EMPLOYMENT TRIBUNALS

Claimant: Mr C Hargreaves

Respondent: Department for Work and Pensions

Heard at: **Leeds** **On:** **4, 5, 6 and 7 June 2018**
(Reserved) 20 June 2018

Before: **Employment Judge Keevash**
Mr G Harker
Mrs J Rathbone

Representation
Claimant: In person
Respondent: Mr S Healy, Counsel

RESERVED JUDGMENT

1 The complaint that the Respondent failed to comply with a duty to make reasonable adjustments when between 17 July and 21 September 2017 it failed to allow the Claimant to work flexible hours succeeds.

2 The complaint that the Respondent discriminated against the Claimant when treating him unfavourably by dismissing him succeeds.

3 The remaining complaints of disability discrimination fail.

4 The complaint that the Respondent made unauthorised deductions from pay succeeds.

REASONS

Background
1 By his Claim Form the Claimant complained of unfair dismissal and disability discrimination. The Respondent resisted the complaints.

Issues
2 At a Preliminary Hearing the Claimant withdrew his unfair dismissal complaint because he did not have sufficient qualifying service. An Employment Judge

adjudged that the complaint be dismissed on his withdrawal. She identified the issues which had to be determined at the final hearing.

Hearing

3 The Claimant gave evidence on his own behalf. Lindsay Ingle, PIP case Manager, Gary Jeffers, Service Centre Manager, Lee Pendleton, Operations Manager, Andrew Carr, Operations Manager, Denise Hayes, Band D RA, and Mark Christopher Bailey, Service Centre Manager, gave evidence on behalf of the Respondent. The Tribunal also considered a bundle of documents.

Facts

4 The Tribunal found the following facts proved on the balance of probabilities:-

4.1 On 4 February 2016 the Claimant was employed by the respondent as a Case Manager

4.2 By a letter dated 24 May 2016 Ms Nyatsambo, Occupational Health Adviser, informed the Claimant's line manager:-

"…

Current Health Situation

…

As you are aware Mr Hargreaves is currently not work (sic). He states that he has suffered with depression since the age of 17 years and the triggers are unknown. He states that he has intermittent flare ups. He describes symptoms including feeling exhausted, wanting to isolate himself, low mood and episodes of anxiety. These have lead to reduced motivation, poor concentration and reduced confidence.

He states that he is being supported by his GP as he has been taking anti-depressants for the past 2 weeks…

Capability For Work

Based on my assessment Mr Hargreaves is fit to be at work. He has informed me that management has agreed for him to do flexible working …

Disability Advice

My interpretation of the relevant UK legislation, is that in my opinion, Mr Hargreaves conditions (anxiety and depression) are likely to be considered a disability because they:
Have lasted longer than 12 months
Are likely to recur
Would have a significant impact on normal daily activities without the benefit of treatment.

Response to Specific Questions:

Question: "Are there any reasonable adjustments which I can put in place to help Chris sustain attendance at work while having a depressive episode?"
Answer: I believe that Mr Hargreaves will benefit from a Work stress risk assessment and working flexible hours, if the business can support …".

4.3 On 3 August 2016 the Claimant attended an End of Probation meeting which was conducted by Mr Bailey.

4.4 By a letter dated 4 August 2016 Mr Bailey informed the Claimant that his employment was to be terminated because he had "not met the required standards".

4.5 The Claimant appealed that decision. On 9 September 2016 he attended an Appeal meeting which was conducted by Mr Carr. By a letter dated 25 September 2016 Mr Carr informed the Claimant that his appeal was upheld. As a result, among other matters, the Claimant was to be reinstated; his probation period was to be extended; a formal attendance management meeting was to be held at which a decision whether a formal warning was appropriate would be made; there would be an Occupational Health review.

4.6 On 6 October 2016 the Claimant attended a welcome back discussion which was conducted by Ms Ingle, his new line manager.

4.7 During October 2016 the Claimant was often late but Ms Ingle was not concerned because she thought that there were understandable reasons for the lateness.

4.8 By a letter dated 17 October 2016 Ms Paterson, Occupational Health Adviser, informed Ms Ingle:-
"…
Capability For Work
Mr Hargreaves is currently at work and in my opinion is fir for work. He advised he is undertaking training and reports to be coping well with this. Mr Hargreaves can experience fluctuations in his mood and motivation and it is suggested if he is experiencing any increased symptoms that he should inform his manager. Regular meetings with his manager should be arranged in order to discuss any concerns and to monitor the workload to ensure it is commensurate with current abilities. Management may wish to consider some adjustments to his workload and targets when he is experiencing any increased symptoms in order to support his continued attendance at work. Regular breaks should be incorporated into the working day to mobilise out of his chair to help alleviate repetition of action, excessive concentration and tension.

Mr Hargreaves also reported some apprehension in relation to work and was advised to discuss this with his manager…

Response to Specific Questions
…
Question: "what reasonable adjustments can be put in place to help Chris whilst he is at work"
Answer: Regular breaks during the day. Meetings with management to discuss any concerns and monitor the workload…".

4.9 By early November 2016 Ms Ingle became concerned with the Claimant's lateness (for which there was no longer any good reason), the fact that he was missing out on training with his mentor and that he was not making contact to inform her that he would be late. After speaking to HR, she decided to begin a stress reduction plan.

4.10 On 3 November 2016 the Claimant attended a meeting with Ms Ingle in order to put in place a stress reduction plan and to discuss how they could best work together to support him through his probation period. Among other matters

he explained that public transport and traffic were part of the reason why he was finding it difficult to get to work on time. He did not state that his mental health condition was the cause.

4.11 On 21 November 2016 the Respondent gave the Claimant a written warning in relation to his conduct.

4.12 By a letter dated 2 December 2016 the Respondent confirmed that the Claimant had successfully completed his period of probation, his permanent appointment as an EO began on 25 November 2016, and his written warning had lapsed.

4.13 The Claimant continued to arrive late for work and on occasion failed to inform Ms Ingle. She and Mr Bailey received HR advice. The Claimant was absent from work from 5 to 16 December 2016.

4.14 On 20 December 2016 the Claimant attended a welcome back discussion which was conducted by Ms Ingle. Among other matters her record of the discussion stated that “No temporary workplace adaptations or reasonable adjustments are required at this time”.

4.15 On 22 December 2016 the Claimant attended a stress reduction review meeting which was conducted by Ms Ingle. Among other matters they discussed the completion of his flexible working hours sheet and the fact that he lost a week due to a problem with the sheet. She requested that with effect from 29 December 2016 he work fixed hours starting at 10.00 until 18.00 or 18.30, depending on the length of lunch break taken. The Claimant agreed.

