Case Nos: 2200667/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr. P.McQueen**

Respondent: **General Optical Council**

Heard at: **London Central** **On:** 17- 21, 24-25 February 2020
in chambers 26 -28 February

Before: **Employment Judge Goodman**
Mr. G. Bishop
Mr. D. Carter

Representation
Claimant: in person**1)**
Respondent: Mr. J. Boyd, counsel

RESERVED JUDGMENT

1. The respondent victimised the claimant by delay in handling his July 2017 grievance.
2. Remedy for vicitimisation will be decided at a further hearing.
3. Other claims of victimisation, harassment, and disability, race and sex discrimination are dismissed.

REASONS

1. Two cases were before the tribunal for hearing. They concern the claimant's employment by the respondent as a registration officer.

2. The claims are of discrimination in employment, whether because of disability or something arising from disability, or because of race or sex, or for failing to make reasonable adjustments for disability, or harassment, and victimisation. The claims deal with events from April 2015 to February 2019.

3. The claimant left employment later in 2019. There are two other cases pending, not yet listed for hearing, arising from events after February 2019.

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4. A list of 130 issues, drafted by the claimant, was agreed and is appended to this decision. At the start of the hearing he also provided a list of protected acts, which are: the early conciliation procedures for and the presentation of these two claims, and 28 other protected acts, 15 written and 18 verbal.

5. As well as the listed issues, the tribunal must also consider whether some events and claims are out of time. The first early conciliation certificate's day A is 19 June 2018, so anything before 20 March 2018 is at first sight out of time and not in the tribunal's jurisdiction. The claimant argues that earlier events were part of conduct extending over a period which ended within time.

Conduct of the Hearing

6. The claimant has dyslexia and some symptoms of Aspergers syndrome. At earlier hearings it was agreed that the tribunal would make adjustments to assist him. Accordingly, there were breaks every hour, unless the claimant refused them when offered. Exceptionally, the claimant was permitted to record the hearing, on condition firstly that he did not review the recording until his own evidence was complete, secondly that he did not share the recording with anyone, as it was for his private use only, for review, because he found it difficult to make notes, and thirdly, that he delete all recordings as soon as the hearing concluded.

Evidence

7. To decide the issues the tribunal heard evidence from:

Philip McQueen, the claimant. He had prepared a 236 page witness statement, which was sometimes difficult to follow as it was mostly cross referenced to item numbers in the hearing bundle index, rather than the page numbers, and often took the form of commentary on the documents, rather than a narrative of events.

Teresa Couppleditch, interim HR manager. Paragraphs 13-60 of her witness statement were excluded as hearsay.

Lesley Longstone, chief executive

Nadia Patel, Operations Manager, and his former line manager

Peter Cheer, an external consultant who had investigated the claimant's grievance.

Aaron Grell, another registration officer, who was also international coordinator

8. Two witnesses did not attend the hearing – **Michelle Norman**, former head of registration, who had gone to live in New Zealand (an offer to take her evidence remotely was not taken up by the respondent), and **Mark Webster**, the respondent's Director of Resources, whose father died over the weekend before he was to give evidence on the Tuesday. We read

those statements mindful of additional statements prepared by the claimant outlining where he disagreed with what they said. We gave their evidence on these matters little weight.

9. There was a hearing bundle of nearly 2,100 pages prepared by the respondent. The claimant submitted a supplementary bundle of 184 pages, an additional transcript of an April 2019 meeting, and a full copy of the Burgess report (see on).

Disability

10. Most of this case was about disability, so we start there.

11. The respondent admits that the claimant suffers from dyslexia, Asperger's syndrome, neurodiversity and left sided hearing loss, and that each amounts to a disability for the purposes of the Equality Act 2010.

12. Four matters *arising from* disability were listed by the claimant in paragraph 74 of the August 2018 claim and paragraph 151 of the February 2019 claim. Of these four, the respondent admits that arising from the claimant's disability:

    (1) he has a need for written instructions to be provided to back up verbal communications, and

    (2) he required some physical adjustments in the workplace.

    They do *not* however admit that

    (3) the need "not to be approached in a seemingly confrontational manner", or

    (4) the "need to stand up and speak",

    arose from disability. So these are maters the tribunal must decide on the evidence.

The Disputed Matters Arising from Disability

13. We have read the following medical reports:

    13.1 **Dr D McLoughlin**, educational psychologist, 12 July 2000, about dyslexia. He records the claimant having high intelligence but lacking working memory. He had good comprehension of written text, but was a slow reader, with technical accuracy. His written work was poor. The claimant, who was not diagnosed with dyslexia at school, explained to the tribunal that he had used this report to learn techniques helpful to dyslexics, such as focused reading and memory strategies.

    13.2 **Ms Angela Kavuna**, occupational health adviser, 11 June 2015. She notes the dyslexia diagnosed in 2000, and that, according to a report produced to her by the claimant, dated 2014, he also had Asperger's

syndrome; in addition there was moderate left side hearing loss, for which he had a hearing aid, though he told her it was "not needed to be worn in the office". She recommended that information on changes to work process were backed up in writing, that the claimant was then allowed time to read and process information, that he was provided with a recording pen to record the fortnightly team meetings, and given assistance with proofreading. She noted he had good insight into his condition. He should have an opportunity to ensure that both his line manager knew of his disability, and he presented at a team meeting to his colleagues about his disabilities, to avoid misunderstandings.

13.3 **Dr Padraic Ryan** 15 March 2017. The claimant was referred to Dr Ryan through occupational health because of his: "preferred style of mannerism in the workplace, as well as altered speech in certain situations, especially conflict". The issues in relationships for his speech were "tone, appropriateness and his communication style". Dr Ryan noted that the claimant reported escalated levels of anxiety following an incident where he had been given a warning for failure to follow instructions. The claimant told Dr Ryan that there was another report on Asperger's syndrome, which he would send on to him (this is the March 2014 Burgess report of which Ms Kavuna had an extract). Dr Ryan recommended that these symptoms, and the behavioural issues, were assessed by a consultant psychiatrist. He does not seem to have seen the Burgess report himself.

13.4 **Ms Naomi Burgess**, psychologist, 3 March 2014. A section of this report was produced to Ms Kavuna. It is also the report mentioned to, but not seen by, Dr Ryan. We learned that it had been prepared for the purpose of tribunal proceedings against the claimant's former employer; the claim had settled, which constrained the claimant's ability to disclose the full report to third parties. The full report was never made available to the respondent. Ms Burgess was instructed to report on his manner of addressing colleagues, in particular the volume and level of his voice, and "whether or not this was related to or perhaps caused by his diagnosed dyslexia". Of the sections we read, we note that she did not consider the claimant had autism, but he did have "*neurodiverse traits*". He had "*a number of symptoms consonant with the possible likelihood of Asperger's syndrome*". The result of the screening test she had administered would not trigger a further assessment of the Cambridge University criteria for Asperger's syndrome, but it would on the United States diagnostic criteria DSM 1V. She did not conclude that his symptoms were diagnostic of Aspergers syndrome. Of his behaviour, she noted: "although not universal, it is common for people with Aspergers syndrome to have difficulty regulating their emotions". She recorded that the claimant reportedly had a loud voice: "neighbours said they could hear him through the walls". She recorded that his colleagues had found his behaviour was unacceptable. She said: "under stress, control falls away". She found him to have socially avoidant behavior, with "some depressive attitude and self-defeating thoughts". She also said "his multi specific learning difficulties… affected his response to stress", but this is not explained or otherwise set in

context. To conclude, she did not make a diagnosis of Aspergers, and she did not make a finding that lack of control of his emotions was related to neurodiversity.

13.5 **Dr M. Pitkanen**, a consultant neuropsychiatrist, prepared a letter to Dr Ryan in July 2017 after examining the claimant. The claimant had scored high on autism questionnaires, but he was not sure if he had an autistic spectrum disorder, because his dysexecutive syndrome (deficits in planning and cognitive flexibility), noting that he also had loss of smell, could be the result of brain damage from a childhood head injury. He recommended an MRI scan to determine this. As far as we know, this did not go ahead. He also suggested the claimant would benefit from using his hearing aid. He records the claimant saying he can say things which others may interpret as rude, and that people "may perceive him to be angry as his voice fluctuates", but he does not say whether this is related in any way to the possible diagnosis of Aspergers. Of dysexecutive syndrome, he notes there can be a group of symptoms that tend to occur together, and can include "emotional and behavioural" symptoms, but he does not say what they are, and does not comment on whether the behaviour reported by the claimant was a consequence of head injury or possible Aspergers. This means there is in this report no firm diagnosis of Aspergers syndrome, and no opinion on the link between the claimant's anger and any disability (whether from Aspergers or an earlier head injury).

13.6 On receiving this report, Dr Ryan wrote to the respondent saying there could be no comment on his work capability until this (an MRI scan) had been done, and in the meantime he should use the recommended dyslexia tools and the hearing aid.

14. Standing up at work, as something arising from disability, is not explained in the medical reports, and we have resolved that issue after hearing the claimant's evidence. The respondent's managers had asked the claimant not to stand up at his desk to speak to his colleagues in the working area because he had a loud voice, and it was disruptive. The claimant's evidence was: (1) he did not need to wear his hearing aid at work (2) he did not stand up to hear people, as despite there being half height partitions between one row of desks and another he could hear them sitting down, and (3) he stood up so that others could hear what he said. We could not make sense of this. We would have understood if he had said he needed to stand up to hear colleagues, as we know people who are hard of hearing sometimes do better looking at a speaker, relying to a degree on lip reading, but this was not his evidence. We concluded that he stands up because that is his habit, not because it is something arising from disability.

15. Whether the "need not to be approached in a seemingly confrontational manner" arose from disability, whether the disability was dyslexia or Aspergers or both, caught by the term "neurodiversity", was more difficult. Not pleaded, but entered by the claimant on the schedule of issues, is the formulation:

"Autistic/ND perception as a difficult character; perception of intentionally being obstructive towards management; communication issues (including speech; non-visual); perceived demeanour".

