EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr R Gould	**v**	ARL Services (UK) Limited

Heard at: Reading **On:** 5, 6, 7, 8, 9 and 12 November 2018

Before: Employment Judge Gumbiti-Zimuto
Members: Mr A Scott and Mr N Singh

Appearances
For the Claimant: In person
For the Respondent: Mr R Morton (Solicitor)

RESERVED JUDGMENT

1. The Claimant's complaint of victimisation is dismissed upon withdrawal by the Claimant pursuant to section 52 of the Employment Tribunals Rules of Procedure 2013.

2. The Claimant's complaints of direct disability discrimination, harassment related to disability and discrimination arising from disability and a failure to make reasonable adjustments are not well founded and are dismissed.

3. The Tribunal declares that the correct way to calculate the Claimant's entitlement to sick pay pursuant to clause 10.1 of the claimant's contract of employment wages is: (a) to determine the daily rate of pay by dividing the annual rate of pay by 52 weeks, and then dividing the product of that calculation by 5; (b) the daily rate is then to be multiplied by 90 to arrive at the amount of sick pay that the Claimant is entitled to receive under his contract.

4. Unless the parties notify the Tribunal that a hearing is not required, the determination of the claimant's unlawful deduction from wages claim shall take place on the **16 September 2019** at Reading Employment Tribunal to commence at 10am.

REASONS

1. In a claim form presented on 4 January 2016, the Claimant made the following complaints: a complaint about an unlawful deduction from wages,

complaints that the Claimant was discriminated on the grounds of his disability, discrimination arising from disability, a failure to make reasonable adjustments, harassment and direct discrimination on the grounds of disability. The Respondent resisted the Claimant's complaints.

2. The issues that the Tribunal has had to determine in this case were set out in an updated list of issues (p121-124) and also as set out on page 81 of the trial bundle.

3. The Claimant has withdrawn his complaint about victimisation. The Claimant said; *"I do not stand by this complaint. It was written up by lawyers."* When we consider the complaints that the Claimant has made, either in his oral evidence or in the witness statement that he produced, the Tribunal is satisfied that the Claimant does not make a complaint of victimisation, namely that he was subjected to a detriment because he did any act by reference to the Equality Act 2010. We are content therefore to accept the Claimant's withdrawal as being a genuine and appropriate withdrawal in the circumstances. We note that the victimisation claim was drafted by lawyers and would for that reason have been reluctant to accept the Claimant's statement made in the course of cross examination as indicating an intention to withdraw the claim. However, having considered his evidence as a whole and the case as it has been presented, we think that the withdrawal is a genuine statement of the way that the Claimant perceives his case.

4. During the hearing of his case before us the Claimant was unrepresented. The Claimant had previously been represented by solicitors and Counsel and until recently, it appeared that he would be represented by Counsel although his solicitors come off the record some time ago. The Claimant has a disability and at the beginning of proceedings, he explained how he considered that his disability would affect his ability to present his case.

5. On the morning of 5 November, we discussed the state of the case. There were a number of things that needed attending to. The Claimant did not have a copy of his witness statement. At that stage there had not been an exchange of witness statements. Such a late exchange of witness statements could only have operated against the interests of the Claimant. Mr Morton, who appears on behalf of the Respondent, indicated that he had been in contact with Counsel (when Counsel was instructed to act for the Claimant) and was aware that he had a copy of the witness statement for the Claimant. There were discussions as to whether the witness statement in the possession of Counsel was the statement that the Claimant was to rely on in these proceedings. At that stage the Claimant was unclear about that.

6. We then went through the issues that we were to decide in this case and considered the updated list of issues (p121). It was noted that a raft of issues relating to the Claimant's complaints of discrimination arising from disability had not appeared on the updated list of issues. It was therefore agreed that the matters set out in paragraphs 49 to 54 of the amended

particulars of claim (p81) should also comprise part of the agreed list of issues that the Tribunal was to consider.

7. An issue arose as to whether the Claimant was making an application to strike out the response. In the Employment Tribunal's file solicitors acting for the Claimant (while still instructed) had indicated an intention to apply to strike out the Respondent out on the grounds that the Respondent had failed to comply with the Tribunal's orders. The basis of such an application was not clear or apparent. Mr Morton confirmed that he was aware that the Claimant's former representatives had intended to make an application to strike out the response, but he stated that they had never set out the grounds of the application or provided the evidence on which they relied.

8. An order was made by the Tribunal requiring the Claimant to set out the grounds and evidence on which he relied for making that application. However, that has not happened. The Claimant was unclear as to whether he was going to make such an application. The Tribunal informed the Claimant that if he was going to make the application, he would have to specify the reasons why the application was to be made.

9. We were provided with the witness statements on behalf of the Respondent's witnesses. At that stage on Monday 5 November, we were provided with a supplementary witness statement from William Lawrence Nolan, a witness statement from Shazhbaz Nazir Malik, a witness statement from Muhammed Nawaz Malik, and a statement from Samena Nolan-Butt. It was not until the following day, Tuesday 6 November, that we were provided with the main witness statement of William Lawrence Nolan and a witness statement from the Claimant.

10. The hearing was adjourned and resumed on Tuesday 6 November. Mr Morton stated that he had been able to obtain a copy of the Claimant's witness statement from the Claimant's former counsel and also a witness statement made by Mr Rajesh Khhattri-Chattri. The Claimant had served a new statement on Mr Morton. This new statement was the statement which we were provided with by the Claimant. The old statement that Mr Morton had in his possession was not provided to us. Although the older statement had been prepared when the Claimant was represented by Solicitor and Counsel the Claimant did not want to rely on it and did not provide us with a copy.

11. The Claimant indicated that he wished to make an application to strike out the response. The Claimant wanted to strike out the response on the basis that the Respondent has failed to comply with orders. Unfortunately, the Claimant did not go further to specify which orders had not been complied with or how the failure to comply with the orders has affected the conduct of the case. The Claimant pointed out the difficulties that his disability creates for him when it comes to presenting a case. What the Claimant said to us at one stage was: *"I do not have capacity to work through this like normal people. I believe the Respondent knows I am not capable of*

dealing with this. I am out of my depth. ADHD does not allow me to do that." The Claimant said he wanted to rely on the application that had been made by his former lawyers. We explained to the Claimant that there had been no application made his legal representatives; there had merely been an indication of an intention to make such an application.

12. Mr Morton pointed out that while there had been some slippage from both sides in respect of compliance with some of the Tribunals orders the Respondent had otherwise complied with the Tribunals orders and in his view the application was without merit.

13. We did not find a basis for striking out the response had been set out.

14. We discussed the contents of the trial bundle. The trial bundle was produced by Mr Morton and runs to 1,158 pages. The bundle was built around an earlier version that had been prepared for the first time that this case was listed for a final hearing. Included in the trial bundle are documents from the case of Mr Rajesh Khhattri-Chattri. At some stage these documents were considered by the parties to be relevant to the issues to be determined in this case. Although as part of our pre-reading, a number of documents from the case of Mr Rajesh Khhattri-Chattri were identified as documents that we might like to consider, they were not referred to by any witness during the evidence and we were not asked to consider them further.

15. The Claimant raised a number of issues about the trial bundle. The Claimant said that several documents are missing from his copy of the trial bundle, he says they have been removed. Unfortunately, the Claimant was unable to identify the documents which he alleged had been removed except by making the bare assertion that they had been removed. During the course of the hearing, he did not refer to any specific document which had been removed from the trial bundle. The Claimant could have proved his assertion that a document had been removed from the trial bundle because he had the original version of the trial bundle from which they would have been removed. However, he did not identify any document which is not in the bundle which ought to have been in the bundle.

16. Mr Morton, who has been responsible for the preparation of both trial bundles, indicated that nothing had been removed from the trial bundle – on the contrary, documents had been added to the trial bundle at the Claimant's request. He indicated that if any documents had inadvertently been removed from the trial bundle, he would attend to it and ensure that they are replaced.

17. The Claimant then went on to point out that his lawyers had omitted to introduce into the bundle documents that he wished to rely on. The Claimant produced a sheaf of documents. Mr Morton indicated that these documents either were already included in the trial bundle or had been subsequently included into the trial bundle.

18. The evidence in this case commenced at 12.10 pm on 6 November 2018. The Claimant was representing himself and the Claimant did not make any application for a postponement or further delay in the proceedings.

19. We made the following findings of fact in this case.

20. The Claimant is a 55-year-old man who suffers from Attention Deficit Hyperactivity Disorder (ADHD). This is a mental impairment that has substantial and long-term adverse effects on his ability to carry out normal day-to-day activities. The Claimant's disability leaves him highly susceptible to suffering from stress and anxiety in the workplace. The Respondent in the original response did not admit or deny the Claimant's was disabled within the meaning of the Equality Act 2010. The Respondent now accepts that the Claimant is a disabled person. This Tribunal hearing has proceeded on the basis that the Claimant is disabled.

21. The Respondent is a limited company that provides business support services including concierge and buggy services to LHR Airports Limited at Heathrow Airport.