4.16 Between 4 January 2017 and 19 February 2017 the Claimant was absent from work due to sickness. His GP signed two Statements of Fitness for Work on 19 January 2017 and 6 February 2017 in which it was recorded that the Claimant was unfit for work because of depression.

4.17 On 20 February 2017 the Claimant attended a welcome back discussion which was conducted by Ms Ingle.

4.18 On 21 February 2017 the Claimant attended a stress reduction review meeting which was conducted by Ms Ingle. The record of the meeting stated among other matters “Chris was working fixed hours to help with his routine and we agreed that he would remain on these hours ie 10:am until 6:00 or 6.30pm ..”.

4.19 On 3 March 2017 the Claimant attended an Attendance Management meeting which was conducted by Ms Ingle. At the end of the meeting Ms Ingle stated that she would be giving him a first written warning. By a letter addressed to the Claimant dated 6 March 2017 Ms Ingle confirmed her decision.

4.20 By a letter dated 15 March 2017 Ms Chihota, Occupational Health Adviser, informed Ms Ingle:-
“…
Current Health Situation
… He is now back at work and managing his full hours and duties with no problems. He has however stated that there are issues around his wages which are adding stress and affecting his concentration. I understand that his manager is looking into the issue.

Capability For Work
Based on today's assessment in my opinion Mr Hargreaves is considered fit for full duties…

Response to Specific Questions:
…
Question: "Are there any coping mechanisms that can be used to help the employee into work".
Answer: A stress reduction plan would be a good support measure Regular one to one meeting to check progress and offer support are also advisable …".

4.21 On 3 and 4 April 2017 the Claimant was absent from work due to sickness. On 5 April 2017 the Claimant attended a welcome back discussion which was conducted by Ms Ingle. He told her that he was primarily absent due to his mental health issues which were increased by work payment issues.

4.22 By a letter dated 12 April 2017 Ms Ingle invited the Claimant to attend an investigation meeting. She stated:-
"… I am writing to advise you that I am investigating whether you have breached the standards of behaviour.
It has been alleged that you have repeatedly failed to attend work at the required time and have breached the standards of behaviour by not making all reasonable efforts to report for duty at your place of work in a timely manner or informing your line manager if you are unable to attend work at the agreed time …".

4.23 On 19 April 2017 the Claimant attended an investigation meeting which was conducted by Ms Ingle.

4.24 By a letter dated 20 April 2017 Ms Ingle informed the Claimant that she found the misconduct case substantiated and issued him with a first written warning which would remain on his record for a period of twelve calendar months.

4.25 Between 27 April 2017 and 2 May 2017 the Claimant was absent from work due to sickness.

4.26 On 3 May 2017 the Claimant attended a welcome back discussion which was conducted by Mr Jeffers, his new line manager.

4.27 By a letter dated 10 May 2017 Mr Jeffers invited the Claimant to attend a formal meeting under the Respondent's discipline procedure. He stated:-
"… The formal meeting will consider the allegation that your behaviour has fallen short of what is expected of you in relation to time keeping and meeting your conditioned hours of 10.00-18.00 as well as failing to make appropriate contact with your line manager to inform them of any delays in your attendance…".

4.28 On 17 May 2017 the Claimant attended a stress reduction review meeting which was conducted by Mr Jeffers. The record of the meeting stated that among other matters they discussed the Claimant's recent diagnosis of PTSD; he would inform the Respondent about changes in medication; he had trouble getting into work and phoning to discuss this left him feeling almost paralysed; he felt that his conditioned hours were restraining and he wanted more flexibility; Mr Jeffers was not willing to put him back onto flexible working hours due to previous issues but

agreed to make the hours a bit more flexible by allowing him to start between 9:30 and 10:30 and finish between 17:30 and 18:30 depending on when he started the Claimant's current problem was being fatigued and Mr Jeffers stated that he would consider reducing his hours either temporarily or permanently.

4.29 On or about 17 May 2017 the Claimant gave Mr Pendleton a four page letter headed "My Mental Health and How It Affects Me". Mr Pendleton discussed it with him. He also decided to refer the Claimant to Occupational Health.

4.30 By a letter dated 18 May 2017 Ms Barton, Occupational Health Adviser, informed Mr Jeffers:-

"…

Current Health Situation

…

His main symptom is fatigue, with lack of concentration.

Capability For Work

In my opinion Mr Hargreaves is fit to be in work at this time…

Response to Specific Questions:

…

Question: "Are other agreements already in place sufficient? i.e. extra breaks etc."

Answer: Yes, the adjustments currently in place are certainly helping him. If you can continue to remain as flexible as you can to his needs as they arise then this is likely to help him to remain in work…".

4.31 On 18 May 2017 the Claimant attended a disciplinary meeting which was conducted by Mr Jeffers. He was accompanied by Ms Hopkinson, trade union representative.

4.32 By a letter dated 22 May 2017 Mr Jeffers informed the Claimant:-

"… I am giving you a Final Written Warning because your standards of behaviour have not been at a level that is acceptable to the Department.

We discussed the issues relating to your performance which were as follows:

Since you received a first written warning on 20th April 2017 you have been expected to work conditioned hours of 10:00-18:00 and to notify your line manager of any absences or late arrivals at work via telephone call. Evidence was provided of 13 separate occasions when you have failed to meet these requirements between the 20th of April an the 18th of May …

…I find the allegation of misconduct due to failing to meet the expected standards of behaviour substantiated …".

4.33 On 17 July 2017 the Claimant attended a meeting which was conducted by Ms Aitchison, his new line manager. Mr Pendleton (who was about to take over as the new line manager) also attended. They discussed lateness. The Claimant wanted to go back to flexible working hours. Mr Pendleton stated that he would review the Claimant's attendance over the next four weeks and would then consider the request. The Claimant explained that his medication was being reviewed and that his GP had steadily reduced his current medication with a view to prescribing another. He agreed to keep the Respondent informed.

4.34 By a letter dated 10 August 2017 Ms Taylor, Occupational Health Practitioner, informed Mr Pendleton:-

"…

Current Health Issues

…

As you are aware, Mr Hargreaves has anxiety and depression. His current medication is not ffective therefore he is being weaned off with a view to commencing at least one new medication. However, he will be without treatment for a period of a week. He is managing to attend work at present but he is experiencing fatigue, lack of motivation and his concentration is affected. These symptoms may get worse before getting better.

