

mf



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Petr Bosyy
Respondent: ICC Commercial Crime Services Ltd
Heard at: East London Hearing Centre
On: 26, 27, 28, 29 March 2019 and 2 April 2019
Before: Employment Judge Burgher
Members: Mrs L Conwell-Tillotson
Mr M Wood

Representation

Claimant: In person
Respondent: Mr Joshi (Solicitor)

JUDGMENT having been sent to the parties on 11 April 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Issues

1. At the outset of the hearing the following issues were identified as relevant.

Preliminary Issues

- 1.1 Does the Tribunal have jurisdiction to hear the claim of harassment on the grounds of disability i.e. is it out of time?
- 1.2 If so, do any such complaints constitute discriminatory conduct extending over a period such that the claims are in time?
- 1.3 If not, would it be just and equitable to extend time to hear any such complaints?

Disability

- 1.4 Employment Judge Jones determined that the Claimant is disabled for the purposes of the Equality Act 2010 by reason of anxiety with depression. Her judgment was sent to the parties on 19 December 2018.

Direct disability discrimination

- 1.5 The Claimant relies upon the following allegations of less favourable treatment because of his disability:
- 1.5.1 The CEO asking him if he looked happy because Lorraine Cuckney was not in the office, during December 2017;
- 1.5.2 Failure to allow him to work from home to avoid Lorraine Cuckney who was causing him to become depressed.

Failure to make reasonable adjustments (section 20 Equality Act 2010)

- 1.6 The Claimant maintains that the following matters placed him at a substantial disadvantage compared to non-disabled persons:
- 1.6.1 PCP1: being required to work with Lorraine Cuckney;
- 1.6.2 PCP2: not automatically referring him to occupational health; and
- 1.6.3 PCP3: expecting attendance at a grievance meeting whilst on sick leave.
- 1.7 The Respondent denies that the Claimant was placed at a substantial disadvantage compared to non-disabled persons.
- 1.8 The Claimant maintains that the following were reasonable adjustments:
- 1.8.1 RA1: being allowed to work from home to avoid working with Lorraine Cuckney;
- 1.8.2 RA2: referring him to occupational health;
- 1.8.3 RA3: not to have to attend a grievance meeting while he was off sick.

Victimisation

- 1.9 The Claimant maintains that he made protected acts on 28 November 2017, 13 December 2017, 11 January 2018, 12 March 2018 and his claim to the Tribunal on 7 May 2018.
- 1.10 The Claimant alleges the following acts of detriment:

- 1.10.1 The CEO asking the Claimant if he looked happy because Lorraine Cuckney was not in the office, during December 2017.
- 1.10.2 The Respondent's decision not to suspend Lorraine Cuckney, in breach of their procedures on bullying.
- 1.10.3 Mr Mody telling him off with long email on 28 March 2018 for small mistakes.
- 1.10.4 Office employees and managers not talking with the Claimant after he had put in his grievance. It is alleged that staff stop speaking to the Claimant unless absolutely necessary from the 13 February 2018 and this continued until the Claimant left his employment.
- 1.10.5 Failure to pay the Claimant his full wages during February and March 2018. The Claimant claims a total shortfall of £800.
- 1.10.6 Suspending the Claimant on 14 June 2018.
- 1.10.7 Inviting the Claimant to attend a meeting on 18 June 2018 and failing to mention reasonable adjustments to allow him to have a friend or family member to attend with him.
- 1.10.8 On 20 June 2018 inviting the Claimant to attend a meeting and stating there would be no more postponements of the meeting.
- 1.10.9 On 5 July 2018 failing to mention reasonable adjustments to allow him to have a friend or family member to attend with him.
- 1.10.10 On 9 July 2018 letter inviting the Claimant to a disciplinary meeting stating that there be no further postponements.
- 1.10.11 Dismissing the Claimant on 25 July 2018.

Harassment on the grounds of disability

- 1.11 The Claimant relies upon following act of harassment:
 - 1.11.1 Office employees and managers not talking to the Claimant after he put in his grievance.
 - 1.11.2 Was the conduct in relation to the relevant disability?
 - 1.11.3 If so, did the conduct have the effect of violating the Claimant's dignity and/or creating an intimidating hostile and degrading or offensive environment for the Claimant?
 - 1.11.4 Was it reasonable for the conduct have this affect?