22. On 1 October 2008, the Claimant commenced employment with Interserve PLC as Operations Manager. In November 2009, he transferred under TUPE to Aviserv Transport Services Limited (Aviserv); and then in July 2014, he transferred under TUPE to ARL Services (UK) Limited – the Respondent.

23. The Claimant has a contract of employment which is dated 1 November 2009. The parties to the contract are recorded as Aviserv Transport Services Limited and the Claimant. The Claimant's contract of employment includes the following provisions. Under *"Duties"*, it is recorded that:

"the employee shall serve the company as Client Services Director and who shall have responsibility for the management and operation of the Skycaps business."

Under section 4 of the contract of employment, it records the Claimant's place of work. Clause 4.1 states:

"The employee's normal place of work is London Heathrow Airport".

The Claimant's salary at the time of entering into the contract was £50,000.00 per annum, £70,000.00 at the relevant time for the purposes of these proceedings. The Claimant's contract provides that:

"The employee shall be paid a bonus by the company for each financial year of the company during the appointment. The bonus shall be paid within 60 days of each financial year and shall be subject only to statutory deductions required by law and not subject to set-off or counterclaim. The bonus shall equal the sum due under the formula and is a condition of the employee's contractual remuneration under this agreement."

24. The provision then sets out how the bonus shall accrue and remain due and is payable. The contract provides that the formula for calculating the bonus is 30% of annual net profits.

25. The contract also provides a clause which deals with incapacity. Clause 10.1 of the contract provides as follows:

"Subject to the employee's compliance with the company's sickness absence procedures (as amended from time to time) he shall continue to receive his full salary and contractual benefits during any period of absence due to incapacity for up to an aggregate of 90 days in any 52 week period, such payment shall be inclusive of any statutory sick pay due in accordance with applicable legislation in force at the time of absence."

26. The contract included a provision which dealt with what happens on termination. Clause 12.1 provides as follows:

"The appointment shall continue unless and until terminated by either the company or the employee giving not less than 24 months' prior written notice to the other and provided that if there is a change of control, the company may not give such notice within 12 months from the date of such change of control."

27. The contract also makes provisions relating to bonus in the event of termination and clause 12.3, it provides as follows:

"The company may terminate the appointment with immediate effect by written notice and by making a payment in lieu of salary benefits at the cost to the company and bonuses that would have been payable for the unexpired period of notice and to include any further period prior to which notice could not lawfully have been given following a change of control. For the purposes of this clause, the amount payable for each of the bonuses shall be £65,000.00 per financial year or at a greater sum the greater of (a) the highest amount is paid by way of bonus pursuant to the formula in the three financial years preceding the termination or (b) the highest amount paid by way of bonus pursuant to the formula in the three financial years preceding any change of control."

28. The Claimant's contract of employment was a professionally prepared document which on its face was signed by the Claimant and a Mr G Sandhu on behalf of Aviserv Transport Services Ltd.

29. At start of these proceedings, the Respondent disputed that the employment contract document was a valid contract of employment for the Claimant. The Respondent brought proceedings at Central London County Court against Aviserv which included seeking a declaration that the Claimant's purported employment contract is invalid, unenforceable and/or void. On the basis of those proceedings the Respondent claimed that the Claimant is barred from relying on that contract in these proceedings.

These proceedings were stayed pending the outcome of the litigation in the County Court.

30. The Respondent withdrew the proceedings in the County Court without any determination of the merits of the Respondent's case. The evidence given to us about that is that the Respondent took the commercial decision not to continue to pursue those proceedings because of the costs involved and the potential benefit. The contract referred to is the Claimant's contract of employment.

31. In May 2014, LHR Airports Limited awarded the Respondent the contract to provide premium services including porter, concierge and buggy services at Heathrow Airport. This contact had previously been held by Aviserv. The Claimant was at that time employed by Aviserv as a Client Services Director with responsibility for the operation of the Skycap service which is now called the Heathrow Porter Services. The Claimant's responsibilities included the overall day-to-day management and operations of the Heathrow Porter Services.

32. On disclosure to the Respondent of the Claimant's employment contract with Aviserv, the Respondent was suspicious. The terms and conditions of the contract included a headline salary of £50,000.00, a bonus of 30% share of net profits or a minimum bonus of £65,000.00 whichever is the greater amount regardless of performance, 24-month notice period, and the Respondent was barred from serving notice to dismiss the Claimant at all within 12 months of the TUPE transfer.

33. Mr Nawaz Malik explained that he considered that the terms were so generous they were highly unusual, particularly for what was a loss-making business with a turnover of only £1.1 million per annum. Mr Nawaz Malik went on to state that the Respondent's porter services business operates on the basis of a 51/49 per cent profit share model with LHR Airports Limited. Therefore, the Claimant's bonus of 30% of any annual net profits would essentially see him taking the lion's share of any profits that were generated by that business.

34. Mr Nawaz Malik explained that the abandoned legal proceedings with Aviserv concerned the failure of Aviserv to properly disclose to the Respondent the terms and conditions of employment of the Claimant and number of other employees. The Respondent investigated the TUPE information provided by Aviserv relating to the Claimant's very generous sick pay and notice entitlements, there was a delay in the Respondent honouring the Claimant's entitlements whilst those investigations were carried out. Mr Nawaz Malik's evidence was that the delay was not related to the Claimant personally or his disability.

35. In his witness statement, the Claimant states that his disability was declared as part of the information provide in the TUPE process. We were provided with a document setting out a spreadsheet of names giving information about employees who transferred. There is no mention of

disability. The Claimant later revised his position on this to say that it may be possible that such information was not provided but it was his understanding that that information was provided. The Tribunal is satisfied that on the evidence that has been presented that the Respondent did not know that the Claimant had a disability at the time of the TUPE transfer.

36. In his witness statement, the Claimant says that everything was going fine until November 2014 when he had a disagreement with Mr Nawaz Malik over staffing which put him in a corner. He states that this triggered his condition and from that point on things went downhill, he became confused, he had previously enjoyed a good relationship with Mr Malik but after that he was always closing his office door quite blatantly when the Claimant came into the office. The Claimant says it was very obvious and embarrassing.

37. Mr Nawaz Malik said that he always treated the Claimant with respect. Mr Nawaz Malik referred to an incident which occurred in about January 2015. On 3 December 2014, Mr Nawaz Malik sent an email to the Claimant which included the following:

"I am utterly disappointed in the porter services across the terminals and a number of complaints we are receiving not only from Heathrow from customers on emails my team and even myself checked them on a number of occasions giving a poor reflection. I would like to see the plan put in place to uplift the service and a very visible change must be noticed by Friday. Failing in that will trigger a proportionate response by the company against any porter, supervisor or anyone in the chain found failing their responsibilities. Please consider this as a warning to all from my side and convey to all that we will be on the mission to catch the dead wood out of the system. I have my reservations if the guy you put on security doing a good job. We are spending a lot more resources on porters and given enough time in managers and to visit 2/3 times to keep a check on all these porters on all terminals. I am sorry to say but I am not happy with the situation. Please initiate stringent actions against all culprits and fix it as a priority. I will not tolerate any penalties from Heathrow." (page 795).

38. The Claimant replied on 4 December; his email included the following:

"What you are asking is impossible without a huge uplift in numbers…
I will need another 30 porters…
The truth is boss the problem is not at operational level but lays with the lack of understanding of how the system works by head office…
We both feel we are being deliberately harassed as we have produced record numbers without any recognition. It is impossible to do our jobs under these circumstances. Again, my ADHD has been triggered. This is against the Mental Health at Work Act. We request a meeting with you."

This was the first reference made by the Claimant to ADHD.

39. A meeting took place between the Claimant and Mr Nawaz Malik at some time in January 2015 where they discussed the financial performance of the Respondent's porter services over the previous six months which had been poor. Mr Nawaz Malik describes the meeting as very contentious. Mr Nawaz Malik told the Claimant that it was his intention to roll out a biometric time and attendance system for porters. Mr Nawaz Malik states that the Claimant was extremely resistant to that suggestion and responded by threatening that if that went ahead, all the porters would resign. Mr Nawaz Malik states that during the meeting, the Claimant told him that he had ADHD. Mr Nawaz Malik says that prior to that he did not know or suspect that the Claimant suffered from ADHD. Mr Nawaz Malik then asked Mrs Nolan-Butt to meet with the Claimant to carry out a risk assessment in order to ascertain whether there was anything that the Respondent ought to be aware of regarding the Claimant's condition and to enquire whether there were any adjustments that the Respondent needed to make to his role.

40. The Claimant broadly agrees with the way that Mr Nawaz Malik describes the meeting which took place in January 2015. The Claimant only takes issue with the suggestion that he was threatening Mr Nawaz Malik during the meeting; what the Claimant says is he was merely reporting what had been told to him by other porters.

41. The Claimant then had a telephone interview with Mrs Nolan-Butt to discuss his ADHD and to carry out a risk assessment. The Claimant subsequently completed a risk assessment document which that he provided to Mrs Nolan-Butt.