The behaviour that resulted when confronted was described by the claimant as a "meltdown". We deduce from Dr Burgess's report that this was the type of behavior she was asked to report on. As already noted, she mentions loss of control as associated with Aspergers symptoms, and Dr Pitkanen mentions "emotional and behavioural" symptoms, without specifying what these were. It is commonly known that people with Aspergers have difficulty reading social situations, body language, and understanding figurative expressions of speech, though on the evidence before us, including interaction with him over seven hearing days, these are *no*t difficulties met by the claimant. It is not clear to us on the evidence that people with Aspergers have difficulty handling disagreement. We did understand that on the claimant's account he relied on set processes being followed, and that he was confused by changes, and needed to have changes to set process put in writing, so he could understand and remember them. He had agreed with the respondent that he would have written confirmation of changes. We could understand without formal medical evidence, that if there were unconfirmed changes of process then, taken with the challenges of dyslexia, he might become frustrated to the point of anger. We therefore examined the occasions during the time he worked for the respondent when he went into "meltdown" to see what had happened to cause it. Paragraphs 25-34 cover the first meltdown at work, 40-42 another. The cause of the episode in paragraphs 60-61 is not explained by the claimant, and in 70 and 75 seems to occurred when it was pointed out to the claimant that he had not followed policy on what to say about resits. In 98, the claimant said the perception of his loud voice was caused by dyslexia and hearing loss, not any neurodiverse trait. Finally, in 112, he became loud and angry because his line manager asked him to enter a room for a discussion. This cannot be related to any failure to record changes to process in writing. In our finding these episodes did not arise from changing processes without noting them in writing, they arose when the claimant was asked to do a task in accordance with the set process, and he objected to doing that task rather than another task, and sometimes just that he resented being told what to do, or told that he had done something wrong. The circumstances of these outbursts indicate that they were not caused by dyslexia or Aspergers, but because he had a short temper, and he resented being told what to do.

Other Protected Characteristics

16. The claimant is a man. In relation to the race claims, he described himself as black English.

Findings of Fact

17. The respondent is a statutory regulator. It has a duty under the Opticians Act to maintain a public register of optometrists and opticians qualified to practice in the UK. It is a registered charity, funded by the fees charged to registrants. Just under 100 staff are employed.

18. The claimant was interviewed by the respondent on 8 July 2014. He had supplied a detailed CV. This explained that he had dyslexia, to explain his poor academic record, while stressing that despite this difficulty he had an excellent standard in verbal and written communication. He was offered the job of registration officer.

19. He completed an employee information form saying he had a disability. In answer to the question asking what adjustments may be required he said: "access to word processor, recording device for notes and meeting, access to a proof read if possible". He provided the report from Dr McLaughlin on dyslexia, which recommends these adjustments.

20. He started work on 31 July 2014 when he had a discussion with his line manager Nadia Patel. Next day she sent him her notes of the discussion, recording that they had agreed as adjustments for dyslexia an audio-recording device such as a live scribe Smartpen for notes and minutes. He had explained he wrote slowly, and would need the device to take notes. She had said he was not required to take notes, as she normally sent bullet points of meetings. He would have a computer for written duties. She would also proof-read his bespoke letters at busy times, and otherwise he had volunteered to reread letters, after waiting 5 minutes, so he could identify mistakes. No adjustments were required for his hearing loss.

21. The claimant was employed in the registrations team of around 8 people. He had to process different application forms, from the UK, the EEA and non-EEA, to verify identity, and take payment. The team also functioned as a contact centre, and he had to respond to queries by phone and email. There were a large number of standard operating procedures (SOPs). August to October is usually a busy period as students register with the council then. The claimant mastered the procedures. He enjoyed the work. The respondent had no complaints about his ability. On his three-month review in November 2014 it was noted that he had a "great working relationship with the team and other departments". In February 2015, on completion of probation, he applied for the permanent role and got it.

22. There is a factual issue as to whether it was at this stage or nearly 4 years later that he supplied an updated CV which, significantly, adds at the end "specific requirements", first listing access arrangements for dyslexia, and then:

> "although dyslexia in my cluster I have a slight Aspergers treat (sic) therefore like formalisation and paid extreme attention to detail which in turn more or less guarantees 100% accuracy in the implementation of individual responsibilities or duties, 100% auditable practices administrated by my line of responsibility all by myself. 100% guaranteed accurate important minute meeting notes minutes and instructions when required".

There is no mention of meltdown behaviour.

23. There is no covering note or email to show that he supplied the updated CV when applying for the role to be made permanent, but the claimant did supply a copy to the respondent in December 2018 for a grievance hearing.

The Respondent says this version was *not* on their personnel file. It is of course possible they had not noted the change from the one already on file. It is also possible the claimant did not tell them in February 2015 about the Aspergers, and added it to the CV some time later. He already had Dr Burgess's March 2014 report, which did mention Aspergers, when he prepared the initial CV, so he could have mentioned it from the outset if he had wanted to.

24. In our finding, it is not now possible to be sure whether before December 2018 the respondent did not have this, or whether they did have it, presumably late in 2014 or early 2015, but did not notice the small addition to a four page personal profile, in small print, which otherwise resembled the one they already had. The claimant did not at that time discuss with any manager or member of the HR department any adjustments required for Asperger's, a disability not mentioned when first hired, or in the initial discussion of reasonable adjustments with Ms Patel, and in our finding, even if the version with added text was supplied in 2015, (and we have real doubts of that) it was reasonable for an employer not to notice this small change in a long document when it was not drawn to their attention by the claimant in writing, or at any meeting. Asperger's only came to the respondent's attention after the first sign of trouble in the employment relationship.

The First Meltdown

25. On 23 April 2015, towards the end of the day, Nadia Patel asked the claimant to prioritise a particular application because the applicant had made a complaint to the Chief Executive. The claimant reacted badly. He said there was no justification for prioritising an application because of a complaint; it was outside policy. He then asked her to email the instruction to him. Ms. Patel was embarrassed that the rest of the team was witnessing this heated confrontation. She asked them to go home while she and the claimant carried on.

26. Next morning she emailed the claimant saying her request had been reasonable, and his response had been "very inappropriate". He had spoken to her "in a way which I found rude, disrespectful and wholly inappropriate in the workplace. I have to say I found your body language and gestures aggressive and threatening and entirely out of place in a work setting. I would not tolerate any repetition of that behaviour and would remind you that actions of the kind that you displayed yesterday could lead to disciplinary action being taken against you". He had mentioned he had a disability, "and suggested that this allows you to act in the way that you did". She said she did not have details of any disability information he might have disclosed to HR, but that did not "remove the need to behave appropriately in the workplace". No member of staff or manager should be expected to tolerate "aggressive shouting and gesticulation" from a colleague.

27. They met to discuss what had happened. She confirmed that she would send emails of instruction where it was necessary to vary a procedure, but priorities might change, and he might be given tasks to complete that took precedence over others. If he wanted to discuss the work he was being

given, he should email her so they could discuss it out of the office. It was not acceptable for him to behave in the way that he did with her or with colleagues. If that did happen it might be taken down a disciplinary route. She noted what he said, "about your responses to challenging circumstances being to some extent affected by your health condition", and she would do her best to make appropriate allowances, but could not tolerate behaviour she found intimidating. He had said he had Asperger's, and they were looking at referral to occupational health for this. In other words, the claimant seems to have told her that his loud and heated response resulted from a disability.

28. The claimant called this episode, and later ones like it, a "meltdown". The tribunal saw something of this meltdown behavior when he was being cross examined. He spoke loudly, he interrupted and overspoke. He stood up. He gesticulated. He repeated himself. He often spoke so quickly that it was not possible to note his words, nor was it possible to get a word in edgeways. He sometimes broke his words down into separate syllables and altered the stresses on those words for emphasis, coming across as sarcastic. At one point he started to hiss. The claimant is aware that he behaves like this. He later apologised, unasked, to the tribunal; once or twice he said he was not going to speak of something because he would: "get silly".

29. The claimant had arranged for us to listen to a 15 minute section of a recording of a later meeting with Ms Patel. We heard similar loud, rapid speech, and that whenever Ms Patel tries to speak, she is interrupted and spoken over. We were told that in this recorded meeting Ms Patel had spoken aggressively, but if she did, the claimant chose not play us that bit.

30. We can allow that litigants, especially in person, are in a heightened state at a hearing of their claims and that they often find it difficult to be cross examined. For that reason, conduct in a tribunal setting may not be typical of conduct outside it. But as we could hear from the recording, and as we read in the several transcripts he had made of recorded meetings, the claimant behaved in just the same way addressing managers at work. He also behaved like this with colleagues. Aaron Grell, with whom he had very good relations until July 2017, referred in a statement he made then to his "anger", and commented: "sometimes when he goes off, because I'm used to it, I think there he goes again".

31. The referral to occupational health the respondent made in May 2015 following this episode with Ms Patel shows how it was perceived. The incident was said to have provoked "an inflammatory reaction", leaving his line manager very shocked. His body language and gestures had been aggressive.

32. The claimant told the occupational health adviser, Ms Kavuna, that this was because he had Aspergers, and showed her an extract from Ms Burgess's March 2014 report. This suggests the claimant suggested to Ms Kavuna that his meltdown behavior was related to unexpected change, though this is not clear in the Burgess report. The report that came back from Ms Kavuna said:

"due to his disabilities Mr McQueen needs to have any information particularly around any changes that are given to team members verbally clearly backed up by written statements of those changes to allow him to process those changes visually. He then needs time to read and process the information".

33. She recommended a recording pen so he could record the fortnightly team meeting, and that his line manager might need to check whether he had not picked up any issue. She noted "undue anxiety" around change. She also recommended that he had a full discussion with his line manager about his needs, and if appropriate should also give a brief synopsis of his disabilities and challenges to colleagues at a team meeting. Other than the pen, he had adequate software and was being provided proofreading support.

34. The tribunal notes that the event that provoked the claimant to speak so angrily to Ms Patel was not being asked not to follow the set process for dealing with an application, but to deal with one application before another application. It was also an extreme reaction.

Workplace Changes

35. Ms. Patel was not sent Ms Kavuna's report, but she got a summary from HR to the effect that she was to confirm deviations from established process in writing, he was to have a recording pen for meetings, and there was to be encouragement of greater awareness of his condition.