Current Capacity for Work

Mr Hargreaves remains fit for work with the following recommendations:

A reduced target level, by 25%, my need to be considered over the next 6-8 weeks whilst he starts his new medication…

Manager Question(s)

Are there any workplace adjustments that can be suggested to help Chris attend and maintain attendance at work? How long should I make those adjustments for?	A reduced target level may need to be considered over the next 6-8 weeks whilst he starts his new medication.
Chris's medication is being changed and he will have 1 week of no medication being taken before he then moves onto a new medication (undecided) how will his symptoms effect his ability to do his job and attend work.	This change over of medication is likely to affect his fatigue levels, concentration until the new medication is effective. This should take approximately four weeks after starting a new one. Mr Hargreaves may benefit from taking a short period of annual leave the week when he is on no medication at all.

…".

4.35 Subsequently Mr Pendleton agreed that the Claimant should take a week's leave commencing 23 August 2017. He had previously agreed to reduce his target from eight to six.

4.36 By an email dated 16 August 2017 addressed to Mr Pendleton Ms Khammash, HR consultant, summarised their discussion that day. She stated:-

"…

Summary of Query: You rang to discuss a Disciplinary case

Summary of Discussion: … You wanted to know if you could send the case to the DM for dismissal…".

4.37 By a letter dated 8 September 2017 Mr Pendleton invited the Claimant to a meeting in order to discuss his attendance during the First Written Warning Review period. He stated:-

"…

Your attendance has been satisfactory during the First Written Warning Review period. This meeting is to make sure that you understand what will happen if your attendance becomes unacceptable again …".

4.38 By a letter dated 14 September 2017 Mr Pendleton invited the Claimant to attend an investigation meeting. He stated:-
"I am writing to advise you that I am investigating non-compliance of your working pattern agreement and failure to record correct hours of attendance on your personal flexible working hours record.

It has been alleged that you have between the 17.07.17 to 11.08.17 failed to adhere to your working pattern agreement 16 times and have failed to correctly record 22 hours and 19 minutes of deficit flexible working hours…

I am investigating this under the Gross Misconduct category …".

4.39 On 18 September 2017 the Claimant attended a meeting which was conducted by Mr Pendleton. By a letter of the same date Mr Pendleton confirmed that the Claimant's attendance was satisfactory during the First Written Warning Review Period, the Period had ended and his attendance would be monitored for a further twelve months.

4.40 By a letter dated 20 September 2017 Ms Smith, Cognitive Behaviour Therapist, informed the Respondent:-
"…
Chris was referred to our service in April 2017 and has been on our waiting list until he was placed onto my caseload and was seen for his first follow-up appointment on 16th August 2017. Prior to our service Chris' doctor had referred him to a service called IAPT in Leeds but they were unable to help as they felt Chris required more specialist input which is why from Jan 2017 – April his throughput through the mental health services was delayed.

Chris presents with ongoing low mood (depression). This is a debilitating condition, but one that is treatable …

Symptoms of depression can range from mild to very severe. Chris' scores … this shows that Chris' low mood falls within the severe category. At this level, Chris will struggle with the following: concentration, motivation, being slowed up in cognition and physical being, he will struggle with sleep, sometimes finding it difficult to get to sleep or wake in the mornings. And of course Chris does experience many negative thought processes that leave him being extremely self-critical. All of these symptoms will impact on him differently each day, for example he may be able to get up and in for 10am whereas on another day it could be more around 11:30 as the symptom of being slowed-up will impact his speed. On some days this could mean that he will struggle more to get into work for a fixed time. Staying on fixed times for Chris feels like another obstacle for him to overcome daily. If this were to be removed, Chris would then be freed up to concentrate on his work and on meeting his therapy targets.

I understand that Chris has been working to a pattern of fixed working hours and that he has requested to be placed back on flex-hours as many/most of his colleagues are on. I have discussed this with Chris today and I feel that he is in a different place in his life than he was in Jan when his depression flared up again. At that time I can understand why he would have struggled to get into work and

work full hours and I feel that for him he returned to work too early in his recovery at that time. He did so due to financial constraints (as I am sure you can appreciate is many peoples worry in this current climate). I understand that Chris' actual performance at work is fine and without concern.

I would appreciate if you could support Chris in his request for flexi-hours. Additionally, I would welcome any further support that you could offer Chris around helping him to attend and follow through on his therapy to reach his goals. People who are struggling with depression require some understanding of the symptoms in order to appreciate how difficult it can be on some days to meet fixed expectations. I am confident that with your full support, Chris will continue to be a valued member of your team…".

4.41 On 21 September 2017 the Claimant attended a meeting which was conducted by Mr Pendleton. He was accompanied by Mr Cullum, trade union representative.

4.42 Subsequently Mr Pendleton prepared an investigation report in which he stated:-
"… Therefore for the purposes of transgression it is clear that Chris has failed to adhere to his working patter, nor has he taken appropriate steps to help himself and I have decided that there is a case to answer and I have referred this case to a decision maker …".

4.43 By a letter dated 17 October 2017 Ms Hayes informed the Claimant-
"… you are required to attend a formal meeting under DWP's Discipline Procedure.

The formal meeting will consider the allegation/s that you failed to meet the department Standards of Behaviour when you

- You breached your fixed hour's agreement by attending late or leaving early on 16 occasions within a 4 week period.
- You also falsified your flexible working hour's record on 27 occasions resulting in that record reflecting that you had worked 22 hours more than you had actually worked.

… I must make you aware that the allegations concerning failing to adhere to fixed working hours and correctly recording working hours represent gross misconduct offences. The meeting may therefore result in your dismissal without notice or payment in lieu of notice. OR As you are presently under a final written warning for misconduct the meeting may result in your dismissal …".

4.44 By an email dated 17 October 2017 Ms Hayes informed the Claimant that she would be the decision maker on his case and asked whether he would be available on 1 November 2017. That date was inconvenient for the Claimant. They agreed to meet on 2 November 2017.

4.45 By an email dated 24 October 2017 the Claimant informed Mr Pendleton:-
"I would like my reasonable adjustments to be as follows:

1) flexi time to be reinstated. I have requested it multiple times and provided written medical evidence that my current pattern is a barrier to work and that Flexi Time will be beneficial.

2) Increase in my trigger point for absences (DETP). I was told in meeting this had already been done until you confirmed otherwise. You said you would aim to get me a 100% increase but since have said a 50% increase should be done …".

4.46 On 2 November 2017 the Claimant attended a disciplinary meeting which was conducted by Ms Hayes. He was accompanied by Mr Cullum.

4.47 On 7 November 2017 Ms Hayes discussed the Claimant with HR.

By a letter dated 8 November 2017 Ms Hayes informed the Claimant:-
"…
I have considered all the circumstances including the results of the investigation dated 21/09/2017.
Also first written warning dated 20/04/2017.
Final written warning dated 22/05/2017.
I have also carefully considered the Occupational Health outcome reports dated 18/5/17 and 10/08/2017.