42. In the risk assessment document, the Claimant stated that normal work stress is not an issue for him. However, injustice-related stress can make him physically ill. The question: *"Are there any preventative measures that could be done to eliminate or reduce the risk?"* was answered by the Claimant: *"When given instructions, a clear understanding is better. I may question instructions if I do not understand properly."* The Claimant said that his condition did not impact on his daily duties.

43. The Claimant gave the following information about his condition:

"I live in the moment, i.e. if the situation is bad, then in my mind my world is bad. Always has been and always will be. This applies to good too. This can affect my morale greatly and sometimes may mean I speak for the current environment as if it was ongoing. I am aware and self-regulated. I am unable to tell a lie if asked a direct question. I say it how I see it. I speak practically and this sometimes affects my diplomacy. I get frustrated if I cannot express myself properly. I am a very deep thinker and think things through thoroughly. Everything I do has a reason and a result but sometimes I have trouble communicating what I am thinking."

The Claimant also said:

"I do not require any particular fixed measures, just the ability to discuss things with my boss and an understanding that I may speak out of turn. I never intentionally offend anyone. If I do then I am unaware that I have."

44. In about March 2015, the Claimant became aware that Mr Nawaz Malik intended to step back from the operation of the company and appoint a new MD. On 8 March 2015 the Claimant sent Mr Nawaz Malik an email which included the following passages:

"I am saddened to hear that you are stepping up to CEO status and a new MD will be appointed. This is probably best for stress factor and your health as it is clear you have a hell of a lot on your plate. I am not so good with words on a one to one basis but I wish to say that you are one of the best MDs I have ever worked for. Even though we don't always see eye to eye, your open office and open-minded attitude does you great credit and allows us to air our issues rather than bottle them up. Hope you will still be around and we can continue our debates. You can rest assured that I will work with the new MD with the best interests for the company. Maybe we can get that game of golf one day." (p811.)

45. Mr William Nolan was appointed as Chief Operating Officer from 15 April 2015. Mr Nolan was to be responsible for the day-to-day operation of the Respondent's business including its financial performance. When Mr Nolan joined the company the porter services business was consistently making a significant loss on a monthly basis. The Claimant denies this, but the evidence produced confirms Mr Nolan's assertion.

46. The Claimant took issue with the documents produced by the Respondent. He provided no basis for criticising the information other than the fact that the documents were not on paper with a heading. He provided no analysis of the information to suggest that information provided by the Respondent, was incorrect.

47. Mr Nolan considered that it was necessary to take immediate action to bring the porter services business back to profitability. Mr Nolan conducted a review of the business. He held a series of meetings with the Claimant to discuss and agree ways in which the overspend could be addressed. Mr Nolan eventually communicated to the Claimant and the Respondent's then Operations Manager, Mr Rajesh Khhattri-Chattri, that the costs of providing the Respondent's porter services could be better controlled in a number of ways which included adhering to a 65% revenue-to-labour costs' target (excluding holidays) and a 75% revenue-to-labour costs' target (inclusive of holidays); the use of "Timegate" and more efficient rostering.

48. The Claimant was ultimately responsible for achieving the financial performance of the Respondent's porter services business meeting the 65% and 75% targets. The Claimant provided Mr Nolan with three weekly financial reports on 29 April, 6 and 13 May. The revenue-to-labour costs

were shown as running significantly over the 65% and 75% that had been set by Mr Nolan.

49. Mr Nolan spoke to the Claimant about these figures. The Claimant acknowledged Mr Nolan's comments about the first two sets of figures. However, following Mr Nolan's comments on the third, the Claimant responded by stating to Mr Nolan that the new targets were unachievable.

50. The Claimant says that Mr Nolan was adamant that the Claimant was achieve the targets on a weekly basis. The Claimant says he tried to show that this was not possible. Having heard the Claimant and Mr Nolan on this issue the Tribunal conclude that the Claimant was required to provide a weekly financial report to Mr Nolan. The Claimant was not being assessed on a weekly basis, he was reporting on a weekly basis. The figures were considered on a monthly basis by the Respondent (p232). The reporting for the purposes of the Respondent's management records is done on a monthly basis.

51. Soon after his arrival, Mr Nolan was communicating to the Claimant and to Mr Khhattri-Chattri how he saw their performance and the operation could be improved (p204). Also, at about this time, the Claimant considered that the Financial Director, Mr Hassan Janjua was *"contacting my staff to check up on me and more and more accusations of wrongdoing were coming out from other senior managers based at head office"*. This led the Claimant to write to Mr Nolan on 7 May (p820) to complain about: *"being checked up on by Hassan again. This culture of calling Raj and/or the Res centre and asking where I am if they can't see me on camera is nothing more than harassment and bullying"*. The Claimant asked that Mr Nolan ensure that the practice ceases.

52. Mr Nolan was on holiday on 7 May and responded to the Claimant indicating that he will sort when he returns. Mr Nolan says that on his return from holiday, he did contact the Claimant to discuss this issue with him. The Claimant denies that any such contact was made.

53. A meeting was arranged to take place on 19 May 2015. Attending the meeting were the Claimant, Mr Hassan Janjua and Mr Nolan. In preparation for the meeting, Mr Nolan sent an agenda of the points that he wished to cover. The agenda for this meeting is headed *"Agenda to Senior Financial/Operational Review Porters"* (p212).

54. Following the meeting Mr Nolan sent the Claimant an email in which he said: *"I thought I would drop you a quick line detailing what we discussed and agreed yesterday."* (p219) The email set out four points.

55. The Claimant responded to the email at 17:47 on 20 May. He set out several points in response to Mr Nolan's email about the meeting. The description given of the meeting by the Claimant suggests that it was a contentious meeting. Amongst the points he made the Claimant has included the following:

"You told me that operation is responsible for 90% of indirect costs… The porter service appears to be running at a loss last year… Again, I am told I am responsible for the high labour costs of February… I am responsible for the company making a profit this year… I have failed to enact a new temporary supervisor's instruction from 1 May… I have failed to meet your target 65%... You are unaware of what I do all day… You rejected my offer to discuss reducing my hours to save costs… I asked you straight if it was your intention to get rid of me as I have had it from several sources that this is the case. You denied this. I did not manage to submit all my ideas for the improvement of performance and reduction of costs as we spent most of the time with you and Hassan highlighting my failures in past issues and me defending myself to the point my ADHD was triggered and I had to leave the meeting in confusion… All in all to me yesterday's meeting was not about the way forward but about criticising me. Although you and Hassan constantly pointed out where I had apparently gone wrong, there was no mention to Hassan of the appalling payroll issues we have had since ARL took over. I left confused and deflated as I was under the opinion that you were going to come up with a way forward. I am now off sick and awaiting to go to the doctor. I have been in touch with Wendy and agreed to help out where I can."

56. Mr Nolan's response to the Claimant's email sent that day was to say:

"I do not agree with your account of the meeting and will respond in due course. I find your approach somewhat surprising as both when you left and subsequent texts which I retained stating that it was positive and that you reassured me that we would succeed as a team which I also reiterated in a text."

57. On 22 May, Mr Nolan replied to the Claimant's various points in his email by incorporating annotations to the Claimant's email (p226).

58. The Claimant was signed off sick. The Claimant has remained away from work since 20 May 2015. Although the Claimant remains an employee of the Respondent, he has not been able to return to work.

59. During that period of time, the Claimant was entitled to be paid sick pay in accordance with his contract on the basis that he receives 90 days' pay in every 52 weeks. In calculating the Claimant's pay, the Respondent has calculated it using the formula of 90 days x 1/365th of £70,000.00 to give the total amount of sick pay that has been paid to the Claimant.

60. The Claimant says that this is an inaccurate way of calculating his sick pay and that the correct calculation ought to be 1/260 x £70,000.00 to give the correct amount of sick pay.

61. The extent of the Claimant's dispute with the Respondent in relation to unlawful deduction of wages is a determination of whether the Claimant has been paid sick pay in accordance with the terms of his contract of employment.

62. Up until the point the Claimant went off sick, he was based at D'Albiac House. Whilst the Claimant was on sick leave, the Respondent made a decision to close D'Albiac House and to relocate staff at head office. The reason for the closure was a business decision in order to improve the financial performance of the porter services business. Aviserv Transport Services had been allowed to occupy D'Albiac House free of charge by Heathrow Airport. When the Respondent took over the contract in July 2014, Heathrow Airport began to charge rent for the use of the premises. The Respondent has a head office about 10 minutes away in Colnbrook. It was not considered economical to continue with the lease at D'Albiac House and so the staff that were based there were all relocated to Colnbrook. The only exception was the Operations Manager, Mr Khhattri-Chattri, who had direct responsibility for the day-to-day management of staff. The service based at the terminals moved to a satellite office at Heathrow Terminal 2. The reasons for the closure of D'Albiac House were notified to all the staff in advance including the Claimant (p829).

63. In the time that the Claimant has been off sick, there have been attempts to get the Claimant to return to work. There have been discussions between the Claimant and the Respondent. The Claimant has been referred to occupational health. Occupational health has indicated that the Claimant should receive treatment from his GP and in relation to the difficulties that he has at work that there should be mediation.