36. The claimant, Ms Patel and a person from HR met to discuss this. It was agreed that he could follow verbal instructions to switch task, but emails were required to vary the way the task was done. On the pen, it was recorded that the claimant said he could process 99% of the things he was told, and he could read notes, but would need it ideally. When he got a pen, colleagues were to be told if he was recording. Finally, he was asked not to repeat the behaviour shown in April.

37. The claimant says he found this last comment "humiliating and distressing".

38. The respondent contacted DWP about Access to Work funding for a recorder pen (cost, £110). The claimant was asked to apply, as the request must come from the disabled person, and he did. After that nothing happened. We note that when he made a further application in 2017, he received a standard DWP response letter asking him to phone the DWP to discuss it. In the absence of other information, the panel has concluded that the reason why the 2015 application did not go anywhere was because the claimant did not make this call. It should also be said that the respondent did not follow up what was or was not happening.

39. As for the team meeting to explain his difficulty to colleagues, the action points from a one-to-one meeting, as listed by Ms Patel on 26 August, show that the claimant was to tell Ms Patel when he wanted to do this, and that he would prepare a presentation. He was to inform her when he was ready. The claimant never did.

A Second Meltdown

40. Both the claimant and Ms Patel found the relationship difficult after the April 2015 confrontation. The claimant says he had to withdraw from speaking on matters of contention. Ms Patel avoided speaking to the claimant on anything that might prove controversial. When a new HR administrator, Michelle Norman, arrived in December 2015, she agreed to manage the claimant more closely so that Ms Patel could step back.

41. In April 2016 there was another confrontation between the claimant and Ms Patel which left her tearful. She had asked the claimant to give some of his backlog to other workers, and he had objected. A few days later he discussed this with Michelle Norman, and he asked for Nadia Patel to have some disability awareness training.

42. We note that her request to him, which had left her in tears, had not been to vary or step outside a process, but to hand on some of his work to others. This is hard to read as something arising from Asperger's, with a need for set routines, or dyslexia. It seems more likely to be resentment at being told what to do.

43. Our reading of Ms Patel's actions in 2015-16, and her evidence to the tribunal, is that she genuinely found his behavior very frightening ("intimidating"). The claimant has complained that when Ms Patel said this, in her 2018 statement to those investigating her grievance, she was guilty of race discrimination, by stereotyping his actions as aggressive and threatening because he is black. We are aware of the stereotype; for example, research has shown that black schoolchildren are more likely than their white classmates to be perceived by teachers as aggressive. However, having seen and heard the way the claimant behaves, read the transcripts, and noted the reaction of colleagues to the claimant's behavior from time to time, (including Aaron Grell, who is himself black), in our finding Ms Patel would have found this behavior intimidating if it came from a white man, or a woman. Her reaction was understandable. Loss of control to that degree is frightening. She was not apprehensive because he was black.

44. Despite that, behaviour problems towards managers are not recorded in his 2016 annual appraisal. He was described as a "competent and committed team player", he was quick and efficient. He had good customer service skills. He had been supportive, discreet and taken his time to help train new starters on various processes. The only caution expressed was he should alter the way he spoke to difficult customers, who "did not know his disabilities", on the phone. This phrase suggests he was abrupt or aggressive to some callers, and that his employer was prepared to concede, when communicating this advice to the claimant, the explanation he had given to Ms Patel after the first meltdown, which was that it was a consequence of disability. He was given a performance rating of 3, which means he was meeting expectations. His annual pay rose from £28,658 to £33,291.

45. In June 2016 there was a change in the way the respondent assessed non-EEA applicants for registration, leading to an increase in the number of

overseas assessors required, and the assessors' meetings would have to be minuted. This was announced as a team meeting. The claimant said that without a recording pen he could not take minutes of meetings with overseas assessors. In our finding, however, he did not have to take minutes. The transcription, with one exception, was always done by Aaron Grell.

46. Other changes were instituted following a KPMG review in the autumn of 2016, which recommended changes to process. This meant there could be several successive emails notifying changes; this will have increased the pressure on a dyslexic and process-driven person like the claimant. New staff were taken on. The claimant and Aaron Grell took other members of the team through their particular skill, how to register non-EEA applicants, so they would know what to do.

47. At the end of November Aaron Grell was designated workflow coordinator, meaning he allocated incoming applications to particular team members.

48. This was the setting for conflict in December 2016

The Job Description

49. At the end of November 2016 the claimant was set his annual objectives. They included: "train new/existing colleagues on various processes and procedures as required."

50. The claimant had just been provided with a new job description drafted by KPMG. This included being the "champion" for a key registration process, in his case, non-EEA applicants, and he was to show he: "demonstrates ownership by updating and amending relevant documents, effectively trains colleagues and almost any query on the subject matter". The claimant queried with Michelle Norman what was meant by "training", when his existing job description spoke of "coaching". She replied that the dictionary definition of coaching was training staff, and there was no difference between old and new formulation in what he was being asked to do. The tone of her reply is combative (the claimant calls it "passive aggressive"). She said: "my position is firm on this point". The claimant then told Mandy Roberts in HR that he was happy to train team members, but it was not his responsibility, as responsibility for training lay with the operations manager. He wanted confirmation on this point before he signed the new job description. Although Ms Roberts responded that she would come back to him, he never did get a substantive answer from her. Ms Roberts sought legal advice on this in April 2017, and a conciliatory answer was drafted, but it was never sent.

51. The respondent says he was not *required* to sign the new job description. He continued to work under the old one. He was never criticised or chased up for not signing. The point was simply abandoned by the respondent. This failure to answer him rankled with the claimant.

The First Disciplinary

52. A day after her email about training being the same thing as coaching, Ms Norman sent the claimant a long email on concerns about his performance. First, she objected to him standing up at his desk to discuss matters with team as it was "disruptive". They had already spoken to others about this. Next, he was not complying with a recent team instruction to send Nadia Patel all emails for checking. He had also left a cheque stapled to a form, showing lack of attention to detail. Next, he was not sending out the new welcome email now required for new applicants, only 4 in 25 been done, and she wanted the rest done by 16 December. He was also continuing to use a cover sheet that the team had been told in September not to use. To reinforce the need to follow instructions she added that audits that year had shown that individuals acting independently created unnecessary risk to the department's work. He was to follow instructions. "If you consider that you have a better way of doing something you need to discuss it with Nadia first". Finally, there were a lot of backlogged voicemails for him. He was told: "if there continue to be repeated incidents of this nature, I will be left with no choice but to pursue the matter on a formal basis", a clear threat.

53. The claimant initially responded cooperatively and added that he would no longer stand up, but he added a disability-related reason: "if I do not respond it's because I cannot hear the person cannot make out what has been stated to respond".

54. A few days later he responded to the criticism at greater length. He argued he had misread the email about sending material to Nadia to check. He had misunderstood which targets were hard and to be enforced. Management should have disability awareness training, as the link between his actions and his conditions was not being picked up. There were some further argumentative emails about whether he could wear headphones at work (it has not been suggested this was disability related), and more about standing up.

55. On 16 December Nadia Patel asked Aaron Grell to allocate an enquiry from an applicant about an interview. On 4 January he allocated it to the claimant. It came with a note from Michelle Norman saying that the applicant would have to complete a new form, and that they no longer offered appointments for meetings. The claimant's response was to tell Aaron Grell he was not doing other people's work, and he should send it to Nadia Patel, as the applicant had initially addressed the enquiry to her. It was "nonsensical" to allocate it to him. Four days later however he drafted a reply.

56. On 18 January 2017 the claimant was invited to a disciplinary meeting. The charges were: failing to follow management instructions, negative attitude, and refusing to undertake work allocated.

57. Following the hearing, on 24 January 2017 he was given a written warning on the first of the three charges, that of not following instructions. Michelle Norman did not accept his explanation that she had verbally agreed he need not send welcome emails because of the backlog, when the contrary was clear in writing. She had however accepted his

explanation that he did not answer the email addressed to Nadia Patel because he thought it was sent to him in error. She also accepted his explanation that at a team meeting on 6 January 2017, when he was thought to have shown a bad attitude, (refusing to discuss matters with the rest of the team) it related to confusion about when it was all right to discuss matters with the rest of the team, sitting or standing. He was asked to speak face to face where possible, and to try to contribute positively to the team.

58. By the respondent's own disciplinary policy (CAP) Michelle Norman should not have given evidence about the claimant's shortcomings and at the same time heard and decided the charge and then given him a formal warning. As a line manager she could only have done this informally.

59. The tribunal noted that the claimant's explanation for not following instructions was that he followed a verbal instruction (though the respondent firmly denies there was any such verbal instruction) in preference to a written one.

Implementation of the Recommended Adjustments for Disability

60. In February 2017 there was a further confrontation between the claimant and Nadia Patel. The provocation is not entirely clear. The claimant says only in his witness statement that Ms Patel "aggressed at my desk", while Ms Patel says she spoke to him about some incomplete work. She denies being aggressive, authoritarian or confrontational. This to us is more plausible than the claimant's assertion, judging both by her own manner in tribunal, and what was by then her very cautious approach to the claimant. His response was irate.

61. He was then invited to a meeting to discuss the working relationship. It lasted nearly an hour. It was recorded by the claimant, but we only have a partial transcript and we only heard part of the recording. Going by what we heard, we agree with Ms Patel that he was "very agitated", and raised his voice and talked over her.

62. The claimant was then away sick for one week with anxiety. There was a return to work meeting with Miss Mandy Roberts on 15 February 2017. The claimant complained that reasonable adjustments had not been made for his disability, and that he had been disciplined unfairly, but he had not appealed because he could not handle the stress.

63. The Respondent then commissioned a further occupational health report, the report of Dr Ryan. He repeated that the claimant needed a pen for recording meetings, some dictation software, and that he should not have to carry out dictation duties. He recommended the respondent contact Access to Work about practical aids. Having been told about Asperger's by the claimant, he recommended that they get a further report on whether he had Asperger's syndrome, and whether this affected his behaviour.