Discrimination arising from disability

- 1.12 Did the Respondent treat the Claimant unfavourably in consequence of his disability? The Claimant relies upon the following matters:
- 1.12.1 The Respondent's failure to refer the Claimant to occupational health, it is alleged that this did not happen because of what it might reveal about the Claimant's condition.
 - 1.12.2 Failure to make a reasonable adjustments during the course of his grievance, specifically expecting him to attend the grievance meeting whilst he was on sick leave.
 - 1.12.3 The Respondent's decision not to suspend Lorraine Cuckney in breach of their procedures on bullying.
- 1.13 Can the Respondent show that this was a proportionate means of achieving a legitimate aim?

Unauthorised deduction of wages

- 1.14 Is the Claimant owed money in respect of wages for February and March 2018? The Claimant claims £800 in respect of non-payment of full salary during these months.

Unfair dismissal

- 1.15 It is for the Respondent to establish a potentially fair reason for dismissal? The Respondent asserts conduct.
- 1.16 If the Respondent establishes a potentially fair reason for dismissal, whether dismissal was fair and reasonable in all the circumstances.

Evidence

2. The Claimant gave evidence on his own behalf. The Respondent called Mr Ricky Ramsoondur, Mr Michael Howlitt, Mr Cyrus Mody, Ms Lorraine Cuckney and Mr Pottengal Mukundan to give evidence on its behalf. All witnesses prepared statements and were subject to cross-examination and questions from the Tribunal. The Tribunal was also referred to relevant pages of a bundle of over 460 pages.

Facts

3. The Tribunal has found the following facts from the evidence.

4. The Respondent services some of the world's largest trade finance companies who use the Respondent's services to verify whether trade documents submitted to them for financing relate to real and authentic transactions. The Respondent carries out due diligence on documents to avoid money-laundering, fraud and breaches of sanctions, in furtherance of regulatory requirements that have been imposed on their clients.

5. The Respondent's confidentiality policy required the Claimant to exercise reasonable care to keep safe all documentary or other material containing confidential information and that it should not be used at any time or disclosed to any person without prior written consent.

6. The Respondent has a secure online portal that is heavily encrypted. It has an extensive internet and email policy that provides that unauthorised or inappropriate use of the internet system or email may result in disciplinary action which could result in summary dismissal. This required business emails to be kept confidential and it stated that the email system should not be used for unofficial or inappropriate purposes.

7. The Claimant commenced employment with the Respondent on 10 March 2014 as an analyst, initially on a 1 year fixed term contract. This did not reflect the contractual reality as all employees were employed on this basis and had annual renewals of their fixed term contracts regardless of their length of service.

8. The Claimant was given a full induction on employment which included the relevant policies of the Respondent at the time. The Respondent has updated its policies on 3 separate occasions since the Claimant's induction and posted changes on the internal G drive. However, the Claimant stated that he was not explicitly told that the policies were updated.

9. The Claimant is a Russian speaker and was employed on a salary of £31,000 per year working 35 hours a week. His contract provided that he should normally work at the Respondent's office or at home. His contract provides that he is entitled to sick pay of 4 weeks full pay in any continuous 12 month period.

10. After approximately 9 months work, the Claimant was promoted to the position of Postmaster. At the relevant time the Respondent employed 4 Postmasters including the Claimant, and a Quality Service Manager/Lead Postmaster. There were also a number of analysts. The Respondent practice was to recruit analysts with a view to them being promoted within the organisation.

11. The Claimant sat alongside Ms Lorraine Cuckney from October 2015. He stated that Ms Cuckney acted inappropriately to him and others in that she would not listen to him, she would act contrary to his wishes and would often leave work for him and others to finish. He says Ms Cuckney would not communicate with him and would act in a generally offensive way.

12. We find that the Claimant did not mention any concerns about Ms Cuckney to her or management prior to 28 November 2017. On this date he mentioned to Mr Mukundan that Ms Cuckney was defensive. The Claimant referred to several emails between him and other members of the team relating to operational concerns he had with Ms Cuckney but we cannot conclude that they allege harassment or bullying by Ms Cuckney at all.

13. On 9 December 2016 the Respondent had a residential Christmas party at the Hanbury Manor Hotel. The Claimant had too much to drink, became emotional and damaged hotel property. The cost of the damage was £291.67 and this was billed to the Respondent. Mr Mukundan subsequently had a meeting with the Claimant, sometime before Christmas 2016, where he stated that the Claimant's behaviour was

surprising and out of character. The Claimant agreed to repay the damage. Mr Mukundan gave the Claimant his mobile phone number on a post-it note as he did not wish the Claimant to be alone over Christmas. Mr Mukundan had extended this invitation to others. We find that the Claimant was confused in his evidence and that he did not convey that he believed he was depressed at the time. We find it is more likely that the Claimant informed Mr Mukundan that it was a personal crisis that was responsible for his out of character behaviour.

