five or more months from 24 October 2017. His finding was that the University knew that she was suffering from some injury to her mental health from about the end of October 2017 and that this was connected to the laboratory interviews [54]. By the end of November 2017 her behaviour was *"objectively bizarre"* and indicated that there was *"something seriously amiss with her"* [89]. On 5 December 2017, Dr Barnes was clearly under the impression that there was a mental health issue and thinking in terms of her potentially having a disability given his suggestion that a DSS may be needed. The Judge found as a fact that he knew that she was suffering some injury to her mental health connected to the interviews [56]. Thereafter, the University's knowledge of these matters only increased.

    ii) In making these findings, the Judge was obviously aware of the fact that the University did not have a definitive diagnosis and that the cause of the mental health issues was not fully known. He did not suggest otherwise, and he noted the issues in relation to Mr Wilkes. But there was never a suggestion by the University that Ms Abrahart did not genuinely have issues with her mental health or was anything other than genuinely unable to cope with the oral assessments. Moreover, the duty to make reasonable adjustments is concerned with the effect of the PCP on the disabled person of which, the Judge found, the University was aware. A precise diagnosis would no doubt have been of interest, as would an explanation of what had caused the mental health issues, but these considerations were not of decisive importance under section 20 of the 2010 Act once it was apparent that there was a genuine issue with Ms Abrahart's mental health which was affecting her ability to meet the requirements of the Module.

iii) A second matter, of which the Judge's findings and the evidence showed the University was aware, was that Ms Abrahart was unable, for reasons related to her mental health, to engage with the University's processes and/or with strangers. This became increasingly apparent as the University encouraged her to take steps to obtain a diagnosis and a DSS and/or to contact the Student Wellbeing Service and the Disability Service. In effect, she also told Drs Barnes and Bell this on 13 February 2018 and it was noted in various communications thereafter. Again, there was no suggestion that she was anything other than genuine. Moreover, the Judge was critical of *"the strategy of referring a student known to be unable to talk to strangers to strangers"* [91]. That was a view of the evidence which he was entitled to take.

213. A second theme in the Judge's findings is that the University took the view that although adjustments could have been made, it would not do so without due process and medical evidence. At [98] he said that it was clear to him that Dr Barnes *"was not prepared to take significant action until he received a Disability Support Summary from Disability Services"*. At [101] he found that:

> *"In similar vein to Dr Barnes it seems that Dr Bell decided to await a Disability Support Summary before taking effective action albeit he told me that he could have agreed some adjustments for Natasha with Dr Barnes"*

214. These findings were consistent with the University's own case at trial and on appeal. Contrary to Ms McColgan's argument, there was therefore nothing surprising in the Judge's finding, at [133] of the Judgment, that in the absence of a DSS the University seemed to stall in its consideration of reasonable adjustments. The University's own case was that it was not reasonable to make the adjustments proposed without due process, including a DSS and medical evidence.

215. A third theme in the Judgment is that the Judge found that the University's strategy was to continue to mark Ms Abrahart down and penalise her, and he was critical of this. At [98] he noted that Dr Barnes' suggestion that Ms Abrahart should do the laboratory work even if she did not attend the interviews did not amount to an adjustment because she was marked on the basis that the interviews were required. At [99] he noted that Dr Barnes accepted that Ms Abrahart would know of the adverse marks she received for not attending the interviews and that, albeit with the benefit of hindsight, this would have had an adverse impact on her. At [102] he noted that this strategy continued through to the April interview.

216. It was in this context that the Judge said, at [98] that he could not see how the extenuating circumstances process would have been appropriate for her. He appears to have taken the view that the University's approach meant that she would suffer the adverse marks and penalties on the basis that, provided she engaged with the University's procedures, and provided she could make the case that this should be done, in due course a decision might be made by the University to modify her results. Again contrary to Ms McColgan's argument, the Judge's view of the reasonableness of this aspect of the University's approach was clearly open to him. As Mr Burton emphasised, at the trial and in the Appeal, by the time of her death Ms Abrahart had a set of marks which meant that she was very much at risk of failing the Module. She was therefore very much under pressure to attend the interviews and the presentation. Particularly

given that her principal issue was anxiety, the possibility that her marks may be modified at some point in the future can have been of little real comfort to her.

217. A fourth theme in the Judgment is that the Judge noted that Dr Barnes accepted that *"there should have been a much earlier conversation with Natasha about reasonable adjustments i.e. before Ms Perks' conversation with"* her in March 2018. Overall, he clearly took the view that, bearing in mind that the duty to make reasonable adjustments is anticipatory, and having regard to what was known about Ms Abrahart, the University was not sufficiently proactive.

