



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondents

Mr K Tudor-Rosa

London Borough of Islington

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 9 MAY 2017

Introduction

1. The Respondents are a local authority.
2. The Claimant, Mr Kafele Tudor-Rosa, who was born on 20 May 1985, was employed by the Respondents as an Environmental Support Officer from 20 July 2015 until 6 January 2016, when he was dismissed on the stated ground that he had failed his probation.
3. By a claim form presented on 11 April 2016 the Claimant brought complaints of unfair dismissal and disability discrimination.
4. All claims were resisted in the response form.
5. Pursuant to an order of Employment Judge Hodgson made at a case management hearing on 19 September 2016, the Claimant supplied further particulars of his case on disability and set out the acts or omissions intended to stand as complaints of disability discrimination. The latter were arranged under 12 numbered 'Allegations', many of which included several discrete elements.
6. A further case management hearing took place on 21 October 2016, before Employment Judge Auerbach. He placed on record the following matters.
 - (1) The complaint of unfair dismissal was withdrawn, the Claimant accepting that, by the date of termination, he had not accrued the right not to be unfairly dismissed.
 - (2) The Claimant relied upon two distinct disabilities: claustrophobia and depression. References in his further particulars to 'anxiety' were not intended to specify a third disability: that was, on his case, only a 'facet' of his claustrophobia.
 - (3) Disability was conceded in respect of claustrophobia but not depression.
 - (4) The claims under the Equality Act 2010 were put as allegations of direct discrimination and/or harassment and/or victimisation.

7. The issues were more fully defined by Employment Judge Goodman at a further case management hearing on 14 March this year.

8. The final hearing came before us on 4 April this year with eight days allowed. The Claimant appeared in person but was assisted by his mother, Ms Diane Carrington. The Respondents were represented by Ms Sinead King, counsel.

9. Having taken time to read into the case we heard evidence and argument over days two to five and then reserved judgment, devoting much of what remained of the allocation to our private deliberations.

The Rival Cases

10. In bare outline, the Claimant's case was that, once the Respondents (and in particular his line manager, Ms Abena Asante, and her line manager, Mr David Salenius) became aware, at a very early stage in his employment, that he was affected by claustrophobia, they subjected him to an intolerable campaign of bullying and harassment and grossly unfair treatment in various other forms (which became all the worse after he took a period of sick leave in August 2016 having been diagnosed with depression), culminating in the wholly unjustified dismissal which they sought to defend on the bogus ground that he had failed his probation. He characterised the matters complained of under Allegations 1 to 12 as instances of disability-related harassment, alternatively direct disability discrimination, alternatively, relying on a number of alleged 'protected acts', victimisation.

11. The Respondents strongly denied bullying or harassing the Claimant or treating him in any way which merited the fierce criticism directed against them. They readily accepted that some of his actions (or omissions) caused Ms Asante and Mr Salenius to harbour doubts about his suitability for the position to which he had been appointed and that as time went by their worries became ever more profound, particularly because of the growing number of troubling events and episodes, his unwillingness to acknowledge fault or error and his hostile reaction when concerns were raised with him. Following a public scene on 29 September 2016, when (on their case) his mother attended their offices to confront and harangue Ms Asante and he did nothing to prevent her from doing so, they decided to place him on special leave. He was subsequently dismissed in accordance (it was said) with the Respondents' probation policy. By then, they maintained that the working relationship between the Claimant and Ms Asante had completely broken down. They denied that their actions towards him were 'because of' or 'related to' either of the conditions relied on as disabilities or the fact that he had committed any protected act.

The Statutory Framework

Disability

12. The Equality Act 2010 ('the 2010 Act') protects employees and applicants for employment from discrimination based on a number of 'protected

characteristics'. These include disability.

13. By s6 it is provided (so far as material) as follows:

- (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 affect on P's ability to carry out normal day-to-day activities.

Paragraph 2 of Schedule 1 states:

- (1) The effect of an impairment is long-term if –
 - (a) it has lasted for at least 12 months,
 - (b) it is likely to last for at least 12 months, or
 - (c) it is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse affect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

By section 212(1), 'substantial' means more than minor or trivial.

14. We have reminded ourselves of the 'Guidance' as to the meaning of disability under the 2010 Act, s6(5) (the current version was issued in 2011), the relevant parts of the EHRC Code of Practice on Employment and the copious case-law on the subject.

Harassment

15. The 2010 Act defines harassment in s26, the material subsections being the following:

- (1) A person (A) harasses another (B) if –
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of –
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- ...
- (3) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (4) The relevant protected characteristics are –
 - ...
 - disability ...

16. Protection from harassment in the workplace is governed by the 2010 Act,

s40 which, so far as material, reads:

- (1) An employer (A) must not, in relation to employment by A, harass a person (B) –
 - (a) who is an employee of A's ...

17. We have borne in mind *Richmond Pharmacology-v-Dhaliwal* [2009] ICR 724, in which the EAT (Underhill P and members) considered the law of harassment under the Race Relations Act 1976, s3A. The wording of that section differs from the 2010 Act, s26 but the EAT's guidance remains extremely valuable.

18. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset ... but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' ... is a distortion of language which brings discrimination law into disrepute.

At para 51, the Lord Justice added this:

I do not think that a Tribunal is entitled to equate an uncomfortable reaction to humiliation.

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

Direct discrimination

19. Another form of 'prohibited conduct' is direct discrimination, which is defined by s13 in (so far as material) these terms:

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

20. In *Nagarajan-v-London Regional Transport* [1999] IRLR 572 Lord Nicholls

construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

If racial grounds ... had a significant influence on the outcome, discrimination is made out.

In line with the judgment of Underhill LJ in *Onu-v-Akwivu* [2014] EWCA Civ 279, we proceed on the footing that the introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

21. The essence of direct discrimination is less favourable treatment of X than Y on a proscribed ground. Unreasonable treatment of itself cannot establish discrimination: it cannot be inferred only from the fact that the employer treats X unreasonably that he would have treated Y more favourably (see *Zafar-v-Glasgow City Council* [1998] IRLR 36 HL).

22. Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

(2) An employer (A) must not discriminate against an employee of A's (B) –

...