14. In July 2017 the Claimant requested to work from home. Two other employees had also requested to do this and this was denied. The Claimant did not mention that he sought to work from home for medical reasons. His fellow Postmasters had been able to work from home as they were able to continue to benefit from the terms of the working regime that applied before the Claimant was employed.

15. The Claimant did not take any time off from work due to depression prior to October 2017. The Claimant indicated to Michael Howlett, Company Director, in a back to work interview on 4 and 12 October 2017 that he was depressed, taking medication and seeing a therapist. Mr Howlett informed Mr Mukundan of this by email dated 16 October 2017.

16. The Claimant had a further day's absence on 27 November 2017. Mr Mukundan held a back to work meeting with the Claimant on 28 November 2018. During this meeting the Claimant provided full information about the extent of his depression and that he was receiving medication and counselling. Mr Mukundan offered the Claimant use of the Respondent's employee assistance programme which could provide him with help and assistance.

17. The Claimant had asked to work from home and was informed that there was no business need for this as circumstances within the company had changed. The Claimant acknowledged and accepted the explanation given by Mr Mukundan and stated that he was happy to continue working from the office.

18. During this meeting the Claimant stated that he found it difficult to work with Ms Cuckney because she did not work as part of a team, she had blocked communication between managers and other postmasters and became very defensive to any suggestions to improve her work methods. He stated she makes mistakes that have to be corrected by others. Mr Mukundan stated that he would take this issue up with Ms Cuckney and suggested that a more supportive, as opposed to critical approach, be taken when mistakes were made. The meeting concluded with the Claimant agreeing to continue to work alongside Ms Cuckney for the next few months and see how the changes improved relations with her and if there were no improvements he would like to move to another location in the office.

19. Mr Mukundan met with Ms Cuckney at her annual performance review on 11 December 2017. He explained to her that some postmasters felt that she had reacted defensively when mistakes are pointed out. Mr Mukundan stated that her colleagues were trying to help. Ms Cuckney stated that she had no idea that she was perceived as being defensive as no-one had conveyed concerns to her. She agreed that all postmasters should seek to communicate more and support each other in future.

20. Mr Mukundan conducted the Claimant's annual performance review on 13 December 2017. He conveyed that he had spoken to Ms Cuckney and that she had promised to be more open to advice from colleagues. The appraisal records that the Claimant had stated that he works well as part of the PM team, the Claimant was happy with the work life balance and working arrangements and happy with employment with the Respondent. The Claimant stated that he agreed with everything that had been discussed in the appraisal and that he was looking forward to the new challenges and opportunities.

21. In contrast to the completed annual performance review form, the meeting the notes of the 5 January 2018 between the Claimant and Mr Mukundan states:

"Petr came into my office today around 3.30pm and he began by referring to a meeting held a few days ago after the New Year, in which he advised me that he was finding it difficult to work with Lorraine Cuckley because the same things that have been discussed during the APR had occurred again".

22. We find that the Claimant continued to raise concerns about Ms Cuckney in the context of his perception of her work performance and her interaction with the team.

23. The Claimant alleges that sometime following the appraisal meeting Mr Mukundan stated that the Claimant looked happy that day and whether it was because Ms Cuckney was not in the office and then he giggled in his face. Mr Mukundan has no recollection of this and makes the point that it did not form any part of the Claimant's subsequent grievance. We find that there was an element of confusion in the Claimant's evidence and do not accept Mr Mukundan said this or that he would have giggled in the Claimant's face. Mr Mukundan struck us as a caring, paternal character who would not have acted in such a way.

24. Ms Cuckney returned from holiday on 29 December 2017 and placed a small cushion on her desk with a photograph of her face on it with a caption "*I am the best PM in the world*". This deeply upset the Claimant who believed that this was a provocative act and the cushion was placed to intimidate him as a response to the complaint made about her on 28 November 2018. He saw this as an example of Ms Cuckney's increasingly aggressive behaviour and this precipitated the Claimant having a breakdown with suicidal ideations.

25. As a matter of fact the small cushion was a Secret Santa present purchased by Mr Ramsoonrandur as a light hearted Christmas present and was not given in a serious way. Ms Cuckney had no involvement in the present, or the wording which was a surprise for her.