What the Judge saw as the central issue

218. The second main point in terms of how the Judgment should be read is that although the structure and/or the terminology used by the Judge were not strictly correct, it is clear that he saw the question whether adjustments ought to have been made as the key issue in relation to all three disability discrimination claims. This was how the case was presented by the parties and, as I discuss further below, it was also implicit in the way in which Mr Stagg argued the issue of justification on behalf of the University in relation to both sections 15 and 19 that this was the central issue.

219. At [121], in the context of the reasonable adjustments claim, the Judge said that he would consider justification later in the Judgment. Although justification, as such, is not part of the test under section 20(3) of the 2010 Act, and although he concluded, at [135], that the reasonable adjustments claim was made out before going on to consider justification, it is clear from [139]-[141] that he had the University's arguments about its Regulations, due process and fairness to other students well in mind in relation to the issue of adjustments. Having considered the University's due process arguments, his conclusion at [141] was that the University had *"not justified the lack of adjustments"*.

220. In any event, the University's due process arguments were not cogent reasons for its failure to make adjustments. The problem with the University's reliance on its own Regulations and policies, as I pointed out to Ms McColgan, was that they are not the law. They were subject to the law, including the requirements of the Equality Act 2010. It therefore did not follow that, for the purposes of section 20 of the 2010 Act, it would necessarily be reasonable for the University to insist that its processes were followed if any adjustments were to be made. As the Judge pointed out, with his reference in [139] and [140] to the University's rules and requirements becoming *"another PCP"*, an argument that the University followed its procedures begged the question whether those procedures ought reasonably to have been adjusted in the circumstances of this case.

221. Moreover, the Regulations and Code of Practice relied on by the University also recognised this point. As the Judge pointed out, at [10.7] of this document it was recognised that the student was not obliged to contact or use Disability Services and that Schools still had a responsibility to make anticipatory and reasonable adjustments. At [17.41], it was stated in terms that the duty to make reasonable adjustments may require relaxing or setting aside the provisions Regulations and Code of Practice.

Analysis of the Judge's conclusions

222. Turning to the Judge's conclusions:

i) As I read the Judgment, at [121] the Judge was accepting the submission of Mr Burton, relying on *Finnegan v Chief Constable of Northumbria Police* (supra) that the burden of proof had shifted to the University. The adjustments contended for by Dr Abrahart were not unreasonable on their face and the burden was therefore on the University to show that they were not reasonable ones for it to take. I therefore do not accept the suggestion in Ground 5.3 that [121] (wrongly referred to as [122]) is a statement of the Judge's final conclusion. Even if it was, it was open to the Judge to state his conclusion before explaining why it had been reached.

ii) At [122], the Judge accepted Mr Burton's submission, relying on *Cosgrove*, that there was no obligation on Ms Abrahart, at the time, to specify the adjustments which she required. This was a key point which addressed a central feature of the University's case i.e. the point that she had not engaged with its processes and there was therefore no DSS with recommendations etc.

iii) At [123] he addressed arguments between the parties about the effect of *Archibald v Fife Council* (supra) and said, albeit somewhat clumsily, that the duty to make reasonable adjustments continues for as long as the PCP continues to cause a substantial disadvantage to the disabled person. Contrary to pleaded Ground 5.1, which was ultimately not pursued, this paragraph therefore did not indicate any error of law. It is true that the Judge did not appear to consider that Ms Perks informing Ms Abrahart that she need not speak at the conference, nor the other suggestions which had been floated amounted to adjustments (Ground 5.4). But the form of the presentation had not been changed (as the Judge noted at [101]) and the approach to how Ms Abrahart would be assessed had not been formalised. In any event, the key point was the one which the Judge made, namely that whether or not what the University had done should be regarded as adjustments, Ms Abrahart remained at a substantial disadvantage and the University had not taken all of the steps which it was reasonable for it to take to avoid that disadvantage.

iv) The Judge then dealt with the question whether the PCP alleged was a competence standard and, if not, whether it put Ms Abrahart at a substantial disadvantage at all material times.

