Case No: 2302102/2016

EMPLOYMENT TRIBUNALS

Claimant: **AA**

Respondent: **A Supermarket**

Heard at: **London South (Ashford)** **On:** **6, 7, 8, 9, 10, 13, 14 (In Chambers) & 15 August 2018**

Before: **Employment Judge John Crosfill**
Mr G Anderson
Mr S Huggins

Representation

Claimant: Ms L Millin of Counsel

Respondent: Ms R Barrett of Counsel

REASONS

1. The Respondent made a request at the conclusion of the hearing on 15 August 2018 that the Tribunal provide written reasons for its decisions in this matter. These reasons are provided in response to that request. They include both the liability decision and the decision on remedy.

2. The Claimant is a pharmacist and he started work for the Respondent at its F******* Store on 10 March 2013.

3. The Claimant alleges that during the course of his employment he was subjected to direct discrimination because of disability. That he was subjected to unlawful harassment related to disability. That there was a failure to make reasonable adjustments. He says that having made a protected disclosures during his employment he was subjected to detriments on the grounds that he had done so.

4. Whilst the Claimant was subsequently dismissed, the claims that we had to consider did not include any that related to the dismissal, although it formed part of the background we considered.

Procedural matters

5. When the claim was first issued, the Claimant declined to give any full particulars of the case until the tribunal considered whether or not to make an order under rule 50 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Such an order was then made by Employment Judge Kurrein on 7th March 2017. The order was couched in terms that it was for an indefinite duration. EJ Kurrein made a series of Case Management Orders set out in his order dated 9 March 2017. By that order EJ Kurrein required the Claimant to provide full and proper particulars of the claims he advanced.

6. After a further case management hearing on 9 May 2017 EJ Kurrein ordered the Claimant to set out his claims in a schedule. He made provision for the Respondent to respond. At a hearing on 22 June 2017 EJ Kurrein considered that the Claimant had not adequately completed that task and made an 'unless order' requiring the Claimant to complete a schedule. The Claimant was given permission to advance some additional claims, mainly matters that had arisen since he had presented his ET1.

7. On 29th August 2017, Employment Judge Kurrein ordered the Claimant "*to identify the six factual events that the Claimant relies upon as the basis of his most recent and meritorious claims"*. That order went on at paragraph 3 to state that *"the remainder of the Claimant's claims ("the stayed claims") should be stayed until the final determination of the 'hearing claims'*.

8. At paragraph 4 of the order EJ Kurrein said "*For the avoidance of doubt, the Claimant shall be entitled to adduce evidence relating to the stayed claims at 'background material' at the hearing provided that such 'background maters' at the hearing provided that such background material relates to events on or after 6th May 2016"*.

9. Employment Judge Kurrein gave his reasons for that decision which were:

> '*the Claimant has provided a Scott Schedule, and the Respondent an amended Scott Schedule in accordance to my earlier directions. It is clear that the Respondent takes serious objection to some of the events the Claimant has included within his schedule.*
>
> *The Claimant might be well advised to have regard to those objections in selecting what he consider to be the six most recent and/or meritorious claims he wants to proceed with at this time'*. That order is appropriate and in accordance with the guidance provided by ***HSBC v Gillespie*** **EAT/0417/10**.'

10. Shortly before the hearing before us on 1st August 2018, the Employment Appeal Tribunal published its judgement in the case of ***Dr L Tarn v Hughes & Others*** **UKEAT/0064/18/DM**. That case dealt with a similar case management order as that made by EJ Kurrein. In that case HHJ Eady QC considered the appropriateness of such orders, and on the facts of that particular case, quashed the order that had been made. Some of the observations are pertinent to the approach that we took in this case. In her judgement, HHJ Eady QC said:

"That said, of its nature, a discrimination claim is likely to require an ET to draw inferences from the evidence and from its primary findings of fact; to adopt a fragmented approach to the issues to be determined may "have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have [on the determination of causation]" (see per Mummery J (as he then was) in Qureshi at page 875H). Moreover, to limit the potential impact of the complete picture provided by the full complaint made might well be "both unreal and unfair" (see per His Honour Judge McMullen QC at paragraph 11, Franco v Bowling & Co Solicitors UKEAT/ 0280/09)"

11. At the outset of the hearing, we drew attention to this authority. Both advocates appeared to say that they were aware of it although Ms Millin suggested on the final day of the hearing that a colleague had brought the full authority to her attention over the weekend. At no stage was any objection taken to EJ Kurrein's order and, as neither party had appealed that order, it was binding upon us. We reminded the parties that we were anxious to avoid any risk of taking a fragmented approach, and we made it clear that we were prepared to hear any evidence bearing on the issues that we have to determine. At no stage in the proceedings was any objection taken by either party to the relevance of any line of questioning and/or any evidence adduced. Nor was it necessary for the tribunal to question at the relevance of any evidence. We were provided with documents that spanned the entirety of the Claimant's employment.

12. We considered all the evidence that was put before us; either orally or in documentation. In fact, we not only read material referred to in the witness statements, but all three members of the tribunal read extensively within the bundle of documentation that we were provided with. To the extent of permitting the Claimant to rely upon evidence pre-dating the first of the claims he had selected for determination we departed from the order of EJ Kurrein.

13. The parties had agreed a list of issues and it was those issues that we determined at the hearing. That list is not reproduced here but the issues are referred to below. By reason of the case management orders the issues before us were limited to 6 claims previously identified by the Claimant by his e-mail to the Tribunal sent on 22 September 2017.

14. During the hearing, the Claimant gave evidence on his own behalf. We then heard from JL, who had been the Claimant's line manager, RA who in approximately August 2016 had taken over from him, and from MS who was the general store manager from June 2016.

15. In the course of the hearing, it transpired that the bundle did not include medical records, which had been sent by the Claimant to the Respondent's solicitor, but which had inadvertently not been included within the bundle. This omission caused Miss Barrett to challenge the Claimant on the absence of documentary evidence establishing a disability relating to his mental impairment. A suggestion, which she then very properly withdrew after the Respondent's solicitor carried out a search for documents which he had been supplied. These showed that the Claimant was correct and that he had indeed provided medical records pertaining to his mental impairment.

16. The Claimant continued to suggest that there were further records which dealt with a further episode of psychosis towards the very end of 2016 or early 2017.

It was suggested on his behalf that the Respondent had failed to 'disclose' those documents. We did not think that this was a failure to disclose documents as such. They had come from the Claimant in the first place. At worst they had been left out of the bundle by accident. We pressed the parties to see whether these documents could be provided from whatever source. Upon making enquiries from his former solicitors, the Claimant was able to provide additional records from which he selected (without any objection from the Respondent) some records which he wished to rely upon. These did, as the Claimant said they would do, provide evidence of a further episode of psychosis at the end of the year of 2016.

17. We admitted all of this medical evidence as it was relevant in that went to the issue of whether the Claimant met the statutory test of disability set out in Section 6 of the Equality Act 2010. There was no objection to us taking this course.

18. At the conclusion of evidence, and having given the advocates the time that they asked for to prepare, the parties made submissions to us. Both counsel had provided us with written submissions and each had provided us with a bundle of authorities. We shall not set out the entirety of those submissions in these written reasons but we refer to the material parts of the arguments, presented to us below.

LIABILITY REASONS

The structure of the judgment

19. The parties had identified two issues which we dealt with discretely. The first was the question of whether the Claimant was disabled at the time of the matters he complained of. The second is whether he had made a protected disclosure on 21 October 2016 (the only material disclosure for the matters we had to decide). As it was essential to parts of the Claimant's claim that he establish those matters we shall deal with them at the outset of the written reasons. We did the same when giving oral reasons although in a different order.

20. As we did in our oral reasons, we then make some general observations and make findings under relationships in the workplace, we consider that these matters are important and informed our more specific findings in relation to the claims. Thereafter we deal with the claims identified in the agreed list of issues. Under each heading, we shall set out the relevant law, but set out additional findings of fact before reaching our conclusions on each one. The manner in which we have set out the judgment, and in particular the fact that we have not adopted the conventional approach of setting out a comprehensive history of events should not be understood as meaning that we have not had regard to the entirety of the history and evidence in reaching our conclusions. We did.

The burden and standard of proof

21. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

22. The burden of proof in claims brought under the Equality Act 2010 is governed

by section 136 of that act and provides that, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the Respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**.

23. The burden of proof provisions should not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Was the Claimant disabled at the material time?

24. The definition of disability for the purpose of the Equality Act 2010 is set out in section 6, when read alongside schedule 1. The material parts of Section 6 read as follows:

> *6 Disability*
>
> *(1) A person (P) has a disability if—*
>
> > *(a) P has a physical or mental impairment, and*
> >
> > *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
>
> *(2)-(3)…*
>
> *(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*
>
> > *(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*
> >
> > *(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

25. The definition of what is meant by 'long term' is found in paragraph 2 of Schedule 1 of the Equality Act which states:

2 (1)The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

26. Ms Barrett reminded us of the guidance in ***Goodwin v Patent Office*** **[1999] IRLR 4 EAT** where it was suggested that the proper approach is to ask the following questions:

26.1. Does the Claimant have an impairment which is either mental or physical?

26.2. Does the impairment adversely affect the Claimant's ability to carry out normal day-to-day activities?

26.3. Is the adverse effect substantial?

26.4. Is the adverse effect on the Claimants' abilities long-term?

27. The burden of proof falls on the Claimant to establish that he is disabled – see ***Morgan v Staffordshire University*** **[2001] IRLR 190**. In some cases, it will be essential to have regard to medical evidence, but not all. A tribunal is entitled to have regard to evidence, whatever the source.

28. S.212(1) of the Equality Act 2010 now defines 'substantial' as meaning 'more than minor or trivial'.

29. The tribunal are obliged to have regard to the statutory code of practice published by the Equality & Human Rights Commission.

30. The Respondent had not initially admitted the Claimant's mental health condition amounted to a disability. However, once the issue of disclosing (or including in the bundle) all of the medical records was finally dealt with it, through Ms Barrett, accepted that all elements of the test for disability were

met. We should record that the only point that had been taken by the Respondent was the issue of whether the impairment met the definition of long term.

31. As the matter had been conceded we shall deal only briefly with this aspect of the claim. It was common ground that during the summer of 2014 the Claimant began to experience the symptoms of what was later diagnosed as acute and transient psychosis. His symptoms included thought blocks, panic attacks, hallucinations, disorientation, nightmares and psychotic phenomena including hearing voices. On 9 June 2014 the Claimant was admitted to hospital under Section 2 of the Mental Health Act 1983. On discharge he was prescribed Olanzapine, an antipsychotic drug.