26. The Claimant approached Mr Mukundan on 5 January 2018. He was emotional, he requested to work from home away from Ms Cuckney as he was finding it difficult to cope. The Claimant was asked to provide detail about the difficulties and was unable to specify precisely what Ms Cuckney was alleged to have done. The Claimant mentioned the small cushion that Ms Cuckney had displayed and maintained that she was bullying him. Mr Mukundan declined to allow the Claimant to work from home and stated that there was no business need for him or others to work from home. Mr Mukundan also asked the Claimant to provide evidence of the bullying which the Claimant interpreted as being asked to put a formal grievance.

27. It is clear that by this stage the Claimant was very emotional. Mr Mukandan knew that the Claimant was suffering from depression. The Claimant had displayed an unreasonable obsession in relation to his negative perception of Ms Cuckney and there was no specific evidential basis. The Claimant acknowledged that 'emotional bullying' was hard to prove. The Claimant was depressed and we find that he had an irrational negative reaction to Ms Cuckney at that time.

28. On 9 January 2018 the Claimant presented a grievance and stated that there was systemic campaign of harassment and discrimination by Ms Cuckney 'under Equality Act 2010'. He demanded that Ms Cuckney be suspended and stated that he could no longer work with her. He was then signed off sick for work for 4 weeks with depression and anxiety.

29. The Claimant was informed on the 10 January 2018 that as he was off on sick leave for a month, for security reasons there was going to be disabled access to his system and email account and arrangements for any work emails would be dealt with by other people in the office.

30. By letter dated 11 January 2018 the Claimant was invited to a grievance hearing to consider his grievance on 16 January 2018. This was whilst he was still on sick leave. The Claimant notified the Respondent that he was unable to attend due to sick leave and the date was postponed to a date after his sick leave had ended.

31. The Respondent outsourced its grievance and disciplinary processes to Peninsula as a way of managing efficiently with the resources that were at its disposal.

32. The Claimant returned to work on the 9 February 2018. He returned on a phased return to work working 4 hours a day, 4 days a week for a four week period. He was told that he would not be paid full pay because he had exhausted the company's sick pay in accordance with the sick leave policy.

33. The Respondent's harassment policy states that in making a complaint of harassment the person making the complaint should keep notes of harassment so that the written complaint can include the name of the harasser, nature of the alleged harassment, the dates and times when the alleged harassment occurred, the names of any witnesses, and any action already taken by the person to stop the alleged harassment. What was clear in this case was that the Claimant was not able to provide any specific details of the alleged harassing acts of Ms Cuckney. He made a significant number of generic allegations against Ms Cuckney but at no stage was able to provide the specified details.

34. Not surprisingly, in the absence of specifics, the Claimant's grievance was dismissed. However, mediation was offered but the Claimant maintained that he could not work with Ms Cuckney and refused mediation.

35. When the Claimant returned to work in February, when he first encountered Ms Cuckney, he turned and left the office. We find that he has no reasonable basis for him doing this, the Claimant's thoughts were clearly dominated by the dim perception he had of her but there was no specified basis provided for this.

36. The Claimant also complained about not being paid full pay following his return from 4 weeks sickness absence. This formed the basis of a grievance where the Claimant alleged discrimination and victimisation in his email of 12 March 2018.

37. This grievance was dealt with by Peninsula and the grievance was dismissed on the basis that the Claimant had exhausted his sick pay.

38. The Claimant made a subject access request at the same time of his first grievance in January 2018. The search was undertaken by the Respondent. Ms Cuckney was asked to do a search and when she did this search she came up with 770 emails that were placed on an encrypted USB stick. This was given to the Claimant in a meeting on the 28 February 2018.

39. On 28 March 2018 Mr Mody wrote to the Claimant outlining a concern that had been raised by a client in relation to the services that the Respondent could offer. It was apparent that the Claimant had wrongly informed the client that the Respondent did not provide the service which it was in fact able to offer.

40. Mr Mody's email of 28 March which was an unexceptional an innocuous response to a concern that was properly raised by a client to a senior member of staff.

41. The Claimant presented his first Employment Tribunal claim to the Tribunal on the 7 May 2018.

42. On 14 May 2018 all members of staff were sent an email from Mr Mody stating that the biggest asset of the Respondent was its members and their information and the core principles of safeguarding their and the Respondent's information was confidentiality, protecting against unauthorised disclosure integrity, protection against unauthorised or accidental modification, and availability as and when required in pursuance of the organisations business objectives. To achieve these core principles it was stated that it was necessary to follow the policies and record any breaches as instances of non-conformance, the aim is to produce error in our work practices and raise standards as an organisation thus providing members with a more robust and reliable service.