v) Having found that it did and that there was, therefore, a continuing duty to make reasonable adjustments, at [133], the Judge then turned to the University's arguments that it did not have sufficient knowledge/expertise to act, that Ms Abrahart did not engage and that she might not have been receptive to adjustments in any event. He made the point that the duty is anticipatory, that there was no evidence that she would have refused or resisted adjustments and that her non-engagement had resulted from her disability. He returned to his finding that the University was unwilling to take steps until a DSS had been completed and he found that *"in these circumstances"* the University could not rely on lack of knowledge on its part (hence, presumably, the University's decision not to pursue pleaded Ground 5.2).

vi) The Judge's reference to *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 EAT appears to be to passages at [69] and [72] of the judgment of the Employment Appeal Tribunal which were cited to him by Mr Burton. These

said that consultation itself is not an adjustment, but if an employer does not consult with an employee about adjustments it cannot then rely on a lack of knowledge which would have resulted from consultation as a shield to defend a complaint of failure to make reasonable adjustments. Again, this reflected the Judge's view that the University should have spoken to Ms Abrahart about reasonable adjustments earlier and been more proactive.

vii) At [134] the Judge then addressed the question whether the suggested adjustments would avoid the substantial disadvantage in question, finding that they were reasonable and, in effect, that there was a real prospect that they would have mitigated or avoided Ms Abrahart's difficulties. Again, these were findings of fact and/or evaluative judgments which were open to him on the evidence.

Conclusion on Ground 5

223. I agree that the Judge could, for example, have dealt with each of the proposed adjustments in turn and considered the likelihood that it would be effective. But the most extreme step advocated by Mr Burton was abandoning the requirement for oral assessments and assessing Ms Abrahart by written work (including by answers typed "live" but remotely which, the Judge noted, Ms Abrahart was using to interact with other students). There was no dispute that this would have avoided the disadvantage which Ms Abrahart was experiencing. The only question was whether the University had satisfied the County Court that, for the reasons which it had put forward, this was not a reasonable step to take. The judgment of the Court on the facts of this particular case was that the University had not done so. Whilst it would have been open to another court to take a different view, this conclusion was clearly open to the Judge and it is not one which I am persuaded was "wrong" in the relevant sense.

224. As to whether the County Court's conclusions were the result of a reasoned approach, I am satisfied that they were for the reasons which I have explained:

i) Insofar as this was a contention that the judgment was *"wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency or a failure to take into account some material factor"* (see *Prescott v Sprintroom Limited* (supra) at [76]), I do not agree.

ii) Insofar as this was a complaint about the adequacy of the Judge's reasons, I agree that the Judgment could have been more carefully expressed, and in a way which was more accessible to the first time reader. But I also agree with Mr Burton that a person, including the parties, with knowledge of the arguments and evidence in the case is able to understand why the University lost this claim. Applying *English v Emery Reinbold and Strick Ltd* (supra) and *Harris v CDMR Purfleet Ltd* (supra), the Judge's reasons for his decision that the University breached its duty to make reasonable adjustments were adequate.

225. I therefore reject Ground 5.

GROUNDS 1-3 - THE CHALLENGE TO THE COURT'S FINDING THAT THE UNIVERSITY BREACHED SECTION 15 OF THE EQUALITY ACT 2010: DISCRIMINATION ARISING FROM DISABILITY

Legal framework

The terms of the section

226. Section 15 of the 2010 Act provides:

> *"**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."*

Actual or constructive knowledge of the claimant's disability: section 15(2)

227. It is apparent from the terms of section 15(2) that the burden is on the alleged discriminator to prove lack of knowledge, such that section 15(1) is not engaged. In *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211 at [36] the Court of Appeal held that the knowledge referred to is actual or constructive knowledge that the employee had an impairment with the characteristics described in the statutory definition of disability. Rimer LJ said:

> *"(i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge…. is of the facts constituting the employee's disability as identified in [section 6 of the 2010] Act. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; ... provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a "disabled person" as defined…"*

228. Although this statement was made in an employment case and in the context of the duty to make reasonable adjustments, the formulation of the statutory test was materially the same as under section 15(2) of the 2010 Act. The *Gallop* interpretation has therefore been applied in the context of this section in, for example, *A Ltd v Z* [2020] ICR 199, on which Ms McColgan relied.

229. In contrast to the broad approach to knowledge for the purposes of the reasonableness question where adjustments under Schedule 13 are concerned (see [166] and [167]

above), the requirement under section 15(2) is focused on knowledge of the facts amounting to the disability. It also has a number of specific or technical requirements including actual or constructive knowledge that the effect on the claimant's ability to carry out normal day to day activities is *"long term"* i.e. *"could well"* (*Boyle v SCA Packaging* (supra)) last for more than 12 months.