32. The Claimant had a relapse in October 2014 and was re-admitted to hospital. In November 2014 he was discharged and his medication was changed to Aripiprazole. He said he was still taking this drug at the time of his disability impact statement made on 6 April 2017 although it may be that he had stopped taking it by then.

33. When the Claimant's later medical records were available (to use a neutral term) they showed that the Claimant had been admitted to a specialist mental health hospital in January 2017. The Claimant told us that he had a further psychotic episode at that time. We mention below that this is not something that was mentioned in the disability impact statement nor was it something that the Claimant drew to the Respondent's attention. At the time that the Claimant was in hospital his GP issued a Certificate of Fitness for Work stating that the Claimant was unfit to work through back pain. As a consequence of that third acute episode the Claimant was advised that he must continue to take medication for at least 2 years.

34. Once it was established that the Claimant had had a third serious psychotic episode the issue of disability on the basis of the mental health impairment was quite properly conceded. When the Claimant was suffering symptoms his ability to carry out ordinary day to day activities was heavily impacted. His symptoms were (usually) controlled by medication. The effect of any treatment must be disregarded when looking at the impact of a disability. We have no hesitation in finding that the Respondent's concession was properly made.

35. The Respondent did not concede that the Claimant's back and muscular skeletal problems amounted to a disability at least at the relevant time.

36. We make the following findings in that regard:

    36.1. The Claimant's GP records which were provided during the course of the hearing disclose that on 21st April 2016, the Claimant attended his GP surgery identifying the problem he had as 'back pain'. The GP's notes undoubtedly truncated, report the following: *'a history from lung to lumbar spine for a year has pins and needles in the left limb area and has a pain across the shoulder. Has urinary frequency, denies elements of UTI. On his feet for most of the day, is a pharmacist at "A SUPERMARKET", requests MRI back scan and has private insurance'*.

    36.2. That prompted the Claimant's GP to wrote to a consultant. As one might expect, in the letter of instructions to the consultant, the Claimant's

GP set out the history that he had taken, and he says *'I would be grateful if you would kindly give this 39-year-old gentleman an appointment in your clinic. He has been having pain from his neck to the lumbar spine for nearly 12 months now. He has also been experiencing pins and needles in the left limb and also pain across the should area. He has complained of urinary frequency – but no symptoms suggest of a urinary tract infection. He works as a pharmacist in "A SUPERMARKET' and is on his feet for most of the day. There are no complaints of urinary or faecal incontinence and there is no history of any loss of power'*. We have no reason to doubt that the Claimant gave a reliable account to his General Practitioner who no doubt examined him on that occasion, and we accept that what he said was accurate.

36.3. Shortly after that, the Claimant wrote to his then line manager, Mr Laming and asked for what he described as a reasonable adjustment request. Within that email, he simply asserted that he had a disability and described it as a deformity of a vertebrae or spinal nerves, with pains that have lasted over 12 months. He rather bluntly suggests that there should be adjustments made for him notwithstanding the fact that this was the first time that he had relied upon this particular disability and it would have come as news to his employer.

36.4. The next document which we had regard to was a report produced by the consultant to whom the Claimant has been referred, a Mr James Casha, who is an orthopaedic consultant and spinal surgeon. The report is dated 23 June 2016. He said this, '*Thank you for asking me to see this 39-year-old gentleman who is a non-smoker and works as a pharmacist in "A Supermarket' with regard to his history of nearly a year of neck pain as well as low back pain. He has neck dominant pain, with a lot of stiffness radiating to his left shoulder and left thoracic area. He also has back to his low back radiating to his left buttock, with some radiation down the left leg to the ankle and lateral aspect of the foot in what sounds mostly like left S1 root territory. He is back dominant. He is stiff and sore in the morning. He is more comfortable in bed with his knees up in a lumbar lordosis flat. He has pain worse from getting up from a chair and getting up from a bent position. He also has pain on prolonged standing. This is in keeping with the diagnosis of cervical facet pain and lumbar facet and nerve root irritation*'. Mr Casha went on to suggest that in terms of accommodating the impairment, that it would be wise for the Claimant to keep as active as he possibly could and that he would not make his condition any worse if he did so. The letter also goes on to consider analgesia and it is clear from that letter, and indeed subsequent records from the GP, that the Claimant was prescribed what could be described as a cocktail of painkillers. This would suggest that the level of pain that Mr Casher considered the Claimant was suffering from was fairly severe. In terms of ongoing treatment, Mr Casher said this, '*in addition, I have also offered him the possibility of spinal injections in the form of facet joint injections L1 – S1 under x-ray-controlled stations. Plus, left L4, L5, S1 neuro-root block which also adds a transforminal epidural also under x-ray control and sedation. With a 30% change of significantly helping back or leg pain in the long-term and greater in the short-term and only a tiny risk of vessel injury*'.

36.5. Mr Casha said that that there might be a 30% chance of long-term improvement. We note that that carries with it a 70% chance that there would be no improvement. Whilst the report of Mr Casher does not specifically address the question of how long the condition might be thought to last, there is certainly a strong indication that without treatment, the condition is likely to be long-term.

36.6. Once the MRI scan was performed, on 14 July 2016 Mr Casher wrote a further letter, which is found at page 651 of the agreed bundle. This really adds very little more, save for this, '*the gentleman reported today that he still has back pain, especially on prolonged standing. On examination today, lumbar flexation is full and not really painful, but coming up he still has facet catches and back pain, and extension is full, but painful, and more painful than flexation*'. The Claimant is referred for physiotherapy and it is noted that he is struggling with his analgesia and his cocktail of medicines was adjusted in a consequence.

37. From the evidence, including the impact statement provided by the Claimant, we have come to the conclusion that because of the back condition the Claimant was in pain for most of the time and that pain was only partially managed by his analgesia. We are satisfied that the back pain made it difficult for the Claimant to extend and to stand for a long period, but equally and having regard to the later DSE assessment, it also would have made it difficult for him to sit for a long period as well. We accept the evidence that the Claimant gave us that during this period, he would sit for some periods in the consulting room in order to give his back a rest. Both standing and sitting are ordinary day-to-day activities. We are satisfied that at some point prior to the Claimant making his first GP appointment in April that the pain had progressed to a point where the interference in his ordinary day-to-day activities was more than trivial. The key question in this particular case is therefore whether or not at all material times, the condition had or was likely to last at least 12 months.

38. We are rightly reminded by the Respondent in that approaching that we should not have any regard to matters which arose subsequently and that assessment must be made on the evidence available, or which ought reasonably to have been available see ***Richmond Adult Community College v McDougall*** **[2008] IRLR 227 CA**.

39. In our view, the earlier report from which we quoted from above Mr Casha makes it quite plain that:

39.1. long-term treatment with a hefty cocktail of analgesia was recommended, and

39.2. that the condition was such that it might be alleviated by spinal injections, but only with a view to reducing the symptoms rather than eliminating them.

40. Mr Casha is quite clear that he is considering the matters in the long-term. We also have regard to the fact that the condition had proved itself to be progressive, starting at some point one year before the GP's appointment and had already been getting worse up to the point that the Claimant was required to take the cocktail of drugs and the suggestion of surgery was first made. In plain terms the condition was getting worse. Having regard to that, the evidence

available at the time showed that it was likely, in the sense that it could well happen, that the condition would either remain as it was for at least 12 months, or at best improve slightly but still remain for that period at a level giving more than a trivial effect on day-to-day activities.

41. We have therefore concluded that the Claimant was disabled by reason of his muscular skeletal condition from no later than 22 June 2016 when there was sufficient evidence available to conclude that the condition was long term in the sense that it 'could well happen' that the condition would last for 12 months.

42. Having regard to the concession made by the Respondent as to the Claimant's mental health condition and having regard to our own findings we conclude that the Claimant was disabled for the purposes of Section 6 of the Equality Act 2010 both by reason of his mental health impairment and by reason of his muscular skeletal condition at all material times for the purpose of the claims before us.

Did the Claimant make a protected disclosure?

43. Whilst the Claimant's other claims refer to him having made other protected disclosures the claim selected by the Claimant for determination during the hearing was very discrete and referred only to an e-mail sent by him on 20 October 2016. The issue between the parties, specifically identified at 'F' on the agreed list of issues is whether or not sending that e-mail amounted to making a protected disclosure. Under this heading we deal solely with the question of whether there was a protected disclosure and not (assuming there was) to the consequences of it (to which we shall return below).

44. The statutory definition of what is a protected disclosure is set out in section 43B of the Employment Rights Act. The material parts of that section are as follows:

> *43B Disclosures qualifying for protection.*
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 is made in the public interest and] tends to show one or more of the following—*
>
> > *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> >
> > *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> >
> > *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
> >
> > *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
> >
> > *(e) that the environment has been, is being or is likely to be damaged, or*

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

45. Reliance was initially placed on Sub-sections 43B(1)(b) & (d) but, in our view very sensibly, Ms Millin focussed her attention on the Sub Section 43B(1)(d) in her submissions.

46. Section 43B requires the disclosure of 'information'. The meaning of that expression had been the subject of some debate at the level of the EAT but has recently been the subject of a decision in the Court of Appeal. In ***Kilraine v London Borough of Wandsworth*** **[2018] IRLR 846 Sales LJ** agreed with the submissions of the employee that there was no clear distinction that could be made between making an allegation and conveying information. He stated that the proper approach was:

> *"The question in each case in relation to s 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]'. Grammatically, the word 'information' has to be read with the qualifying phrase, 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-s (1)."*

47. In ***Chesterton Global Ltd (t/a Chestertons) and another v Nurmohamed*** **[2017] IRLR 731** the Court of Appeal gave guidance as to the proper approach to the necessary subjective belief of the worker making a disclosure. Elias LJ said:

> *"26 The issue in this appeal turns on the meaning, and the proper application to the facts, of the phrase "in the public interest". But before I get to that question I would like to make four points about the nature of the exercise required by section 43B(1).*
>
> *27 First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula's case [2007] ICR 1026 (see para 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.*
>
> *28 Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to the "Wednesbury*

approach" (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking—that is indeed often difficult to avoid—but only that that view is not as such determinative.

29 Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable4.