64. Since going off sick the Claimant has insisted that he should not have to work at head office. He states that it would be injurious to his health because it would mean that he would be working in close proximity with people about whom he has made complaints. The Claimant has stated that he should be able to work at the terminals at Heathrow because that is provided for in his contract of employment and he points out that his contract of employment does not contain any mobility clause.

65. The Respondent says that the Claimant is a manager, he is not operational. The Claimant is now required to work at head office. The Claimant would not be physically located in the same part of the head office building as Mr Nolan and Mr Nawaz Malik.

66. Irrespective of where the Claimant is based, the nature of his role is such that it requires him to have contact with senior directors. He would have almost daily contact with Mr Nolan, who is his line manager. When based at D'Albiac House the Claimant still had contact with Mr Nolan and other senior directors who worked at head office. The Claimant would still be required to carry out duties that required him to attend at the terminal. D'Albiac House is an administrative office complex and was not located in the terminals at Heathrow.

67. In the course of moving to head office doing that, it became apparent that there was a safe in the Claimant's office. The Respondent thought that the safe belonged to the business. It transpired that the safe belonged to the Claimant. The Respondent asked for access to the safe. The Claimant and the Respondent initially debated who the safe belonged to. The Claimant

has since produced documents which show that the safe belongs to him. However, the Claimant gave conflicting information to the Respondent about the safe, at one stage indicating that it belonged to a third company called Barinco which apparently is a charitable entity run by the Claimant. This in fact was not true.

68. The Respondent eventually caused the safe to be opened and in the safe being opened, it was discovered that the safe was empty save that it contained a pound coin. The Claimant has explained that the reason that the safe was kept in the office was because he was given permission to retain some of his personal documents in the office. He explained that he needed to do this because of his ADHD and the assistance that he received from Mr Khhattri-Chattri in maintaining some of his affairs. There were no documents in the safe. The Claimant's evidence again was contradictory in relation to the contents of the safe because at one stage the Claimant was contending that there were personal documents contained in the safe, and on another occasion, the Claimant had confirmed that in fact the safe was empty.

69. The reason that the safe was opened was because the Claimant had insisted on attending at the D'Albiac House to clear out his possessions and to remove the safe. The Claimant's possessions could and would have been transferred to head office when they moved from D'Albiac House to the head office without the safe being opened but for the Claimant's insistence that he did not want his property taken to head office. It was the Claimant's desire to collect his property which resulted in the safe having to be opened.

70. An issue arose between the Claimant and the Respondent as to what happened on the occasion that the Claimant attended at the office in order to collect his belongings. The Claimant had to be allowed into D'Albiac House and whilst he was in D'Albiac House, he was accompanied by Mr Shazhbaz Malik. The Claimant said that he was also accompanied by another colleague called 'Gary'. He complains that he was treated like a criminal because he was escorted onto the premises and then escorted off the premises.

71. The Respondent says that what happened was usual and quite normal. The Respondent disputes the contention that the Claimant was accompanied by 'Gary' at all. The Respondent states that Mr Shazhbaz Malik let the Claimant onto the property and then accompanied him whilst he was collecting his goods and remained with him until he left the office.

72. Insofar as there is a dispute about what happened on this occasion, the dispute is whether there was one or two people that accompanied the Claimant; there does not appear to be much more in dispute between them as it is accepted that the Claimant was accompanied whilst he was on the premises. We have no reason to doubt the Respondent's explanation that the Claimant's landside pass had expired and therefore he needed to be escorted. The Claimant says that at the time his landside pass had not expired. The Claimant however does not appear to contest

the suggestion that it was necessary for him to be given access to the premises on that specific occasion suggesting that he may be mistaken about his landside pass not having expired.

73. In January 2017, the Claimant raised a grievance (p568). The Claimant attended a grievance meeting on 1 February 2017. Present at that meeting were Ball Sidhu and Corine Darreuyre. The meeting was recorded and a transcript made (p575). Corrine Darreuyre left the Respondent's business and Mrs Samena Nolan-Butt took over as the investigation manager for the grievance. Mrs Nolan-Butt concluded the grievance and sent the grievance outcome to the Claimant on 20 March. The grievance report of 18 pages rejects the Claimant's grievance.

The Claimant's submissions

74. On a number of occasions during the course of the case, the Claimant has made comments which echoed the passage which we quoted earlier where the Claimant stated that he did not have the capacity to work through a case like normal people, that he was aware that the Respondent knew that he was incapable of dealing with this case and that he was out of his depth because his ADHD did not allow him to do what normal people can.

75. The Claimant has however been able to present a number of arguments in support of his case. The Claimant has not always stuck to the list of issues as had been agreed by his legal representatives whilst still acting on his behalf earlier on in the proceedings. However, the Claimant has been able to raise those matters he wished to raise and drop allegations that he did not wish to pursue. A number of other matters the Claimant has just made no mention of at all.

76. In his closing submissions, the Claimant made the following points:

    76.1 Of the contention that in a period from July 2014 to March 2015, the porter business was losing money, the Claimant says if things were as bad as the Respondent says, why was it allowed to continue. The Claimant says he was not provided with a P&L (profit and loss). He says he was not aware of what costs were being taken into account by the Respondent. His position is that he had been TUPE'd across to the Respondent and it had been business as usual with the Claimant doing what he always did as there was no complaint about his performance in that period and says that if better performance was expected of him, he should have been spoken to by the Respondent.

    76.2 When Mr Nolan arrived, he introduced targets without a full understanding of the nature of the business. The Claimant described the business as being a very complicated business. The Claimant also says that Mr Nolan expected him to achieve the targets in each week. The Claimant says that the initial targets were set and he met them but then the Claimant says the goal posts

were moved by the introduction of costs which meant that he could no longer achieve the targets over a weekly period. It was therefore impossible, it could not be done without the company being in breach of its contract with LHR Airports Limited. The Claimant pointed to the fact that LHR Airports Limited forced him to put staff in areas where it was not productive. The Claimant says that Mr Nolan never attempted to understand why his performance failed.

76.3 Referring to the meeting of 19 May, the Claimant says that the meeting was used to assassinate his performance. There was no offer of coaching; there was no training; he was just told to do it now and provided with targets that were unachievable, not because of his performance but because of the way that the Respondent operated. The Claimant says there was no support or performance management. He was put in a hostile environment. The Claimant referred to his disability and his attempts to communicate in a hostile environment.

76.4 The Respondent did a number of things which the Claimant complains about. He says they broke into his safe; they froze his contract; and they published his documents. The Claimant complained about being flanked by two members of staff like a common criminal and complained that the other managers came in and they were not flanked. The Claimant says that he was deliberately underpaid each month. He complained how this affected his family and says it was not coincidental.

76.5 He complained that the Respondent ignored his contract of employment by requiring him to work in head office and in doing so wanted to put him in a place that was unsafe. The Claimant describes being told by Mr Nolan that he had no right to protest and he complains that the Respondent disregarded his disability with “breath-taking impunity”.

76.6 The Claimant went on to say that he had been clear on countless occasions that he could not work out of the head office and complains that the only reason why the Respondent cannot give him an office at Heathrow was because of money. The Claimant says that he could use a space to do his job at Heathrow Airport with a Wi-Fi access and a laptop. He said the only cost to the Respondent would be car parking costs. Instead, the Claimant says that the Respondent expects him to work in conditions in which he is unable to work at head office knowing how it would affect him. The Claimant says he should not be required to work in head office because his doctor had declared that it is an unsafe environment. The Claimant described how working in head office would be the equivalent to asking a phobic to work in an environment where is phobia is manifest. He says that the Respondent refused to make reasonable adjustments; they did not attempt to do anything. He asserted that there was a difference in the way that he was treated with Mr Khhattri-Chattri – they did not do anything that was

derogatory to his health; they visited him at his home whereas in his case, they refused to give him a home visit.

76.7 The Claimant criticised the spreadsheets which had been provided by the Respondent saying that they did not provide any useful information. He criticised the lack of headings or page numbers on the documents produced. The Claimant pointed out what he thought was a contradiction in the evidence of the Respondent about who was responsible for a decision to increase the charges in relation to the porter services. The Claimant said that he found it strange that Mr Shazhbaz Malik had outperformed him in the time that he took over his role and he first went off sick when he himself had been doing the job for 14 years.

76.8 The Claimant made reference to trying "again and again" to negotiate with the Respondent and said that it is the requirement to get him to work at head office which is the reason that is keeping him away from work. The Claimant says the Respondent failed to look at his grievance and the Respondent failed to pay him the sick pay that he was entitled to. When they did start paying him, they paid him the wrong amounts.

76.9 The Claimant complained that Mr Nawaz Malik had mistakenly thought that he had made a threat of industrial action when he had not. This misunderstanding the Claimant said came about because of his disability. The Claimant said that had he been challenged by the CEO at the time, he could have corrected the mistaken understanding and explained. The Claimant said that his disability means that when he is in a hostile environment, he performs badly. He says the hostile environment arises because the Respondent disputes everything he says and fights him. He said throughout his life he has had to put up with people "tutting", "huffing" and "eyerolling". This type of behaviour reflects the Respondent's attitude towards mental health. He posed the question: "would he do that to someone who has a physical disability?"