230. Ms McColgan pointed out that in *A Ltd*, HHJ Eady QC (as she then was) included the following passages in her summary of the principles applicable to constructive knowledge under section 15(2) at [23]:

> *"(3) The question of reasonableness is one of fact and evaluation: see Donelien v Liberata UK Ltd [2018] IRLR 535, para 27; none the less, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*
>
> *(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability-related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes…, and (ii) because, without knowing the likely cause of a given impairment, 'it becomes much more difficult to know whether it may well last for more than 12 months, if it has not [already] done so….*
>
> *(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making inquiries, the likelihood of such inquiries yielding results and the dignity and privacy of the [disabled person]…."*

231. Singh LJ agreed with this summary in *Stephen Sullivan v Bury Street Capital Ltd* [2021] EWCA Civ 1694, [2022] IRLR 159 at [98], another case under section 15. Ms McColgan also pointed out that Singh LJ accepted that the employment tribunal in that case should have addressed questions which included:

> *"(5) Insofar as knowledge was relevant…..what did the employer actually know? What steps could they reasonably have taken to find out more? And what would they have reasonably concluded if they had taken those steps?"*

Section 15(1): relevant principles

232. As Simler J (as she then was) pointed out in *Pnaiser v NHS England* [2016] IRLR 170 EAT at [31], in summary, where section 15(1) applies it raises a series of questions:

i) What is the unfavourable treatment by A complained of?

ii) What was A's subjective reason for that treatment?

iii) Objectively, did that reason arise in consequence of B's disability?

iv) Was the treatment of B a proportionate means of achieving a legitimate aim?

233. In relation to the fourth of these questions, the shorthand "justified" is often used but the test is more specific than this. In *R (Elias) v Secretary of State for Defence* [2006]

EWCA Civ, [2006] 1 WLR 3213 at [165], in the context of the corresponding test in the context of indirect discrimination Mummery LJ said that there are three questions:

> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*

234. In *Aster-Livingstone v Aster Communities Limited* [2015] UKSC 15, [2015] AC 1399, a case under section 15 of the 2010 Act, at [28] this formulation was approved by the Supreme Court which added a fourth question, applying *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 at [74]), namely:

> *"(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."*

235. In the context of section 15 the detriment which requires to be weighed at this fourth stage is the detriment to the individual claimant by reason of the unfavourable treatment, rather than detriment to *"the disadvantaged group"* which is the subject of a complaint of indirect discrimination under section 19: see e.g. *Stott v Ralli Ltd* [2022] IRLR 148 at [81].

236. Consideration of whether a measure or treatment is proportionate will necessarily take into account whether less unfavourable or detrimental treatment might reasonably have achieved the defendant's aims: as Lord Reed put it in *Bank Mellat (No 2)* (supra) at [74], *"(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective*". In this connection, I note that section 28B(8) of the Disability Discrimination Act 1995 expressly provided, in the context of education, that disability related less favourable treatment could not be justified if there had been a breach of the duty to make reasonable adjustments, unless the treatment would have been justified even if the duty had been complied with. Although this provision is not replicated under section 15 of the 2010 Act, given *Bank Mellat* question (3), it will be a rare case in which unfavourable treatment of a claimant falling within section 15(1)(a) would be proportionate for the purposes of section 15(1)(b) in circumstances where the need for it would have been avoided had the duty to make reasonable adjustments been complied with: compare *City of York Council v Grosset* [2018] EWCA Civ 1105, [2018] ICR 1492 at [57] and see [6.19] and [6.20] of the Technical Guidance.

Discussion and conclusions on Grounds 1 and 2: actual or constructive knowledge

The arguments of the parties

237. Curiously, given the University's position in the Appeal as to the importance of knowledge, no point was taken by the University on section 15(2) in the pleadings for the trial despite the fact that it had the burden of proof on this point. Although [75] of the University's skeleton argument for the trial said that there was nothing to lead University staff to think that Ms Abrahart's difficulties with oral assessments were "long term" the section 15(2) question was not identified on an agreed list of 22 issues, plus additional sub issues, submitted after the evidence, which the Judge was asked to

determine. However, this question was addressed by both sides in closing submissions with Mr Stagg's principal argument being that the University did not have actual or constructive knowledge that Ms Abrahart's impairment was *"long term"* as defined, given that there had been no issues in the first year and given the lack of medical evidence of a diagnosis and the prognosis.