30 Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation—the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

48. Ms Barrett argued that the requirement that the worker actually hold a reasonable belief both in the fact that the information tends to show a relevant failure and that it is in the public interest means that if the employee imparts information only out of self-interest neither believing nor caring what it tended to show nor thinking at all of the public interest then the statutory definition would not be met. She drew an analogy to the type of bad faith found in the earlier case of ***Street v Derbyshire Unemployed Workers' Centre*** **[2005] ICR 97,** CA). We accept that, in principle, that submission is correct. However, the question of whether the workers mind was so full of his or her own self-interest as to preclude a reasonable belief as to the matters required by Section 43B of the Employment Rights Act is matter of fact that must be decided by the Employment Tribunal on a case by case basis. The mere presence of bad faith is not sufficient to exclude any disclosure from the definition.

49. Turning to the particular facts in relation to this issue, the Claimant sent an email to RA and copied into MS which was found at page 708 of the agreed bundle. He said this:

'Hi Rebecca,

I am writing regarding my concern regarding product withdrawal not being actioned by Sunil. I have voiced this concern in the past but have not been taken seriously.

Tonight, I found a product withdrawal documentation handed over by the locum pharmacist of last night left on the Pharmacy counter unactioned by Sunil. The colleague Susanne informed me that it was given to the Locum Pharmacist last night to be actioned and that they both checked and found no drugs. It appears that the second day checks had not been carried out by the senior resident Sunil and if I had not seen it would have been left unchecked putting patients at risk.

Furthermore, I have found two other recall/withdrawals from September left on the shelf not actioned by the other resident Pharmacists. There are now too many health and safety risk[s] occurring in this Pharmacy regarding refusal of residents to process product withdrawals and I believe that it is now a real safety concern.

Please investigate this matter as soon as possible'.

50. We accept that the contents of the email reflected the Claimant's state of mind at the time. However, we would be unsurprised if the Claimant was not pleased to be able to point out errors by 'SA' (see our findings below). However, we conclude that often (but not always) the Claimant is concerned with professional standards.

51. The Respondent's arguments were as follows:

    51.1. First, is the argument identified above that the Claimant's desire to get back at 'SA' what was such that there is no room in his mind for a reasonable belief as to the public interest or a real risk of health and safety.

    51.2. Secondly, and putting that to one side, it is argued that he could not have had a reasonable belief that there was a health and safety risk.

52. To assess those arguments, it is necessary to make findings about the process that is being referred to. Within the "A Supermarket' store, there are effectively two key processes for recall of goods. The first one is exclusive to the pharmaceutical industry in that the pharmacists would have been notified of a central decision to withdraw drugs from the shelves. They could be taken for clinical reasons and such alerts would come in via computer and be actioned. It was those alerts, and the failure to act on them, that were the subject of the Claimant's earlier concerns in 2013.

53. There was a second more general process for the recall of products not limited to pharmaceuticals. Where such products are recalled, the first thing that would happen is there would be a notification from "A Supermarket''s head office, at "A Supermarket' House. That generated an electronic form which required acknowledgement at the time it was received. Thereafter the fact that it had been actioned had to be acknowledged. This applied to all goods, so for example it would apply to a mislabelled can of baked beans, and equally to drugs in the pharmacy.

54. The process that ought to have been followed was that as soon as the alert came in and was acknowledged, it was acted upon by removal of goods which should then be returned within 24 hours. That ordinarily involved a stock check and removal of the goods from the shelves or storage. Thereafter what was required was, for the four days that followed, a double check to be made that there were no goods either within the store or to be placed for sale. The proforma that was produced and that had a space for checking signing against those four additional checks. In respect of the example that we were given, the can of baked beans, it may have been the case that baked beans were not only found on the shelves, but they might have been found in the stores or they might have been out in transit having been ordered automatically and be on their way. The four daily checks were a precaution to ensure that goods were not inadvertently delivered or discovered in storage after the initial removal and placed on the shelves for sale.

55. In respect of pharmaceuticals, the ordering process was somewhat different in that all orders were made manually, but nevertheless, the same process was to be followed in that the checks should have been made for four days to ensure that no goods in the pipeline or simply stored elsewhere found themselves onto the shelves. In the particular instance referred to by the Claimant, what had happened was that the alert had come in for the recall of certain drugs. We noted that the problem with the drugs was that drugs for one dosage had been put into packaging relating to another dosage. That gave rise to the possibility of somebody either taking too much, or indeed too little of the drug. This in turn gives rise to an obvious risk to health.

56. It appears that the alert had been acknowledged as expected and indeed initially dealt with in accordance with the process set out above. It had been recorded that the stocks were checked, and zero stocks were discovered. It seems that what happened thereafter was a failure to complete at least two of the daily checks to ensure that no pipeline orders had found their way to the shelves. When MS gave evidence, he described the risk to health and safety of an error in the pharmacy of a failure to follow those latter processes to be far less than the example given of the can of baked beans. He pointed to the differences in the way that orders and deliveries were made. However, we note from the Claimant's email that his concerns were not limited to the particular instance, he refers to at least two other instances that month which he says were not actioned. On its face this would suggest that there was a more widespread problem with not completing paperwork, and that because of this it was not possible to ascertain whether necessary checks had taken place. We infer from the fact that the Claimant has included all of those aspects within his email that he did believe that there was a pattern going back to 2013 of a failure to complete withdrawal paperwork, and with that the risk that he has identified being a risk that a drug would be sold that should have been withdrawn.

57. Whether a risk is de minimis or not, we accept that the Claimant believed that, there was a repeated pattern of failure to complete paperwork, giving rise to a risk to health and safety of others. It seems to us that the processes were put in place for a good reason and that double or treble checking to avoid such a significant risk was a sensible and logical process. We therefore conclude that it was entirely reasonable of the Claimant to believe, and find that he did believe that, a failure to complete the paperwork correctly, or there being a pattern of

failing to complete paperwork correctly, is likely to risk to the health and safety of the public. That is what he said, and we conclude that he held that belief.

58. We must then consider whether the Claimant's belief was reasonable. The threshold is not that health and safety would be endangered but whether the failure identified shows that it is 'likely' to be. Whilst some people might conclude that the risk of not completing the recall process in full was de-minimis others might reasonably take the view that there was a risk. Certainly pharmaceuticals were not exempted from the process despite the manual ordering process. It would have been surprising if such potentially dangerous products were exempted. Adopting the guidance given in ***Chesterton*** we have concluded that the Claimant's belief that disclosing information tending to show that there had been failures to complete all checks and paperwork when drugs were recalled was likely to endanger health and safety was reasonable.

59. Turning to the question of whether the Claimant reasonably believed that the disclosure was in the public interest, we note that in his e-mail he makes specific reference to health and safety risks within the pharmacy and he makes specific reference as to this being a safety concern. He also makes specific reference to putting patients at risk. It is quite clear that somebody could reasonably believe that it is a public interest at expense at dispensing incorrect drugs that should have been withdrawn.

60. The issue was whether the Claimant acted without regard to the public interest and solely in his self-interest at striking back at the other pharmacists. As we have set out below we do think that there was a higher degree of animosity between the Claimant and Sunil and indeed the Claimant and some other members of staff, but we do not find that he was entirely motivated by that to the exclusion of the public interest. Quite clearly disclosing information that tends to show that drugs that should have been recalled might slip through the net and be sold is objectively in the public interest. Therefore, and for those reasons, we are satisfied that the email sent on 20th October 2016 did amount to a protected disclosure for the purposes of the relevant part of the Employment Rights Act.

Our general findings in respect of the relationships in the workplace

61. As stated above we looked at all of the evidence in this case in the round. We heard evidence and had documentation relating to issues between the Claimant and other employees in the Pharmacy going back to the outset of the Claimant's employment. The suggestion which the Claimant has made in his evidence was to say that he is simply a victim of other the employees ganging up on him at the suggestion of the other pharmacists. He explains this as being a consequence of him raising his concerns about product recalls in 2013.

62. Whilst we accept that the Claimant did raise matters in 2013, we do not accept that the Claimant is correct that this was a significant cause of the bad feelings towards him, although he may perceive that to be the case. We had particular regard to a grievance that was brought by one of the Claimant's hourly paid colleagues, CC. That grievance process was extensively documented in the bundle. The documents show that CC, having attended a meeting which was designed to clear the air between the pharmacists, felt that matters could not be resolved unless matters were dealt with formally. His grievance letter starts behind a standard form at page 180 of the agreed bundle. All three of us took

care reading that grievance, and we considered that it was a measured document, which, whilst at some length, set out a pattern of difficult working relationships within the pharmacy. We accept that much of the criticism is directed towards the Claimant, but we also note that in respect of at least one incident CC is critical of another pharmacist SA. The circumstances were apparently that a disagreement between the two pharmacists meant that a customer had been kept waiting for some time.

63. In assessing this grievance, we have regard to some of the things said. CC says '*over four years of working with "A Supermarket', I have never had to raise a grievance against anybody or in eleven years of employment. I feel that the Claimant is bringing the worst out in people that he works with*'. Whilst that is a robust criticism, we consider that the grievance overall was very measured and we had regard to the matters set out under the heading 'what I want to achieve from this grievance meeting' and CC says, '*I would like management to look into the information that I have provided and to verify the facts for themselves. I would like management to come to a decision of what they can do to help the situation. I would like the Claimant to help colleagues when they ask him for help. I would like the Claimant to listen to colleagues when they speak to him about problems and for him to consider what they actually say might be true. I would like the Claimant to participate more in the duties of the pharmacists and work with the rest of the colleagues as a team. I would like the Claimant to be aware of the negative comments that he makes, and I would like him to put a stop to those comments. I would like to clear the air with the Claimant about the accusations he has made of favouritism, discrimination and racism so that we can move on from this. I felt the accusations were never fully resolved. If the Claimant feels that I or anyone else have participated in any of these things, I would encourage him to come forward and raise a grievance*'. That we conclude is a measured and responsible response to a difficult situation in the workplace. The matter was unfortunately left to drag on for quite some time and the Claimant was interviewed on a number of occasions, but it was never possible to conclude the interviews through pressure of time. As a tribunal we consider that this is a matter of some real regret generally speaking the sooner such matters are dealt with, and the less time they are left to fester, the better for all parties.

64. In the course of one of the interviews during the grievance process, the Claimant said: '*before I go into the particulars of the grievance, I would like to set the tone at what I believe to be the reasons for the grievance. I reasonably believe that CC is bringing this grievance vindictively and without good faith due to the following reasons. He has purposefully come in late since March 13th when I joined F********* and constantly been late above the one-hour late allowance. I gave him several verbal warnings and encouraged him to improve his punctuality'.* The Claimant then goes on to attack CC's conduct at work. It seems to us that describing CC's grievance as *'vindictive and without good faith'* given the very measured way in which it was put was disproportionate and inappropriate.