The investigation has concluded that you have failed to meet the Department's standards of behaviour in two areas:
1. You breached your fixed hours contract by attending work late or leaving earlier than agreed on sixteen occasions in a 4 week period, from 17/07/2017 to> 09/08/2017. I accept that on occasions public transport can be disrupted and potentially cause late attendance, and that you should always notify your manager at the time if that is the case as they have a duty of care for your wellbeing. However with regard to you leaving early without explanation, you have not provided any explanation in respect of mitigation.
2. You incorrectly falsified the record of your hours actually worked on 27 occasions and incorrectly recorded that you had actually worked 22 hours that you had not worked more than you had actually worked. I understand that when questioned about this you were honest and insisted that you would pay back the hours in whatever way the department saw fit. You had not intended to do anything wrong, you also perceive that you were given mixed messages about the recording of your fixed hours.

This concludes my findings of fact. Based on my findings of fact I have decided that there has been a breakdown in the working relationship between employee and employer. This is because there have been 43 instances where you have either (a) incorrectly recorded your actual hours worked to your financial advantage, or (b) failed to be attend work on time (or left work earlier than agreed).

This is Gross Misconduct because it constitutes the falsification of official records, repeated breaches of the standards of behaviour rules and repeated or persistent failure to follow reasonable instructions.

After considering all the relevant factors, it has been I have decided that your employment with DWP be terminated. This will take effect immediately, without notice and without pay in lieu of notice …".

4.48 By a letter dated 11 November 2017 addressed to Mr Carr the Claimant stated that he was appealing Ms Hayes' decision.

4.49 On 7 December 2017 the Claimant attended an appeal meeting which was conducted by Mr Carr. He was accompanied by Mr Anderson, trade representative. After the meeting Mr Carr spoke to Ms Hayes about how she had invited the Claimant to the disciplinary meeting. He also spoke to Mr Pendleton to establish what support had been given to the Claimant.

4.50 By a letter dated 9 January 2018 Mr Carr informed the Claimant that his appeal was not upheld.

4.51 At the material time the Respondent's Discipline Policy provided:-
"…
Informing and meeting the employee
40 Once an investigation is concluded, the next step is for the Decision Maker to decide, on the basis of all the evidence, whether or not there is a case to answer.

41…

42. If there **is a case to answer**, the Decision Maker will need to take further formal action and should write to the employee who has been investigated as soon as possible and within five working days of receiving the report and invite them to a formal meeting to discuss the findings of the investigation. The final decision will be taken and notified to the employee after the meeting. ..

43. The Decision Maker should:

- give the employee at least five working days' notice of the meeting and allow the employee a reasonable amount of official time to prepare their case and get advice and support from a trade union representative or work colleague
- …
- enclose the investigation report and witness statements/appendices …

Informing the employee of the decision
59. The Decision Maker should normally make a decision as soon as possible and within five working days of the meeting having consulted with to an HR Expert … where appropriate ad immediately communicate this in writing to the employee …

Appeal Manager's actions
…
74. Normally as soon as possible and within five working days of the appeal meeting, the Appeal Manager should decide and inform the employee whether their appeal has been upheld or rejected …".

The Respondent's Flexible Working Hours Agreement provided:-
"…
16. Separate to any disciplinary action or penalties, the manager may withdraw access to the FWH scheme and apply fixed hours for a reasonable period, usually up to three months to help employees with attendance problems to develop a regular and acceptable pattern of attendance. Fixed hours must be within the individual's contracted hours' framework…".

Law

5 Section 15 of the Equality Act 2010 ("the 2010 Act") provides:-

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

Section 20 of the 2010 Act provides:-

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

(2) The duty comprises the following three requirements.

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

Section 21 of the 2010 Act provides:-

"(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person … ".

Paragraph 20(1) of Part 3 of Schedule 8 to the 2010 Act provides:-

"A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-

(a) …

(b) … that an interested disabled person has a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first … requirement."

Section 26 of the 2010 Act provides:-

"(1) A person (A) harasses another (B) –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect …".

Section 136 of the 2010 Act provides:-

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision … ".

The Equality and Human Rights Commission: Code of Practice on Employment (2011) ("the Code") provides:-

" …

5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…

5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimized the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.

…

6.23 The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.

6.24 There is no onus on the disabled worked to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable.

6.25 Effective and practicable adjustments for disabled worker often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to have to make. Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example, compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make.

…

6.28 The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage'
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer…".

Submissions

6 The Claimant presented written closing submissions. He also made oral submissions. Mr Healy presented written outline closing submissions. He also made oral submissions. He referred to **Environment Agency v Rowan** [2008] IRLR 20 EAT; **Newham Sixth Form College v Saunders** [2014] EWCA Civ 734 CA; **Trustees of Swansea University Pension and Assurance Scheme v Williams** [2015] IRLR 885 EAT; **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305 EAT; **Pnaiser v NHS England** [2016] IRLR 170 EAT; **Hensman v Ministry of Defence** UKEAT/0067/14/DM; **Carranza v General Dynamics Information Technology Ltd** [2015] IRLR 43 EAT; **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 EAT. Where

appropriate, the Tribunal will refer to these submissions in the Discussion section of these reasons.

Discussion

The reasonable adjustment complaints

Complaints that the Respondent failed to comply with a duty to make reasonable adjustments when (a) failing to allow the Claimant to work flexible hours (b) failing to allow him to work from home and (c) failing to adjust the absence target trigger to take account of disability related absence

What was the provision, criterion or practice ("PCP")?
7 At the Preliminary Hearing an Employment Judge identified two PCPs:- (a) an instruction that the Claimant work fixed hours from 10:00 until 18:00 each working day and (b) a requirement to attend work regularly. There was no dispute that from 22 December 2017 the Claimant was required to work fixed hours between 10:00 and 18:00. On 17 May 2017 Mr Jeffers agreed to relax that arrangement. From thereon the Claimant had to arrive between 9:30 and 10:00 and he could leave between 17:30 and 18:00.

Did the application of the PCP put the Claimant at a substantial disadvantage?
8 The Claimant gave evidence that his mental impairment caused him difficulties including an inability to arrive at work on time and anxiety about using his mobile phone to call in late or absent. That evidence was supported by Ms Smith's letter dated 20 September 2017.

9 The Tribunal accepted the Claimant's evidence on this matter. It found and decided that the application of the PCPs placed him at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled.