43. The Respondent commenced an ISO training process. All members of staff attended training days between 22 and 25 May.

44. The Claimant presented a second more detailed subject access request on the 16 May 2018 as he was not content with the breadth of the search that had already been undertaken in relation to his first request. This time the Respondent instructed an external IT specialist to undertake the search. This disclosed a number of emails and concerns to the Respondent namely:

- 44.1 On 2 January 2018 the Claimant forwarded an email to his private email address and the information included the name of a ship, date of loading, port of loading and the name of two clients that would be involved in the transaction.

- 44.2 On the 15 February 2018 the Claimant sent an email to the investigator that makes clear that he had uploaded and number of personal client data to his personal device.
- 44.3 On 30 April 2018 the Claimant sent sensitive client information and blind copied this to his Google email address.
- 44.4 On 11 June 2018 the Claimant emailed private client information to his Google email address.

45. These emails were in breach of the Respondents policies and they were discovered as a direct response to the forensic data search that was undertaken as a result of the Claimant raising his second subject access request. The concerns that arose from the subject access request resulted in the Claimant being suspended from work on the 14 June.

46. On 18 June the Claimant was invited to an investigation meeting to take place on the 21 June. The Claimant could not attend this meeting due to not having the appropriate representative and this was then postponed to 28 June. In the letter of the 20 June 2018, rearranging the meeting, states:

“I must warn you that no further postponements will be granted therefore if you fail to attend the rescheduled hearing the consultant will proceed with the investigation in [the Claimant’s] absence.”

47. The Claimant was provided with the full response to his subject access request on the 26 June 2018.

48. The rearranged investigation meeting in relation to the disciplinary allegations took place on 28 June 2018. The disciplinary investigator, Mr Paul Baker, concluded that there were four allegations that the Claimant should face relating to the emails of concern. These recommendations were accepted and a disciplinary hearing was arranged to take place the 12 July 2018.

49. The disciplinary meeting was chaired by Ms Jacqueline Davies who considered the evidence and representations and produced a report recommending dismissal for gross misconduct in relation to the first three allegations and final written warning in relation to the fourth allegation.

50. Mr Mukundan accepted Ms Davies’s recommendations and the Claimant was dismissed by a letter dated 25 July 2018.

51. The Claimant appealed his dismissal on the 30 July and his appeal was heard on the 10 August 2018. His appeal was dismissed.

52. Before the Claimant was dismissed the Respondent undertook a full sweep of all of its employees’ email use from January 2018. This sweep included the CEO’s email use. The sweep found that there was general compliance by all employees with the Respondent’s email policies apart from the Claimant. There was one other employee who was found to have sent three emails but they related to her own work and did not include any business confidential information. One of these emails was not sent

because of personal email address of been wrongly entered. She was interviewed on the 6 July and advised of the danger of sending such emails to a private email and shown how reminders can be sent on the system. The member of staff was given a verbal warning.

53. The Claimant stated that he was sending the emails to himself to protect himself in relation to the grievances that he was bringing against Ms Cuckney. He stated that he was not seeking to disclose confidential information, but he was seeking to disclose behaviours of Ms Cuckney. Whilst this may have been the Claimant's intention, it is evident that the emails amounted to breaches of confidential information contrary to the Respondent's policies.

Law and conclusions

54. The relevant statutory provisions are as follows:

Direct disability discrimination

55. Section 6 of the Equality Act 2010 defines disability as a protected characteristic and section 13 of the Equality states:

“13 *Direct discrimination*

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

56. The Claimant claims that he was directly discriminated against on grounds of disability because Mr Mukundan asked him if he looked happy as Ms Cuckney was not in the office during December 2017. We have found that this discussion did not take place and there was an element of confusion in the Claimant's evidence. We do not conclude that any conversations that Mr Mukundan had with the Claimant in December 2017 amounted to less favourable treatment because the Claimant was suffering from anxiety or depression. Any discussions regarding Ms Cuckney were likely to have been because of the Claimant's previously expressed concerns about Ms Cuckney. Therefore this claim fails and is dismissed.