238. Mr Burton's answer to this argument was that there was actual or constructive knowledge of all of the elements of the definition of disability under the 2010 Act. The University knew that Ms Abrahart was very shy in the first year, and lacked confidence in the laboratory. By December 2017 Dr Barnes considered that she had an underlying mental health issue which was causing the difficulties with oral assessments and he was expressing concerns that she would not be able to complete the oral assessments over the course of the rest of the academic year. In any event, the University had a duty to do all that it reasonably could to find out the position. There was no evidence that if Ms Abrahart had been asked for her consent to a medical examination or the disclosure of medical information about her, she would have withheld it.

Analysis of the Judgment

239. I have difficulty with [116] of the Judgment (cited at [101] above), which states that the University had the requisite knowledge *"from October 2017"*.

i) I note, firstly, that the first sentence of the paragraph is incorrect, albeit in the University's favour. Dr Abrahart did not have to prove actual or constructive knowledge of his daughter's disability on the part of the University under any of the statutory provisions in issue. Moreover, section 15(2) expressly placed the burden of proof on the University.

ii) Secondly, there is also a lack of clarity as to whether the Judge was finding that there was actual or constructive knowledge. [138], which refers to what the *"University knew or should have known"* in the context of section 15, indicates that the Judge had constructive knowledge in mind. But the finding at [54] and the references in [116] to what University staff could *"see for themselves"* indicate actual knowledge.

iii) Thirdly, I do not accept that the finding of fact, at [54], that from about October 2017 Ms Perks knew that Ms Abrahart *"was suffering some injury to her mental health connected to the interviews"* is challengeable, so far as it goes. On the contrary, it was a perfectly permissible finding of fact on the evidence. But Ms McColgan is, in my view, entitled to complain that the Judge did not explain the basis on which he went on, at [116], to conclude that it was known or ought to have been known that the adverse effect on her ability to carry out normal day to day activities was likely to last for at least 12 months. Nor is the basis for this conclusion apparent from his Judgment as a whole or the evidence which I was shown.

240. I therefore agree with Ms McColgan's argument under Grounds 1 and 2, at least to the extent that the Judge's conclusion at [116] was not adequately reasoned.

Was section 15(2) satisfied at any point?

241. Anticipating that I might take this view, Mr Burton contended in the alternative that section 15(2) was satisfied as at 5 December 2017 or by 31 January 2018 at the very latest, and he invited me to take the unusual step of making such a finding. In effect, his position was that I should hold that the Judge was right that section 15 was engaged but wrong as to the point at which it was engaged, and that I should draw an inference of fact as to the correct date pursuant to CPR rule 52.21(4). Ms McColgan did not argue that I did not have a power to do so; her argument was that section 15 was never engaged and therefore the Judge was wrong to find that it had been breached.

242. It is not strictly necessary for me to make an alternative finding given my conclusion that the Judge was entitled to find that the duty to make reasonable adjustments was breached by the University. All of the damages awarded by the Court would flow from this breach. However, it may be helpful for me to indicate my view given the centrality of this issue, at least to the University's case. In doing so, I will err on the side of caution by giving the University the benefit of the doubt. I have not heard the evidence and there is clearly a risk of unfairness if I were to be overly robust.

243. I agree with Mr Burton that the Judge's finding of fact, at [56], that from 5 December 2017 Dr Barnes knew that Ms Abrahart was suffering some injury to her mental health connected to the interviews is not open to challenge. Again, however, this is not a finding that the effect would be *"long term"*. At this point Dr Barnes was clearly seeing this as at least potentially an issue of disability, albeit his and Dr Bell's evidence was that they did not know that this was the case. But I do not accept that it would be fair for me, without having heard the evidence, to find that at this point they knew or ought to have known the likely duration of the difficulties. They had asked Ms Abrahart to see a doctor or Student Counselling Services to find out the position and in my view they were entitled to wait to hear from her.

244. It is true that this was not followed up for some time but I am reluctant to criticise Drs Barnes and Bell for this without hearing their evidence. It appears that it was decided that they would revisit the matter once the beginning of term exams in January 2018 were out of the way and this may have been reasonable. By 1 February 2018, however, Drs Barnes and Bell were aware that the problems with attending laboratory interviews were persisting and had been for some time. They were now concerned about Ms Abrahart's ability to complete the interviews that (academic) year. There is therefore a powerful case that they knew or ought to have known that the impairment *"could well"* last 12 months, bearing in mind that it had now been evident for 3 months and they were concerned that it might last until at least the middle of 2018.