The Respondent's knowledge
10 The Claimant gave evidence that in October 2016 he emailed a word document to Ms Ingle detailing the problems caused by his mental impairment. That document was not produced at the Hearing. On 16 May 2017 he gave Mr Jeffers a four page document in which he described his mental health and how it affected him. Among other matters he described how most mornings his tiredness made "it difficult to get up and get going" and how some days he had "issues with contacting someone in work to say whether I'm coming in or going to be late". Finally the Tribunal noted that in her letter dated 20 September 2017 Ms Smith explained the Claimant's impairment and its impact on his ability to get into work for a fixed time. In those circumstances the Tribunal found and decided that by 16 May 2017 the Respondent knew or could reasonably be expected to have known that the Claimant was likely to be placed at a substantial disadvantage by the PCPs.

Reasonable adjustments
11 At the Preliminary Hearing an Employment Judge recorded that the Claimant relied upon three adjustments:- (a) allowing him to work flexible hours (b) allowing him to work from home and (c) adjusting the absence target trigger to take account of disability related absence.

12 At the Hearing the Claimant almost entirely based his case on the Respondent's failure to allow him to work flexible hours. Before discussing that at length, it was convenient to address the other suggested adjustments.

13 In his letter to Mr Jeffers dated 16 May 2017 the Claimant asked for home working "but not all week because I still think it's important for me to touch base with managers and staff until I find myself on an even keel." In his evidence he accepted that because of changing business needs he could not effectively do his work from home. He would need to discuss cases with colleagues and managers; he needed to take calls from claimants; he needed to have access to information; there were potential security risks. The Claimant was unaware of any other colleague who worked from home. The Tribunal considered the provisions of the Code. It found and decided that home working was not practicable.

14 The Tribunal found that from October 2016 the Respondent adjusted the absence target trigger point by four days. It was unable to establish any connection between this step and the disadvantage caused by the PCPs. Even if there had been a more generous adjustment, it was more likely than not that the Claimant would have received his warnings for poor attendance and he would been dismissed for misconduct. It was unclear how such adjustment would have made any difference. During his evidence the Claimant appeared to accept that this was the case. The Tribunal considered the provisions of the Code. It found and decided that adjusting the absence target trigger point would not have been effective in preventing the substantial disadvantage.

15 The Tribunal found that the Claimant worked flexible hours until December 2016. Following a meeting with Ms Ingle from 22 December 2017 the Claimant was required to work fixed hours between 10:00 and 18:00. On 17 May 2017 Mr Jeffers agreed to relax that arrangement. From thereon the Claimant had to arrive between 9:30 and 10:00 and he could leave between 17:30 and 18:00.

16 The Tribunal considered the final suggested adjustment of allowing the Claimant to work flexible hours. It accepted Mr Healy's submission that the reasonableness of that step had to be considered at different times:- January 2017, 20 April 2017, 22 May 2017, 16 August 2017 and 24 October 2017.

17 There was a conflict of evidence as to whether on 22 December 2016 the Claimant agreed to move from flexible working to fixed hours. The Tribunal decided that it was unnecessary to resolve that conflict because it found that he did not protest at the change and he worked to the new arrangement for some time before requesting a reversion to flexible working. It accepted Ms Ingle's evidence that before the change the Claimant was struggling:- he used annual leave to recoup his flexi-time deficit and he missed out on training with his mentor. She believed that "fixed hours would give him more stability in his working platform and would help him get into a routine". The Flexible Working Hours agreement expressly permitted a manager to take such action. The Tribunal considered the provisions of the Code. It found and decided that allowing flexible working in January 2017 would not have been effective in preventing the substantial disadvantage.

18 Ms Ingle gave evidence that between January and 20 April 2017 the Claimant regularly attended work late and/or failed to let her or Mr Bailey know if he was going to be late or attend. At the meeting on 19 April 2017 the Claimant

acknowledged that he did not have a problem with fixed hours "under normal circumstances". Financial and dental issues had primarily caused him problems. She decided to give him a First Written Warning. The Tribunal accepted her evidence. The Tribunal considered the provisions of the Code. It found and decided that allowing flexible working in April 2017 would not have been effective in preventing the substantial disadvantage.

19 Mr Jeffers gave evidence that between 20 April and 22 May 2017 the Claimant regularly failed to meet the requirements of working fixed hours and notifying his line manager. On 17 May 2017 he discussed this problem with the Claimant at a stress reduction review meeting. The Claimant wanted some flexibility with his working hours. Mr Jeffers refused that request because he believed that the previous difficulties would probably recur. The Tribunal accepted his evidence. It considered the provisions of the Code. It found and decided that allowing flexible working in May 2017 would not have been effective in preventing the substantial disadvantage. For example it was more likely that such an adjustment would have led the Claimant to build up a flexi-time deficit.

20 Mr Pendleton gave evidence that between 22 May and 16 August 2017 the Claimant continued to fail to meet the Respondent's requirements. On 17 July 2017 he told the Claimant that he would review his attendance over the next four weeks. During that meeting the Claimant explained that his medication was being reviewed. He agreed to keep the Respondent informed. A few days later the Claimant told Mr Pendleton that his medication was being reduced steadily with a view to making a change to a new type. There would be a period of one week when he would have no medication. Mr Pendleton referred the Claimant to OH who reported on 10 August 2017 that the Claimant's symptoms "may get worse before getting better". Mr Pendleton took advice from HR and it was clear that he wanted to know whether he could refer the Claimant to a decision maker for dismissal. He was advised to ensure that the Claimant was well enough to participate in any disciplinary process. After meeting the Claimant on 21 September 2017 he prepared his investigation report. By then he had received Ms Smith's letter.

21 The Tribunal found and decided that Mr Pendleton failed to appreciate that at least by 21 September 2017 there had been a significant change in the Claimant's circumstances. Firstly there was a change in his medication. Mr Pendleton ought reasonably to have recognised that this change could help improve the Claimant's condition. That certainly should have become more clear to him on 10 August 2017 when he received the OH report. That alerted him to the fact that during and after the transition the Claimant's symptoms could become worse before improving. In the Tribunal's judgment it would have been reasonable at that stage for Mr Pendleton to suspend, extend or restart the trial period with a view to introducing flexible working once the Claimant began meeting the Respondent's requirements. There was even more support for that judgment when on 14 August 2018 the Claimant told him that he would start his CBT treatment (for which he had waited many weeks) in a couple of days. That marked a watershed in the progress of the Claimant's condition. By 21 September 2017 there was further support for Mr Pendleton to adopt this approach. In her letter Ms Smith gave an extremely clear description of the Claimant's condition and how it affected him. He had started treatment and there was a positive prognosis. She observed that the Claimant's circumstances had changed since January 2017 and she supported his request for flexi-hours.