- (c) by dismissing B;**
- (d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see eg *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

Victimisation

23. By the 2010 Act, s27, victimisation is defined thus:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

- (a) B does a protected act, or**
- (b) A believes that B has done, or may do, a protected act.**

(2) Each of the following is a protected act –

...

- (d) making an allegation (whether or not express) that A or another person has contravened this Act.**

24. Employees are protected against victimisation in the form of detrimental treatment by the 2010 Act, s39(4)(d).

Burden of proof

25. The 2010 Act, by s136, provides:

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

26. On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions. Giving the only substantial judgment in the Supreme Court, he said this¹:

[The burden of proof provisions] will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

In other words, our task in the ordinary case is simply to confront the ‘reason-why’ question² and decide it by reference to all the relevant evidence placed before us. But if and in so far as recourse must be had to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer’s explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King-v-Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl-v-Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

Time

27. By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. “Conduct extending over a period” is to be treated as done at the end of

¹ Para 32

² See eg *Nagarajan-v-London Regional Transport* [1999] IRLR 572 HL.

the period (s123(3)(a)). The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA).

Oral Evidence and Documents

28. We heard oral evidence from the Claimant and Ms Carrington (already mentioned), his mother, and, on behalf of the Respondents, Ms Asante and Mr Salenius (both already mentioned), Ms Kim Hambis, Human Resources Business Partner, Mr James Walker, Reception Centre Manager, and Mr Simon Kwong, Service Director. All gave evidence by means of witness statements.

29. In addition to witness evidence we read the documents to which we were referred in the single-volume agreed bundle.

30. Finally, we had the benefit of the written closing submissions on both sides.

The Facts

31. The evidence was wide-ranging. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

Disability

32. We have recorded that the Respondents conceded that the Claimant was disabled by claustrophobia. He told us that he has been affected by that condition for as long as he can remember and that the precautions which he takes to deal with it have become second nature. He is unable to travel by air or to use the Underground system. He rarely travels by train and will break any train journey to avoid a tunnel, switching to a bus if necessary. He is unable to use lifts and avoids underground car parks. He visits supermarkets and cinemas early or late, to avoid crowds. For the associated anxiety he carries medication with him at all times and has developed certain other coping mechanisms.

33. As for depression, a report of Dr Jane Cushion, Consultant Psychiatrist, dated 22 August 2016 provides a helpful overview of the Claimant's history and current condition. Mental health problems have affected him over most of his 31 (nearly 32) years. They originated in traumatic events during his childhood and are characterised by extreme difficulties with interpersonal relationships. He is affected by persistent features of post-traumatic stress (particularly avoidance, hypervigilance and trigger memories). His education and work life have been affected. He has taken anti-depressants for many years and has undergone other forms of treatment including counselling.

The Claimant's role

34. As we have mentioned, the Claimant commenced employment with the Respondents on 20 July 2015. As Environmental Support Officer, he reported to

the Environmental Coordinator, Ms Asante. They formed a team of two which sat within Housing Operations – Central Estate Services. Ms Asante was responsible for the decision to recruit him.

35. A job description summarised the Claimant's role in these terms:

- **To support Estate Services and Housing Operations in inspecting, assessing, progressing and realising various aspects of Estate Services' delivery, service improvements and indications of performance.**
- **To provide and or collate information for Housing Operations in the development and organisation of area-based Estate Service activities.**
- **To work with the Environmental Coordinator in establishing and implementing the training needs of Estates Services.**

36. Ms Asante told us without challenge that the Claimant's work divided approximately 70%/30% between general administrative functions and audit duties. The former were office-based; the latter involved travelling within the Borough, visiting estates and other sites and carrying out inspections, as well, no doubt, as ancillary office-based duties.

The slap

37. On his first day at work the Claimant was struck across the back of the head or neck (it is not necessary for us to decide which) by a colleague, Ms Patricia Fox. This bizarre event, which may have been some sort of childish initiation rite, came to the attention of Ms Asante. She spoke to Ms Fox and made her displeasure clear. She did not take any formal action. She told us that this was because, as the Claimant agreed in evidence, the episode was laid to rest on the basis of Ms Fox's apology, which he accepted.

The claustrophobia disclosure

38. On or about 23 July 2015 (day three of his employment) the Claimant accompanied Ms Asante on some local site inspections. In the course of the day he disclosed to her that he suffered from claustrophobia, which precluded him from using lifts, and from travelling on the Underground or by air. Ms Asante also witnessed that he was "cautious" when inspecting a bin chamber. On returning to the office, she read in an email from an Area Housing Manager that he had applied "on medical grounds" for a parking permit at the Respondents' offices. She told us in evidence that she was somewhat perturbed on learning of his condition. Our attention was drawn to the 'Functional Based Health Assessment Questionnaire' which he had signed on 6 June 2015. In answer to the question, "Do you have a health condition that you feel may impact on your ability to undertake the proposed role?", he ticked the "No" box. Asked, "Do you consider yourself to be disabled?", he again ticked the "No" box.

39. Ms Asante spoke to the Claimant about the parking application which, it transpired, had been made on or about 21 July 2015. He told her that he had been feeling increasingly anxious about commuting to and from work by public transport and hoped that his application would be accelerated if put on a medical ground.

40. In an exchange of emails on 28 July the Claimant reassured Ms Asante that

he was fit to perform all of his duties.

41. The Respondents' pleading that he was allocated a parking space on about 7 August 2015 (not, as we understand it, on a medical ground) was not challenged before us.

42. Ms Asante's disquiet about what she saw as a "failure" by the Claimant to make frank disclosure of a relevant medical condition is apparent from her contemporary emails seeking advice on the matter.