245. By 13 February 2018, it seems to me that on any view they knew or ought to have known that this was the case. It was at this point that, in effect, Dr Barnes appreciated that, in addition to the other effects which had become apparent over the preceding months, Ms Abrahart's condition was such that she felt unable to seek the help or support which he had advised her to seek. He considered that she genuinely had some form of social anxiety and he was looking at the issue as related to disability, hence his referring her case to Disability Services on Ms Abrahart's behalf.

246. I am therefore prepared to find that by 13 February 2018 the University was unable to satisfy section 15(2). Thereafter, the University's case under this section grew weaker

given the sad events from 16 February 2018 and particularly the events of 20 February 2018 of which Ms Perks was aware.

247. Moreover, I cannot see any basis on which it could be argued that, by this point at the latest, the University could not reasonably be expected to have asked Ms Abrahart if it could discuss the matter with Students' Health Service or for her to consent to a report from this Service. The evidence strongly suggests that if she had been asked she would have consented, and the likely duration of her condition would have been clear. On 13 February 2018 she had agreed to Dr Barnes contacting Disability Services on her behalf and disclosing information about her mental health in an attempt to access support. On 16 February 2018 she had consented to Mr Palan disclosing information about her self-harming and, on 20 February 2018, she had consented to Mr Palan disclosing her attempted suicide to Ms Perks and to him accompanying her to Students' Health Services.

248. I therefore reject Ms McColgan's argument, under Grounds 1 and 2, that no duty not to treat Ms Abrahart unfavourably for reasons arising out of her disability ever arose on the facts of this case. Of course, it would also follow from what I have said that the section 15 claim could only succeed on the basis of treatment on or after 13 February 2018, but whether the University would wish to argue that this affects the Order made by the County Court remains to be seen.

Discussion and conclusions on Ground 3

249. As far as Ground 3 is concerned, I do not accept Ms McColgan's submission that the Judge failed to consider the question of justification under section 15(1)(b) (Ground 3.1). He considered this question compendiously in relation to both section 15 and the issue of indirect discrimination under section 19. This is apparent from the fact that he did not reach a conclusion on indirect discrimination before moving on to the section 15 claim and, indeed, from the terms of the Order dated 8 June 2022.

250. I agree that the Judge did not refer to the terms of section 15(1)(b) or use the terminology of legitimate aims and proportionate means. However, the submissions made by Mr Stagg on this topic were brief. He said that the legitimate aims here were to carry out a rigorous assessment of the student's capabilities and to ensure that fairness to all students. It was proportionate to vary the method of assessment only with a proper evidential basis. And he relied on the submissions which he had made in relation to the duty to make reasonable adjustments.

251. The Judge appeared to accept that the aims of the University in adopting its approach were legitimate and so there is no materiality to the complaint that he did not put it in these terms. I accept that he did not use the language of proportionality or apply any test resembling the *Bank Mellat* test in finding against the University on this issue. But this was in large part a reflection of the way that the case was put on behalf of the University. Mr Stagg appeared to recognise that the marks and penalty points awarded to Ms Abrahart were a reflection of her performance and/or an expected consequence of her failures to attend. For as long as the laboratory interviews in their current format were a requirement the marks were likely to be proportionate. But if compliance with the duty to make reasonable adjustments would have meant that Ms Abrahart attended and/or performed better in the adjusted assessment then it was virtually inevitable that the marks and penalty points would not be proportionate because the unfavourable

treatment which was actually meted out would not have been necessary or appropriate. For all practical purposes, the issue under section 15(1)(b) therefore turned on the issue of reasonable adjustments.

252. Accordingly, the issues as to the terminology used by the Judge (Ground 3.2) and as to the relevance of knowledge and extenuating circumstances to the question of justification (Ground 3.3) are not material. On the basis that the Judge reached a permissible conclusion on the question of reasonable adjustments, Ground 3 fails. I am not willing to interfere with the Judge's finding that the University breached section 15 of the Equality Act 2010 save to substitute a finding that it did so in respect of any relevant unfavourable treatment on or after 13 February 2018.