76.10 The Claimant has asked the Tribunal to note what they had observed of his disability over the days that the hearing had taken place and pointed out how he "could be irritating". He stated that he had to "live with it every day" and he can be "unaware of it". The Claimant said that he is unaware of his behaviour at times but he stops immediately when it is pointed out to him.

76.11 He referred to having severe Adult ADHD. He explained how he was diagnosed in 2007 and the diagnosis produced a "lifting of a weight off his shoulders" as it explained a number of things to him.

76.12 He pointed out that he had conceded an item in his claim which did not represent what he wanted to complain about but had been put in by his lawyers. He stated that he cannot lie, and he does not have the mental capacity or memory to do so. He said: *"I have no*

choice but to be an honest person." He explained the absence of Mr Khhattri-Chattri as a witness in this case and pointed out that he would have liked to refer to evidence from a colleague WE who is still employed by the Respondent.

76.13 The Claimant pointed out how he had worked very hard to build the business. He said when he left the business temporarily in about 2006 it was not because of an inability to meet targets it was because he was unable to work the hours which were being asked of him which was leading to him being ill.

76.14 The Claimant pointed out that he had seen occupational health twice and had been offered no support. The Claimant stated he was not offered reasonable adjustments and that reasonable adjustments should have been offered when the Respondent was aware of his disability. He pointed out that the target was one of the things that should have been considered for an adjustment and complained about his contract being seized and explained that made things particularly bad for him because he did not know why his contract was being seized. The Claimant contends that the Respondent knows that by forcing him to go to work at head office it would keep him off work and that was the reason why they are only offering him the option of returning to work at head office because they know that he will not return to work there.

76.15 The Claimant complained that his grievance was not considered impartially.

76.16 The Claimant says that the company was aware that the safe was his and asked why they did not ask him to come in. Instead, they said that it was not his safe. The Claimant complained about the attitude that the Respondent adopted towards the safe and said that had contributed to him being ill - at that time he was very ill.

76.17 The Claimant spoke about how staff were relocated to head office and says that he was the only non-reservation staff who was to be moved.

76.18 He said he is willing to compromise and wants to go back to work. He points to the Respondent's actions and says are they the actions of a company who wanted to get him back to work. He says that the company does not like him. He said if they do not like his performance, then they should train him. The Claimant says that there was discrimination by design. The Claimant states that if he is given the space to speak and operate, he can perform well.

77. At the end of the Claimant's submissions, Mr Morton raised a complaint saying that there were 19 points that the Claimant made which did not appear in his witness statement. Early on in the Claimant's closing submissions, Mr Morton had interrupted making an observation that the

matters the Claimant was saying had not been referred to in his witness statement or in the evidence that he gave.

78. It is right that Mr Morton should point out the fact that the Claimant's closing submissions appeared to cover a wider range of matters than the Claimant actually dealt with in his witness statement. However, nothing that the Claimant said during his closing submissions, whether it was contained in his witness statement or not, would have come as a surprise to Mr Morton. Mr Morton had the Claimant's professionally prepared witness statement, the contents of which we are unaware of, but he also has had access to the trial bundle, the pleadings, the voluminous documentation which has been generated between the parties over the course of this case. Most if not all of what the Claimant said in his submission is to be found there.

79. It is with regret that the Tribunal formed the view that part of the purpose of Mr Morton's interventions was to disrupt the Claimant's presentation of his case. Mr Morton was informed by the Tribunal after the first intervention during the Claimant's submissions that he should not intervene and that he should note the points that he wanted to object to and could make reference to them at the conclusion of the Claimant's submissions. While this was the first intervention made during the course of closing submissions, it was not the first intervention that Mr Morton had made at times when the Claimant was trying to present an argument or put his case.

80. It is noteworthy that at the end of the Claimant's submissions, apart from pointing out an alleged 19 occasions when the Claimant had made reference to matters which did not appear in his witness statement, Mr Morton said nothing to correct any misinformation or error that had been generated by the closing submissions made by the Claimant.

The Respondent's submissions

81. Mr Morton made closing submissions on behalf of the Respondent. His closing submissions started at about 10.00 am and finished just after 11.10 am. His closing submissions helpfully addressed the issues as they appear in the list of issues. We do not set out the closing submissions as presented by Mr Morton separately section. In our conclusions which follow we accept a significant number of the points made by Mr Morton which we consider are well made and we refer to them in our conclusions.

Victimisation

82. The Claimant withdrew his complaint of victimisation. In withdrawing the complaint, he explained that it was not his case that he was victimised, it was an argument that was presented by his lawyers and he did not wish to pursue it. We have therefore dismissed the Claimant's complaint of victimisation upon withdrawal by the Claimant.

Unlawful deduction from wages

83. Section 13 Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction. The meaning of wages includes, any sums payable to the worker in connection with his employment, such as a bonus or other emolument referable to his employment, whether payable under his contract or otherwise and also statutory sick pay (section 27 (1) ERA).

84. Section 23 ERA provides that a worker may present a complaint to an employment tribunal that his employer has made a deduction from his wages. An employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made and where a complaint is brought in respect of a series of deductions or payments, the last deduction or payment in the series.

85. The unlawful deduction from wages complaint arises because of the way that the Respondent has calculated the Claimant's suck pay. The Claimant's contract of employment at clause 10.1 reads as follows:

"Subject to the employee's compliance with the company's sickness absence procedures (as amended from time to time) he shall continue to receive his full salary and contractual benefits during any period of absence due to incapacity for up to an aggregate of 90 days in any 52 week period. Such payment shall be inclusive of any statutory sick pay due in accordance with applicable legislation in force at the time of absence."

86. The way that the Respondent has interpreted this contractual clause is to say that it gives the Claimant the right to be paid his salary for 90 days in any 52-week period and as a result, every 52-week period in the 3.5 years that the Claimant has been away from work, he has received pay as calculated by the Respondent pursuant to this provision.

87. The Claimant agrees with how the contractual provision has been construed by the Respondent. The dispute between the Claimant and the Respondent is because in calculating his 90 days' pay in any 52-week period, the Respondent has used the formula of £70,000.00 (being his annual pay) divided by 365 days x 90 days, resulting in a payment due to the Claimant in the sum of £17,260.30. The Claimant says this is incorrect and what they should do instead is they should divide his annual pay of £70,000.00 by 260 days and multiply that figure by 90 days resulting in a payment to the Claimant of £24,230.80.

88. The Tribunal consider that the clause requires the daily rate to be determined and then for it to be multiplied by 90 days.

89. The Claimant's pay in a 52-week period is £70,000.00. To determine his daily rate of pay, what the Tribunal did was divide £70,000.00 by 52 weeks. The Claimant's contract of employment at clause 5.1 provides that: "*The employee's normal hours of work shall be 0900 hours to 1700 hours, Mondays to Fridays and such additional hours as are necessary for the proper performance of his duties*.

90. The weekly rate of pay should then be divided by 5 to arrive at the daily rate of pay.

91. Using our calculations, the Claimant is therefore entitled to a payment of £24,230.80 sick pay in accordance with clause 10.1.

92. Does the Tribunal have jurisdiction to consider the unlawful deduction from wages claim? The parties have not addressed the question whether we have jurisdiction to consider the claim of unlawful deduction.

Equality Act 2010

93. Disability is protected characteristic within the meaning of section 4 of the Equality Act 2010 (EA). The Claimant is a disabled person within the meaning of section 6 EA.

94. For the purposes of the EA anything done by an employee in the course of the employee's employment must be treated as also done by the employer. It does not matter whether that thing is done with the employer's knowledge or approval. In proceedings against the employer in respect of anything alleged to have been done by an employee in the course of the employee's employment it is a defence for the employer to show that the employer took all reasonable steps to prevent the employee from doing that thing, or from doing anything of that description.

95. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened a provision of the EA the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.

96. Proceedings on a complaint to an employment tribunal under the EA may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the person in question decided on it.

97. **Direct disability discrimination (Section 13 Equality Act 2010)**

98. Section 13 EA provides that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment. An employer discriminates against an employee if because of his disability he treats the employee less favourably than he treats or would treat others. Where the employee seeks to compare his treatment with that of another

employee there must be no material difference between the circumstances relating to each case.

Not offering any support from occupational health

99. The Claimant contends that he was not offered from occupational health by the Respondent. The Respondent denies this. Both parties agree that the Claimant had two occupational health referrals. The Respondent says that the Claimant was offered a third this year which he was unable to take up. The Claimant has not contested this.

100. The Respondent says that occupational health has pretty said that the Claimant is fit to come back to work. The Respondent says that the Claimant's evidence does not touch on this. A reference to occupational health is absent from the Claimant's witness statement. Mr Morton confined his cross-examination of the Claimant to the evidence that was set out in the witness statement that the Claimant relied upon.