57. The Claimant alleges that he was directly discriminated against because of his disability by not being allowed to work from home to avoid working with Ms Cuckney. We have broken this allegation down into two questions. First, was the Claimant less favourably treated by not being able to work from home because of his anxiety and depression? We do not conclude that this is the reason. The reason for not allowing the Claimant to work from home at that stage was that there was no business need. The staff who were permitted to work from home had qualified for that entitlement as a result of previous operational practices. The second question concerned whether the Claimant less favourably treated by being unable to avoid working with Ms Cuckney. The Claimant asserts that Ms Cuckney was causing him to become depressed. We do not conclude that Ms Cuckney was responsible for anything to cause the Claimant to become depressed and there was no less favourable treatment to the Claimant to require him to work with Ms Cuckney. What the Claimant was seeking was a removal of Ms Cuckney because of his negative perceptions of her. Whilst his perceptions may

have been a symptom of his depression the requirement to work with Ms Cuckney was not because of his anxiety and depression. It was the business working structure. Therefore this complaint fails and is dismissed.

Failure to make reasonable adjustments

58. Section 20 of the Equality Act 2010 specifies the provisions relating to the duty to make reasonable adjustments.

“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) The second requirement is a requirement, where a physical feature 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.*
- (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.”*

59. Section 21 of the Equality Act 2010 states:

“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) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.”*

60. When considering the scope of reasonable adjustments HHJ Serota QC stated in the case of Salford NHS PCT v Smith UKEAT/0507/10 at paragraph 47 that:

“47. At this point we stress that reasonable adjustments are limited to those that prevent the PCP or feature placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. Reasonable adjustments are primarily concerned with enabling the disabled person to remain in or return to work with the employer.”

61. The Claimant maintains that the following matters placed him at a substantial disadvantage compared to non-disabled persons:

61.1 PCP1: being required to work with Lorraine Cuckney;

61.2 PCP2: not automatically referring him to occupational health; and

61.3 PCP3: expecting attendance at a grievance meeting whilst on sick leave.

62. In respect of PCP1, being required to work with Lorraine Cuckney. The Claimant's anxiety and depression involved him having unreasonable and negative perceptions of Ms Cuckney harassing and bullying him. His anxiety worsened and was aggravated by the thought of working with Ms Cuckney. In these circumstances, we conclude that the requirement to work with Ms Cuckney amounted to a PCP that placed the Claimant at a substantial disadvantage than persons not suffering from his anxiety and depression.

63. When considering sections 20 and 21 of the Equality Act 2010 the duty is on the Respondent to take steps to make reasonable adjustments to ameliorate any provision criterion or practice.

64. At the meeting on 5 January 2018, Mr Mukundan knew that the Claimant was suffering from anxiety and depression, he saw that the Claimant was in an emotional state. The Claimant was clearly stating that he could not work with Ms Cuckney and asked to work from home. Mr Mukundan did not address or consider the Claimant's anxiety and depression in considering the Claimant's request. He disregarded it and required the Claimant to continue working with Ms Cuckney, stating there was no business need for home working, and he required the Claimant to provide further evidence of bullying to address matters going forward.

65. Whilst this course of action would have been reasonable with an employee who was not suffering from anxiety and depression, we do not conclude that it was reasonable in the circumstances of the Claimant's evident emotional and anxious state. The Claimant was making emotive and unspecific allegations about being bullied and was requesting to work away from his alleged harasser in order to continue work. This was not permitted and the Claimant was then signed off sick.

66. We conclude that it would have been a reasonable adjustment to allow the Claimant to work from home, albeit for a limited period, so that he could have time for his anxiety to abate and to be able to reflect on the reality of his working relationship with Ms Cuckney. Mr Mukundan did not do this and the Claimant was subsequently signed off sick for four weeks. Prior to that stage the Claimant had not taken any

periods of time off work for long-term absence. We therefore conclude that the failure by Mr Mukundan to take reasonable steps to accommodate the Claimant's anxiety and depression at the meeting on 5 January 2018 contributed to the Claimant's subsequent absence from work.

67. Had the Claimant been able to work from home for a limited period we consider that he would have been unlikely to have signed off sick. The reasonable adjustment would therefore have allowed the Claimant to have continued working. The Respondent had systems that allowed employees to work from home and it would have been reasonable to extend this to the Claimant for a limited period of time.

68. In respect of the period of time for home working, we conclude that a reasonable period was that to allow the Claimant's anxiety to abate. From the evidence, the Claimant was signed off for four weeks and was able to return on a phased basis, working with Ms Cuckney. Reasonable adjustments are required to allow workers to be able to continue working by making reasonable accommodations for the disability. The Claimant was able to return to work following his phased return to work and his medication and treatment enabled him to manage his anxiety to address his perceptions of working with Ms Cuckney.