GROUND 6: THE CHALLENGE TO THE COURT'S FINDING THAT THE UNIVERSITY INDIRECTLY DISCRIMINATED AGAINST MS ABRAHART: SECTION 19 OF THE 2010 ACT

The terms of section 19

253. Section 19, provides, so far as material, as follows:

> *"**19 Indirect discrimination***
>
> *(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."*

Relevant principles

254. Again, section 19 requires a sequence of questions to be answered about the PCP complained of. It is therefore important that the PCP is clearly identified or defined for the purposes of the analysis and that its effect is then identified before going on to decide whether "it" – i.e. the PCP - is a proportionate means of achieving a legitimate aim.

255. Although the formulation of the test under section 19(2)(d) is the same as under section 15(1(b), a section 19 claim typically raises questions of wider application than claims under sections 15 and 20. At issue is the generally applicable PCP itself - whether the

oral assessments in this case were a proportionate means of achieving a legitimate aim - rather than the question whether, in the circumstances of a particular case, adjustments to the PCP should be made, or it should be disapplied. The impact which is being considered is the impact of the PCP on a group of people including those who share a particular disability (see section 6(3) of the 2010 Act). The test for proportionality therefore requires that the disadvantage which is weighed in the balance under *Bank Mellat* question (4) is the group disadvantage which results from the PCP. The proportionality question is also likely to be answered by reference to wider, "macro", considerations than the effect of the unfavourable treatment (section 15) or the PCP (section 20) on the particular disabled person who brings the claim.

256. It follows from this that claims under section 19, on the one hand, and claims under sections 15 and 20, on the other, do not necessarily stand or fall together. If a claimant wins under section 19 it is likely that they would win under sections 15 and 20 as well assuming that all of these causes of action were based in the same facts. But the converse is not the case: a claimant might lose under section 19 but nevertheless win under section 20 and/or 15 for example if the PCP is justified having regard to wider considerations but reasonable adjustments ought to have been made in the individual case and/or the unfavourable treatment would not then have occurred.

Discussion and conclusions on Ground 6

257. It follows from what I have said that I agree with Ms McColgan that the Judge's approach was wrong in dealing with justification in relation to sections 15 and 19 compendiously. I agree that he does not appear to have appreciated the difference, in terms of what was being justified and the evidential perspective, between the two sections. As I have noted, although he did not find that the University's aims were illegitimate, nor did he use the language of proportionality in finding against the University. I accept that, overall, he did not carry out an adequate assessment of this issue in the context of section 19.

258. However, whilst agreeing that the finding of indirect discrimination was based on a wrong approach, I am not prepared to allow the appeal on Ground 6. Again, the Judge's approach reflects the way in which justification was argued by the University, which had the burden of proof on this issue. The substance of Mr Stagg's arguments did not differentiate between the sections 15 and 19. His submission in respect of both claims was that it was proportionate only to vary the method of assessment if there is a proper evidential basis to do so and due process was followed. He also relied on his submissions on the reasonableness of the adjustments proposed in Ms Abrahart's case but he did not advance arguments specifically under section 19 as to the merits and disadvantages of oral assessment as a way of teaching or testing students.

259. Ground 6 therefore fails.

GROUND 7

260. Cockerill J refused permission on the basis that Ground 7 did not identify any error of law and, in any event, the relevant finding did not appear to impact on the overall conclusion and Order. I agree.

261. The first point is that I do not read [95] and [96] as a specific criticism of Ms Perks. Rather, these paragraphs read as a reflection on what might have been had Disability Services known the full picture: hence the reference to *"suicides"* (plural) when Ms Perks only knew of one attempt.

262. Even if there was an implied criticism of Ms Perks in these paragraphs, the Judge was fully entitled to say what he said at [95] and [96] based on his evaluation of the evidence. As I have said, there was no reason why Ms Abrahart's consent to disclosure of her self-harm and attempted suicide could not have been sought and no evidence to suggest that she would have withheld it. The evidence is to contrary effect.

263. Ground 7 is all the more surprising when one considers that Ms Perks did feel that she was at liberty to disclose information about Ms Abrahart self-harming and other personal information about her to Ms Harvey-Lindon on 16 February 2018. Ms Perks also told the Inquest that she had spoken to Ms Harvey-Lindon on the phone before the "off my danger list" email of 21 February 2018. Although she did not recollect exactly what she said, it was "very likely" that she told Ms Harvey-Lindon about Ms Abrahart's suicidal ideation/suicide attempt and did not put anything in writing.

264. Moreover, the University has not challenged [66] and [90] of the Judgment in which, as I have noted, there is criticism of Ms Perks for failing to pass on the information about the suicide attempt – a *"worrying emergency situation"* - to others: notably Dr Barnes, Ms Harvey-Lyndon or Professor Phillipps. On the Judge's findings there clearly was a need for Ms Perks to draw the attention of key people to the seriousness of Ms Abrahart's situation, with or without her consent, and for immediate action to be taken to remove the pressure of the forthcoming laboratory interviews and conference from her shoulders.