101. The Tribunal notes that at the second sickness review, the Claimant made a request for occupational health support (p341). A referral to occupational health was made and the Claimant attended. An occupational health report was prepared dated 26 February 2016 (p348). The report noted that the Claimant was at the time unfit for work; it referred to stress and anxiety being related to his work; that his ADHD was triggered or exacerbated by it. It was advised that the Claimant discuss his medical condition with his GP or psychiatrist. The report also contained the following passage:

"With regards to his work situation I feel some form of mediation is warranted with his management to resolve pending issues. I have encouraged him to explore this with the company. Once the above steps have been taken and he is feeling clinically better, I can review him at management discretion in about three months' time with a view to assessing his fitness for work."

102. The Claimant made no mention of occupational health in his witness statement. In paragraphs 40-42 of his grounds of complaint the way that he put his case is as follows:

"40 The Claimant relies on Raj Chattri as a real comparator in the circumstances of this case. Mr Chattri is in the same material circumstances as the Claimant save for the fact that he does not possess the same disability and was signed off from work with issues of stress in early May 2015.

41 Since the commencement of his spell of sickness absence, Mr Chattri has received occupational health support arranged by the Respondent and had been offered adjustments by way of the implementation of a phased return to work or shorter working days.

42 The Claimant has not been offered any support from occupational health nor has he received any commitment to the implementation of

reasonable adjustments by the Respondent to enable him to return to work. The Claimant claims that this constitutes an act of direct discrimination because of his disability."

103. Commenting on the way that the Claimant puts his case, the Respondent says that, properly analysed, there is no difference in the way that the Claimant was treated in contrast to Mr Khhattri-Chattri. Both men were referred to occupational health, recommendations were made in respect of the Claimant – do not have evidence what was decided in the case of Mr Khhattri-Chattri. There is no evidence of the Respondent refusing to carry out any reasonable adjustments. We agree with the Respondent's contention that the matters as specified by the Claimant in paragraphs 40-42 of his grounds of complaint have not been established in the evidence.

104. The conduct alleged at 4a of the updated list of issues in our view did not occur. The Tribunal has not been able to conclude that the Claimant was not offered any support from occupational health by the Respondent.

<u>Not offering any commitment to the implementation of reasonable adjustments</u>

105. The evidence that we have heard from the Respondent shows that the Respondent is open to the Claimant returning to work if he is fit to do so. There is a willingness to consider a phased return to work and other options to enable the Claimant to return to work. The matter preventing the Claimant from returning to work presently is his desire to return to work at Heathrow terminal rather than head office. The Respondent wants the Claimant to return to work at head office. The Claimant had previously worked at D'Albiac House. That work location is no longer an option for the Respondent to place the Claimant. We note and accept the witness evidence of Mr Nolan at paragraph 29 which deals with this situation.

106. The Respondent says that originally the only reasonable adjustment that the Claimant sought was the removal of a target. The Claimant's position in relation to this part of the case is inconsistent because he had previously complained that they were unachievable; then he went on to complain that they were achievable, but he could not achieve them measured over the course of a week; and then on another occasion went on to say that in fact he was achieving the targets. The Respondent says that this part of the Claimant's case is not clear.

107. The Respondent says that in case as originally presented, the Claimant was not fact claiming that a reasonable adjustment was that he should be able to return to work at a Heathrow terminal. The Respondent also points out that the Claimant in fact was offered a phased return to work and asked to try a return to work at the head office and to "see how it goes".

108. When the case originally presented and when the updated list of issues was drafted, the reasonable adjustment in issue between the Claimant and the Respondent did not include a claim that the Claimant be required to return to work at head office, the issue was an adjustment of the targets.

The Claimant's complaint has evolved into one which includes a complaint that he should not be required to return to work at head office. What the Claimant now argues is that he is entitled to work at Heathrow Airport and he relies on clauses 4.1 and 4.3 of his contract of employment (p168). The Claimant sees the requirement for him to work at head office as a failure to honour his contract. He sees this as part of a strategy to get rid of him which he says is because of his ADHD.

109. Considering the complaint at 4B of the updated list of issues either as the Claimant presents it (the evolved version) or as the Respondent has sought to categorise it (the original version), we are unable to conclude that this complaint is made out. We do not accept that the Respondent did not offer any commitment to the implementation of reasonable adjustments.

110. In respect of adjustment of the targets, the evidence shows that the targets were achievable and not manifestly excessive. The Claimant's own evidence was that the targets were achievable and that he did achieve them. It seems to the Tribunal that the height of the Claimant's case is that in any one week, if you measure the targets, the Claimant may miss them and therefore the Claimant says that the targets were unachievable. We do not consider that there was a failure on the part of the Respondent to have a commitment to implement reasonable adjustments by adjusting the targets. There was no need to adjust targets.

111. The Claimant has presented his case that there was a failure to make an adjustment involving his return to work at head office. The Tribunal notes that the Claimant says that this was part of a strategy which was designed to get rid of him but the Tribunal rejects that. The evidence that we have heard was that the reason D'Albiac House was closed was related to finance and business reasons. Requiring the Claimant to be based at head office was an entirely reasonable and appropriate decision to be taken by the Respondent. The Claimant would have remained in the Heathrow area at Colnbrook.

112. The recently raised observations by the Claimant were about requiring him to work in the same location as managers who had harassed him. The Tribunal does not consider that this would have made it unreasonable for the Claimant to be expected to return to work at head office because it is not established that the Claimant had been harassed. In addition, the layout of the building made it possible for the Claimant to continue to work without any more contact with colleagues whom he did not desire to come into contact with than he would have had previously.

113. We are not satisfied that in requiring the Claimant to return to work based at head office that the Respondent was failing to implement reasonable adjustments or failing in offering him commitment to the implementation of reasonable adjustments.

114. Finally, the requirement that the Claimant returned to work at head office was not in any sense because of his disability.

Seizing the Claimant's employment contract on 18 June 2015

115. The Respondent agrees that this conduct occurred.

116. Was such treatment less favourable treatment than that of Mr Khhattri-Chattri? There is no evidence that Mr Khhattri-Chattri's contract was seized by the Respondent. There is no suggestion that his contract may have been seized by the Respondent. As we understand it, no issue arose in relation to Mr Khhattri-Chattri's contract at the relevant time. Initially, there was no contract available for Mr Khhattri-Chattri, when the contract was available there was no dispute in relation to the contents of that contract as there was in the Claimant's case. It has not been established that there was less favourable treatment of the Claimant when compared with Mr Khhattr-Chattri. The circumstances of the Claimant's case and the circumstances of Mr Khhatri-Chattri's case do not compare.

117. We have gone on to determine whether the treatment (which we have not found was less favourable treatment) was because of the Claimant's disability. The Respondent found that the Claimant's contractual terms were so generous and favourable to the Claimant that they suspected that they were fraudulent. This led the Respondent to initiate County Court proceedings against the transferor in the TUPE transfer, i.e. Aviserv. Subsequently, those proceedings were abandoned by the Respondent in circumstances that were explained by Mr Nawaz Malik and Mr Nolan.

118. The Tribunal is satisfied that there was no relationship between the Claimant's disability and the decision to seize the Claimant's contract. The genuine reasons for seizing the Claimant's contract related to the fact that there were doubts as to whether or not the Claimant's contract contained genuinely agreed terms. There was no connection to disability in this.

119. **Disability-related harassment**

120. Section 26 EA provides that an employer harasses an employee if the employer engages in unwanted conduct related to a relevant protected characteristic, this includes disability, and the conduct has the purpose or effect of violating the employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. In deciding whether conduct has that effect the perception of the employee, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect must each be taken into account.

Setting unrealistic and unachievable targets from April 2015

121. The Claimant complains that the Respondent set unrealistic and unachievable targets from April 2015. This in our view is not established. As has been previously stated, the Claimant's own evidence was that he hit the target. There is in addition evidence that from the relevant date that the targets were set, the targets have been hit consistently. In any event,

the Tribunal notes that the purpose of the targets was not to harass but to address profitability of the Respondent. However, our conclusion is that the Respondent did not set unachievable targets.

122. The Respondent shows that the targets have been consistently hit since April 2015 (p232). We also note that when Mr Shazhbaz Malik gave his evidence, he said that when he took over the Claimant's role, he changed staff rotas and the hours that they worked, explaining that this resulted in an upturn in the figures. The complaint is simply not established by the evidence.

Refusing to consider the Claimant's complaints of 7 May or to properly investigate those issues raised

123. The Claimant sent an email to Mr Nolan on 7 May 2015 (p821). When this email was sent, Mr Nolan was on annual leave. Mr Nolan responded saying: *"I will sort when I return"*. There is a dispute between the Claimant and Mr Nolan as to whether on his return Mr Nolan actually contacted the Claimant. Mr Nolan was clear that he did. The Claimant was clear that he did not. However, in our view it is more likely than not that Mr Nolan did address the issue when he returned because one of the things that happened was that it was arranged that there would be a meeting between the Claimant and Mr Hassan Janjua about whom the Claimant was complaining of harassing and bullying him.

124. It is the conclusion of the Tribunal that there was not a refusal to consider the Claimant's complaints of 7 May or to properly investigate them in May 2015. In any event, the Claimant subsequently raised a grievance in which this complaint was raised. It was considered and investigated by the Respondent.

125. The Tribunal does not find established that there was a refusal to consider the Claimant's complaints of 7 May or to properly investigate the issues raised as alleged in 7b of the list of issues.