64. The claimant met Michelle Norman and Mandy Roberts on 23 March 2017 to discuss the recommendations.

65. The reasonable adjustments for dyslexia were now followed up. The claimant made another application to Access to Work for funding. On 1 June 2017 the DWP confirmed to the respondent they could buy a pen, it was provided by 4 July 2017, and on 7 July the team was told he would be using it to record team meetings.

66. It was also arranged that the respondent would fund half the cost of training for an NVQ in business administration level 3, not to adjust for disability, but to be helpful to the claimant. As far as we can see, it was a goodwill gesture. The claimant started the course in September 2017. The respondent also arranged disability awareness training for managers, which took place later that year.

May 2017 Appraisal

67. On 4 May 2017 Ms Patel carried out the claimant's annual appraisal. She gave him a grade 3, meeting expectations, the same as the year before. The claimant was however antagonised by her written comment that some of his work the previous autumn had only been worth a 2, but he had improved, so it was 3. He wanted this comment changed or removed.

68. Noting that the claimant does not challenge the overall grade 3, and that there was no financial implication, it is not easy to understand why this caused such a hostile reaction. We conclude it was probably because it related to what the claimant held to be an unfair criticism leading to the January 2017 disciplinary warning which he resented. He said that any errors he had made were because he did not have adequate proofreading, and that his inconsistencies logging new applications had been given too much weight in the overall result. We noted he did not deny there had been inconsistencies, and that he did not say here that his need for written instructions was the reason for inconsistent logging. We also noted this is the only complaint of not having adequate help in proofreading his work.

69. She refused to sign his amended version, and he refused to sign her original version. There it was left.

The Second Disciplinary

70. On 6 June 2017 Aaron Grell heard the claimant tell an overseas applicant that she would be able to resit the qualifying exam if she failed. This was not the case. Previously resits had been available, but the position was in flux in 2017, involving negotiation with the College of Optometrists, which administered the exam. As the exam fee was £2,300, many candidates were anxious to know whether they could resit if they failed, or whether they would have to apply again and pay another fee. Staff had been told to tell applicants that it was not known if they could resit. Aaron Grell told the claimant that what he had told the applicant was wrong, and the claimant replied: "we have to allow them to resit so that is what I will be telling them". According to Aaron Grell, the claimant was "animated and in disagreement", and later "venting about it to members of the team", so Aaron Grell emailed Nadia Patel asking her to tell the

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claimant otherwise.

71. Next day Michelle Norman sent a general email to all, restating that there would be no resits, and Nadia Patel asked the claimant about it, who said he had just told the candidate what Michelle Norman's email said, but agreed he had not logged the call (as should have been done, so colleagues would know what a caller had been told). HR then investigated with team members what the claimant had said and done, and he was invited to a disciplinary meeting on 15 June 2017 on a charge of deliberately providing a candidate with incorrect information in relation to resits, and in so doing refusing or failing to follow a reasonable management instruction. He was warned that these allegations might amount to serious misconduct, and that as he was already subject to a written warning for conduct, one of the outcomes might be dismissal.

72. The hearing on 30 June was chaired by Keith Watts. On hearing the evidence, he found the charge unproved, and the claimant was notified of this in writing on 3 July 2017. Keith Watts found the evidence: "contradictory and generally weak". On our reading, this was because Aaron Grell backed down on some of his earlier statements.

73. Although this second disciplinary went nowhere, the claimant will rightly have been alarmed at the real risk that he might have been dismissed.

74. The claimant argues that this outcome shows the matter was always so flimsy that the charge should not have been brought in the first place, further, that the reason for doing so was his disability, or something arising from it, or sex and race discrimination, and a failure to make reasonable adjustments, and harassment. We make findings here on factual issues arising.

75. When Aaron Grell gave evidence to Mr Watts, he agreed that he could have misheard what the claimant was saying, that there might have been an error on the timing of the call he reported, and so on. Mr Watts went out of his way to make clear that Aaron Grell was a genuine witness who had acted in good faith, and was "to be commended for stepping in where others may have feared to tread" in remonstrating with the claimant (we note that the claimant had accepted at the hearing that he had been "passionate" on the afternoon of the call). Aaron Grell had not expected his report to result in disciplinary proceedings. Our impression of Aaron Grell was the same; he did not report the matter in malice or bad faith. We concluded Mr Grell backed down because he did not want the claimant to be dismissed for this.

76. The claimant suggests that witnesses were improperly offered anonymity. We note that at a very preliminary stage in the respondent's procedure witnesses may be interviewed anonymously, but only signed evidence was before Mr Watts.

77. As for the decision to discipline, Keith Watts himself concluded that "a thorough review of documents may well have led to a different decision to deal (in a) different way with the team", suggesting that it just needed emphasis on the proper line to take with examination candidates. He held

there was some room for doubt that the claimant did understand the position, though an argument that the respondent had itself given incorrect information earlier was rejected. Alternatively, staff wanted to be helpful to candidates at a time when the respondent was considering whether there was some way they could offer resits.

78. Mr Watts does not deal with the claimant (as reported at the time by Aaron Grell, whose evidence we do not reject) having apparently decided that the respondent's position on resits was wrong, and that was why he was telling candidates otherwise. We also note that on one of the charges, the claimant had failed to log the call, as shown when the candidate had called back later that day and spoken to another team member. Given that Aaron Grell still maintains the claimant said he told the caller there would be resits because that was what the policy should be, then going on the evidence available to the respondent following investigation, there was reason to believe C was deliberately refusing to follow orders and being insubordinate, and so a disciplinary charge was supported. The eventual outcome was otherwise because Mr Grell conceded he could be mistaken about the timing of the calls he had reported. Mr Watts did not make a finding on whether the claimant had said he was not following policy because he thought it was wrong, the closest he got to that was his comment that staff wanted to be helpful to candidates.

Grievance

79. On 13 July 2017 the claimant wrote complaining of his treatment. (He has mentioned a complaint on 20 June, but he does not discuss it in his witness statement, and the content or circumstances of that complaint is unknown. We could not find it in the documents bundle).

80. He complained:

(1) of the January 2017 disciplinary that it was because management had failed to adhere to reasonable adjustments i.e. the providing of written notes to avoid misunderstandings
(2) of the appraisal, that Nadia Patel's comment directly related to "my condition and the failure to make and adhere to reasonable adjustment"
(3) that the second disciplinary amounted to 2 unjustifiable disciplinaries in the last six months, both involving clear breaches of agreed reasonable adjustments. There were failures "to act within the law in regards to the care of duty and EQ 2010".
(4) the "negative/passive-aggressive response by managers" to his concern about the change of job description transferring responsibility for training staff members to registration officers from the operations manager. His line manager and head of department (we understand Nadia Patel and Michelle Norman) had known about his "condition".

In short, his concerns were the two disciplinary charges, the appraisal, and the job description. Breaches of the Equality Act were mentioned.

81. Lauren Campling of HR replied on 17 July 2017 that she would get in touch, but not this week because both Nadia Patel and Michelle Norman were away on holiday. But nothing more was done.

82. On 15 December 2017, five months later, the claimant followed it up. Mandy Roberts of HR replied: "apologies for the delay in responding to you. I'm on my own due to staff shortage so could I ask that you give me a little longer please. Would I be right in assuming that you want this to be investigated formally." The claimant said yes, he did.

83. Miss Campling sought advice. On 13 February 2018 she met the claimant, and according to her own note (which she did not share with him), the claimant was enthusiastic about his NVQ training, the disability awareness training had now taken place, and his new team manager (Yeslin Gearty, from September 2017), who had "taken (him) aside to understand his condition and how best to work with him". However, he still had the concerns which he had raised about his treatment. He was aggrieved by the first disciplinary which should never have taken place, and that Michelle Norman should never have heard it. A failure to make reasonable adjustments had led to the disciplinary. He wanted it reopened and looked at. Nor was he happy about the second disciplinary. There was "miscommunication and no reasonable adjustments made again". He was also not happy that the appraisal had still not been signed off, and Nadia Patel had refused to make reasonable adjustments. He wanted this rectified.

84. Ms Campling wrote to the claimant on 9 March 2018, referring to this discussion, and said:

> "you confirmed that this had addressed the issues that you had raised in your email in July 2017, with one exception, i.e. your concerns regarding previous disciplinary sanction in January 2017".

She said that the warning for the first disciplinary had now expired, so the caution was "inactive", and it stayed on the personnel file for the record only. In any case, he had been offered the right of appeal but not exercised it. They could not reopen it.

85. Ms Campling has not given evidence, so we do not know why in this letter she only dealt with first disciplinary, when her own note records there were other issues outstanding.

86. The claimant pointed out that other matters still awaited answer, and Lauren Campling replied on 16 March: "we are actively looking into what you have raised and will be in a position to update you next week".

87. However there was no update until 3 April 2018, when Ms Campling wrote to the claimant again, saying: "as a gesture of goodwill, though it is not our usual practice, as you have clearly stated this as your preferred outcome, we are prepared to confirm that any reference to the disciplinary warning will be removed from the record. We trust that on this basis we can all move forward from this matter, and therefore now consider this matter to be closed." This still did not deal with the complaint about

reasonable adjustments which he said underlay the disciplinary charges, or the appraisal, or the job description.

88. The tribunal suspects that Ms Campling's letter was sent when it was because of what happened next. The very next day, 4 April, the claimant was summoned to an investigation hearing on a fresh charge of abusive and discriminatory language and behaviour in the work environment which had been the subject of a recent complaint from other staff.

89. The claimant replied promptly, pointing out that although he was still awaiting an outcome to the remaining points of his complaint, which had been outstanding for months, they were acting very promptly to take a recent complaint through a formal procedure.

90. Philippa Mann investigated the complaint about the claimant under the disciplinary policy. She concluded it should not go to a hearing because there was no case to answer.