The complaint of unclear and unreasonable management

43. The Claimant complained (Allegation 1) that, on and after 24 July 2015, Ms Asante "continually" failed to provide him with clear instructions or training or to support him as a new employee, was rude to him and subjected him to unreasonable criticism including accusations of incompetence. She strongly denied so doing. She gave evidence of regular support and guidance, for which there was documentary evidence in the form of supervision notes. At the supervision of 27 July 2015 a range of topics relating to the Claimant's duties was explored. The notes also evidence a discussion about his claustrophobia in which he explained that it had made inspection of a particular location difficult, but that he had managed it. Asked the following day to confirm that he was able to perform all aspects of his role, he sent an email to Ms Asante to that effect. We find that his allegation that her behaviour towards him became "steadily erratic" is misplaced. Our attention was drawn to an email of 31 July 2015 in which she acknowledged that perhaps her instructions had been less than clear on two particular matters. It was no part of the Respondents' case to say that her guidance and instructions were always flawless. On the other hand, his allegation that when he raised a problem to do with his ID card she told him only to "call Sarah" we reject as improbable.³ He may have perceived that in an exchange about a key on or about 22 July 2015 she thought that he was not using the key correctly. More generally, he may have perceived that some answers from her were somewhat curt. Overall, we think it likely that in her manner towards him she did not disguise her disappointment concerning what she perceived as his culpable omission to make full disclosure of a relevant medical condition. That and certain other matters to which we will shortly turn combined to produce the beginnings of what became a fatal lack of trust between the two. Additional evidence of the deteriorating relationship is to be found in the Claimant's increasing tendency to communicate with others in circumstances where he ought to have been dealing with Ms Asante.

The jury summons

44. On or about 21 July 2015 the Claimant informed Ms Asante that he had received a summons for jury service commencing on 17 August. She asked him if this commitment had been mentioned to HR in pre-employment checks and he replied that it had not. She requested that he produce the summons so that consideration could be given to applying for deferral. The Claimant's evidence to us, as we understood it, was that he had already applied for deferral on the basis that the date given was very soon after the commencement of a new job. By an

³ Needless to say, many people with that first name work for the Respondents.

email of 29 July 2015 he advised her that he had received confirmation that his jury service would be deferred to a date later than September. Ms Asante replied on 31 July pointing out that deferral to the autumn or winter was less than ideal as that was the busiest time of year. She made the point that the request for deferral was something for discussion between him and his line manager. He did not supply the jury summons as requested. He told us that it had been mislaid in a house move.

45. On 3 August the Claimant notified Ms Asante that he had sought a further deferral until March 2016. She replied on 27 August (he had been away on sick leave in the interim) pointing out that (again) he had not discussed the deferral with her and requiring him to provide her with a copy of the original summons (this repeated a request made at a meeting the previous day). He promised to produce it the following day. The next day he produced a copy of an email which he had sent on 22 July to the jury summons authority within HMCTS which read: "I have just started a new job and my manager has asked if I can defer as my attendance will conflict with training." The Claimant told us that this was not an initial application for deferral of the first summons but a "follow-up" communication seeking to expedite an application already made. We reject that evidence as untrue, mainly on the ground that it makes no mention of any prior application and there is no explanation as to why, had a prior application been made, the Claimant saw any purpose in simply repeating it. This was the first and only application. Ms Asante did not respond, perhaps because she was about to go on leave.

46. The subject of the jury summons was next raised very soon after Ms Asante's return, on 14 September. At this point the Claimant produced a part of the summons document. It bore the date of 22 June. Ms Asante put to him the proposition (probably mistaken in fact) that that was the date on which he had received it. He did not give a direct answer that question but challenged her, accusing her of calling him a liar. She denied making that accusation but reminded him (as was the fact) that he had earlier claimed to have received the summons in July and that she was getting an inconsistent account from him. The exchange became bad-tempered. At one stage he called her a "dangerous liar". In an email from HMCTS dated 16 March 2017 attached to the Claimant's witness statement, a Jury Summoning Officer advised that summonses are delivered in 7 to 10 days from the date of issue, namely, in this case, 18 June 2015, so that it would have been delivered to the Claimant by 28 June. Thus far, the email is clear. It ends, however, with this puzzling final sentence: "We processed your form on 3 July." In addition, the Claimant pointed out that postal deliveries may have been delayed because of his change of address and the associated redirection of mail. In the circumstances, we feel unable to reach any confident view as to the date on which the summons was delivered.

Unauthorised use of the Respondents' Oyster card

47. On 7 August 2015 the Claimant made personal use of an Oyster card provided to him for work purposes only (hereafter 'the business Oyster card'). On 27 August Ms Asante wrote to him, pointing out that in doing so he had breached the Respondents' Oyster Card Code of Conduct. He promptly responded to acknowledge the error and the fact that he had very recently repeated it.

Other events up to 10 August 2015

48. On 29 July 2015 the Claimant conducted a site inspection at Hargrave Park Estate which, in the usual way, was followed by a report in which he scored the condition of the site against certain criteria. One aspect of his scoring was disputed by the Estate Manager. It appears that the Claimant immediately saw, correctly, that the scoring was wrong but did not respond. The defective scoring was not put right until 27 August or thereabouts, following an intervention by the Estate Manager's line manager. In a probation report on the Claimant of 26 August Ms Asante stated that he had "ignored" the challenge of the Estate Manager. In a written commentary on the report he rejected that finding as "incendiary", stating that he had merely been awaiting the Ms Asante's observations. We were not shown any evidence of her having failed to deal with any relevant query or otherwise contributed to the delay in resolving the small matter at hand.

49. Another point raised in the August probation report was the Claimant's failure to attend an induction course on housing matters which was fixed for 5 August 2015. This, as he accepted, was the result of his failure to diarise the appointment appropriately and appears to have resulted in some form of monetary penalty for the Environmental Department.

50. We heard about events following an inspection conducted by the Claimant and Ms Asante at Holland Park. Issues had arisen between a Quality Assurance Officer and the Environmental Department concerning the scores which the Claimant and Ms Asante had awarded. The Claimant arranged a meeting at short notice with the Quality Assurance Officer, for 10 August 2015, but Ms Asante was not able to attend and would not authorise him to proceed on his own. He felt that her decision had unfairly denied him an opportunity of progressing in his employment. He sent an email to the Quality Assurance Officer stating that he would have been happy to go ahead with the meeting but had been prevented from doing so by his line manager owing to his (perceived) "lack of experience" (he put those words in inverted commas). His message, which clearly undermined Ms Asante, eventually found its way back to her and on 24 August she sent him an email referring critically to its content and tone.

51. There was also evidence about a small purchase by the Claimant of some postage stamps. That errand was run on behalf of Ms Asante on 10 August. Unfortunately, he mislaid the receipt and accordingly it was not possible for her to recover the cost as a business expense. The oversight was referred to in the August probation report.