Mr Nolan using the meeting of 19 May as an opportunity to assassinate the Claimant's character and cause a great deal of stress and anxiety to the Claimant triggering his disability

126. The Respondent's position on this is that the purpose of this meeting was to discuss performance of the company. During the course of the discussion, there would have been talk about the way that the Claimant was performing his role and the extent to which he was succeeding or failing. However, the Respondent says that it was a discussion about turning around the business.

127. The exchange of emails following that meeting is in our view informative. On 20 May, Mr Nolan sent an email to the Claimant setting out what had been discussed and agreed at the meeting that had taken place the previous day. He identified four bullet points of actions to be taken by the Claimant.

128. The Claimant in response to that email sent to Mr Nolan a three-page email in which he set out in 24 bullet points a series of matters. The Claimant begins his email with the sentence: *"In response to your email outlining yesterday's meeting, I feel I have to respond with my understanding of it."* He then points out a number of matters setting out what he says was said to him by Mr Nolan in the meeting and it is clear from the way that email reads that the Claimant did feel as though he was being put upon at the meeting and a number of accusations were made against him. Towards the end of the second page of the email, there is a bullet point which begins:

"I asked you straight if it was your intention to get rid of me as I have had it from several sources that this is the case. You denied this. I did not manage to submit all my ideas for the improvement of performance and the reduction of costs as we spent most of the time with you and Hassan highlighting my failures and past issues and me defending myself to the point my ADHD was triggered and I had to leave the meeting in conclusion."

The Claimant concludes with the passage as follows:

"All in all, to me yesterday's meeting was not about the way forward but about criticising me. Although you and Hassan constantly pointed out where I had apparently gone wrong, there was no mention to Hassan of the appalling payroll issues we had since ARL took over. I left confused and deflated as I was under the opinion we were going to come up with a way forward. I am now off sick and waiting to go to the doctor. I have been in touch with Wendy and agreed to help out where I can."

129. Mr Nolan responded to the Claimant initially with a short email saying that he did not agree with the account that the Claimant had given of the meeting and telling him that he would respond in due course. He pointed out that he considered that the Claimant's approach was surprising as when they left the meeting and also from the texts that he sent following the meeting, he had thought it was a positive meeting and that the Claimant had been reassured that they could succeed as a team.

130. Mr Nolan then subsequently responded in more detail (p226-231). It embeds into the Claimant's email his response to many of the points which the Claimant has made and he refutes the allegations that the Claimant has made. It is noted that in his email, the Claimant does not in fact raise a complaint about Mr Hassan Janjua harassing him in the meeting on 19 May or in the email complaining about the way that the meeting was conducted. He has an opportunity to do so and has not done so.

131. In the Claimant's witness statement, at bullet points 27 to 30, the Claimant deals with the meeting on 19 May. The Claimant does not make the same complaints that he articulates during the course of the hearing.

132. The conclusion of the Tribunal is that this was a meeting where the Claimant's performance was very much an issue. The fact that the

Claimant's performance was to some extent criticised does not in our view amount to harassment related to disability. The topics under discussion as is evident from the Claimant's email and also from the response given by Mr Nolan is that the matters that were discussed were related to the business. It appears to the Tribunal that the way in which they were discussed were, on their face, appropriate and there does not appear to be the suggestion of serious bullying that the Claimant now seeks to rely upon although he does make it clear in his email that he feels that he has not been fairly treated in the criticism. However, on balance, we are not satisfied that the way that the Claimant characterises the meeting on 19 May amounts to harassing conduct.

133. If we had reached the conclusion that the manner in which the meeting was conducted was inappropriate so as to amount to harassing conduct, we would not have been able to conclude that the meeting was conducted in that manner related to the Claimant's disability. It is clear at this time that the sole purpose of the meeting and intention of Mr Hassan Janjua and Mr Nolan was to discuss the performance of the business. It is important to note that Mr Nolan was only in his second month in the business at this time, having been brought into the business in order to produce an improved performance.

Seizing of the Claimant's contract on 18 June 2015

134. The Claimant's contract was seized for the reasons which have already been explained. This was not related to the Claimant's disability; it was because of concerns about the Claimant's contract, its contents and its nature. In any event, the Tribunal would not have been able to conclude that this was harassing conduct: there was a genuine concern on the part of the Respondent that the Claimant's contract was fraudulent.

Requiring the Claimant to be escorted through the workplace in front of friends and colleagues flanked by two members of managerial staff

135. This was agreed by the Respondent.

136. There is a slight disagreement between the Claimant and the Respondent in that the Claimant says that he was flanked by two members of staff, whereas the Respondent says that it was only the one. The Claimant however does not appear to contest the Respondent's evidence that he was let into the property by one of the people who flanked him. In our view, the description of the event is innocuous. It is not unusual for an employee who is not in work to be accompanied around the premises. We note that this was an area which had a level of security which required a pass to be on the premises in this location. There was an issue as to whether or not the Claimant's pass had expired or not.

137. The Tribunal is not satisfied that there was any question of the Claimant being harassed in relation to this action. It was not in our view harassing conduct; it was a way of acting which was not unique or unusual for somebody who might be in the Claimant's circumstances, i.e. a long-term

absentee from work, in respect of whom their security pass had lapsed and who needed to be given access on and off the premises. In any event, the Tribunal is not able to conclude that the treatment of the Claimant in this regard was in any sense related to his disability.

Threatening to relocate the Claimant to head office so as to work in direct contact with all directors of the company including Mr Nolan

138. The proposal to close the location at D'Albiac House was completely unrelated to the Claimant or the Claimant's disability. It was a financial decision. The Respondent on the one hand was able to obtain alternative office space in circumstances where it did not have to pay as much as it would have been required to pay at D'Albiac House. This was not in any sense related to the Claimant's disability; it was not harassment.

139. Other members of staff were moved. The Claimant's complaint about this has developed as his absence has extended and relates as much to the progress of these proceedings and the ongoing dispute. At the time that the proposal was made in the summer of 2015, Mr Nolan was a relatively new employee. The Claimant and Mr Nolan had limited contact in the workplace. The Tribunal is not satisfied that the decision to relocate the Claimant to work from head office was in any sense related to the Claimant or related to his disability. It was a business decision and there were sound reasons why the Respondent wanted to operate in this way. Of course, it is possible that they could have made alternative or different arrangements but the arrangements that they did make were in no sense related to the Claimant's disability.

Initially refusing to pay company sick pay

140. It is not in dispute that when the Claimant initially went off sick, the Respondent refused to pay his sick pay.

141. The Respondent also initially refused to pay sick pay to Mr Khhattri-Chattri. In the case of Mr Khhattri-Chattri, the refusal to pay sick pay was because the Respondent was not in possession of a copy of his contract of employment which showed an entitlement to pay his sick pay. The TUPE transfer of the business had not been efficient in the passing on of information about the transferred employees' contracts of employment. The Claimant's position was that by the time that the Claimant's entitlement to sick pay was established, his contract was in doubt; it was in doubt in the sense that the Respondent was questioning the genuineness of the contractual terms which included the contractual term that the Claimant is to receive 90 days' sick pay. In due course however, the Respondent did pay. The initial refusal to pay was not in any sense related to the Claimant's disability but was because there was a genuine dispute concerning the validity of the Claimant's contract of employment.

Subsequently refusing to consider that the Claimant had been incorrectly paid company sick pay

142. As can be seen from the Tribunal's decision above, we have come to the conclusion that the Claimant's sick pay was inaccurately calculated. We have gone on to consider whether the Claimant's disability played any part in this. We are not satisfied that the Claimant's disability is a factor in arriving at the amount that the Claimant has been paid.

143. The reason that the Claimant has been paid less is because the Respondent has taken a view of the contract which results in a calculation being made in a particular way. It is their interpretation of the contract. The Claimant has a different interpretation of the contract. We are not satisfied that this was harassment related to the Claimant's disability.

Refusal to implement reasonable adjustments

144. As has been. previously stated, the Tribunal has not been able to conclude that there was a refusal on the part of the Respondent to implement reasonable adjustments.

Cracking the Claimant's workplace safe

145. It is agreed that the Respondent cracked the Claimant's safe. At the time they did so, there was a question mark as to whose safe it was. The Claimant had not been able to provide them with access to the safe; the Claimant had also refused to have his property transferred to head office and had insisted on collecting the personal properly. He had not been able to collect his safe on the day that he attended because there was a question mark as to the ownership of it. That question was not resolved until sometime into the conduct of these proceedings, well after the issue has arisen. The Tribunal is not satisfied that the issue relating to the cracking of the safe was in any sense related to the Claimant's disability.

146. The conclusion of the Tribunal is therefore that the Claimant's complaints about disability-related discrimination fail.

Failure to make reasonable adjustments

147. Section 20(3) EA provides that where a provision, criterion or practice (PCP) of an employer's puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. An employer discriminates against a disabled employee if the employer fails to comply with that duty in relation to that employee.

148. The PCP that the Claimant relies on is setting extremely high targets for the Claimant. It is agreed between the parties that targets were set. In issue between the parties is whether or not they were extremely high targets.