65. We have further regard to the fact that after that grievance was completed ongoing difficulties within the team were noted in a meeting that took place on 9th May 2014This meeting was again aimed at 'clearing the air'. Within the notes an employee Kalin is recorded as saying that this was the smallest team in the store but always seems to have problems.

66. We note that in the course of CC's grievance, the Claimant who raised a number of allegations against CC himself and also against 'SA'. This is a pattern, effectively of retaliation, that repeated itself time and again, and in particular during the period from May – June 2016, which immediately proceeds the events which we were concerned.

67. Having had regard to all of that documentation and the evidence of the witnesses, we have reached the conclusion that whether the Claimant realises it or not, he does have the capacity to offend his colleagues by the manner in which he behaves or manages them. We would make it clear that the difficulties in the pharmacy were by in no means limited to the Claimant. For example, we have documents that suggest that 'SA' expressed himself as resenting 'AP' the other pharmacist and in particular her flexible working pattern (a consequence of her childcare responsibilities). 'SA' was certainly prepared to make complaints about the Claimant, doing so in some trenchant terms once RA is appointed.

68. JL the Customer and People Trading Manager said that complaints were raised as much as 2-3 times a week, by each of the pharmacists essentially complaining about the others. We accept his evidence. He identified the different ways in which the pharmacists would complain. He suggested that 'AP' was particularly concerned about rotas and the other pharmacists not pulling their weight. He said that the Claimant would complain in a more vociferous way about the others. Finally, he said that 'SA' would make complaints about the others albeit not aggressively. We also heard evidence from RA who said that when she first arrived all three pharmacists came to her with their complaints and she took the view that they were attempting to get her on their side.

69. By mid-2016 we find the situation was approaching a level which would fairly be described as dysfunctional. It was certainly taking up a considerable amount of management time. In fact, this was a matter brought to RA's attention in advance of her move to the F********* store. She was told that the store was a great place to work, with the one exception of the pharmacy She was warned that this was caused by the difficult relationships between the three professional pharmacists within the organisation.

70. What we take from this is that there was a great deal of friction between all of the pharmacists and between the Claimant and other members of staff. We find that the Claimant shared some responsibility for the poor relationships. He was as anxious to criticise the others as they were to blame him. This made for a difficult working environment and was a matter of some notoriety.

Claimant's Schedule Number 12

"I reported the Harassment and verbal abuse (by MH) to JL who refused to take action against the offender"

71. This claim relates to an incident that took place on 14 June 2016 where the Claimant's colleague MH lost his temper with the Claimant and referred to him as 'mental'. The incident itself is the subject of a claim of harassment contrary to Section 26 of the Equality Act 2010. This claim was not about the incident per-se but was couched as a complaint about the failure to take any adequate

action in response. The claim is identified as a claim of direct discrimination because of disability.

Direct Discrimination – the legal framework

72. The relevant definition of direct discrimination is found in section 13 of the Equality Act 2010, the material part of that sections reads as follows:

"a person A discriminates against another B if because of a protected characteristic A treats B less favourably than A treats or would treat others."

73. In order to establish less favourable treatment, it is necessary to show that the Claimant has been treated less favourably than a comparator not sharing his protected characteristic. Section 23 of the Equality Act 2010 provides that any comparator must be in the same or not materially different circumstances. What is meant by circumstances is for the purposes of identifying a comparator is those matters, other than the protected characteristic of the Claimant, which the employer took into account when deciding on the act or omission complained of see ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances.

74. The proper approach to deciding whether the treatment was afforded "because of" the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572**.

75. Section 39(2)(d) of the Equality Act 2010 makes it unlawful to discriminate against an employee by subjecting him to 'any other detriment'. It is clear that an unjustified sense of grievance cannot amount to a detriment ***Deer v University of Oxford*** **[2015] EWCA Civ 52**. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] IRLR 285** the House of Lords dealt with the question of what might amount to a detriment at paragraphs 34 and 35. What is necessary is that *'a court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work'.*

Material findings of fact

76. In reaching our conclusions in respect of this matter we have had regard to our general findings of fact both as to the Claimant's disability and to the relationships between the employees generally. Specifically, we have had regard to our later findings that the Claimant was as he claimed referred to as 'mental' by MH (see below).

77. On 2 July 2016 the Claimant sent JL an email in the following terms:

"*Hi James,*

Following my report to of in the last two weeks of an instance in the pharmacy, please find the details below for your prompt action.

On 14/6/2016, between 5pm and 5:35pm, the Pharmacy colleague dispenser Mounir Homrani collected a prescription from a patient and I overheard him telling the patient to call back later. I looked at the prescription which was for Daktacort HC15g cream and informed him to ask the patient to wait as we did not have the item. I reminded him that he should check availability before sending patients away. This is in line with company policy SOP1.2 which says that "always check the availability of an item before the customer leaves their prescription". But he replied sternly and aggressively to me saying that we have the drug in the fridge and the patient doesn't have to wait. I again told him calmly that he needs to check first and that the item is however not stored at the fridge. He shouted angrily at me saying the item is in the fridge, saying "you are mental, you are mental", why should she wait?'. I felt quite intimidated and I wanted to call in security. I informed him calmly that he cannot call me such names and I believe that he should be aware of the "A Supermarket' discrimination policies. He then replied, swearing at me 'fuck off and go tell James the manager, I don't care."

78. In the same e-mail the Claimant then went on to deal with another matter he says "*later that night, Mounir left two prescription forms belonging to a patient, RM on the counter desk in full view of another patient, clearly breaching confidentiality policy. I picked up on the forms and reminded him of the need to protect patient confidentiality. To which he responded to unkindly again"*.

79. JL decided that some response ought to be made to the Claimant's complaint. He instigated an investigation but did not conduct that investigation himself. MH was invited to a meeting which took place on 8th July 2016. That meeting was conducted by another manager DW. This was in no sense unusual and would be the standard practice in the store. The notes that we have been provided of that meeting are clearly very basic indeed. They were taken by JL who also attended the meeting. The notes are perhaps only twenty lines long but the timespan of the meeting was between 16:52 and 17:38 in the evening. Clearly much more must have been said than what was recorded in the meeting notes. In the course of that meeting, MH was asked whether or not he had sworn at the Claimant and he admitted that he did – he said "*yes, in certain circumstances and for a reason, I have been pushed. As a human being, certain people do not understand, I approach things pragmatic and reasonably".* The notes then peter out, but he said *"as a last resort, I had enough. I can either go home and let the company down. I had enough*". He was asked whether it happened before and suggested that other people working in the pharmacy including Rob, Sunil and James know the situation and suggested that the Claimant had said "*I am the boss now, do as I say*". He accepted that leaving the two prescriptions on the counter overnight but said that had amounted to a human error.

80. The conclusion reached by DW is set out at page 646 of the agreed bundle. She said "*an altercation did take place between you and the Claimant. I also believe the second allegation of the prescriptions being left out was down to human error. I understand the pressure you can be under in the pharmacy, but to use bad language towards another colleague/manager is unacceptable. My decision is to issue you with a general file note, which is a recorded conversation that any further instances taken place, the outcome could possibly*

be more severe again". Once again we consider that the notes are merely a summary of the conclusions that were reached but overall the meaning is clear.

81. We are satisfied that it was DW who took the decision to merely issue a file note and reject any suggestion that JL influenced that decision in any way.

Discussions and conclusions

82. We find that the outcome imposed by DW was surprisingly lenient given that it had been accepted that the Claimant was told to 'fuck off' by a junior employee. Generally, we would have thought that such conduct would have merited some form of disciplinary action beyond a 'file note'. A further matter that causes us to question whether the complaints were taken seriously is the fact that there is no record of the part of the Claimant's allegations where he had said that MH had suggested that he was 'mental'. Mr Laming, when he gave evidence, was unable to recall whether the matter was raised or not. We accept his evidence that he was unable to recall these events as he was giving evidence some 2 years later.

83. We have accepted Mr Laming's evidence that it was he that brought attention to the Claimant's complaint and also his evidence that his role in the process was that of a note taker rather than a decision maker. That is supported by the fact that a disciplinary meeting was convened and by the roles ascribed to the attendees at that meeting.

84. We find that the outcome of the disciplinary process could be viewed by a reasonable employee as being a detriment. A person who had made the complaint that the Claimant had made and who later learnt that the matter was dealt with by way of a file note, could reasonably believe that the Respondent was not taking the matter seriously or at least sufficiently seriously.

85. The difficulty for the Claimant in seeking to establish this claim is that he has criticised JL for failing to take action. We have found, indeed it was not disputed, that JL instigated a disciplinary investigation. There was no failure to take sufficient action in that respect. The Claimant could not have expected anything less. The principle failure complained of is the unduly lenient sanction that was imposed. We have accepted that it was not JL that made that decision. It was DW.

86. We note that DW appears to be a person in whom the Claimant has at times have placed some trust as she was always the member of management that he would ask to sit in as a companion in meetings that he had with management. We do not know whether the has deliberately chosen not to aim this allegation at DW or whether it was inadvertent.

87. To succeed in this claim, the Claimant must show that the disciplinary decision that was made was 'because of disability'. That involves an assessment of the mental process of the decision maker. That decision maker was DW. The Claimant has not put his case in this way. He was on notice that the Respondent was making this point and there was no application to amend his case. We have considered whether this is a matter we should consider for ourselves but do not believe that it would be right to do so. DW has had no notice that she might be accused of discrimination has not been called as a witness. She has not been given an opportunity to explain her lenient approach.

and therefore she has not had the opportunity for what we do consider to be a very lenient approach. Given the widespread knowledge of the friction in the Pharmacy we accept that there are possible explanations other than discriminatory motives.

88. This claim cannot succeed because JL was not the person responsible for the decision complained of.

The allegations of Harassment

89. Four of the claims that the Claimant has asked us to determine are allegations of harassment contrary to Sections 26 and 39 of the Equality Act 2010. In respect of each the Claimant says that employees of the Respondent subjected him to harassment 'related to disability'.