Sick leave and return to work

52. On 10 August 2015 the Claimant was seen outside the Respondents' offices in obvious distress. Ms Asante spoke with him and asked what was troubling him but he was reticent and referred to it as something personal. She sent him home and he subsequently attended his GP, who diagnosed 'anxiety' ('fit notes' covering the period from 2 to 20 September also refer to 'depression').

53. The Claimant was away on sick leave for two weeks, returning on 25 August on a 'phased' basis at 50% of his contracted hours. On that day a return to work meeting was held, conducted by Ms Asante. At this point the Claimant stated that he was on medication for the depression, was on a waiting list for counselling and had had Cognitive Behavioural Therapy for anxiety in the past but felt that it did not work. He was, he reported, seeing his GP every other day. He stated that his concentration was "sporadic" but he felt that he could maintain his composure in the workplace and was not at risk of breaking down in front of colleagues. There was some discussion of his claustrophobia and he explained that his symptoms and experiences were as before. In particular, he was unable to travel by Underground. On the other hand, he insisted that there was no problem with bus travel at any time of the working day. Ms Asante reminded him that he was being managed in accordance with the Respondents' attendance at work procedure. She also advised him that inability to complete his duties might have a serious impact on the outcome of his probation. But it is not true that (on this or any other occasion) she told him (see Allegation 4) that he had failed his probation.

54. Allegation 3 complained that Ms Asante had falsely accused the Claimant of failing to attend an HR meeting during his sick leave. In his evidence, he explained that the allegation was "misworded" and that the real complaint was that he was falsely told by Ms Asante that the meeting would not be taking place. In fact what happened was that, in a telephone conversation on 13 August 2015, she explained to him that his attendance at the meeting would not be required since he was on sick leave.

Events after 25 August

55. The Claimant complained (Allegation 2) that on his first day back Ms Asante humiliated him by ordering him to make the tea and by telling him, in a laboured and grossly sarcastic fashion, "This is the tea, this is the sugar" etc as she removed those items from a bag. We do not accept that account. We find that his version is exaggerated. Ms Asante did ask him to make two teas. There was nothing unusual or remarkable about that. She did refer to supplies of tea, coffee and associated items which were in a bag she was holding. She did not do so in a mocking or humiliating way. But we accept that there *may* have been something in her voice which he genuinely, albeit mistakenly, interpreted as sarcastic or some form of put-down. If that was his interpretation it is explained by what had become, by 25 August, his profound mistrust of, and antipathy towards, Ms Asante.

56. In Allegation 4 and elsewhere in his pleaded case and in his evidence the Claimant complained that Ms Asante repeatedly accused him of lying. Eventually, in his evidence before us, he appeared to accept, and we find, that she did not at any point level that charge at him. His adjusted position was to say that by constantly pressing him for information in relation to various matters (such as the jury summons and the Oyster card) she was *by implication* calling him a liar.

57. It is not true that the Claimant was "stripped" of his duties (as asserted in Allegations 4 and 6). Some of his duties were restricted on his return from sick leave, pending an OH assessment. He told us that one task relating to a vacuum cleaner and another to the procurement of some diaries were taken from him. In

so far as Ms Asante told him (in September 2015) that those matters did not require further attention from him, that was not indicative of any material adjustment of the scope of his responsibilities.

58. A further complaint under Allegation 4 is that Ms Asante said to the Claimant (apparently on 27 August 2015) that he did not suffer from claustrophobia and that he was manufacturing a medical case in order to avoid having to perform duties and in order to obtain the use of a Council van. We do not accept this part of his case. Ms Asante did not doubt that he suffered from claustrophobia and she did not suggest to him that he was making up the condition or exaggerating it, or that by drawing attention to it he was seeking to secure any particular advantage for himself. What did trouble her, and she may well have alluded to on 27 August, was that he had not disclosed the condition in the pre-employment questionnaire. She also had an abiding concern about the safety implications of his undertaking certain duties given the effect on him of his claustrophobia.

59. The final complaint under Allegation 4 was that, on an unspecified date, the Claimant was subjected to repeated questioning which included being asked whether he had "any further impairment" which was stopping him from replying at once. That charge was not put to Ms Asante (or to any other witness for the Respondents) and we reject it.

60. We treat Allegation 5 compendiously as a complaint about aggressive, repeated questioning and false accusations. This has much in common with the part of Allegation 4 on which we have made findings at para 56 above. We find that Ms Asante was determined and persistent in pressing the Claimant for information on certain matters, such as the jury summons and the Oyster card affair. We accept that he may well have found the questioning uncomfortable and, to a degree, stressful. Her manner on occasions (particularly when met with an unclear or unsatisfactory answer) betrayed, we suspect, her irritation. One instance was on the visit to Highbury and Islington Underground station (see below). On the other hand, we do not accept that she made false accusations or subjected him to behaviour which could be regarded as unfair or oppressive.

61. We have already mentioned the probation review meeting of 26 August. A wide range of matters was discussed. Many were concerns raised by Ms Asante. We have already referred to some. She also made positive comments. The Claimant produced a document after the meeting in which he challenged a number of her criticisms.

62. The Claimant was absent from work on 2 September 2015. He had made Ms Asante aware that he had a medical appointment that morning but did not request permission to take the entire day off. On 18 September she sent a stern email to him stressing that in future he must not make assumptions about what she could be taken to know or assume.

63. On 7 September the Claimant and his mother had a brief meeting by appointment with Ms Natalie Layne, HR Officer. Their purpose was to raise a number of concerns, all or mostly to do with the Claimant's relationship with Ms Asante. Ms Layne told them that they should approach Mr Salenius and that other HR officers were responsible for providing support in the Claimant's work area.

64. On 14 September 2015 Ms Asante held a second probation review meeting with the Claimant. Many of the matters debated on 26 August were revisited. She referred to his written response to the probation report of 26 August, criticising its tone and content. She also noted his request for future supervision meetings to be attended by a third party and stated that she was not prepared to make that change. Further, she alluded to the fact that he had involved his mother in his workplace concerns, and that she had telephoned Ms Asante's 'manager' (presumably Mr Salenius) to complain about how he was being treated at work. The meeting was strained and uncomfortable.