91. For context, the complaint was of racial prejudice, that while watching a television news report on how the Labour party handled complaints of antisemitism, the claimant had said the Jews were making it all up to get into power, and it was a distraction from the discrimination Muslims faced; politicians only expressed outrage about antisemitism "because that's where all the money and power were". There had been a number of witnesses, and he had been loud and strident. Ms Mann concluded that the views expressed were about politicians, not Jews, and there had been "significant miscommunication". Informing the claimant of this outcome on 12 April, Lauren Campling said: "although there is no case to answer it would be necessary for both parties involved to complete training on appropriate language in the workplace". The training was scheduled for later that month.

92. The respondent decided that as the claimant was now complaining about the HR department itself not dealing with his grievance (see paragraph 89), an outsider was needed to investigate. At some point in April the respondent verbally instructed Peter Cheer, who had worked for them on other matters requiring an external adviser. He interviewed the claimant on 25 April 2018. He spoke to Mandy Roberts, Michelle Norman and Nadia Patel and others. He asked the respondent for documents (such as the job description and disputed appraisal) but did not get any, so submitted a draft report on 22 June.

93. After discussing his draft, he renewed his request for documents and got some, but not all. In evidence he said these difficulties getting documents had occurred on other matters where he had been working for the respondent.

94. In the meantime, the claimant had been to ACAS to start the early conciliation process. ACAS emailed Nadia Patel about the claim on the evening of 4 July, she discussed it with Mandy Roberts on 5 July.

95. Peter Cheer sent his final report on 6 July 2018. He added that the claimant had asked when it would be ready, and he suggested that: "this

would be a good point for the HR team to establish an ongoing updating process with Philip (the claimant), if they don't already have one in place". He was aware that the claimant had now been waiting a long time for an answer to his grievance.

96. On 3 August 2018 Teresa Couppleditch, HR manager (replacing Mandy Roberts, who had left in June) replied to the claimant on the grievance. In ten pages she summarised Peter Cheer's chronology of events, then indicated his conclusions. The reasonable adjustments had now been met, though there have been delays, for reasons which were unclear. On the first disciplinary, he reached no conclusion on why it had gone to a formal meeting, but he accepted that the process was flawed because Michelle Norman was conflicted. However, the matter had now been removed from his record. As for the second disciplinary, Mr Cheer had not made a decision on why it went to a formal meeting, but no action had been taken. On appraisal, it was regrettable that management thought he was concerned with the overall rating, while the claimant was only concerned about the comment, but that if it had been reviewed, the rating would be the same. On the job description, training was a relatively small issue that had become a big issue. The claimant however should have had confirmation that his role had not changed. On the lack of response to his July 2017 grievance, it was "clearly very unsatisfactory", that his concerns had not been investigated in time. Peter Cheer had concluded that lack of understanding, or competence and efficiency, on the part of the individuals involved was the reason for managers' actions rather than "a desire to see you dismissed." The claimant was told that Mr Cheer recommended a formal apology, written confirmation as to his job description, written confirmation about the position on the appraisal, and a review of the role of managers and HR in supporting employees with disabilities. He was invited to a meeting to discuss on 7 August.

97. On 5 August the claimant sent a detailed critique of this letter, covering seven pages. He thought there should be disciplinary action against managers for gross incompetence. Commenting on a discussion of his behaviour, perceived by some to be aggressive, he said: "my speech control in regards to volume fluctuates regardless, as that is more related solely to dyslexia and my hearing loss". (The tribunal notes here the different disability related reasons given by the claimant for aggressive behavior to that advanced in the pleadings). The suggestion that there should be an agreement on how he should behave in future, and the "reasonable expectations of employment" was not just insulting but erroneous.

98. Discussion at the meeting on 7 August lasted over an hour. Although the claimant recorded it, we have only small extracts transcribed. He complained that Peter Cheer had mis-recorded what he had said, "purposely writing notes that put me in a bad light".

99. On 31 August Teresa Couppleditch sent a follow-up letter. The respondent declined to go back to investigate failures of management since late 2016. They did not intend to commence disciplinary hearings against current members of staff, which would be unfair as most of those implicated by him had now left. As to unfair treatment of performance,

Mark Webster had compared this with others and concluded that the disciplinary process used was appropriate. The claimant had confirmed he now had all reasonable adjustments and was happy with his current line manager, and they wanted to focus on the future. They would apologise for (1) not making enough effort to ensure the adequate reasonable adjustments were in place until July 2017, (2) the formal disciplinary warning "through a decision-making process that is flawed and unfair", and not put right earlier, and (3) not responding until April 2018 to his concerns. He would get written confirmation that the old job description still applied, a written response about his query about comments and performance appraisal, and there would be a review of the role of managers and HR supporting employees with disabilities. If he remained dissatisfied, he had the right of appeal.

100. Teresa Couppleditch told the tribunal that the reason given for not disciplining the managers was not strictly true. The real reason was that she and Mark Webster had decided that it had all been going on too long and a line should be drawn under the past.

101. There was then a fierce correspondence between Ms Couppledicth and the claimant about the procedural stage they had reached. He held there should now be a stage 1 hearing of his grievance. She argued stage 1 was complete, and the hearing would be of his appeal. At the end of October Ms Couppleditch referred it all to Lesley Longstone, recently appointed the respondent's chief executive.

102. Ms Longstone decided they must stick to the grievance procedure. She held a preliminary hearing with the claimant on 26 October to find out what he said about the grievance issues. She also met Aaron Grell, Mark Webster and Keith Watts. A report was sent to the claimant on 6 December, in preparation for a full grievance hearing on 19 December. As well as minutes of his various investigation meetings, the claimant now saw Peter Cheer's report for the first time.

103. The grievance hearing went ahead on 19 December. Nadia Patel and Mark Webster attended, but not Aaron Grell or Keith Watts. The claimant was allowed to record it on his pen, but when the respondent noticed that he had left the pen in the room, still recording, when the panel was in private discussion, his pen was taken away, to prevent him hearing the recording of the private discussion.

104. Ms Longstone wrote with the outcome on 18 January 2019. The letter (dated 18 December 2018, agreed to be an error) is of 3 pages accompanied by a 65 page report. The letter purported to include an audio disc of the recording, which was not in fact enclosed, as well as a transcript.

In summary, her findings were:

(1) The complaint about the unfairness of the first disciplinary should be upheld. Nadia Patel had stopped writing notes of 1:1 meetings with the claimant by the autumn of 2016. There was reason to believe he may genuinely have been confused about what was required in a period of

changes being made by email.

(2) The complaint about the second disciplinary was upheld, in that it had been inadequately investigated before proceeding to a charge. The complaint that his managers were trying to get him dismissed was rejected. The panel held that the managers' lack of understanding of Asperger's had led them to believe he had been *deliberately* defiant.

(3) The complaint about the appraisal was upheld to the extent that "managers' understanding of his disability was not as good as it could have been", and if better would have caused less offence, but the remarks were reasonable. There is also discussion of the claimant's various, sometimes conflicting, explanations of why he had not performed well in the period in question, "so the issues appear to be more complicated than the suggestion that they are all disability related".

(4) The allegation that the claimant's objections to the appraisal were ignored had been withdrawn by the claimant.

(5) The allegation about bullying and harassment when the claimant would not accept changes to the job description was not upheld. Any alteration to the wording of the job description was of no significance.

(6) Of the allegation that the HR Department or Mark Webster had failed to investigate, respond to, or act on concerns first raised in the December 2016, in order to conceal the concerns and protect the management team, the panel upheld the view that the response was inappropriate, and it would have expected "more intrusive oversight" from HR, but did not agree that this was done to conceal concern or protect managers from disciplinary action. In their view, there were questions about how Ms Patel managed the claimant (their guarded relationship, and her failure to make notes of 1:1s), but none that would require disciplinary action.

(7) The allegation that the claimant had been less favourably treated by HR, when compared with concerns raised by other members of staff, was not upheld. The panel accepted that the racist remarks episode was simpler to investigate than the claimant's complex grievance, and that there was some suggestion that turnover of staff in HR had led to other cases being delayed at the same time.

105. In composing the report, Ms Longstone arranged for documents referred to and relied on to be appended in their entirety. This meant that sometimes only a few emails from a chain had been appended (comparing document 10 and document P). The claimant became very upset about evidence tampering and spoliation of evidence. He said he could not come to work because of the "corrupt process". Nor was there any point in carrying on with the grievance process, instead the respondent should move to use CAP (the disciplinary policy) and the bullying and harassment policy against the various mangers involved.

106. Miss Longstone says selected documents were extracted from the

hearing bundle so that the report could be read as a standalone document. She insisted that had the claimant appealed, all the documents considered, not just the ones appended, would be in the appeal bundle. The tribunal accepts her evidence on this. It makes sense, and had the claimant appealed, he would in any case have been able to insert all the missing material into the bundle if the respondent did not do as they said they would. In the meantime, there was a blizzard of emails expressing his dissatisfaction with the process and outcome.

107. Another bone of contention was the recording pen. The claimant said he was withdrawing permission to delete anything from the pen, and insisted it was returned. On 26 January he reported its theft to the police. There was some correspondence about who had paid for it, until he asked the respondent to deduct £29 from his salary for the contribution the respondent had made to its cost. He was then invited to come in to input the password to the pen so an IT technician could remove the covert recording. He was told the respondent had bought him a new pen because he could not take home the pen with the recording of the panel discussion on it.

Getting the Claimant Back to Work after the Grievance Hearing

108. The claimant did not come in to work after 10 December. He was given special leave to the end of the year to cover this. In the new year, when told he would not get the outcome letter until 18 January, he was told he could work from home as an alternative to taking sick leave. As far as we know he did no work from home. On 25 January, after his several emails expressing dissatisfaction with the outcome, he was told he should now return to work if he was fit, and if he was not fit, supply a fit note. Separately, he was told that they were concerned about his mental health, and he was urged to see his GP or contact their Employee Assistance Programme.

109. There was then a wrangle about his fitness for work. He remained absent from work and the respondent told him they were arranging an occupational health assessment. The occupational health advisor said that the respondent should wait until the grievance had been resolved, as "any occupational health appointment prior to resulting grievance will be dominated by the circumstances not the health issues". (4 February) The respondent then instructed another occupational health provider, to examine the claimant on 6 February. The claimant disagreed with the content of the referral letter, provided his own set of contentious instructions instead, told the respondent that he would attend the appointment to give the background, and:

> "if I find the report has not been written or conducted in relation to the matters of concern as in the background I have provided I will take legal action against the OH and rescind by (sic) consent".