Harassment – the legal framework

90. A claim for harassment under the Equality Act 2010 is made under section 26 and 39. The material parts of Section 26 reads as follows:

> *26 Harassment*
>
> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(2) …..*
>
> *(3)…..*
>
> *(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.*
>
> *(5) The relevant protected characteristics are—*
>
> *age;*
>
> *disability;*
>
> *gender reassignment;*
>
> *race;*
>
> *religion or belief;*
>
> *sex;*
>
> *sexual orientation.*

91. Guidance as to the proper approach to claims of harassment was given in

Richmond Pharmacology v Dhaliwal **[2009] IRLR 336**. At paragraph 10 of that report the EAT identify the 3 elements that must established in order to make out a claim of harassment. These are (1) whether the alleged conduct took place (2) whether it had the proscribed purpose or effect and (3) whether it related to the protected characteristic. That guidance has been 'updated' in ***Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham*** **[2018] IRLR 542** where Underhill LJ said at paragraph 88:

> *"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment4 created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."*

92. There is also a reminder in ***Dhaliwal*** of the need to take a realistic view of conduct said to be harassment. At paragraph 22 it is said:

> *"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*

93. The same point is made in ***Grant v. HM Land Registry*** **[2011] IRLR 748** where at para 47 Elias LJ said in relation to the requirements that acts or words said to amount to 'a violation of dignity' or create an 'intimidating, hostile degrading, humiliating or offensive environment' that *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".*

94. The question of whether unwanted treatment "relates to" a protected characteristic is to be tested applying the statutory language without any gloss ***Timothy James Consulting Ltd v Wilton*** **UKEAT/0082/14/DXA**.

Claimant's Schedule – Number 11

"I was called mental by an "A Supermarket' Pharmacy colleague who further harassed me by saying I should fuck off when I asked him to follow procedure"

95. This was the incident that caused the Claimant to write to JL in the terms we have set out above. As such his version of what happened was set out at the time. Other than relying on what MH is recorded as having said during the disciplinary process there is no evidence to contradict what the Claimant said.

96. Ms Barrett quite properly recognised the difficulties she faced in challenging the Claimant's account of events. In her oral and written submissions, she accepted that the Claimant had been told to fuck off and took a neutral stance as to whether the expression 'mental' had been used. Whilst there were some aspects of the Claimant's conduct towards his colleagues which caused us some concern we saw no reason not to believe the Claimant's account of this incident. It seemed to us that the tensions in the pharmacy were such that a loss of temper of this level was unsurprising. We therefore accept that MH called the Claimant 'mental'.

97. We take into account our findings above about the difficulties in the workplace and in drawing our conclusions in this matter have particular regard for our conclusion that the Claimant's manner had caused a number of his colleagues to complain about him.

Discussion and conclusions

98. Having accepted the Claimants account the issue for us is whether the conduct of MH created the proscribed environment. A second, but interrelated question is whether the conduct complained of related to disability. We shall deal with each in turn.

Did the conduct found have the purpose or effect of violating the Claimant's dignity or creating a hostile, humiliating or offensive environment?

99. We considered whether referring to anybody as 'mental' would invariably pass the threshold imposed by Section 26 of the Equality Act. We recognise that whilst on one meaning it carries with it offensive connotations about mental health it is an expression that in other contexts might be used without objection ("the rollercoaster was mental'). The facts of the present case were that the Claimant was referred to as 'mental" when he was giving instructions that exasperated MH. The context shows that it was intended as a criticism or insult. In that context it plainly approaches, and in our view probably surpasses, the threshold of creating an offensive environment. However, we need not decide the matter on that basis alone.

100. Any assessment of the context cannot leave out of account the fact that the Claimant had a mental health condition. Being referred to as 'mental' would usually have a far greater sting in such circumstances. As recognised in ***Grant v Land Registry*** there might be a material difference in the effect of language where the recipient knows that the speaker is acting out of benign motives. It seems to us that a key question is whether MH knew of the Claimant's mental health issues. We have therefore gone on to make the following findings of fact in that regard:

100.1. The Claimant first suffered a period of ill health in the middle of 2014 and in October 2014 suffered from a relapse. Up to that point, he had been a pharmacist section leader and entitled to oversee the sale of prescription medicines in a highly regulated environment. As a consequence of his

second period of ill-health the Claimant was suspended from prescribing for a period. Thereafter, for a slightly longer period, he was permitted to work but only under supervision. MH was already working at that stage and he would have been in place in the pharmacy. The pharmacy team was comprised of 8 – 10 people throughout that period. It seems to us that it would have been extraordinary if, even without full knowledge, there had not been some speculation as to the reason why the Claimant was no longer (or for at least a period) carrying out the duties of a pharmacist. Particularly so given that he suffered from no obvious physical impairment at the time. It it must have been fairly obvious to everybody that his illness was a mental health condition.

100.2. We also find it likely that there had been a degree of gossip and that there was real possibility that the reasons for the restrictions on the Claimant's practice would become more widely known.

100.3. The evidence that tips the balance in the Claimant's favour comes from him. He said that in the course of his work that he had some conversations, albeit with some with other managers about the medication that he had been prescribed. There was nothing sinister in this but it was simply the case that there were discussions about the Claimant's mental health that went beyond senior management. The Claimant also said, and we accept, that he had discussions about his mental health with MH. That evidence was consistent with our conclusions that the Claimant's mental health condition was known to his long standing colleagues although not freely discussed. We find that MH was aware of the Claimant's condition.

101. We conclude that MH became exasperated with the Claimant's criticism of his work and lashed out at him using the epithet 'mental' in the knowledge that the Claimant had experienced a period of acute mental health issues. He did so, in the heat of the moment, in the knowledge that it would be something that would be particularly hurtful towards the Claimant.

102. In these circumstances we have little doubt that it would be objectively reasonable to consider that the offensive and degrading and humiliating environment condition had been made out, and that the Claimant was actually offended by this remark. In coming to that conclusion we have assumed that MH had some cause to lose his temper but find that this could not render such a personal offensive comment excusable. This went considerably beyond the sort of 'unfortunate phrase' that should not be regarded as harassment.

103. The next issue is whether the expression mental 'related to disability". Ms Barrett correctly pointed out that in his e-mail of complaint the Claimant had not expressly complained that the comment was linked to his mental health or health at all.

104. It seems to us that the expression 'mental' is simply an abbreviation or shorthand for describing somebody as being mentally ill or mentally abnormal. Whilst it historically has been a term that might have been commonplace it is necessary for a tribunal to move with the times, and many expressions which many years ago were acceptable in the playground, are not acceptable now let alone in the workplace. Thankfully mental health conditions are beginning to attract the same degree of consideration as physical conditions. We would have concluded that the expression 'mental' would almost invariably and in any

context relate to disability. In the present case we find that the expression was directed to the Claimant in the knowledge that he had suffered from a mental illness. In those circumstances a conclusion that the harassment 'related to' disability is inescapable.

105. There was no dispute that this claim had been presented within the time limits imposed by Section 123 of the Equality Act 2010.

106. For the reasons set out above we find that MH subjected the Claimant to unlawful harassment by referring to him as 'mental'.

Claimant's Schedule – Number 13

"I was shouted at by an "A SUPERMARKET' staff member when [the Claimant] tried to advise her to follow procedure and not to breach patient confidentiality"

107. We make the following findings of fact in respect of this claim:

107.1. AC was a junior member of staff in the Pharmacy. The Claimant was responsible for supervising her compliance with clinical standards.

107.2. On 22 June 2016 the Claimant observed AC dealing with an enquiry from a police officer. The officer was asking about the medication prescribed to somebody who was thought to be suicidal. The Claimant intervened to stop Ms Coates simply handing over details of the patient's medication to the police. He pointed out (correctly in our opinion) that that would be a breach of the Respondent's data protection policy to release such information unless there had been a request made in writing.

107.3. The Claimant's description of this event was that Ms Coates attempted to argue with him and contradicted him before the police officer. We did not hear any evidence from AC and have no reason to disbelieve the Claimant's account. His account is consistent with evidence of many other occasions where he would pick up on the failure of his colleagues (which is not something he can be criticised for). That said the reaction he describes in AC is also consistent with an array of his colleagues. We have found above that the Claimant lacks awareness of how his criticisms are perceived by others.

107.4. We are prepared to assume, without expressly finding that it was the case, that AC raised her voice in the context of this disagreement.

Discussion and Conclusions

108. We consider that this is the sort of event that is quite likely to give rise to a disagreement between colleagues. It is easy to see that AC would be anxious to assist the police who were in turn trying to assist somebody who was feeling suicidal. That said the Claimant cannot be criticised for drawing attention to the fact that it might be improper to do so without the proper consent of the individual concerned and would be a breach of the Data Protection Policy. Such tensions might be expected to lead to a disagreement where voices were raised.

109. As we have set out above in order to amount to unlawful harassment it is necessary to establish that the conduct complained of 'related to' disability. The Claimant does not suggest that anything in the words said to have been shouted related to or were intrinsically connected with disability. The manner in which he put his case was as follows: he says that he was so clearly AC' superior that she should have automatically followed his instructions. Ms Millins on his behalf invites us to draw an inference that AC must have been somehow influenced by the fact that the Claimant had suffered from a period of mental illness. She says that is the link that establishes that the conduct 'related to' disability. She invited us to make in order to conclude that the matter relates to a particular protected characteristic.

110. That submission turns not on whether there was any intrinsic connection between the behaviour but looks at the motivation for it. We consider it at least possible – although we have no evidence of it – that AC was aware that the Claimant had suffered from a period of mental illness.

111. We consider that we should approach the issue of whether or not AC was motivated by the Claimant's disability by applying the guidance in ***Igen v Wong***. The first issue is whether the Claimant has proved facts which could support an inference that the conduct related to disability. We take into account the fact that it was possible that AC knew of the Claimant's mental health condition. We must also have regard to the fact that it was a (as we have already alluded to) a situation in which could quite understandably give rise to a heated dispute between two colleagues.

112. We have had regard to all of the background evidence but note that this is the only allegation against AC. These facts are not sufficient that we are could draw an inference that Angela Coates was in any way motivated by the Claimant's mental impairment. Even on the Claimant's account there was an overwhelming inference that AC spoke back to him because she thought, perhaps wrongly, that he was stopping her assisting prevent a possible suicide. There is not enough evidence for us to infer that there was any connection between what AC did and disability. In the absence of any proper basis to draw an adverse inference we find that it did not relate to disability. That allegation therefore falls to be dismissed.

Claimant's Schedule- Number 15 (Part 1)

"I was spoken [to] angrily by [Rebecca] Arnold when I asked her why my approved reasonable adjustments were not in place for over three months"

113. The claim relates to what the Claimant says occurred on 15 September 2016. The way he puts his case is that he claims RA angrily brushed off his request for reasonable adjustments. The context for this claim is that there had been a recommendation that reasonable adjustments were made for the Claimant's back condition. As we find below there had been some considerable delay putting those adjustments into place. We make specific findings in respect of those matters when dealing with the claim that there has been a failure to make reasonable adjustments. We shall not repeat those findings here but have had regard to them when making this decision. In addition to those findings we make the following additional findings of fact in relation to this particular claim.