65. On 18 September Ms Asante delivered her second probation report to the Claimant. It included some uninhibited language. She remarked that the written response to the first probation report "lacked a component of self-responsibility" and that his challenges often included assumptions about her own thoughts, such as that he was being untruthful. She also commented: "His behaviour appears to have declined into an accusatory and aggressive stance." He signed to acknowledge receipt, adding that he would furnish a "rebuttal" in due course.

66. On 17 September 2015 a meeting took place between the Claimant, Mr Salenius and Ms Shashi Bearne, Human Resources Business Partner. It was arranged at the Claimant's request. Prior to the meeting Mr Salenius had learned from Ms Asante that she was finding it difficult to manage the Claimant and that the relationship between the two was poor. In the meeting the Claimant spoke about the difficulty of working with Ms Asante and of her (perceived) mistrust of him. As to his own health and fitness, he assured Mr Salenius that he was able to undertake the duties required of him. It was noted that an OH report was awaited. Mr Salenius passed comments on the importance of healing the relationship between the Claimant and Ms Asante. The encounter ended with agreement that a further meeting (which Mr Salenius called a "reconciliation meeting") would be arranged at which Ms Asante would be present.

67. The Claimant told us that, on 23 September 2015, he lost the business Oyster card when on a site inspection. On his account, he telephoned Transport for London ('TfL') immediately to cancel the card and transferred the balance (over £30) to a personal Oyster card of his own. He provided TfL with Ms Asante's email address (apparently a necessary step in transferring the balance to the new card) and accordingly she received email confirmation from TfL the same day or perhaps early the following morning. Until that point she was entirely unaware of any unusual dealings involving the card. On 24 September she confronted the Claimant on the subject, having ensured in advance that Mr Salenius was also present. She challenged him to explain what he had done in relation to card. He said that he had arranged to "collect" the replacement card, apparently from the local Underground station. Ms Asante said that she would accompany him and they went together to Highbury & Islington station. There was, of course, no functioning ticket office from which anything could be collected but it then emerged that "collection" consisted of tapping the card on to a reader, thereby completing the process of transferring the balance to the replacement card. The transfer appears to have been in conformity with the email of 23 September 2015 appended to the Claimant's witness statement, which may well be the same

message which alerted Ms Asante to the news that something unusual had happened relating to the card. What the documents do not reveal is how the Claimant was able to achieve the transfer in circumstances where the right to do any such thing was (apparently) restricted to Ms Asante and subject to customary safeguards including a password. TfL subsequently acknowledged that their security procedures had not been properly operated.

68. One effect of the transfer was that the travel history under the original card was irrevocably lost.

69. The Claimant complained of bullying and oppressive behaviour towards him by Ms Asante in relation to the Oyster card. We are in no doubt that she was exceedingly concerned by what had happened. As she saw the matter, the Claimant had acted entirely without authority in relation to property which was not his and for which he was not responsible, had done so without reference to anyone within the Respondents, and, it appeared, had breached the security processes designed to protect the Council's assets and her as the custodian of those assets. We think it very likely that her manner towards him in the initial confrontation and on the visit to the Underground station was, to put it at its lowest, animated.

70. On 25 September 2015 the Respondents' OH providers produced a consultation report based on a face-to-face assessment carried out on 15 September. The author was a Registered General Nurse. The document addressed first the subject of anxiety/depression. That section reads as follows:

Mr Tudor-Rosa has an underlying medical condition of anxiety and depression. He is on medication to manage his symptoms and reports compliance. Mr Tudor-Rosa confirms a recent acute anxiety episode being related to anxiety associated with starting his new job, he felt emotionally overwhelmed at work and had a panic attack at work. The trigger to this event was precipitated by some negative feelings and emotions he was experiencing. Mr Tudor-Rosa was seen by his GP following this episode and he has been referred ... for talking therapy.

The report went on to deal with claustrophobia. Turning to management advice it included this:

Mr Tudor-Rosa is fit to continue in his current post with restrictions.

In my opinion Mr Tudor-Rosa is likely to be considered under the disability provisions of the Equality Act 2010 for his psychological condition due to the long-term and substantial effect and the requirement for medication.

Future attendance cannot be predicted at this point. It is of course possible Mr Tudor-Rosa may incur further sickness absence if his symptoms of claustrophobia persist. ... It is anticipated once a treatment plan is implemented and his symptoms improve, that Mr Tudor-Rosa will be able to render a reliable service and attendance in the future.

While Mr Tudor-Rosa is fit to continue at work, I recommend a risk assessment is carried out to identify measures that can be put in place to facilitate the aspect of his job that requires an Environmental Officer to inspect building spaces which he perceives as a confined space and triggers his claustrophobic symptoms.

I suggest management re-refer Mr Tudor-Rosa to [OH] for a review appointment to assess his progress with medical intervention from his GP to address

claustrophobia symptoms in 6-8 weeks. Mr Tudor-Rosa has been referred for counselling ... I recommend management allow some flexibility in Mr Tudor-Rosa attending therapy appointments which are usually booked in advance and on the same day.

71. On 28 September 2015, the Claimant wrote an email to Ms Debra Norman, Assistant Chief Executive – Governance & HR, raising complaints about Ms Asante treating him in a “completely unprofessional manner” and subjecting him to behaviour which was “aggressive, confrontational, unprofessional and beyond all reasonable proportion.” He also complained of a failure by Mr Salenius or anyone else to support him and protect him from “bullying and harassment”.

The 29 September incident and ‘special leave’

72. On 29 September 2015 at around lunchtime the Claimant’s mother went to the Respondents’ offices. The Claimant met her outside. Not long afterwards Ms Asante left the building to take her lunch break. The Claimant identified her to his mother who then approached her and began to complain about the way in which he was being treated at work. She did so in a loud and hostile way. Eventually Ms Asante decided to return to the offices. The Claimant’s mother followed her back, continuing to attempt to engage her on the subject of her son’s treatment at work. When they had reached the offices there was an exchange with the Assistant Facilities Manager, who threatened to call the police. It seems that matters then quietened down. Mr Salenius was made aware of the incident and had a brief conversation with the Claimant’s mother. He also spoke separately to Ms Asante whom he described in his witness statement as being “in a very distressed state”.

73. Ms Asante sent a lengthy email to Mr Salenius the same day setting out her account of the incident. She described the Claimant’s mother shouting at her and blocking her path and the Claimant “calmly either standing to my side or following and smirking”.