Because of the threat of legal action, the examination did not go ahead. Very late on 5 February the claimant asked if he had to provide a fit note from his GP to return to work, or whether paid leave would continue until the formal proceedings to address his complaint of evidence tampering,

and about the pen, had been resolved.

110. On 7 February the respondent told the claimant in terms that any complaint about the pen, and any other dissatisfaction about the process or the outcome, should be the subject of a grievance appeal. They would not be using the conduct policy or bullying and harassment policy. The occupational assessment had been cancelled, and he was given the reasons, including the threat of legal action against the doctor, but also explaining the purpose of getting an occupational health assessment, which was to assess fitness for work and any adjustments needed to get him to return to work. He must either provide a fit note, or return to work, as his special paid leave was now ending. At the same time, Ms Longstone wrote to say that she had now learned that he had not in fact been sent to the recording of the grievance meeting, and the disc was now enclosed.

111. On 8 February the claimant arrived for work at 8:40 a.m. His entry pass was only now valid for 9-5, but a colleague let him in. His line manager then asked him to come to a meeting room to discuss his work, and the claimant refused, saying he could not do that without his recording pen. He was upset, and loud, and the line manager asked the other 5 team members to move to the kitchen. Ms Couppleditch arrived. There was then a dispute about who owned the pen. She brought in the IT assistant to set up a laptop to delete the recorded content. There was further dispute – Ms Couppleditch seems to have believed that the whole recording had to be deleted, not just the private session. After forty-five minutes the line manager brought the team back from the kitchen so that they could start work and the claimant left. Later that day he complained of an "overt act of disability discrimination", and said his stress levels were such that he was now breaking down in public.

112. There was more correspondence about whether the claimant was now making a formal grievance against the HR department. He was told to submit it in a particular way (essentially so that it all was in one document rather than many emails) and the claimant complained to the line manager that this was obstruction in order not to take action against Webster, Patel, Aaron Grell and Teresa Couppleditch for:

> "dishonesty, failure to observe policies and procedures, corrupt practices e.g. evidence tampering et cetera, serious breach of the respondents policies procedures and rules, conduct the brought its name into disrepute, serious bullying of staff, and discrimination or harassment of a fellow employee on the grounds of disability".

113. Events after this date are within the scope of his subsequent tribunal claims which are not yet listed for hearing.

The Time Issues

114. Section 123 of the Equality Act 2010 provides that proceedings may not be brought after the end of "the period of three months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable". By section 123 (3)

"conduct extending over a period is to be treated as done at the end of the period".

115. **Hendricks v the Metropolitan Police Commissioner** establishes that it is not necessary to establish a rule or policy underlying "conduct extending over a period", and instead the conduct extending over a period can be a "discriminatory state of affairs". Establishing a discriminatory course of conduct means identifying the discriminatory acts which are the evidence of a course of conduct. In **South Western Ambulance NHS Foundation Trust v King (2020) IRLR 168**, the EAT held:

> "If a tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would render the time limit provisions meaningless. Reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs."

116. To decide that, we consider whether the acts complained of are discriminatory and can be linked to the delay handling the grievance, or its outcome, which are also complained of as acts of discrimination or of victimisation.

117. We start with the claim of failure to make reasonable adjustments for disability. As noted, the claimant did not get the recording pen until 2017, when the matter was revived by the occupational health report. In our finding, the reason why the claimant did not get the recording pen in 2016 was because he did not complete the steps required by the DWP. The respondent did not oppose or obstruct it, and encouraged the claimant to make a funding application which could only come from him. At worst they failed to check progress. After 2016 he was not required to take minutes of meetings, so he was not at a disadvantage there. Ms. Patel did not always record the action points of every one to one meeting with him, but there was no evidence before the tribunal that he was at a substantial disadvantage (as required by section 20) because of that. Ms Longstone found that during the period of perceived poor performance in the autumn of 2016 it was not clear what was disability related, and it is not clear to us, when changes to process were being confirmed in emails, that a recording pen would have made a difference. The tribunal did not have evidence of what use the claimant made of the pen in his work when it was supplied. If there was any disadvantage, it had ceased by July 2017 when all the adjustments recommended were in place. When he presented the July 2017 grievance, reasonable adjustments were no longer an issue.

118. Of events in December 2016, in our finding the dispute over the job description - whether the claimant's "training" of colleagues amounted to more than the coaching he already did – was not because of disability, or something arising from disability. The manager's approach on this was firm, to a degree tough. In our finding, that was not because of the need for written instructions or any physical changes in the workplace (the "something arising" from disability) but because she was out of sympathy with the claimant because of the history of meltdown behavior towards a manager, and the claimant disrupting work with his custom of standing up and speaking loudly. In our finding, neither trait was "something arising" from disability.

119. The disciplinary warning in January 2017 was unfair, because the manger was prosecutor, witness and judge. In our finding this was not because of disability, or something arising from it. She was not an experienced manager (in fact it was her first management post), and she should have checked the policy before making an informal warning a formal one. The behaviour being disciplined did include what looked like insubordination – such as the refusal to take the matter referred on by Ms Patel, and standing up when already spoken to about it – and not doing his work, such as the backlog of emails. It was a period of change, which the claimant may have found difficult because procedures were changing, but the standing up, and refusing to undertake a task were not disability related. The reason he had a warning was because he was disruptive, and did refuse to do work, and because the manager did not check the policy. Had she given an informal warning, as she could have done within the policy, we would not have found it discriminatory, and that she wrongly gave a formal warning was not in our finding because of disability or something arising from it.

120. The next event in time, the comment in the appraisal in May 2017, is essentially because the claimant found the criticism that his performance the previous autumn had been lacking unfair. It is hard to see this as detriment, when he was assessed for the year at a level he does not dispute, which had no effect on his pay or prospects, and when there do appear to have been shortcomings, such as being behind with emails, and not doing work allocated to him, but even if it was, it is not in our finding because of disability or something arising from it. Her refusal to alter her comments arose from the history of meltdown behaviour challenging her authority.

121. The last event preceding the grievance, and which must have precipitated it, was the discipline in June 2017. We did not conclude this was because of disability, or something arising from it. It arose from Aaron Grell's concerned report of what the claimant was telling would-be applicants. The concern was in part that the claimant would not accept he was wrong, saying in effect that the policy was wrong, and resits should be allowed. This was not, in our finding, about the claimant not having something in writing, it was that he did not like being told he was wrong, and had become "passionate" about it. In the event, the discipline case was found not proved, and it was allowed that he may have made a mistake, or not said what was alleged, but we found there was good reason to bring the charge on the basis of the statements made. That

excludes a discriminatory reason for starting disciplinary action.

122. To conclude, we do not find a discriminatory course of conduct or state of affairs, and as already noted, events before 20 March 2018 are on the face of it out of time, unless there is conduct extending over a period which ended after that date.

123. The claimant does not argue that it is just and equitable to extend time, and he has not provided any explanation why he delayed until June 2018 to start early conciliation for tribunal proceedings. The chronology suggests to the tribunal that he went to ACAS at this time because he was exasperated by the delay in getting a response to his grievance even after the external investigator, Peter Cheer, had interviewed him about it.

124. On the facts before us, and as confirmed by the claimant on a number of occasions during the grievance process, all the reasonable adjustments recommended by the various occupational advisers consulted, and as requested by the claimant, had been put into effect by July 2017. So had additional suggestions made by the claimant himself, such as disability awareness training. Any failure by Nadia Patel to provide written notes of one-to-one meetings had ceased by that date, because she was away from work ill from 20 June 2017, and when she returned in the autumn, she was no longer the line manager.

125. If the claimant had any complaint about failures to carry out reasonable adjustments for disability, he should have brought it within three months of that date. He was well aware of the history. He was well able to get advice, and he knew about tribunal proceedings, having engaged in them before. He had a good knowledge of disability discrimination and the need to make adjustments. He accepted that the adjustments he had asked for were now in place. It cannot be said that any breach of duty continued. In our finding, any breach of the duty to make adjustment for disability was *not* conduct continuing after July 2017. Failure to resolve his grievance about past acts and failures to act (if that is the reason for his delay) did not perpetuate those failings.

126. The claim for a failure to make reasonable adjustment for disability fails because it is out of time and so outside the tribunal's jurisdiction.

127. So do the claims that the decisions to discipline him for conduct in January and July 2017 were direct discrimination, discrimination because of something arising from disability or harassment. He knew everything about those decisions. They were one-off events, not continuing acts of conduct. The operative date for the second disciplinary was the decision in July 2017 not to uphold it. By 23 January 2018 the first disciplinary was not even on his record, so not capable of affecting his future should another disciplinary charge be proved. Complaints about both these episodes are out of time.

128. The difficulties experienced by later investigators in establishing just what had occurred by way of verbal or written instructions and failure to follow them in the autumn of 2016 is a good example of why time limits are important. It is very difficult at a distance in time to examine whether

failings were because of dyslexia, or how hostile behavior may have been related to the tentative diagnosis of Aspergers.

129. Referring to the paragraph numbers of the grounds of claim, as dated and summarised in the schedule of issues, the claims in paragraphs 5-29, 31-34, 36-37, 40-61, 63, 64a and 69, are out of time and therefore dismissed.

130. So is 64a, which concerns the first disciplinary in January 2017, said to be discriminatory because on the claimant's case it arose from failing to confirm changes to process in writing, an adjustment for dyslexia and possibly Aspergers. The claimant says this continued to January 2018 and then January 2019. Both the imposition of the warning and its expiry occurred out of time. The issue about whether it should be removed altogether is treated by the tribunal as part of the handling of the grievance procedure, which is discussed later, as the claim for this is in time.

131. As for the job description, paragraph 30, Ms Norman made the position very clear in November 2016. That (her "passive aggressive" tone) is the act of harassment alleged, and it is out of time. It cannot be said that any harassment or discrimination continued because the respondent would not accept the claimant's understanding of what the job description meant. The matter was dropped. The statutory provision on time limits allows for omissions, that:

> "failure to do something is to be treated as occurring when the person in question decided on it"

and

> "in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—(a)when P does an act inconsistent with doing it, or (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

By March 2018 it had long been clear that nothing further was happening about the job description. There was nothing to amount to a course of conduct.