69. In respect of PCP2, not automatically referring the Claimant to occupational health, we conclude that this is not a provision criterion or practice nor did it place the Claimant at a substantial disadvantage. This allegation therefore fails and is dismissed.

70. In respect of PCP3, expecting attendance at grievance meeting during sickness absence, we conclude that on the evidence there was no substantial disadvantage. The Claimant notified the Respondent that he could not attend during his sickness absence and the grievance meeting was postponed until he was fit enough to return. This allegation therefore fails and is dismissed.

Victimisation

71. Section 27 of the Equality Act 2010 sets out the provisions for victimisation. It states:

"27 Victimisation

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

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

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

- (a) bringing proceedings under this Act;*
- (b) giving evidence or information in connection with proceedings under this Act;*
- (c) doing any other thing for the purposes of or in connection with this Act;*

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

72. In respect of the alleged protected acts, we have concluded that the meetings on 28 November 2017 and 13 December 2017 did not amount to protected acts. The Claimant was not raising any allegations that would engage the Equality Act in either of those meetings.

73. We conclude that the Claimant made protected acts in his grievance of 9 January 2018, in his grievance regarding pay on the 12 March 2018, and in his Employment Tribunal complaint on the 7 May 2018.

74. Given the conclusions on protected acts we considered the allegations of detriment that the Claimant has made. He alleged that in December 2017 the CEO asked the Claimant if he looked happy because Ms Cuckney is not in the office. We have found that did not happen and then in any event could not amount to an act of unlawful victimisation as no protected act had taken place by that stage.

75. In respect of the allegation of not suspending Ms Cuckney in breach of their procedures of bullying, we do not conclude that this is a detriment to the Claimant. The Claimant was expecting the Respondent to suspend Ms Cuckney but in view of the lack of any specific basis for his allegations of bullying and harassment against her this would have been unreasonable.

76. In respect of the allegation of Mr Mody telling the Claimant off with long email of 28 March 2018 for small mistake, we do not conclude that this was an act of victimisation. The email was not long, it was an innocuous email concerning an error that the Claimant acknowledged. We do not conclude that Mr Mody wrote this email because of any protected act, it was written because of the concern that was raised to Mr Mody by the client.

77. In respect of the allegation that the Claimant was not being talked to following his return to work from long term absence, it is evident that his conversations with Mr Ricky Ramsoondur did reduce following the Claimant's return to work. The Claimant is a quiet reserved individual who normally kept himself to himself and after his return to work we find that he was less approachable. This affected the ability of others to make conversation with him and he did not seek to have conversations with others. There were discussions about operational matters, but we do not find that the reduction interaction was due to any protected act. It was more likely to have been caused by the perception the Claimant had and his unwillingness to engage with others. We therefore do not conclude that this was an act of victimisation.

78. In respect of the allegation of failure to pay the Claimant his full wages between February and March 2018, we do not conclude that this was because of a protected act. This was because the Claimant had exhausted his 4 weeks sick pay and was being paid according to his contractual entitlement.

79. Therefore all of the Claimant's claims for victimisation in respect of the Claimant's first claim fail and are dismissed.

80. We address the victimisation claims made in the Claimant's second Employment Tribunal complaint are addressed separately in this Judgment.

Harassment

81. Section 26 of the Equality Act 2010 states:

- “26 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.”*

82. We have considered the Claimant's allegation that he was not being spoken to by other office colleagues. The Claimant is a quiet reserved individual who normally kept himself to himself and after his return to work we find that he was less approachable. This affected the ability of others to make conversation with him and he did not seek to have conversations with others. There were discussions about operational matters, but we do not find that the reduction interaction was related to his disability. Therefore we do not conclude that the Claimant has established his claim for harassment.

Discrimination arising from disability

83. Section 15 of the Equality Act 2010 states:

- “15 Discrimination arising from disability*
- (1) A person (A) discriminates against a disabled person (B) if –*
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
 - (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

84. Under section 15 of the Equality Act 2010, the Claimant is required to establish that he was treated unfavourably because something arising in consequence of his disability.

85. The first allegation the Claimant makes in this regard is the Respondent's failure to refer him to occupational health. We conclude that this is not unfavourable treatment, it is more a request for more favourable treatment therefore section 15 is not engaged.