74. The Claimant told us that he believed that he had made some effort to dissuade his mother from confronting Ms Asante but his recollection appeared to be somewhat clouded and he described a general sense of having felt “detached” during the entire episode. We find that if he intervened at all it was once only and in a manner not calculated or likely to deter his mother from the course which she had embarked upon.

75. Prior to 29 September the Respondents had scheduled a meeting with the Claimant for 30 September to address the subject of his relationship with Ms Asante and the appropriate response to the OH report. In light of the events of 29 September it was decided that that meeting would not take place. Instead, the Claimant was informed by Mr Salenius in a brief meeting that he was to be placed on “Special Leave” pending an investigation into his actions during “an alleged verbal assault” on Ms Asante by his mother.

76. 30 September 2015 was the Claimant’s last working day with the Respondents.

Investigation

77. The investigation was entrusted to Mr Walker (a witness before us). He studied the CCTV footage and produced a log summarising what he had seen. He also interviewed the Claimant and five other witnesses. They did not include the Claimant's mother. Eventually, on 13 November 2015, he produced an eight-page report. Under "Conclusions", he said this:

My conclusion is that:

- **This incident happened and was of a serious nature**
- **It was captured on CCTV**
- **It caused considerable distress and apprehension to Abena Asante**
- **There was no noticeable effort on Kafele Tudor-Rosa's part to defuse the situation at any time during the altercation ...**
- **There was no apology, remorse or even an explanation offered by Kafele**
- **Witnesses felt that there was a genuine threat of violence towards Abena Asante from ... Kafele's mother**
- **The event was witnessed by passers-by in Upper Street**

Kafele says that he played very little part in what transpired out on the public pavement and then inside... Instead he will say that the incident has been blown out of proportion and that he was not aware of what was happening and that he had little control over the situation and the behaviour of his mother. He will also claim that he was on medication at the time (Valium and other anti-depressants) which had "sedated" him to the extent that he was unaware of what was going on around him.

...

In summary there is little to suggest that Kafele made any attempt whatsoever to intervene to restrain his mother or more important still to defend his manager and colleague or calm the situation. Kafele had many opportunities to intervene but didn't. He could not explain his non-intervention other than to say that he was on medication and that he didn't feel that he was part of the incident at all.

Neither in fact has he offered any kind of remorse or offered any apology for what happened ... Kafele felt that there was no need for an apology to be given as he felt that he was due an apology and one had not been furnished ...

Under "Recommendation", Mr Walker said this:

This incident should be viewed as a very serious incident that compromised the Health and Safety of Abena Asante and if usual procedures were followed I would recommend that the matter should be dealt with as a disciplinary one. However as Kafele is still in his probation period then his actions, behaviour and his involvement in the incident on 29 September should be taken into account and considered as an appendix to his probation report.

78. A noteworthy feature of the interviews conducted by Mr Walker was his marked tendency to ask closed, leading questions which appeared invariably or almost invariably to suggest an answer adverse to the Claimant.

Grievance and other (alleged) protected acts

79. On 26 October 2015 the Claimant presented a grievance in which he raised numerous complaints which correspond broadly with those pursued before us.

They included allegations of disability discrimination. Initially the grievance was entrusted to Mr Walker but at some later point the decision was taken to pass it to Mr Jon Farrant, Head of Tenancy Management & Estate Services, to consider it as part of the final probation hearing (to which we will shortly turn).

80. The six earlier alleged protected acts (noted in Employment Judge Goodman's order) did not involve allegations of unlawful discrimination or any other act by the Claimant capable of amounting to protected acts.

Final probation report

81. On 15 December 2015 Mr Salenius completed a probation report. Among other things he noted that the Claimant had been on sick leave for 11 days and had undertaken a phased return to work between 25 August and 18 September. On the quality of his work Mr Salenius entered some favourable comments and some concerns. Under "Relationships with customers, clients and colleagues", the report includes this:

KTR's line manager states that he became hostile, provocative, aggressive and accusatory in his contact with her once he returned from sick leave. His behaviour became so unprofessional that his line manager reported his behaviour to her own line manager. He has shouted at his line manager while gesturing in an exaggerated manner.

Reference was also made to the panic attack on 10 August and to the recommendations. A lengthy section followed under the heading of "Reliability". This included summaries of a number of concerns raised by Ms Asante with the Claimant relating to such matters as the jury summons, the housing services induction, notification of sick leave, failure to keep her aware of his whereabouts, failure to maintain adequate diary entries, the loss of the receipt for the stamps, and the Oyster card episode. Under "Main Concerns" Mr Salenius listed a number of items including the panic attack and worries about the Claimant working alone, his (alleged) unprofessional and hostile conduct towards Ms Assante, and his behaviour in relation to the Oyster card. The penultimate heading, "Management Conclusion" appears to be a list of the main remarks volunteered by Ms Asante. The last was:

KTR's medical conditions are not insurmountable obstacles to his remaining in post. However, his lack of transparency and professionalism remain a serious concern.

The report ended with the recommendation that the Claimant be dismissed with notice.

Probation hearing

82. A lengthy probation hearing was held on 6 January 2016. It was chaired by Mr Jon Farrant, Head of Tenancy Management and Estate Services. The Claimant attended, accompanied by his partner, Ms Nicola Regan. The other people present were Mr Walker, Ms Hambis and Mr Steven Sage of HR, who took a note. We accept that note as a fair record of what was said. The subject-matter of Mr Walker's investigation and Mr Salenius's report was explored at length. The Claimant was given a full opportunity to set out his position on all points. He said

that he had felt “detached” during the events of 29 September 2015 and, later, that the episode was nothing to do with him. In respect of the concerns discussed in the probation report, he adopted a defiant stance. For example, he dismissed the issue about the Oyster card as “hilarious”, insisting that his actions in that regard had been above reproach and that he could not understand why managers had had any concerns. After an adjournment Mr Farrant announced that he had decided not to confirm the Claimant’s employment. He gave as his first reason the breakdown in the relationship between the Claimant and Ms Asante and his significant contribution to that state of affairs. The outcome was confirmed in a letter from Mr Farrant to the Claimant dated 11 January 2016, which included this:

The reasons for my decision are that the probation report and management investigation indicates that your relationship with your manager has irretrievably broken down and this has contributed to the way you perceive any management instruction. It is a fundamental expectation of any council employee that they treat their colleagues and managers with dignity and respect, and that the employee fully engages in the supervisory relationship. You showed a lack of concern for the wellbeing of your manager during the incident on 29 September and your response ... has demonstrated that you do not respect her judgement.