22 The Tribunal rejected Mr Healy's submission that the period between August and December 2016 was a helpful "litmus test" in terms of suitability of flexible working for the Claimant. As observed by Ms Smith, the Claimant's personal circumstances had changed considerably since then. He had been prescribed new medication and even more importantly had started a course of CBT treatment. Whilst it was the case that OH had not recommended that there should be a return to flexible working, it was also the case that the Respondent had not asked the question and had not sent them a copy of Ms Smith's letter. If OH had been consulted in this way, it was likely that it would have adopted her position. Further the Claimant's performance during the four week trial period did not outweigh the reasonableness of suspending, extending or restarting the trial period. Ms Smith's letter strongly supported a change of direction in the Respondent's handling of the Claimant's conduct issues.

23 The Tribunal considered the provisions of the Code. It found and decided that allowing flexible working by 21 September 2017 at the latest would have been effective in preventing the substantial disadvantage and practicable. In the Tribunal's judgment it would have been reasonable for the Respondent to allow the Claimant to return to flexible working at the very least on a trial basis of a minimum of four weeks. The Tribunal did not accept that the Claimant would have been resistant to such a proposal. On the contrary, it was highly likely (if not certain) that he would have eagerly grasped the opportunity and that he would not commenced a period of sickness absence on 11 October and a subsequent period of special leave.

24 In reaching that conclusion it considered Mr Healy's submissions relating to Ms Smith's letter: namely it should not be equated with OH advice; she had only been working with the Claimant since 16 August 2017; she had no input from managers before writing her letter; it was unclear what background information she had been given. The Tribunal noted that Ms Smith was a Cognitive Behaviour Therapist who presumably was trained and experienced in the understanding and treatment of depression. Of course she would have been better informed had there been input from managers. However there was nothing to prevent Mr Pendleton (or any other manager) from asking her questions about her letter. Further there was nothing to prevent the Respondent from sending the letter to OH and asking for their opinion on the appropriateness of offering flexible working. Mr Pendleton chose not to take such course of action. That inaction could not excuse the Respondent's failure to comply with its duty to make an adjustment.

25 Accordingly the Tribunal decided that the complaint that the Respondent failed to comply with a duty to make reasonable adjustments when between 17 July and 21 September 2017 it failed to allow the Claimant to work flexible hours succeeded. The complaints in respect of any earlier period failed. The complaint in respect of any other reasonable adjustment also failed.

The discrimination arising from disability complaints

Complaint that the Respondent discriminated against the Claimant when treating him unfavourably by delaying from July to September 2017 in raising concerns about recording/adhering to fixed hours

26 The Claimant gave evidence that on 17 July 2017 he attended a meeting with Ms Aitchison, his temporary line manager. Mr Pendleton also attended and he agreed that "if I could stick to my fixed hours for the next 4 weeks I would be

allowed back onto flexi time. Although the 4 week period ended on 11 August 2017, Mr Pendleton did not raise his concerns until 14 September 2017.

27 Mr Pendleton gave evidence that it would have been inappropriate to "pull up" the Claimant about his attendance during the 4 week period. He was also advised by HR not to discuss these issues with the Claimant until he was used to his new medication.

28 The Tribunal found and decided that the Respondent had not placed the Claimant at any disadvantage. It understood that there had to be a measurement against an objective sense of that which is adverse as compared to that which is beneficial. In its judgment, the delay was not lengthy. Further, it would not have been beneficial to the Claimant if Mr Pendleton had told him step by step whether there were concerns. That would more likely than not have generated increased anxiety and adversely affected the Claimant's ability to conduct himself as required. Accordingly the complaint under this head failed.

Complaint that the Respondent discriminated against the Claimant when treating him unfavourably when Mr Bailey influenced and instructed managers to manage him in a way designed to get rid of him in November 2017 after a failed attempt to dismiss him in August 2016

29 The Claimant gave evidence that on 4 August 2016 he was dismissed by Mr Bailey. Following an appeal hearing conducted by Mr Carr he was reinstated. He stated that the documents showed that Mr Bailey had "some kind of personal vendetta" against him.

30 Mr Bailey denied the allegation.

31 There was no dispute that the Claimant had been dismissed by Mr Bailey and reinstated by Mr Carr. The Tribunal carefully considered the documents on which the Claimant relied and decided that they did not support his contention. It accepted the evidence of Mr Bailey in relation to the complaint under this head. It also accepted the evidence of the various managers. The Claimant did not cross examine them on the allegation and it was left to the Tribunal to put his case to them. Each manager who gave evidence denied that Mr Bailey influenced or instructed them in the manner in which they managed the Claimant. The Tribunal found that Mr Bailey did discuss with various managers the Claimant's performance, standards of behaviour and attendance. There was nothing unusual about that as he was their line manager. However, they acted independently when making their decisions. The Tribunal decided that that there were no facts from which it could conclude, in the absence of any other explanation, that Mr Bailey had influenced and instructed managers as alleged. Accordingly the complaint under this head failed.

Complaint that the Respondent discriminated against the Claimant when treating him unfavourably by delaying in the disciplinary and appeal processes

32 The Tribunal found that on 14 September 2017 the Respondent informed the Claimant that it was conducting a disciplinary investigation; on 2 November 2017 the disciplinary hearing was held; on 8 November 2017 the Claimant was notified as to the outcome; on 11 November 2017 the Claimant appealed; on 7 December 2017 the appeal hearing was held; on 9 January 2018 the Claimant was notified as to the outcome.

33 Mr Pendleton gave evidence that he completed his investigation report shortly after 14 September 2017. Ms Hayes gave evidence that she received the documents from HR on 16 October 2017. However, neither was able to explain why there was this delay of about four weeks. There was no delay in arranging the disciplinary hearing and Ms Hayes promptly notified her decision. Mr Carr gave evidence that he invited the Claimant to attend the appeal hearing. After that hearing there was a delay just under five weeks before Mr Carr notified his decision. The Tribunal found and decided that these two periods of delay in the processes constituted unfavourable treatment.

34 Mr Carr explained that after the appeal hearing he carried out further investigations so as to assist him in assessing the Claimant's grounds of appeal. He also consulted HR. He gave the matter a lot of consideration because he found it "tough" to make his decision. The Tribunal accepted his evidence. It decided that his delay was not because of something arising in consequence of the Claimant's disability. It also decided that there was no evidence to support the contention that the first period of delay was for such a reason. Accordingly the complaint under this head failed.

Complaint that the Respondent discriminated against the Claimant when treating him unfavourably by giving him a warning on 19 April 2017 and a final written warning on 22 May 2017

35 The Tribunal found and decided that the first written warning was unfavourable treatment. In an objective sense it was clearly more adverse than beneficial.