114. We have said above that, even before RA started at the store, she was on notice of the difficult relationships between the pharmacists. She expected that this would give rise to difficulties in their management. It is unsurprisingly in that context that she showed herself to be a fairly prolific note-taker. We note that at or around the same time, the Claimant had contacted ACAS, knew of the possibility of an employment tribunal claim and it is very likely that the Claimant's managers were being cautious about what they did and what they recorded. We have seen notes taken by RA on her initial encounters with the Claimant on 6th September 2016. It is RA's case that, if there was any conversation about reasonable adjustment, it took place on that day and not 15th September 2016 as the Claimant says. She denies that there was any reference to the equipment that had been recommended as a consequence of the Claimant's back condition and says that any conversation related to his hours of work. She denies raising her voice.

115. We find that RA's account of the events is to be preferred to that of the Claimant. We do so for the reasons set out below:

115.1. RA made a record of 2 meetings with the Claimant on 6 September 2016. The first recorded a conversation about product withdrawal compliance and the second with a request for holidays.

115.2. The record of the conversation about product withdrawal compliance records the Claimant was exceedingly prickly towards RA. RA records the Claimant as saying that she should stop 'spitting brimstone'. He later went on to describe her giving him managerial advice about product withdrawal as being "show me tell me". We find it very unlikely that RA would have fabricated these somewhat unusual phrases. We have regard to our previous finding that the Claimant could offend people by his mannerisms. This record is consistent with that. We therefore accept that the first note is a broad summary of what took place at the earlier meeting.

115.3. The Claimant says in his witness statement that the occasion when he says RA shouted at him about reasonable adjustments followed a conversation about annual leave. RA agrees that there was an occasion in early September when the Claimant asked for leave. They both agree that the request was refused. RA says that this took place on 6 September 2016. She has made a detailed note. She records the request and sets out the reasons why it was declined. She sets out a subsequent discussion about how the Claimant might take time off without using annual leave. Finally, she records that she provided the Claimant with an extract from the Retail Managers Handbook. That note is so detailed. It records both sides of the dialog and is consistent in part with the Claimant's account of a conversation about annual leave. We accept that it is an accurate record of the meeting. RA denies that that conversation became heated. Whilst the leave was refused it is clear that RA suggested alternative mechanisms whereby the Claimant could have the time off. This is not at all consistent with a suggestion that she was angry that the request was made. She had been well within her rights to refuse it for the reasons she gave. We do not accept that there was any angry exchange on this day.

115.4. RA made an extensive note of events that took place on 7 September 2016. Her note records 'SA' making minor complaints about the

Claimant and whether he was pulling his weight. There is reference to a suspicion that the Claimant might be working elsewhere or studying in working time. In the latter part of that note RA records an additional part of the conversations that had taken place the previous day and says that the Claimant had mentioned the disability act in conversation in the admin office on 6 September 2016. She records that the Claimant had suggested that the failure to give him flexible working meant that the Respondent was "*breaking the law over his flexible working arrangements*" due to his "*disability*". She notes that at that time she is unaware of any details of any flexible working arrangements. We consider that the detail given, which is not one sided, would suggest that the notes were accurate. What they also show is a degree of suspicion about the Claimant and his activities.

115.5. There was a further exchange of emails that took place on 15 September 2016, the date that the Claimant has identified as the occasion RA shouted at him. RA sent the Claimant an e-mail at 10:48. That e-mail set out her understanding of the Claimant's working pattern. She acknowledged that the Claimant had been permitted to reduce his working days from 5 to 4. It is clear that the Claimant had suggested that he was entitled to every Friday off work. RA stated that that we not her understanding from the Claimant's personnel file.

115.6. The Claimant responded at 11.44 but apparently to an earlier e-mail. He asserted that he had an agreement for flexible working. He concluded that e-mail by saying: *"Also if you would kindly follow up from where [JL] stopped and proceed with making the adjustments needed including the recommendations of the occupational health consultant which has since not been actioned".*

115.7. At 15:22 the Claimant responded to Rebecca Laming's e-mail of 10:48. He asked whether RA was in receipt of a full handover from JL. He asserted that he was on a 'flexitime' contract as a reasonable adjustment. He said that he had been 'waiting for you to settle in' before forwarding 'unfinished' communications with JL.

115.8. We are satisfied that the Claimant did raise the issue of the outstanding adjustments to accommodate his spinal condition on 15 September 2016 but he did so by e-mail. The e-mail exchange by both parties is entirely cordial. We are confident that had there been a later meeting then, as all other interactions caused RA to take notes, it would have been recorded.

115.9. The Claimant has pinned the allegation about shouting to the occasion where annual leave was discussed. We are satisfied that that took place on 6 September 2016 and not 15 September 2016 as the Claimant has suggested. Whilst we are satisfied that there was a conversation about 'reasonable adjustments' on that day but that it related to work patterns and not equipment or a chair. For the reasons set out above we do not accept that the interaction between the Claimant and RA on 6 September 2016 became heated. It follows that, in relation to the date at least, we cannot accept the account of the conversation given by the Claimant at paragraph 37 of his witness statement.

115.10. We have considered whether there was any occasion, regardless of date or context when the issue of the provision of equipment was the subject of a heated conversation. In particular, we have considered whether that took place on 15 September 2016 independently of the conversation about annual leave. RA's account of events was more consistent with the contemporaneous records and is more credible because of that. We consider that given that RA was so concerned about the Claimant's behaviour that she made file notes of many interactions with him and knew, and recorded, that he was asserting his rights under the Equality Act it is unlikely that she responded by shouting at the Claimant. We also place weight on the fact that the Claimant's account of the events, whenever they took place, is very vague.

116. For the reasons set out above the Claimant has not established that RA shouted at him on 15 September 2016 or at any time nor that she 'angrily refused to make reasonable adjustments'. It follows from that that this claim does not succeed.

Claimant's Schedule – Number 18

"I was threatened by the "A SUPERMARKET' people manager and falsely declared AWOL even when I had already reported and communicated to her that I was absent for my back pain"

117. This allegation concerns events that took place on 9 December 2016. What the Claimant says is that RA falsely reported him as AWOL and sending him a letter to that effect on 9th December 2016.

118. We heard a great deal of evidence about the provision of sick notes and the withdrawal of contractual sick pay but the allegation we had to determine is narrow and the surrounding evidence is of marginal relevance. The core facts were not really in dispute.

119. The Claimant was absent from work from 28 November 2016. It seems that the immediate cause of this was his back condition. He was entitled to 'self-certify' his sickness absence for the first 7 days.

120. There was some dispute before us as to whether the Claimant had acted in accordance with the Respondent's Attendance Policy which required him to verbally notify his line manager or another manager before the start of any shift affected by the ill health. We do not have to resolve that dispute. It suffices to say that the Claimant had at some point informed a manager that he would not be attending work and the nature of his condition.

121. The Claimant's absence led to him being contacted on 3 December 2016 by RA who made enquiries as to his potential return to work. This was the standard procedure that would ordinarily be followed. In the course of that telephone call, the Claimant told RA that he was likely to be off work for a further week and that he would be sending her a sick note. The Claimant's GP records show that he attended the surgery on that day and the Claimant had promised that the sick note would be placed in the post on the following Monday.

122. By the Wednesday 7 December 2016 RA had not received the sick note and she attempted to follow that up by a series of telephone calls. In the course

of the telephone calls, the Claimant offered to send a copy of the sick note by email. Whilst not expressly indicating whether or not that would be acceptable by itself, RA did give the Claimant her email address. The Claimant did try to send a copy of the sick note by email. It did not arrive as the Claimant had missed out a hyphen from the email address that he was given. There were further attempts by Rebeca Arnold to contact the Claimant on 8 and 9 December 2016 when she left messages on his mobile telephone but without response.

123. By late morning on 9 December 2016, the situation was as follows; the Claimant had promised that he would post his sick note, but the sick note had not arrived. The Claimant had suggested that he would email his sick note but by the morning of 9th December 2016 no email had arrived. Finally, there had been two attempts to telephone the Claimant, neither of which had provoked any response. In the light of that, RA took the decision that she would write to the Claimant under the company's absence without leave policy. She did so using a standard template letter which started with the unfortunate phrase that "*we do not know why you have been absent*" and asking the Claimant to get in contact within 48 hours or face the prospect of disciplinary action. It is the receipt of this letter that the Claimant says amounts to harassment.

124. Before the letter of 9 December 2016 was delivered, the Claimant responded to the voice mail message left by RA earlier that day. In the course of the discussion that ensued the Claimant informed Miss Arnold that he had in fact posted the sick note. RA said that in the course of that telephone call, she said that the Claimant should disregard the letter that was on its way to him. She made no record of that in what is otherwise quite a careful note of her interactions with the Claimant at that time. Because of this we do not unhesitatingly accept her evidence. We do accept that she told the Claimant she had written to him. Despite this we do find that in the course of that telephone conversation the Claimant would have gathered that his attempts to send that sick note by post and e-mail had been unsuccessful. It follows from this that the

125. Later on 9 December 2016, the Claimant did manage to send an email attaching a copy of his sick note dated 3 December 2016. At that stage of course, the sick note had almost expired and the Claimant needed to get another one. In the course of emails on 12 December 2016, the Claimant was instructed by RA that she needed to have original sick notes. We find that this was in keeping with the standard procedure and that original copies of sick notes were usually retained for the purposes of paying sick pay. The Claimant has taken exception to this and considered it unjustifiable. We find that it is unsurprising that the default position was to expect an original copy of a sick note rather than have one electronically. We do note that when the Claimant raised this as an issue a decision was taken not to insist on an original on this particular occasion.

126. We finally note that the sick note that the Claimant says he had posted was eventually delivered on 12 December 2016 the reason for the delay being that insufficient postage had been paid.

<u>Discussion and conclusions</u>

127. The first issue we have to decide is whether the conduct complained of 'related to disability'. The letter that the Claimant complains of concerns an absence that was caused by the Claimant's spinal condition which we have held amounted to a disability. We are satisfied that that is a sufficient link to be able to say that the conduct related to disability.

128. The more substantive issue in this case is whether the conduct complained of had the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We reject any suggestion that RA's purpose was to harass the Claimant (to paraphrase the sub-section). Her purpose was quite clearly to place pressure on the Claimant to comply with the absence policy and provide evidence of why he was absent. That was a quite proper purpose.