Mr Farrant gave no adjudication on the Claimant’s grievance, although many of his complaints had featured in, or been linked to, matters explored in the probation hearing.

Appeal

83. The Claimant appealed against Mr Farrant’s decision. His grounds were extensive, running to six pages. On 29 February 2016 the appeal was heard by Mr Simon Kwong, Service Director (already mentioned). The Claimant was again accompanied by Ms Regan. The others present were Mr Farrant, Ms Shashi Bearne, HR Business Partner, and Mr Sage whose note, again, we accept as a fair record of the proceedings. The hearing was short because the Claimant was content to rely on his written grounds of appeal and Mr Farrant had nothing to add to the document generated by the first-instance hearing and the outcome letter. Mr Kwong reserved his decision

84. By a letter of 2 March 2016 Mr Kwong dismissed the appeal. He rejected assertions of “unprofessional” conduct in, or in connection with, the probation hearing and held that Mr Farrant’s decision had been reasonable and in conformity with the Respondents’ procedures. On the subject of the grievance, he remarked:

Whilst it is true that you raised grievance issues, these were submitted following the instigation of the investigation and as such would be considered after the completion of that case. In the event you raised many of your concerns at the hearing as a response to the matters being presented so they were considered.

Miscellaneous findings

85. Under Allegation 7 the Claimant complains that on 16 September 2015 Ms Asante sent him to an underground cabin to carry out a piece of work, knowing that doing so would exacerbate his claustrophobia. We are satisfied that she had no such knowledge or belief. As her probation report of 26 August noted, he had

assured her that he was quite capable of entering underground rooms and areas.

86. Under Allegation 8, it is said that Ms Asante humiliated the Claimant on 24 September by interrogating him over the Oyster card matter in front of colleagues, calling him a liar and making similar comments. As we have found, she did insist that Mr Salenius was present. She did press him for answers. As he eventually accepted in evidence, she did not call him a liar (although he believed that her evident scepticism implied as much).

87. Also under Allegation 8, the Claimant complains about remarks by Ms Asante and Mr Salenius after the incident of 29 September. We do not accept that she passed remarks to him or other staff to the effect that he was weak or cowardly in relying on his mother to intervene on his behalf. Mr Salenius did have a private conversation with the Claimant and may have made a comment about bringing the Council into disrepute.

88. Turning to Allegation 9, we reject as untrue the claims that on 29 September Mr Salenius told the Claimant that the Respondents had not intended to employ a person with disabilities and that his failure to disclose his disabilities before being recruited had been deceitful.

89. As to Allegation 10, we reject the Claimant's case that the choice of Mr Walker as the investigator of the incident of 29 September was inappropriate on account of a close friendship between him and Ms Asante. Mr Walker was not a friend of Ms Asante or Mr Salenius.

90. By Allegation 11 the Claimant complained that the OH report of 25 September was disclosed to Ms Asante without his consent. It was envisaged on all sides that the report would be passed to her, since she had made it clear that she needed expert assistance in order to decide what duties could safely be assigned to him. He had no reason to refuse consent. On balance, we think it more likely than not that he was asked for, and gave, consent but it is not documented. In any event, we reject the notion (if it was part of his case at all) that she believed that she was not entitled to have sight of the report but read it nonetheless.

Policies and procedures

91. The Respondents' probation policy provides for regular feedback to ensure that probationers know that they are performing satisfactorily or are made aware of areas of concern so that they can be remedied (para 4.2). They are required to respond positively to advice, training, instructions and supervision aimed at assisting them to meet the requirements of the post (para 2). The decision whether or not to confirm an appointment is to be based on the probationer's record over the entire probation period. The assessment takes account of work performance, attendance and behaviour (para 4.3).

92. It was common ground before us that under the Respondents' arrangements, appeals take the form of reviews, not rehearings.

Secondary Findings and Conclusions

Disability

93. As we have stated, the Respondents have accepted that the Claimant was disabled by claustrophobia. The dispute is as to 'anxiety and depression'.

94. It is a commonplace for the expression 'anxiety and depression' to be interpreted as referring to a general depressive psychiatric condition. In this case it seems to us that, for good reason, the Claimant's anxiety has been seen and understood as something distinct from his depression. As we have pointed out, he relies on the anxiety as a facet of his claustrophobia. We do not treat it as a 'free-standing' disability.

95. On depression, the Respondents' case, as we understood it, was that we should treat the diagnosis given in August 2016 as evidence of a new episode, reactive to the natural stress associated with embarking on a new job and/or personal factors which have not been revealed. We have reminded ourselves of the statutory Guidance on the Definition of Disability (2011), paras C1-C11. It includes (para C6) an example of an individual suffering two discrete episodes of depression within a 12-month period:

... the effects of her impairment had not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12 month period.

However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12 month period, she would satisfy the long- term requirement.

It seems to us that the Claimant was at all material times subject to an underlying condition the effects of which were likely to recur beyond the period of 12 months from the date of the events complained of. We base this view on the report of the OH practitioner dated 25 September 2016 and, in particular, that of Dr Cushion dated 22 August 2016. We are satisfied that the condition produced a substantial effect on the Claimant's ability to undertake normal day-to-day activities and/or would have done unless suppressed or diminished by treatments including anti-depressant medication.

Harassment

96. Did the Respondents subject the Claimant to treatment which was 'unwanted'? Undoubtedly some of the matters relied upon under this head were unwanted. Ms Asante's persistent questions in relation to the jury summons and the Oyster card are good illustrations.

97. Did any such unwanted conduct have a purpose within the 2010 Act, s26(2)(b)(i) or (ii)? We are satisfied that no such purpose is shown. Ms Asante did not intend or wish to violate the Claimant's dignity or to create for him an environment to which any of the five strong statutory adjectives could be applied. Nor did any other manager about whom he complained. She was responsible for

employing him and she had every wish to make his recruitment a success. It is, we find, undoubtedly true that from an early stage the succession of events which we have summarised caused her to have increasing doubts about him. Those misgivings explain her conduct towards him. His resentment of her questions and ultimately of her management contributed to a steady decline in the quality of their work relationship. But none of this points to an unlawful purpose on her part.