36 The Tribunal next considered whether the warning arose in consequence of the Claimant's disability. Ms Ingle gave evidence that at the meeting on 19 April 2017 the Claimant explained that financial issues and dental problems had caused him to breach the Respondent's standards of behaviour. However, in her letter dated 20 April 2017 informing the Claimant why she had given him a warning, she also acknowledged that his "mental health issues have an impact on your irregular attendance and contact".

37 The Tribunal considered the guidance of the Employment Appeal Tribunal in **Pnaiser.** It understood that this was a case where there was more than one link between the something that caused the warning and the Claimant's disability. However, it was clear that Ms Ingle had in mind and took into account the impact of the Claimant's disability on his poor attendance and failure to contact. In the Tribunal's judgment, his disability was a significant factor influencing the Claimant's conduct which in turn led to her decision to give a warning. It, therefore, decided that the warning arose in consequence of the Claimant's disability.

38 Finally the Tribunal considered whether the first warning was justified. The Respondent's aim (as set out in the introduction to its Discipline Procedure) was "to help, encourage and support employees to improve". The Claimant had clearly not met the expected standards of behaviour. In giving the warning the Tribunal found that Ms Ingle wanted the Claimant to change and meet those standards. That was a legitimate aim. The Tribunal also decided that the warning was a proportionate means of achieving that aim. The Respondent had taken advice from OH. It had also tried to deal more informally with the Claimant and operated a stress reduction review programme. Nevertheless the Claimant's behaviour remained unsatisfactory causing Ms Ingle to spend much time on

trying to resolve the problem. It was necessary for her to take more formal action. Accordingly the Tribunal decided that the first warning was justified.

39 The Tribunal found and decided that the final written warning was unfavourable treatment. In an objective sense it was clearly more adverse than beneficial.

40 The Tribunal next considered whether the warning arose in consequence of the Claimant's disability. Mr Jeffers gave evidence that on 17 May 2017 he met the Claimant at a stress reduction review and discussed attendance and failure to keep in contact. The notes of that meeting show that at the outset they discussed the Claimant's mental health issues. Shortly afterwards the Claimant gave him a lengthy document explaining how his mental health affected him. Among other matters he described how on most mornings tiredness made it difficult for him to get up and how he had issues with contacting the Respondent. He described himself as "figuratively paralysed by the fear of the consequences for not going in, or being late …". During the investigation meeting on 18 May 2017 the Claimant's mental health was discussed. This was acknowledged by Mr Jeffers in his letter dated 22 May 2017 giving the Claimant a final written warning.

42 The Tribunal again considered the guidance of the Employment Appeal Tribunal in **Pnaiser.** It again understood that this was a case where there was more than one link between the something that caused the warning and the Claimant's disability. However, on this occasion the Claimant did not rely on financial and dental problems as an excuse for his behaviour. The Tribunal found it difficult to understand Mr Jeffer's evidence that the Claimant did not discuss his condition during the investigation meeting. The notes of the meeting suggested the contrary was the case. In any event the Claimant had made clear the effect of his condition at the stress reduction review meeting a few days earlier. Mr Jeffers was aware of the link between that condition and the Claimant's behaviour. If he chose to ignore it, that did not cause it to disappear. The Tribunal found that the Claimant's disability was a significant factor influencing his behaviour which in turn led to Mr Jeffer's decision. It, therefore, decided that the warning arose in consequence of the Claimant's disability.

42 Finally the Tribunal considered whether the final warning was justified. The Respondent's aim was as described in paragraph 38 above. It was a legitimate aim. The Tribunal also decided that the warning was a proportionate means of achieving that aim. The Respondent had taken further advice from OH. It had also continued with the stress reduction review programme. Nevertheless the Claimant's behaviour remained unsatisfactory. He had met the standards of behaviour on only seven out of twenty two working days since the date of the first warning. He was still awaiting an appointment for specialist treatment. The circumstances were similar to those facing Ms Ingle when she made her decision. However, importantly the Claimant had fully explained to Mr Jeffers the impact of his mental health condition. Mr Jeffers was better informed as to the reasons for the Claimant's behaviour. He could have sent the Claimant's document to OH and asked whether flexible working would have been a reasonable adjustment. His failure to take that action did not, in the Tribunal's judgment, undermine its conclusion that it was still necessary for him to take more formal action. Accordingly the Tribunal decided that the final warning was justified.

43 The complaints under this head failed.

Complaint that the Respondent discriminated against the Claimant when treating him unfavourably by dismissing him.

44 The Tribunal found and decided that the Claimant's dismissal was unfavourable treatment. In an objective sense it was clearly more adverse than beneficial.

45 The Tribunal next considered whether the dismissal arose in consequence of the Claimant's disability. Mr Healy submitted that the "something" was the falsification of records, the repeated breaches of standards of behaviour and failure to follow reasonable instructions (including reporting to Mr Pendleton or other managers when he was coming in late or leaving early). The evidence did not support a contention that this arose from the Claimant's disability.

46 The Tribunal once again considered the guidance of the Employment Appeal Tribunal in **Pnaiser.** It found that the repeated breaches of the Respondent's standards of behaviour and failure to follow reasonable instructions (including reporting to Mr Pendleton or other managers when he was coming in late or leaving early) did arise from the Claimant's disability. That conclusion was supported by the Claimant's own evidence, the document he gave to Mr Jeffers on 17 May 2017, the discussion about his mental health difficulties during the investigation meeting on 21 September 2017 and Ms Smith's letter dated 20 September 2017. It again understood that this was a case where there was more than one link between the something that caused the warning and the Claimant's disability. For example during the investigation meeting the Claimant also talked about other personal or family reasons which were unrelated to his mental health difficulties. However, it was clear that there was a link between his disability and his behaviour. This had a significant influence on the decision to dismiss.

47 Finally the Tribunal considered whether the dismissal was justified. The Tribunal found Ms Hayes to be an unreliable witness. She gave evidence that she could see that his behaviour had an adverse impact on the business. She referred to the detrimental effect on the Claimant's team, how colleagues were unable to speak to their line manager because he was so busy dealing with the Claimant and they were left unsupported. The Tribunal rejected that evidence which was an embellishment. Although the Claimant was not easy to manage, there was no evidence of any detrimental effect on his team as suggested by Ms Hayes.