129. We turn to the question of whether, whatever the purpose, sending the letter had the proscribed effect. We would accept the possibility that an employer in following an absence management process might violate dignity of create the proscribed environment. We are prepared to accept that the Claimant was offended to receive a letter that stated that he was absent without leave as he had at the time he received that letter taken steps to explain his absence.

130. We turn directly to the issue of whether it was reasonable to regard RA's conduct as having the proscribed effect. We remind ourselves that we must have regard to all of the surrounding circumstances including the subjective effect on the Claimant. We consider that by the time the Claimant received the letter he complains of he would have known that, at the time the letter was sent, all of his attempts to convey information to the Respondent had failed. He would therefore have known that RA could reasonably have thought that he was not complying with the absence management process albeit unintentionally. He would have known that his later explanation for this came after the letter to which he objects being sent.

131. We would have taken some persuading that the contents of the letter of 9 December 2016 could ever surpass the threshold of harassment. It seems to us that to do so would risk '*cheapening the significance'* of the words 'intimidating, hostile degrading, humiliating or offensive environment' in Section 26 of the Equality Act 2010. However, given the context of the matter and what the Claimant actually knew about the circumstances in which the letter was composed and sent we have no hesitation in concluding that it was not reasonable for the conduct complained of to have the effect prescribed by Section 26 of the Equality Act 2010.

132. For the reasons set out above this claim does not succeed.

The Claimant's Schedule – Number 15 (Part 2)

"my approved reasonable adjustments were not put in place for 3 months"

133. The 'approved' reasonable adjustments referred to by the Claimant were those matters agreed following an initial request made by the Claimant on 27 May 2016 to JL.

The legal framework

134. The material sections of the Equality Act 2010 that deal with reasonable adjustments for people with disabilities are sections 20 1nd 21. The material parts of those sections are as follows:

20 Duty to make adjustments

(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.

(4)…..

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6)….

21 Failure to comply with duty

(1) A failure to comply with the first, second or third 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.

(3) ….

135. The proper approach to assessing whether there is an actionable failure to make adjustments is that set out in ***Environment Agency v Rowan*** **[2008] IRLR 20, EAT**

"*... an employment tribunal ... must identify:*

(a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant."

136. The appropriate non-disabled comparator should be identified by the reference to the disadvantage caused by the PCP: ***Smith v Churchills Stairlifts Plc*** **[2006] IRLR 41, CA.**

137. A substantial disadvantage is one that is *"more than minor or trivial" see* **s.212(1) Equality Act 2010.** Whether such substantial disadvantage existed is a question of fact to be ascertained objectively see paragraph 6.15 of the Statutory Code of Practice.

138. Whether an adjustment is a reasonable one to take will in part depend on the likely effectiveness of the adjustment in alleviating the substantial disadvantage. It is not necessary that the adjustment eliminates the disadvantage it is sufficient that it ameliorates it.

Findings of fact

139. On 21 May 2016 shortly after the Claimant first contacted his GP about his back condition he sent an e-mail to JL seeking adjustments to accommodate his spinal condition. His initial requests were focused on altering his hours, having flexibility and he sought some impact mats in order to make standing more tolerable for him. He also asked that his 'lift access' was restored. Mr Lambing agreed to the reduction in hours, he did agree to have some flexibility around shifts and rotas. The Claimant took the view that what had been agreed was 'flexitime' allowing him to take every Friday off. This is what led to the later correspondence with RA. It is clear to us that JL did not agree to such a 'free for all' as the Claimant suggested but was prepared to be flexible whenever the Claimant's back was giving him difficulty.

140. JL ordered an impact mats and he also commissioned a workplace assessment. It is the partial failure to promptly comply with that assessment which gives rise to this particular allegation.

141. The assessment effectively sets out the summary of the Claimant's condition and notes that he has difficulty in standing. The recommendations of the report are made having taken a history from the Claimant where he said that he would spend at least 20% of his time working at a particular dispensing computer terminal in the workplace. The assessment noted that the chair that had been provided at that workstation was unsuitable in a number of regards. Principally because it was broken, was wobbly and not safe to sit on. The following recommendations were made:

141.1. It was recommended that a new chair be purchased that had adjustable height and back support, and a particular brand was mentioned as a recommendation This was not specified as being the only brand of chair that would suit.

141.2. It was suggested that adjustable monitors were provided, to allow the height of the monitors to be tailored to the height of the sitting position of the person using the computer.

141.3. It was suggested that an additional impact mat was provided, and

141.4. the assessment also says that the keyboard required at the time of the assessment to be adjusted. We are satisfied that this simple adjustment was carried out at that time.

141.5. Finally, some very sensible recommendations were made within that report as to how the Claimant could himself best manage his workplace by

alternating between sitting and standing, breaking up patterns of each whenever possible. There was no difficulty with the Claimant being able to follow those particular recommendations.

142. In our findings above when we considered whether the Claimant suffered from a disability as a consequence of his spinal condition we have found that he had particular difficulty with standing or sitting for long periods of time because it caused him to have back pain.

143. A requirement to stand or sit to undertake duties is a 'practice' for the purposes of Section 20. In particular, he was required to undertake those duties using the dispensing computer terminal. We accept the account given at the time of the assessment that the Claimant spent about 20% of his time using that computer. We have no difficulty accepting that the Claimant's back condition placed him at a substantial disadvantage in comparison with those not suffering from a spinal condition.

144. Fairly shortly after the workplace assessment a second impact mat was ordered. It was not argued that the duty to make reasonable adjustments had not been discharged in that regard. That left only the issue of the chair and computer monitor outstanding. The DSE Assessment was completed on 22 July 2016. The chair and monitor were not in place before 10 October 2016 when the Claimant instigated the present proceedings or 28 November 2016 when the Claimant took sick leave.

145. The evidence before us was that the cost of providing a chair would have been around £200. Given that the chair in place was broken and needed replacement in any event this seems like a very modest cost to an organisation the size of the Respondent. It was not argued before us that the cost of the chair made it unreasonable to provide it. We would have had no hesitation rejecting that argument.

146. The argument that was advanced was that there were many suitable chairs in other parts of the building and the Claimant could have easily 'helped himself'. Ms Barrett rightly referred to ***Callagan v Glasgow City Council*** **[2001] IRLR 724** and ***Bishun v Hertfordshire Probation Service*** **UKEAT/0123/11/DA** as supporting the proposition that whether it is reasonable to make an adjustment might turn on the level of co-operation by the employee.

147. We find that the reason why the chair and monitor issue were not ordered as had been envisaged was the lack of a comprehensive handover from JL to RA. RA accepted in her evidence that it took some time for her to learn about the accommodation that had been agreed for the Claimant. It is probably fair to note that the Claimant did not assist himself by misrepresenting the issue of 'flexitime'.

148. We cannot accept that the Claimant bore any substantial responsibility for the delay in providing a suitable chair. We accept that having been told that a chair would be provided he was not obliged to go hunting for a suitable chair in other parts of the building. That goes beyond 'co-operation'. Had it really been that easy there is no reason why JL could not have arranged that. It seems to us that there was an agreement that a special chair would be ordered. The Claimant reminded RA of what was outstanding in his e-mail of 15 September 2016. Whilst he did not refer directly to a chair he did point to the assessment

that had been carried out. It is difficult in those circumstances to say that the Claimant was not co-operating.

149. The Respondent suggested that provision of the monitors was somewhat more difficult. We accept that at some point in February 2017 the Respondent did look into whether the monitors could be adjustable. We accept the evidence given on behalf of the Respondent that the monitors were matched with the particular computer system and that they could not easily be fitted with adjustable stems. It seems to us that this does not provide an answer to the claim. What was necessary was to raise the height of the monitors to match the chair height. If adjustable necks were not possible then a simple alternative would have been to place the monitors on a stand of a suitable height. Monitor stands are readily available, and inexpensive. Once the chair had been provided, it would have been relatively simple to have raised or lowered the monitor on a stand to match the chair.

150. We would accept that the concept of making a 'reasonable' adjustment carries with it implicitly the notion that an employer would not be in breach of any duty until they had a reasonable time to make the adjustment or provide any auxiliary aid. We consider that it would have been reasonable to order a chair within a week or two from the time of the DSE Assessment or to provide the Claimant with a temporary chair of equivalent quality whilst the new chair was awaited. As we have stated above no chair was provided for many months. Without a chair no adjustments could be made to the computer monitor. We find that the failure to provide the Claimant with a chair amounted to a breach of the duty to make reasonable adjustments. The duty was ultimately complied with by the provision of a chair but only during the Claimant's absence.

Claimant's Schedule

151. The final allegation that we have to deal with is the early allegation that the Claimant has suffered a detriment by reason of making a protected disclosure. We set out above our finding that the Claimant's email sent to MS on 20th October 2014 amounted to a protected disclosure for the purposes of a claim made under Section 47B of the Employment Rights Act 1996. The detriment said to be suffered by the Claimant is the response sent by MS 21st October 2014, which is page 708 of the agreed bundle.

152. MS did not reply only to the Claimant. He copied his e-mail to RA and also the two other Pharmacists 'AP' and 'SA'. He wrote this:

> *"I feel the need to send this as I am getting more and more frustrated with what is going on in the pharmacy.*
>
> *Firstly, for clarity there is no such thing as a "Senior Resident" you are all on an equal footing. The responsibility to fulfil all tasks in our pharmacy lie with all 3 of you as a collective. If you feel that you can no longer work together then I will endeavour to find you an alternative position in a different store.*
>
> *As far as product withdrawal goes it is all of your responsibility to complete and the fact that one of you feels the need to highlight this [is] embarrassing as it clearly shows an attitude of "throwing somebody under the bus" rather than working together to fix [it].*

If the 3 of you decide to take on different tasks within your day job then that is fine but you will need to be aware that I will manage your performance on all things relevant to your role as a Pharmacy Manager.

If you have any issues with this come and see me."

The legal framework

153. A claim that a worker has suffered a detriment because they have made protected disclosures is brought under Sections 47B and 48 of the Employment Rights Act 1996. The material parts of those sections read as follows:

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b)from doing anything of that description.

(1E) …

(2)…..

48 Complaints to employment tribunals.

(1) An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 43M, 44, 45, 46, 47, 47A,47C(1), 47E, 47F or 47G.

……

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

154. In ***Fecitt v NHS Manchester*** **[2012] IRLR 64** the Court of Appeal explained the necessary causative link between the protected disclosure and the detriment as follows:

"In my judgment, the better view is that s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower."

155. As both the protected disclosure and the response were in writing the only factual issues that we needed to determine is to ascertain treasons why the e-mail was sent by MS. We do that below.