98. Did the unwanted conduct have an effect within s26(2)(b)(i) or (ii)? We have reminded ourselves, again, of the statutory language and the guidance from the authorities. In our judgment, the evidence falls well short of demonstrating treatment which satisfies the demanding language of the legislation. It was uncomfortable to be pressed by Ms Asante to answer unwelcome questions but she did not act unreasonably in asking them. Unfortunately he failed on no few occasions to give clear answers. She had no reason to think that there was any mental health issue obstructing him from offering a frank answer and we find that there was none (it was no part of the Claimant's case to contend otherwise). In those circumstances, it was not unreasonable to press him for a reply. We find that the unwelcome questions did not amount to harassing treatment meeting the standards of the statutory wording. He found them annoying and, perhaps, upsetting but it would cheapen the test to find that his dignity was violated or any of the five statutory adjectives satisfied. She did also sometimes criticise his work but that was her function in her role of supervising his probation. We do not accept that her criticisms were unfair or unreasonable and we find in any event that they fell well short of amounting to oppressive behaviour of the kind which protection against harassment is designed to catch. His perception may have been that her behaviour towards him fell comfortably within the language of s26(1)(b)(i) and/or (ii) but, having regard to all the circumstances of the case we cannot accept that that perception was reasonable. Nor did any treatment of him by any other manager come close to amounting to harassment. This is a sad but alas far from unusual story of a failed workplace relationship. It is not a story about harassment.

99. Was the unwanted conduct in any event 'related to' either of the Claimant's disabilities? His case was that Ms Asante started to mistreat him as soon as she became aware of his claustrophobia and that that discovery explains the alleged harassment which followed. Here it seems to us that a distinction must be drawn between the things said or written by Ms Asante which were overtly connected with his disability (specifically the claustrophobia) and the other actions about which he complained. Those in the former category, self-evidently, were related to the disability of claustrophobia. Complaints based on them do not fail on the further ground that there was no link to disability. Those in the latter category do fail for that additional reason. We do not accept that discovery of the Claimant's claustrophobia was the catalyst for Ms Asante's enquiries relating to the jury summons or the Oyster card, or her critical comments concerning his performance or any of the numerous other matters about which he complained which were, on their face, nothing to do with his medical condition. We accept her evidence that she did not regard the claustrophobia as a significant obstacle to him performing the role to which he had been appointed. As for 'anxiety and depression', she had no reason to think that he had a serious condition which was liable to affect his ability to do his job. The OH report, produced less than a week before his last working day, said otherwise. The episode of 10 August may have suggested a

certain psychological vulnerability, but nothing more than that. In any event, Ms Asante's unwelcome acts began before then and, for good reason, he did not make the case that that event was the trigger for any alleged harassment.

Direct disability discrimination

100. This complaint fails. The Claimant was not subjected to any detriment 'because of' either of his disabilities. Our findings in relation to harassment largely dispose of this part of the case. In the first place, much of what he complains of, unwelcome as it may have been, did not amount to a detriment. For example, it was no detriment for him to be asked to explain himself in relation to the jury summons and the Oyster card. If he has a sense of grievance about those matters, it is an unjustified one. Some matters can, however, be seen as detriments. One example is the Respondents' failure to give an adjudication on his grievance. The defective way in which Mr Walker handled the investigation is, arguably, another. But we are satisfied that the complaint of direct discrimination fails because there is no ground for supposing that any of the treatment complained of was applied to the Claimant 'because of' his disability. No-one knew that he was disabled by depression. (It is, of course, otherwise in the case of the claustrophobia.) But in any event we are satisfied that there is no evidential basis for the theory that he was subjected to *any* adverse treatment purely because he was disabled by either condition. There is simply nothing pointing to blanket prejudice of that kind. (It might have been more plausible to argue that the prejudice was founded on a fear of some supposed *consequence* of the condition(s), but this is not to suggest that a claim of 'discrimination arising from disability' (the 2010 Act, s15) would have succeeded. The simple fact is that the question does not arise because no such claim is before us.)

Victimisation

101. We have already found that there was no protected act before the grievance of 26 October 2015.

102. Here again, we find no substance in the claim. Our conclusions on harassment and direct discrimination are repeated. There is nothing pointing to the Respondents' treatment of the Claimant having changed after he first complained of a breach of his right to be protected against unlawful discrimination. The treatment followed a natural course which commenced before the protected act. We have no ground for holding that, to the extent that it was detrimental at all, it was materially influenced to any extent by the fact that he had raised complaints of discrimination. The evidence is, in our view, entirely to the contrary.

Time

103. It follows from our findings above that there was no unlawful 'conduct extending over a period' for the purposes of the 2010 Act, s123(3)(a). Accordingly, any claim brought outside the primary three-month period (as extended by the period of ACAS conciliation) fails for the further reason that it is out of time and so outside our jurisdiction, unless we exercise our discretion to substitute a longer period. We have heard no evidence to justify doing so and the primary period therefore

applies. It follows that the Tribunal's jurisdiction extends only to the dismissal and the operation of the probationary procedure (from December 2015) culminating in it.

Outcome and Postscript

104. For the reasons stated, the claims fail on their merits and are dismissed. The Respondents treated the Claimant as they did for the reasons which they gave. There was no unlawful harassment, discrimination or victimisation. Moreover, all claims other than those based on the dismissal and associated matters are, in any event, outside the Tribunal's jurisdiction on time grounds.

105. The Claimant is a person of conspicuous talent but, given the burdens of his experience from a very early age, self-awareness (and particularly awareness of the effect of his conduct on others) may be difficult for him. We hope that he will be able to reflect constructively on his part in the events which we have explored and soon have the satisfaction of returning to the workplace and making the valuable contribution of which he is so obviously capable. As for the Respondents, the processes which culminated in the termination of the Claimant's employment were certainly open to legitimate criticism. Ms King rightly acknowledged that in some respects matters might have been handled better. All involved on both sides of this unfortunate dispute would do well to learn lessons from it.

EMPLOYMENT JUDGE SNELSON
9 May 2017

Reasons entered in the Register and copies sent to the parties on
..... for Office of the Tribunals