48 The Tribunal also rejected Ms Hayes' evidence that she had empathy with the Claimant and that she tried to look at the case from both sides of view. In reaching that conclusion the Tribunal's relied on the transcript of her conversation with HR on 7 November 2017. During that discussion she made several derogatory comments about the Claimant and mental health difficulties. These included:- "They are the person that drives you to distraction because they just use up every second of your time"; "I had one this morning 'cos some happened here today and I ended up on the bloomin' phone so I'm not getting my job done 'cos all these lunatics are not doing what they should be doing"; "having had people like this work for me they, they're very, they are deceitful and that level of trust is never there". These remarks demonstrated what was Ms Hayes' thought process when she made her decision. She was prejudiced against the Claimant and she was unsympathetic towards disabled people. Further she failed to present to the HR adviser relevant information which was supportive of retaining

the Claimant. She failed to make any reference to Ms Smith's request and in fact she even misled him by stating that the Claimant had offered no mitigation.

49 In answer to Tribunal questioning Ms Hayes confirmed that she did not consider Ms Smith's request to offer the Claimant flexible working and that she did not ask Mr Pendleton whether he had considered the request. She stated that she trusted Mr Pendleton to think about that. In the Tribunal's judgment that was an unacceptable and woeful abdication of her responsibility.

50 The Tribunal decided that the Respondent had failed to show that dismissal was objectively justified. It had failed to make a reasonable adjustment. It was open for Ms Hayes to make that adjustment when she was appointed decision maker. Not only did she fail to do so but she did not even consider it as an option. The Tribunal rejected her evidence that she did consider a trial period of flexi working because it was clear that she was determined to dismiss the Claimant. The Tribunal noted paragraphs 5.20 and 5.21 of the Code. It decided that it was not proportionate to dismiss the Claimant.

51 Accordingly the complaint under this head succeeded.

The harassment complaints

Complaints that the Respondent harassed the Claimant by delaying from July to September 2017 in raising concerns about recording/adhering to fixed hours

52 In paragraphs 26 to 28 above the Tribunal summarised the relevant evidence.

53 The Tribunal found and decided that the delay did amount to unwanted conduct. That conduct did relate to disability in that Mr Pendleton refrained from raising concerns which might have had a detrimental effect on the Claimant because of his mental impairment.

54 There was no evidence that the Respondent delayed with the purpose of creating difficulties for the Claimant. The Tribunal, therefore, considered the effect of the Respondent's conduct. It found and decided that there was no evidence that it had the effect of "violating the Claimant's dignity" or "creating an intimidating, hostile, degrading, humiliating or offensive environment." Accordingly the complaint under this head failed.

Complaint that the Respondent harassed the Claimant when Mr Bailey influenced and instructed managers to manage him in a way designed to get rid of him in November 2017 after a failed attempt to dismiss him in August 2016

55 For the reasons set out in paragraphs 29 to 31 above, the Tribunal found and decided that there was no unwanted conduct. Accordingly the complaint under this head failed.

Complaint that the Respondent harassed the Claimant by delaying in the disciplinary and appeal processes

56 The Tribunal reviewed its Reasons set out in paragraphs 32 to 34 above. It found and decided that the two periods of delay constituted unwanted conduct. However, it decided that there was no evidence to support a contention that the conduct related to disability. Accordingly the complaint under this head failed.

Complaint that the Respondent harassed the Claimant when in September 2017 Mr Pendleton commented that his mental state was not stable enough to deal with the consequences of failing to record his hours and not adhering to his fixed hours

57 The Claimant gave evidence that on 14 September 2017 Mr Pendleton gave him a letter in which he was informed that he was being investigated for failure to meet standards of behaviour. He asked why these failings were only being brought to his attention at this stage. Mr Pendleton replied:- "I was waiting until you were more mentally stable". In cross examination the Claimant stated that the comment was "one rung below [calling me] a psychopath, lunatic or headcase".

58 Mr Pendleton gave evidence that he did not make this comment. However during cross examination he accepted that he had said something about waiting before he proceeded with dealing with the Claimant's issues. He could not recall the exact words he had used. In answer to Tribunal questioning he explained that the delay had been caused because he was advised by HR to ensure that the Claimant was well enough to participate in an investigation process.

59 The Tribunal accepted the Claimant's evidence and found that Mr Pendleton had spoken the words either as alleged or something very similar. He had used the word "stable" or "stabilised". The Tribunal decided that these words constituted unwanted conduct and that they related to disability. Mr Pendleton had waited until the Claimant's mental health condition was "stable" or had "stabilised". The Tribunal also found that Mr Pendleton did not use the words for any unlawful purpose under section 26(1)(b) of the 2010 Act. He did not intend to offend the Claimant in any way.

60 The Tribunal considered whether the words had any unlawful effect. It understood that, in deciding whether they did have such effect, it had to take account of the Claimant's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect. It found that the Claimant was offended by the words. Mr Pendleton did take HR advice that he should ensure that the Claimant was able to attend an investigation meeting. The Claimant had been unwell a few weeks earlier but by mid September 2017 his health had improved. In that context the Claimant's health had "stabilised" and he was "stable" enough for Mr Pendleton to proceed. The Tribunal understood that these words were commonly used to describe a situation where someone's physical (as well as mental) health had progressed from a more serious state to a more constant and better state. In its judgment Mr Pendleton used the words in an appropriate context and the Claimant's perception was objectively disproportionate and exaggerated. Accordingly the complaint under this head failed.

Complaint of unauthorised deduction from wages

61 At the Preliminary Hearing the Employment Judge recorded that the issue was whether the Respondent made an unauthorised deduction from wages in relation to overtime worked on 8 October 2017. In his schedule of loss the Claimant claimed that he was entitled to payment for one overtime shift (7.5 hours at double time) and weekend premium. During cross examination he stated that he arranged to work two shifts on consecutive Saturdays in October 2017. He worked the first but was told not to work the second because he was on special leave. He claimed payment for the shift he had worked. He thought that

he had been mistaken as to the date on which he worked and that the correct date was 21 October 2017.

62 Mr Pendleton gave evidence that employees signed themselves in when working overtime and he would receive a time card notification that they were owed money. He had received no such notice for the Claimant. He agreed that the Claimant attended work on 21 October 2017 and that, although he was due to work on 28 October 2017, he did not attend.

63 The Tribunal accepted the Claimant's evidence. It found that he worked on 21 October 2017 and did not submit a time card to the Respondent. It decided that he was entitled to be paid even though he had not submitted a time card. Since he was not paid the amount wages to which he was properly entitled, his complaint under this head succeeded.

Conclusion

64 The Tribunal decided to list this matter for a Private Preliminary Hearing at which the Employment Judge will identify the issues which will need to be determined at the Remedy Hearing and make appropriate Case management Orders (including listing the matter for the remedy Hearing).

_____

Employment Judge **Keevash**

_____

Date 15 August 2018