132. The dispute about the appraisal in May 2017, 64b and 64c, is also out of time. The claimant knew that his manager had refused to agree his version of the comments on his appraisal. If there is any suggestion that the respondent failed to take any further action (such as getting someone else to review it) a section 123(4) about failures to act occurring when a person does act inconsistent with doing it, or if not, on the expiry of the period in which that person might reasonably have been expected to do it, is again relevant. A time within which the respondent might reasonably have been expected to get someone else to review the May 2017 appraisal must long since have expired by March 2018.

133. The same goes for instructions to the claimant not to stand up to talk at

work – 35 and 39. The position had been made very clear in November 2016, and again in January 2017.

134. If we are wrong about that, and the standing up instruction or any remaining lack of clarity did continue after March 2018, and so was in time, we have in any case found that standing up when talking to colleagues at work was not something arising from disability, but a personal habit. The tribunal does not accept, in view of our findings about disability and about something arising from disability, that the need to stand up results from hearing loss, nor does it accept that the claimant was because of dyslexia or other neurodiversity in any way confused about the instruction.

The Claims of Race and Sex Harassment and Discrimination – Relevant Law and Discussion

135. An action that is complained of must, as defined in the Equality Act 2010, be either direct discrimination or harassment, but it cannot be both. As is common, complaints about a number of actions are pleaded in the alternative, and we take these episode by episode.

136. Direct discrimination is defined in section 13 as where "A treats B less favourably than A treats or would treat others". By section 23, when making comparisons, there must be there must be "no material difference between the circumstances relating to each case".

137. Harassment is defined in section 26(1) as where

"(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

138. Discrimination can be hard to prove, as the discriminator may not recognise, let alone admit, that he is discriminating, and the Act provides in section 136 that if there are facts from which the court could decide, in the absence of any other explanation that (A) contravened the provision concerned, the court must hold that the contravention occurred (unless) A shows that A did not contravene the provision. This consolidates earlier decisions in **Igen v Wong** and **Barton v Investec**: it is for the claimant to prove facts from which the tribunal could conclude that discrimination occurred; if so, it is then for the respondent to establish a non-discriminatory explanation. Difference in status and difference in treatment do not by themselves give rise to an inference of discrimination – there must be something more – **Madarassy v Nomura International**

plc, (2007) IRLR 246. In **Pnaiser v NHS England and anor UKEAT/0137/15**, discrimination need not be the only inference from the facts before requiring an explanation. A tribunal need not take the stages in that order, but may focus on explanation. It must address the "reason why" the employer acted as did, rather than "but for" causation. There must be no discrimination whatsoever in the reason.

139. When deciding an employer's reason for acting – or not acting - the Tribunal is required to make a careful evaluation of the reasons. This is in essence a finding of fact, and inferences to be drawn from facts, because a reason is "a set of facts and beliefs known to the respondent" - **Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**, and **Kuzel v Roche Products Ltd (2008) IRLR 530, CA.** The real reason may not be the label attached to it by the employer, nor the reason advanced by ether party. It is for the Tribunal to make a finding – **Blackbay Ventures Ltd v Gahir (2014) ICR 747.**

140. The tribunal must be careful to avoid "but for" causation: see for example the discussion in **Chief Constable of Manchester v Bailey (2017) EWCA Civ 425**. However, it is not necessary to show that the employer acted through conscious motivation – just that, in a victimisation claim, a protected act (and in a sex discrimination claim, the difference in sex) was the reason for the dismissal – **Nagarajan v London Regional Transport (1999) ITLR 574.**

141. Like all Equality Act decisions, the tribunal must have regard to the special burden of proof, already set out, when deciding what the respondent's reasons for their actions were.

Race and Sex Harassment and Discrimination – Discussion and Conclusions

142. The first episode of discrimination or harassment identified in the list of issues is at 60,61 and 63, which deal with the second disciplinary charge, found not proved by Mr Watts in June 2017. Although we have found this claim out of time, we consider the merits in case we are wrong on the time point. Much is about disability. The sex discrimination claim concerns Aaron Grell's statement to the effect that the claimant was a "geezer". It is brought on the basis that the term "geezer" applies to men, not women, and is discriminatory because of sex, alternatively, harassment. As we understood from the evidence, and in the understanding of the lay members, the term "geezer", when used among Londoners is not disparaging, and is more likely to be one of approval – "one of us". Their understanding too was that the term is applied to men, not women. While it is sex specific, we could not find that calling the claimant a geezer (and not to his face, but in a witness statement that was not unsympathetic to him) violated his dignity, or was hostile, intimidating and so on, so it is not harassment. It did not have that purpose, and it could not reasonably have that effect. Nor that it was less favourable treatment than a woman would have received (if there was a comparable term), so discrimination. It is hard to see how it is unfavourable to be so described.

143. The second episode of discrimination or harassment, because of or

related to race and sex, paragraph 82, concerns Nadia Patel's statement to those investigating the grievance in 2018 that the claimant's conduct towards her in February 2015 was intimidatory. We have found, as a matter of fact, that his behaviour on this occasion was frightening, and would have been frightening if he had been white, or a woman, or both. When she said she was intimidated by it, that was not because of a stereotypical assumption about the behavior of men or black people. It was not harassment or less favourable treatment.

144. The next allegation about sex or race is 90-91, about Aaron Grell and his witness statement to Lesley Longmore in the grievance process. We understand this is the "geezer" remark again, and our finding is the same.

145. The last allegation of race and sex discrimination or harassment is 92, about the respondent not initiating the bullying and harassment policy when the clamant said he would not return to work after 10 December 2018 until the environment was safe and suitable. The tribunal does not understand how this is discrimination. The claimant believed he had been unfairly disciplined, when various managers and HR staff had made mistakes, or omitted to deal with his grievance. But the respondent did not deal with the claimant under the bullying and harassment policy any more than it did the white female managers. It is also hard to see how not disciplining the managers is an act of harassment of the claimant. At best this could be an allegation that he was unfairly disciplined in 2016 and 2017 on grounds of race or sex, while they were not being disciplined now. Leaving aside whether the circumstances were truly comparable, both occasions are out of time. Neither is stated to be sex or race discrimination, only disability discrimination. We did not understand how the claimant's sense that he could not be in the workplace unless the grievance was resolved in his favour amounted to harassment or discrimination, nor did we understand what else he holds the respondent should have done to make the workplace "suitable".

Grievance Handling and its Aftermath – Relevant Law

146. The remaining allegations that are in time (paragraphs 62, 64, 68, 69,70,73, 76-93, 95-130) concern the respondent's handling of the grievance lodged in July 2017, and then getting him back to work afterwards. These allegations are variously of direct disability discrimination, discrimination because of something arising from disability, failure to make reasonable adjustments for disability, harassment related to disability, and victimisation.

147. In our finding it is right to treat complaints about the handling of the grievance as conduct extending over a period starting in July 2017 which ended when the outcome was delivered on 18 January 2019. The responses he received from time to time when he asked about progress indicated to him that something might be happening, so it is not a case of concluding that the respondent had decided not to do anything. Only then did time start to run for complaints about the respondent's handling of the grievance.

148. As to the relevant law, direct discrimination and harassment are as set

out above, but here the protected characteristic is not race or sex but disability.

Section 15 – "something arising" claims

149. Section 15 of the Equality Act provides there is discrimination where:

> "(1) (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".

150. Where the claim is of something arising, that something is stated in the list of issues (with some variations in wording) as "autistic/ND reactions; perception as a difficult character; communication issues (including speech; non-verbal)". The Tribunal's finding is that any perception of the claimant as a difficult character was because of the meltdown behavior already described, and that this behavior was not related to changes in process, or dyslexia, or something arising from dyslexia, hearing loss or Aspergers. The respondent from time to time noted that the claimant said he behaved in this way because of process change, and sometimes made allowance for it, but in our finding, the immediate trigger for meltdown behavior in each case we had to examine was not unrecorded process change, and any claim based on this is dismissed.

Adjustment for Disability

151. Section 20 provides a duty to make adjustment for disability:

> "(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".

152. By section 121:

> (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.

Victimisation

153. By section 27 of the Equality Act :

(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

154. Contacting ACAS for early conciliation and bringing tribunal proceedings are clearly protected acts. So is making a complaint that refers to the Equality Act or to a failure to made reasonable adjustment for disability. The tribunal does not understand that the respondent substantially disputes that the acts alleged are protected. The issue in this case is whether the claimant was treated unfavourably as alleged, and if he was, whether the reason for that treatment was any of the protected acts – because he was proposing to start tribunal proceedings, or was complaining of failure to make reasonable adjustments.

The Grievance Handling – Discussion and Conclusion

155. In our finding, the very long delays in handling the claimant's grievance, from July 2017 to January 2019, were unusual and unsatisfactory. Action being taken to assist the claimant at the time it was made – the reasonable adjustments were at last implemented in July 2017, in September he got a new line manager whom he find sympathetic, and in November there was disability awareness training - but the grievance itself was ignored. When the claimant asked about it in December 2017, he was told there were HR staff shortages. Advice was sought and a reply was drafted, but it was not sent. The claimant chased again in February 2018. Lauren Campling met him, but only took action on one of the concerns she had noted down, and then to say the January 2017 warning had now expired so it was not relevant, overlooking that as a result of this warning he had in July 2017 been in fear of dismissal. Further, she only did so on 3 April 2018, on the

eve of the claimant being informed of a disciplinary investigation on the complaint of racist speech. She was told in terms by the claimant that he wanted the formal, not informal, procedure to be followed, but nothing happened until he complained that they were slow to handle his grievance but quick to investigate a complaint about him. At that point the HR department commissioned an external investigation. This proceeded reasonably quickly, but was held up when HR did not supply documents he asked to see, so the first report was only a draft. Even when there was a final report, it took another month to send the claimant a response. Then there were the wrangles about whether he was entitled to a stage 1 hearing. The tribunal concludes that this was an HR department unable or unwilling to deal with the grievance, and by August 2018 very much wanting to shut it down and move on.