149. The Tribunal has come to the conclusion that this PCP has not been made out. The Tribunal is satisfied that they were not extremely high targets that were set. This is evident from the Claimant's own evidence in which he accepts that he could have achieved the targets and in other parts of his evidence where he asserted that he positively did achieve the targets.

150. What the Claimant appears to have been complaining about is the suggestion that his targets were measured or assessed on a weekly basis. The Tribunal is satisfied that this was not the case. It certainly was the case that weekly reporting was done in relation to his targets. This was not assessing the Claimant in any sense. It was not a target that he was required to meet or if he met there would be some penalty. The Claimant may have misunderstood it, especially in circumstances where at the time there were questions raised about his performance or the performance of the business that he was responsible for.

151. Whether the question is setting extremely high targets or setting targets, the Tribunal is satisfied that the PCP that the Claimant seeks to rely upon has not been made out. In any event, even if the Respondent had been able to show that the targets that were set were extremely high and that the PCP was made out, on the evidence which has been given by the Claimant, he has not been able to show that he has suffered a substantial disadvantage by reason of the targets because it is the Claimant's evidence that he was able to meet the targets. At times, the Claimant appeared to be saying that in fact during the relevant period he was exceeding the targets.

Discrimination arising from disability (Section 15 Equality Act 2010)

152. Section 15 EA provides that an employer discriminates against a disabled employee if the employer treats the employee unfavourably because of something arising in consequence of the employee's disability, and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does not apply if the employer shows that he or she did not know, and could not reasonably have been expected to know, the employee had the disability.

153. The Claimant claims that he has been treated unfavourably because of something arising in consequence of his disability. The Claimant says that when his disability is triggered, he becomes susceptible to stress and anxiety and has a tendency to become argumentative and contentious. The Claimant says that because of the something arising in consequence of disability, he was being treated unfavourably by the Respondent and that such unfavourable treatment has been committed with an underlying objective of prompting him to leave his position of employment. The Claimant relies on following as unfavourable treatment:

<u>The Respondent's refusal to provide the Claimant with occupational health support or to implement reasonable adjustments</u>

154. The Tribunal for the reasons which have been set out above has not been able to conclude that there was a refusal to provide the Claimant with occupational health support or to implement reasonable adjustments.

The seizing of the Claimant's contract of employment

155. The seizing of the Claimant's contract of employment was not something which arose in consequence of his disability. It was entirely unrelated to his disability and was concerned with the question of whether or not the Claimant's contract was fraudulent.

The setting for the Claimant of unachievable targets

156. The Respondent did not set the Claimant unachievable targets for the reasons which have been previously set out.

The Respondent's refusal to consider the Claimant's complaint of 7 May or to properly investigate the issues raised

157. The conclusions of the Tribunal as set out above were that in respect of the 7 May, the Respondent did not refuse to consider the complaint. The Claimant did not raise the complaint at the meeting on 19 May and when the matter was raised by the Claimant in his grievance, the matter was fully investigated by the Respondent. There was not the unfavourable treatment which the Claimant has relied upon.

The Respondent's threat of relocating the Claimant to head office so as to work in direct contact with those who he had named as being discriminators

158. The reason for relocating the Claimant to head office was because the Claimant's place of work, the administrative building at D'Albiac House, was closed down. It was not a matter which arose as a result of or in consequence of the Claimant's disability. The Claimant however also complains that the Respondent's intention was to treat the Claimant unfavourably to manufacture a situation whereby the Claimant would become stressed and anxious, forcing him to consider leaving his employment.

159. This is significant when considering the Claimant's complaints relating to the relocation to head office. What the Claimant appears to be saying is by continuing to rely on the requirement that he relocates to head office, the Respondent, even if their original intention was not to discriminate against the Claimant, the effect of it was to discriminate against him.

160. The Tribunal however is satisfied that there were appropriate decisions taken on their own merits in respect of the separate issues relating to the Claimant including the decision to relocate the Claimant to head office. The Claimant clearly viewed this relocation as something that goes against his interests. He considered that his contract entitled him to work at Heathrow Airport. However, the decision to relocate him to head office was not a matter which was arrived at by the Respondent related to the

Claimant's disability. It was not a matter which was caused in any sense by the disability.

161. The Tribunal in any event note that the Claimant was being required to be based at Colnbrook. This is about 10 minutes away from Heathrow. While it is not in the Heathrow Campus it is in our view in the Heathrow area. There is in our view no significant disadvantage in the location of head office in contract to D'Albiac House.

162. What was caused by the disability was the Claimant's inability to return to work and what the Claimant says is that he suffered unfavourable treatment by the Respondent because requiring him to return to D'Albiac House restricted his ability to return to work. The matters of concern for the Claimant were ameliorated by the layout of head office and the fact that wherever the Claimant was located he would have the same level of contact with senior directors. The Respondent's approach to try a return to work at the head office and to "see how it goes" was in our view a reasonable approach.

163. The Tribunal is satisfied that the Claimant's ability to return to work was limited by his willingness to work at head office. Unless the Respondent released the Claimant from returning to work at head office, the Claimant was not returning to work.

Was it reasonable for the Respondent to require the Claimant to work based at head office?

164. The Tribunal is satisfied that it was.

165. The Respondent has explained how the staff were relocated after the closure of D'Albiac House. The Claimant's day-to-day function was not to immediately line manage the porters – his was a manager's role, it was a more strategic role. He had daily contact not only with the porters but also with other managers. It was quite reasonable for the Respondent to take the decision that it did to move the Claimant to head office.

166. In any event, even if the Claimant had been granted the wish which he desired which was to be based at the terminal, he would have been required to have contact with employees and colleagues against whom he has made allegations. His daily work involves contact with Mr Nolan. Being based at head office would not mean that he had any more contact with Mr Nolan or Mr Nawaz Malik than he would do if he was based at the terminal. The Claimant appeared to suggest that it was the idea of bumping into or meeting Mr Nolan or Mr Nawaz Malik around about his workplace that caused him anxiety. We note that the design at head office would have facilitated the ability for the Claimant to be based in a part of the office where he would not have immediate contact with Mr Nawaz Malik or Mr Nolan, they were working in a different part of the same building.

167. Finally, we note that the Claimant previously had not worked at the terminal – he had worked at D'Albiac House which is an administration block. Apart from the location, the Claimant's working conditions would have been remarkably similar save that rather than being in D'Albiac House, he would be in the head office.

168. The Respondent gave clear reasons and explanations as to why it was not suitable for the Claimant to work as he had suggested in a sort of hot desking environment.

169. The Tribunal is satisfied that on any reasonable consideration of the circumstances of this case, the relocating of the Claimant's work location from D'Albiac House to the head office was because of the closure of the admin office at D'Albiac House. It was not in any sense because of his disability.

170. That is also the reason why the Claimant is being asked to return to work there and it is the conclusion of the Tribunal that the Claimant's continuing refusal to return to work at head office for fear of it causing him to be unwell is not a matter which is caused by the Respondent in relocating his place of work from D'Albiac House to the head office. While we accept that relocating the Claimant to head office restricts his ability to return to work and that the reason that the Claimant cannot return to work is related to his disability, we are satisfied that it is a proportionate means of achieving a legitimate aim because there are good financial reasons for doing so, the Claimant would be working in a separate area, the job role that the Claimant would be required to do wherever he was located necessarily involves him having contact with those employees about whom he has made complaints. Finally, there is no more contact that the Claimant would have based in the head office than he would have if his place of work had not moved from D'Albiac House or if he was to be working in the terminals. There perhaps may be a greater risk of bumping into a person about whom he had complained in a corridor but even this on the information that we have been given by the Respondent seems to be of limited risk which arises more from the fact of the Claimant's anxiety and distress or other effect of his ADHD than the reality of being located in head office.

Conclusions

171. In conclusion, we have found that the Claimant's complaints of unlawful discrimination are not well founded and should be dismissed. There is no need for us to consider any questions of jurisdiction arising in relation to those complaints.

172. In respect of the Claimant's unauthorised deductions claim, there is an issue for us to determine as to whether or not the deductions form a series of deductions, the last of which was within the primary time limit and if it is not the case, whether it was reasonably practicable for the Claimant to bring the claim.

173. Neither of the parties have addressed us on the question of whether or not the complaints about unlawful deduction are in time. We have not been addressed as to the periods in respect of which the Claimant ought to recover compensation or the precise amounts. For those reasons, unless the parties are able to reach agreement, the matter will be listed for a Remedy Hearing to determine whether the Claimant is entitled to recover any sums arising from the deduction from his wages.

174. The Tribunal declares that the correct way to calculate the Claimant's entitlement to sick pay pursuant to clause 10.1 of the claimant's contract of employment wages is: (a) to determine the daily rate of pay by dividing the annual rate of pay by 52 weeks, and then dividing the product of that calculation by 5; (b) the daily rate is then to be multiplied by 90 to arrive at the amount of sick pay that the Claimant is entitled to receive under his contract.

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Employment Judge Gumbiti-Zimuto

Date: 31 December 2018

Sent to the parties on: .07 January 2019.

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For the Tribunals Office