86. A similar conclusion is reached in respect of the second allegation under section 15. The Claimant alleges a failure to make reasonable adjustments but this is not unfavourable treatment more a request for more favourable treatment. Section 15 is not engaged.

87. The Respondent's decision not to suspend Ms Cuckney, did not amount to unfavourable treatment to the Claimant. What the Claimant was expecting would have been unfavourable treatment to Ms Cuckney. If the Claimant was suspended he may have been able to contend that it was unfavourable treatment, but to not suspend somebody else does not amount to unfavourable to him.

88. Therefore the Claimant has not established that any aspects of unfavourable treatment as alleged under his section 15 claims occurred and as such his claims for discrimination arising from disability fail and are dismissed.

Unlawful deduction of wages

89. We concluded that the Claimant was paid the pro rata appropriate sum in respect of the phased hours he worked following his return from sick leave. It was contractually permissible to the Respondent to do what they did. Therefore there was no unlawful deduction of wages and the Claimant's claim in this regard fails and is dismissed.

Second Claim Unfair Dismissal and Unlawful Victimisation

90. The Tribunal considered the Claimant's second Employment Tribunal claim of unfair dismissal and unlawful victimisation.

91. For unfair dismissal it is for the Respondent to establish a potentially fair reason. If the Respondent establishes this, the Tribunal will consider whether the dismissal was fair and reasonable in all the circumstances having regard to the well-known case of BHS v Burchell namely, did the employer believe in misconduct; did the employer have in mind reasonable grounds to sustain that belief; did the employer carry out as much investigation as was reasonable in all the circumstances; and was dismissal within the band of reasonable responses open to a reasonable employer.

92. A central question that we have had to consider is whether the disciplinary and dismissal process for the Claimant was an expedient opportunity seized on to dismiss the Claimant in view of his protected acts, including his Employment Tribunal claim. We conclude that the disciplinary and dismissal process arose following his second subject access request on the 16 May and not due to the Claimant's protected acts. The Respondent's review of the second subject access request, which it paid IT specialists to undertake, was in the context of the Respondent coming to terms with the new GDPR regulations and also seeking ISO accreditation that was seen as key to its future development plans.

93. Prior to the second subject access request there was no evidence provided to the Tribunal that the Respondent did anything to audit or monitor its email or internet policy.

Whilst we conclude that the Respondent had a proper basis for concern in the context of the new regulatory regime and ISO accreditation process, we considered whether the Claimant was used as a scapegoat to emphasise the importance of its email and internet policy.

94. We conclude that the disciplinary investigation and dismissal process that was undertaken was thorough and fair, the Claimant had a full opportunity to consider the allegations against him and put forward his point of view, which was not accepted. He was able to attend meetings with chosen companion and was given and exercised a right of appeal.

95. It was evident that there was sensitive information released from the Respondent's systems which could have had serious reputational ramifications for the Respondent. We also accept that the decision to dismiss the Claimant was not taken until after all staff had had their emails reviewed and the aspects of potential unfairness arising from inconsistency was considered. The Claimant was the only person found to have disclosed sensitive information in the period of the email review from the 1 January 2018 to 4 July 2018.

96. Whilst the sanction of dismissal could be perceived as a harsh sanction we do not conclude that the dismissal by the Respondent was outside the band of reasonable responses open to it.

97. In these circumstances, we conclude that the Claimant's claim for unfair dismissal fails and is dismissed.

98. In respect of the allegations of victimisation arising from suspension, and the content of meeting invite letters warning him that there would be no further postponement of meetings if he did not attend, we conclude that they were not on the basis of any protected act. We conclude that the process and letters were standard and overseen by the Peninsula officers seeking to pursue the disciplinary matters efficiently. These matters do not amount to unlawful victimisation and are therefore dismissed.

99. Finally, when considering whether the dismissal was an act of unlawful victimisation, we have concluded that it was not. The Respondent was very sensitive about losing customers for failure to follow the GDPR regulations and not gaining customers due to the ISO accreditation.

Conclusion

100. The reasonable adjustments claim in relation to the events on 5 January 2018 in respect of the failure to make reasonable adjustments in allowing him to work from home succeeds.

101. All of the Claimant's other claims fail and are dismissed.

Remedy

102. Following consideration of submissions, we concluded that an award of £2,250 was appropriate for injury to feelings.

Case Numbers: 3200943/2018 and 3202214/2018

103. The Respondent is therefore ordered to pay the Claimant the sum of £2,250 in respect of injury to feelings for the Claimant's successful claim.

Employment Judge Burgher

Dated: 20 May 2019