265. I therefore refuse permission in relation to Ground 7.

OVERALL CONCLUSION ON THE APPEAL

266. The Appeal is therefore dismissed.

267. For the avoidance of doubt, the lesson of this part of the case is not that due process and evidence are unimportant where the question of reasonable adjustments arises in this context. They <u>are</u> important. There will no doubt be many cases where it is reasonable to verify what the disabled person says and/or to require expert evidence or recommendations so as to make well informed decisions. A degree of procedural formality will also generally be appropriate for the reasons which the University advanced. But what a disabled person says and/or does <u>is</u> evidence. There may be circumstances, such as urgency and/or the severity of their condition, in which a court will be prepared to conclude that it is <u>sufficient</u> evidence for an educational institution to be required to take action. That was the view of the County Court on the facts of this particular case.

THE CROSS APPEAL AND THE ISSUES IN RELATION TO NEGLIGENCE

268. As stated at [11] above, on 10 November 2023 I gave permission in respect of the Cross-Appeal. Dr Abrahart's case is that the Judge was wrong to treat the negligence claim as being based on *"pure omissions"*. He argues, in the alternative, that even if it was a

pure omissions case, the Judge was wrong not to find that the University had assumed responsibility for Ms Abrahart to the extent that she was affected by the forms of academic assessment used on the Module, and that he was also wrong in holding that a duty of care was precluded by the existence of causes of action under the Equality Act 2010. Mr Burton also submitted that the decision of the Judge in the present case was not compatible with the decision of Recorder Halford in *Feder & McCamish v Royal Welsh College of Music and Drama* (Central London County Court 5 October 2023 that a duty of care had arisen on the facts of the case before him. It seemed to me that these contentions had *"a real prospect of success"* (CPR rule 52.6(1)(a)).

269. Having come to the conclusion which I have reached on the disability discrimination claims, however, I do not propose to express a final view, one way or the other, in relation to the Judge's findings about the claim in negligence or the parties' arguments in relation to this claim. It is not necessary for me to do so given that the Order of the County Court stands as a result of my conclusions under the Equality Act 2010. Damages for discrimination are awarded on a tortious basis: section 119(2)(a).

270. In my view, nor would it be wise for me to express a final view for various reasons:

i) The issue is one of potentially wide application and significance. Determining it would increase the risk of prolonging this litigation, which I regard as undesirable.

ii) With due respect to Counsel, I was not confident that the issues in relation to the law of negligence were fully argued. Moreover, a good deal more of the hearing was spent on the issues under the Equality Act 2010.

iii) As noted above, the Judge adopted an economical approach in relation to fact finding. The University's case was that his conclusions on the disability discrimination claims were insufficiently reasoned, and both parties felt that it was necessary to refer to the evidence which was before him in order to understand his Reasons better. The Judgment does not contain the sort of comprehensive analysis of the evidence which is relevant to the issues in the negligence clam which would enable me to rely on the Judge's findings for the purpose of determining the common law issues.

iv) In the event that I agreed with Mr Burton that the Judge was wrong that this was a pure omissions case and/or wrong to hold that there was no duty of care, I would have been very reluctant to proceed to adopt the Judge's brief hypothetical finding that any such duty had been breached by the University for the same reasons as the duties under the 2010 Act were breached. Although I have found that his conclusions as to the reasonableness of the adjustments contended for by Dr Abrahart were open to him in the context of the particular statutory test which he had to apply, and that he was entitled to find that the University had not discharged its statutory burden of proof on this matter, the suggestion that conclusions reached under the Equality Act 2010 can simply be mapped across to the common law, and notwithstanding that the burden of proof in negligence is on the claimant, is highly doubtful. Moreover, there were various particulars of negligence which the Judge did not address. Any resolution of liability in negligence, had I found that there was a duty of care, would therefore have been likely to require a re-trial in any event.

v) The risk of a need for a retrial in the event that there was a duty of care is also increased by the fact that there is a dispute between Counsel as to what was and was not conceded by Mr Stagg at the trial in relation to causation.

vi) Finally, regardless of any view which I might express, in the event that there is an appeal, the Court of Appeal will be able to address the issues in relation to negligence and duty of care should it consider that it is appropriate to do so.