156. As a standard of what should be done, The ACAS Code on Discipline on Grievance, provides of all discipline and grievance:

> Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

Dealing specifically with grievance,

> 33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

There is reference to dealing with grievances informally if possible, but in this case the respondent took 5 months even to ask him if it could be handled informally, and by then the answer was predictable. Most employees would have lost confidence by this time.

157. Delay of this length (18 month) is a detriment. Inevitably it will have caused the claimant anxiety, and stoked resentment that his complaints about treatment he saw an unfair were disdained. From the organisation's point of view, it made a satisfactory outcome much harder to achieve.

158. The tribunal considered therefore what the reasons were for this very long delay, and whether we should conclude, as alleged, that the reason was disability, or something arising from disability, or harassment, or a failure to make adjustment for disability, or victimisation.

159. In examining the reasons for delay, the tribunal is at a disadvantage, in that none of the respondent's staff involved in grievance handling before Ms Couppleditch joined in June 2018, has given evidence, and the internal documents on grievance handling are very sparse. There is the opinion of Mr Cheer as to the reasons in his report. This means we have to rely more on inference.

160. The only explanation provided by the respondent was in Ms Longstone's January 2019 letter, which gave turnover in the HR department, and the complex nature of the grievance, as the reasons for why it had taken much longer to handle his grievance compared to the complaint of racist speech made about him. Mr Cheer suggested in evidence that the reason for delay

was that it had just got put into HR's "too difficult" box. He also noted he had been told by Mandy Roberts of HR that when she joined she had been concerned there was not a good relationship between the claimant and his managers, and that they may have targeted him by picking up on small issues, leading eventually to the change of line management.

161. We had no real evidence about changes in the HR department. We can see from emails that Ms Campling was there in July 2017 as she was in April 2018, and so was Mandy Roberts. We do not know why a reply was drafted and not sent. It does look as if responding to the grievance did go into the "too difficult" box, and we have to ask why.

162. It is true that investigating one episode (as with the claimant in July 2017, or April 2018) is more straightforward than a grievance about several matters, but as originally presented, there were only four, and two (the appraisal and the job description), would not have been complex and could have been dealt with by giving the claimant an answer one way or another, as Mr Cheer recommended, rather than leaving it hanging. One reason for not tackling the grievance is that it concerned confrontation with Nadia Patel and Michelle Norman. The difficult relations between the claimant and these two sprung, in our finding, from the claimant's meltdown behavior. Ms Patel could not handle it, and Ms Norman considered he was insubordinate and out of order. This was not something arising from disability. Nor we do consider they had poor relations with him because of any disability. Ms Patel had made some effort to achieve reasonable adjustments, even if it was not always effective. Importantly, neither individual was responsible for grievance handling. It is *possible* that some members of HR were in sympathy with them, or hoped the grievance would fall away when he had a new line manager, but in the absence of evidence that is speculation. In any event, it only explains the first two months of delay.

163. A theme running though the claimant's list of issues is that he was harassed and victimised by the respondent not employing the bullying and harassment policy to discipline Ms Patel and Ms Norman. We do not see how this is detriment. His grievance could have been investigated at íreasonable speed without this result, and he could have been told (for example) that the January 2017 discipline was a nullity in the summer of 2017 without it following that Ms Norman, who was new to management, be punished, rather than better trained. It is a complaint that the grievance outcome he wanted was to see the managers brought to book as bullies, but as we see it, he could expect a proper response to his complaints, but he could not require particular outcomes against particular managers.

164. We do not see delay in grievance handling as harassment. There was no evidence that the claimant experienced hostility, intimidation and so on, during or because of the prolonged delay dealing with the grievance, except when told he was to be disciplined in April 2018, and in the circumstances, where there was a complaint about racist behavior to investigate, it was not reasonable for it to have this effect. Ms Couppleditch was firm with him in September 2018 about there being no stage 1 hearing, but we did not see how that related to disability, whether as found, or as asserted by the claimant, he was not harassed by her. The reason for her

insistence probably lies in wanting to see an end to the process, especially after the claimant replied that he wanted other managers disciplined for bullying.

165. We turn to whether the delay handling the grievance was victimisation, the protected act being that he had in his complaint asserted breaches of the Equality Act. As we have discounted complexity and staff turnover, and made some allowance for initial delay while line management was changed, to what extent should we infer that the assertion of breach of the Act in relation to (1) reasonable adjustments, and (2) disability as a reason why he had acted as he did when disciplined, and (3) the annual appraisal, which related back to the same period as the events leading to discipline, materially influenced HR's marked reluctance to deal with the outstanding grievance? We considered what might have happened if he had complained of unfair discipline, and unfair appraisal, without reference to disability, or to breaches of the Equality Act in relation to disability. It seemed to us that HR would have found this much more straightforward. They might have checked the policy and understood that Ms Norman was out of order. They might have taken a definite line one way or the other about comment on the annual appraisal, and the same with the job description, rather than just leaving it. What handicapped his managers, and then HR, from dealing with these issues was the assertion that they were failing to take disability into account. They did not or could not get to grips with the assertion of Aspergers (or even whether he did have Aspergers, though they seem at times to have acted as if what he told them was the case) as a reason for his conduct at work, or for raging when asked to do a task. The claimant does not have to establish that his complaint was well founded (if the protected act is accepted, as it is), only that complaining about a breach was the reason for unfavourable treatment. We concluded it was that which made the grievance too difficult, so that collectively the HR department left it alone in the hope that it would go away, and HR policy from August 2018 was to draw a line under it, without holding a meeting. It may not have been their motive for inaction (by its nature, inaction does not always have a motive), but in our finding it was the reason.

166. There was a post-grievance episode with Ms Couppleditch involving the recording pen. The pen had been supplied as an adjustment for disabilty, but her insistence that a recording was deleted was because part had been made without consent, which is not to do with disability. It is a pity that she did not appreciate that not all the recording on the pen needed to be deleted, and that this was behind some of the claimant's agitation. We add that the claimant was by this point under great strain: having regard to section 26(4), to a significant extent his reaction was not, in the circumstances, reasonable. This episode was not harassment related to disability, and neither was the fact that a colleague had to let him in that day, or that the respondent wanted to get an occupational health assessment when he did not return to work, or cancelled it when he threatened legal action against the OH adviser.

167. The claimant includes the grievance outcome itself as an act of harassment and victimisation, the issue being the lack of investigation of the managers concerned for bullying. (List of issues 101 -104). Our conclusion is that the answer to his grievance was enough. The respondent

essentially conceded his points in three of the four original complaints (paragraph 105, (1) to (3), and were even generous in allowing disability as a contributing factor, and the conclusion at (5) on the job description was accurate in our finding. We do not find that investigation was delayed to avoid disciplining mangers (three of the four had left by August 2018). As already stated, an employee with a grievance is entitled to have a grievance answered, but cannot require that other staff are investigated and disciplined, and not to do so is not harassment. There are no examples of staff being investigated after a grievance by a white person that might indicate discrimination.

168. A number of allegations are made about episodes after the grievance outcome was sent out. Teresa Couppleditch is said to have deliberately left documents out of the bundle, and made false statements (105-108. She was not however part of the panel making the decision. The omission of documents from the outcome letter we have noted, and accept the explanation and that it caused no detriment. Of the pen, (111-114, 125-6), the respondent's reason for its actions was that the claimant had, deliberately or carelessly, recorded a private session and they rightly wanted to keep it private. Disability was not the reason, nor was this harassment.

169. Nor was it discrimination or harassment to ask the claimant to undergo occupational health assessment after he had been at home a long time without a fit note. The claimant relies on the first provider's judgment that the cause of the failure to return was the unresolved grievance (paragraph 109) but the respondent in deciding to go ahead with another advisor and rely on their own set of instructions to the advisor was not in our finding harassment, or discrimination or an act of victimisation but the normal conduct of an employer who wants to know if an employee who has not been attending work is fit for work or requires adjustment of disability when he returns to work.

170. When he did return to work,(122) his pass was not activated because the respondent did not know if he was coming in or not, as the preceding correspondence makes clear. The mouse could have been missing for a number of reasons; there is too little evidence on where it was or why. It is hard to understand that it had been removed as an act of harassment in case the claimant returned to work. That is not reasonable in the circumstances of the case. It is more likely to have been put in a drawer or borrowed by a colleague; if it was missing it would not have been complicated to give him someone else's or even go out and buy one. They are cheap and interchangeable items. Things never got that far because the claimant left.

171. The allegations about not using internal policy to examine discrimination (129-130) are dated 8-25 February and are about the respondent requiring this to be an appeal not a fresh complaint. Although not in the original July 2017 grievance, it did arise from the claimant's letter of April 2018, and his reply to the initial findings n August 2018, and was properly a matter to be addressed in an appeal against the outcome, rather than starting a new process.

Remedy

172. Remedy for victimisation must be assessed at a further hearing, which should also consider whether any award should be increased under section 207A of TULR(C)A for breach of the ACAS Code. The tribunal regrets that delays in preparing the reserved judgment and reasons mean that the contingent hearing arranged for 11 June has been lost. A new date will be set shortly.

173. The tribunal also regrets that the delay must have caused some inconvenience and anxiety to both parties. The essential decisions of the judgment, the reasons, and findings of fact, were established in panel discussion in February, so delay will not have weakened our grasp of the case, and it is hoped that is some reassurance that it is properly based on the evidence and argument heard. The reason for delay is that when the writing up was only part completed, the employment judge had then to hear another long case, followed at the beginning of March by 10 days leave, followed by the closure of the building and a prolonged and acute shortage of administrative staff due to Covid-19 lockdown, leading to much time being spent setting up and running alternative administration, and online hearings. Finding enough time to read back into and engage with completion of the writing out of such a complex claim has been difficult.

EMPLOYMENT JUDGE - Goodman

Date_08/07/2020__

JUDGMENT SENT TO THE PARTIES ON

10/07/2020....

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FOR THE TRIBUNAL OFFICE

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