Discussion and conclusions

156. Respondent says that the reason that MS sent that email was essentially that he was fed up with the dysfunctional relationship between the three pharmacists. It is also argued on behalf of the Respondent, that in order to amount to a detriment a person needed to be treated less favourably than their colleagues. We shall take that second point first.

157. We are satisfied that section 47B does not require any comparison of treatment whatsoever. It is entirely analogous to the prohibition against pregnancy discrimination or victimisation – all that is required to be shown is that a person has been subjected to a detriment and that the reason for that was materially influenced by the fact that they had a made a protected disclosure. We can see that there might be some evidential value to establishing that a particular detriment was meted out to a wider group than the individual who made the protected disclosure but we think it goes no further than that.

158. We have considered whether or not MS' e-mail was a detriment. We have set out above where we consider direct discrimination authorities for the proposition that an unjustified sense of grievance cannot amount to a detriment. On any fair reading of MS' e-mail all three employees are being reprimanded for the breakdown in their working relationships. We have found that there was such a breakdown and drawing attention to it may not have amounted to a detriment in other circumstances. However, we note that MS not only tore a strip off all of the Pharmacists he also forwarded the Claimant's e-mail and by doing that revealed that the Claimant had been complaining about 'SA'. We consider that MS made no attempt to hide his exasperation. In that context we are prepared to assume that a reasonable employee, even one who would be unable to reasonably object to more moderate criticism, could view this e-mail as being a detriment.

159. The issue that follows is to ascertain the reason for that treatment. The Respondent says that it was a reaction to the dysfunctional situation. That is what MS said when he gave evidence before us. On behalf of the Claimant it was said that it was obvious that the Claimant's own e-mail, a protected disclosure, was the cause of the treatment. One was a response to the other.

160. We do not think it appropriate to approach the issue of causation on a 'but for' basis. The approach should be the same as in a claim of victimisation or discrimination. The proper question is to ask why the treatment was afforded to the Claimant.

161. In ***Fecitt v NHS Manchester*** the Court of Appeal accepted that the 'but for' approach was inappropriate and held that an employer who had moved a whistle blower to a different post to remedy the dysfunctional situation with her colleagues had not acted on the grounds of a protected disclosure but in reaction to the situation that developed once the disclosure was made.

162. We consider that whilst copying in the other two pharmacists added to the legitimate grievance felt by the Claimant it did cast light on the reason for the treatment. We consider that MS was not acting in response to the protected disclosure at all. He was responding to what had very clearly become a dysfunctional situation. We have made our findings above as to the relationships between the pharmacists we find that MS genuinely and reasonably believed that all three were responsible for the situation and that it could not continue as it was. It was the impact of the poor relationships on the managers and the business that caused him to act.

163. We find that MS' reasons for writing his e-mail were on all fours with those of the employer in ***Fecitt v NHS Manchester*** they were directed at resolving a dysfunctional situation and in no sense at all were they by reason that the Claimant had made protected disclosures. As a consequence of that finding this claim must fail.

164. The Respondent had taken the point that this claim, which was the consequence of an amendment, was out of time and that the Tribunal had no jurisdiction to deal with it. In the light of our findings above we do not have to deal with the interesting question of whether a claim added by amendment is treated as being presented at the date of the ET1 or at the date the application is made.

REMEDY - REASONS

165. Having announced our decision on liability we invited the parties to deal with the issue of remedy. It was agreed that there was no claim for lost wages that flowed from either of the claims that we upheld and we were only invited to make awards for injury to feelings. The Claimant had expressly disavowed any claim for personal injury in his witness statement reserving his position for any civil proceedings. We drew attention to the possibility of issue estoppel but were invited to proceed.

166. We had found two separate acts of discrimination. They were not separated widely in time but are very distinct in their nature. The first matter we considered is whether it was appropriate to make two separate awards or to treat any injury to feelings as being caused by both acts. We decided that the two incidents

were so distinct from one another that any feelings of hurt, anger and exasperation caused by each could and should be treated distinctly.

167. It is clear that the Claimant was upset about the reference to him as being 'mental'. He immediately complained. We took the view that MH was treated very leniently and are unsurprised that the Claimant has taken the same view. The Claimant's mental health had placed his entire career in jeopardy and it was and we find remains a matter about which he is very sensitive.

168. We have had regard to the latest Presidential Guidance on injury to feelings awards. Ms Barrett had very helpfully provided us with the updated bands taken from the original guidance given in ***Vento v Chief Constable of West Yorkshire Police*** **(No 2) [2003] IRLR 102.** One reading of ***Vento*** is that a tribunal will have regard to the act of discrimination in order to assess the band into which any award might fall. It seems to us whilst the gravity of an act might be expected to inform the tribunal of the likely impact but that will not necessarily be the case as each individual may react differently. We find that the Claimant is particularly sensitive in his own feelings (although considerably less so when it comes to others).

169. We accept that the occasion where the Claimant was called 'mental' arose in circumstances where the Claimant ought reasonably to have understood MH was reacting badly to criticism and was lashing out in the heat of the moment. That said use of the expression 'mental' did add significantly to the ordinary abusive behaviour (the 'fuck off comment'). It does appear to have been the only occasion where the Claimant's mental health was referred to directly in insulting terms. In that sense it is a one off.

170. Ms Millin invited us to make awards at the very top of the top Vento band (in respect of both matters i.e. double the top award). We do not think the effect on the Claimant was that grave. He was certainly angry and upset but he was able to carry on working.

171. Ms Millin also invited us to make an award for aggravated damages. ***Vento*** is authority for the proposition that such damages may be awarded in an appropriate case but reminds tribunals to be cautious about double recovery and further reminds tribunals that such damages are compensatory in nature. We consider that the lenient treatment afforded to MH was an aggravating feature in this case. We consider it better to try and assess the affront both of the treatment itself and of the lenient approach to the perpetrator together. Doing that we are persuaded that the failure to take robust action means that any award should be in the middle band but that the effect was not so grave as to take it far from the bottom of that band. Doing the best we can on those facts we consider that an award of £9,000 is appropriate.

172. Turning to the failure to make reasonable adjustments, it seems to us that the following features are significant, and they enlighten us on what the effect must have been on the Claimant himself. We have been asked not trample on the potential for any personal injury claim and will not do so. We would accept, even without medical evidence, that the pain that the Claimant was in at that time was exacerbated by the awkward workstation. We note that this was only used by the Claimant for 20% of the working time and that the Claimant was able to use coping mechanisms to avoid some of the effects of this. For example, he was able to go and sit in the consulting room to work.

173. We do consider that the Claimant was likely to and did become frustrated by the slow progress towards complying with the recommendations of the DSC assessment. He should not have had to chase for these to be completed. That quite reasonably could and we find did lead to him becoming frustrated. We note that the Claimant would have been in pain even without the failure by the Respondent. There was no evidence that the failure to make adjustments was the cause of the Claimant starting a period of sick leave. On that basis we have found that this failure spanned only the months from the assessment through to the Claimant taking sick leave.

174. The Claimant had a further admission in respect of his mental health condition in January 2017. It was that which rendered him unfit to work at that time and not any issue with the workplace.

175. We do consider that had the adjustments been made promptly as they should have been the Claimant would have been more comfortable at work. We accept that he was disappointed and frustrated at the pace things were done.

176. Once again we were invited to make an award of aggravated damages. We see no basis for this. We have found above that the reason for the delay in providing the chair and adjusting the height of the monitor was caused by the failure to conduct a thorough handover to RA. That was an omission but in the context that RA was taking on responsibility for a large number of staff it was not altogether surprising. The failure was one of inadvertence or carelessness and was not deliberate nor high handed. We decline to make an award of aggravated damages.

177. We consider that we should compensate the Claimant for his discomfort together with his proper feelings of anger and indignation caused by the delay in providing him with an appropriate chair. We do not think the injury to be such as to justify an award in the middle band but do think it comes above the middle of the lower band. The particular feature we find significant is the length of time during which the injury would have persisted. We find that the proper award id £6,000.

178. We have looked at both awards together and are satisfied that a total award of £15,000 avoids any double recovery and is appropriate for the discrimination claims that we have upheld.

179. Ms Barrett sought to persuade us that we had a general discretion as to the appropriate rate of interest. Any award of interest is governed by the **Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations** 1996. Regulation *2* gives a power to award interest. The wording of the regulation is permissive. It uses the expression 'may'. However, if the tribunal then decide to award interest and exercises its discretion to do so, the regulations set out how interest should be calculated. The rate of interest is set out and prescribed by law. Regulation 6 tells the tribunal how interest should be calculated in respect of an injury to feelings award. The only expectation that can be made to that is set out in regulation 6 itself. The exception is where there is a risk of '*serious injustice*'.

180. We see no reason why the Claimant should not be awarded interest on any award we make. Interest is compensation for being kept out of what is due. We

see no serious injustice that would be caused by adopting the statutory formula other than the fact that the interest rate presently appears very generous. That cannot be a justification from departing from a rate of interest imposed by statute. We have therefore awarded interest calculated in accordance with the regulations. The calculations are set out in the judgment.

181. At the conclusion of the hearing we raised the issue of anonymization of the judgment and reasons. We accepted that the judgment dealing as it does with the Claimant's medical condition refers to matters which he has a real interest in keeping private and which there is no general public interest. We therefore agreed that we would anonymise the judgment and on the same basis have done so in these reasons. The various individuals are referred to by their initials and the Respondent either by that title or, as above as 'A Supermarket".

182. One matter which we did note was that when the Claimant had his initial Psychotic episodes requiring his hospitalisation his professional body restricted him from practice for a period. The Claimant at that time had very properly explained the situation with the Respondent and had worked with them to remain in practice. In December 2016 when the Claimant's mental health condition flared up again he did not tell his employer. We do not know whether he reported this matter to his regulator but would consider it unlikely that the regulator would not have taken the same precautions of a period of suspension had he done so.

183. When we proposed to vary the order of EJ Kurrein to provide that it should not affect the right of a person to publish details about the Claimant to the General Pharmaceutical Counsel Ms Millin was instructed to object. That gave some weight to our concern that the Claimant might have taken the same stance with his professional regulator as he had with his employer and kept his third admission to hospital a secret. Ms Millin had no reasoned basis for her objection other than the Claimant did not want his regulator to know about the matters disclosed in these proceedings. We did not consider that that was a principled objection. We have no doubt that a professional regulator will, as far as necessary, protect the Claimant's privacy. It may be that the Claimant's health is now such that the regulator need not be concerned but that is a matter for them and not for us. We varied the order in the form set out in the judgment.

Employment Judge John Crosfill

Date 15 February 2019