



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110824/2019 (V)

Held by CVP on 14, 15, 18 and 21 January 2021

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**Employment Judge I McFatridge
Tribunal Member J McCullagh
Tribunal Member A Shanahan**

15 **Mr Jamie McAuley**

**Claimant
Represented by:
Mr Milne,
Solicitor**

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Lloyds Bank Plc

**Respondent
Represented by:
Mr McGuire, Advocate
Instructed by:
Mr M Love, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The unanimous judgment of the Tribunal is that the claimant was not unlawfully discriminated against by the respondent. The claim is dismissed.

REASONS

35 1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unlawfully discriminated against by the respondent. The respondent submitted a response in which they denied the claim. The claim was subject to a degree of case management. The respondent accepted that the claimant was a disabled person in terms of section 6 of E.T. Z4 (WR)

the Equality Act. The claimant produced further and better particulars of claim and thereafter a Scott Schedule was produced setting out the various matters which were said to constitute discriminatory acts. It was the respondent's position that certain of these acts were time barred but following a preliminary hearing held on 19 August 2020 it was ruled that the Tribunal did have jurisdiction to hear the allegations set out in section 3-15 of the Scott Schedule. Two of the allegations were found to be time barred. The remaining claims proceeded to a final hearing which took place over CVP in January 2021. The case was originally set down for three days. By 4pm on the final day all of the witness evidence had been heard but there was insufficient time for the parties to make submissions. Arrangements were made for the case to be listed for a further day so that submissions could be made and this took place on 21 January. During the hearing the claimant gave evidence on his own behalf and evidence was also led from his father Kevin McAuley. Evidence was led on behalf of the respondent from Mandy Arnott, Bank Manager with the respondent who had been the claimant's line manager and who took the decision to dismiss the claimant and Elaine Kinghorn a Senior Bank Manager with the respondent who dealt with the claimant's unsuccessful appeal against dismissal. The parties lodged a joint bundle of productions which I shall refer to in the judgment below by page number. On the basis of the evidence and the productions the Tribunal found the following facts relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent are Lloyds Bank Plc, a company which operates a number of banks throughout the UK including Bank of Scotland. The claimant commenced employment with the respondent on 8 May 2018 at which date he was 17 years of age. He was employed as a Customer Service Adviser. His role involved interacting with customers including working on cash desks and enquiries desks and filling machines with cash. The claimant initially worked at the respondent's Kirkcaldy Mitchelson Bank of Scotland branch but after a time he was sent to the respondent's Glenrothes Bank of Scotland branch. Initially, he was sent there for a

period of a few weeks but ended up staying longer. He was then returned to Kirkcaldy for a short time before going back to Glenrothes branch.

3. The claimant was diagnosed as suffering from anxiety in or about 2016 although he believes that his difficulties pre-dated this diagnosis.
- 5 4. The claimant's absence record was lodged (pages 196-199) showing his absences from work since he started work in May 2018. The claimant's first absence was on 22 May when he was absent for part of a day with sickness. This was shown as gastro-intestinal. He was then off for two days in August 2018 with influenza. He was then off for a further day on 10 1 October 2018 which is marked as gastro-intestinal. He was then off for three days on 15, 16 and 17 October which is marked as being due to anxiety. He was then off on 25 and 26 October, the reason given being "respiratory". He was then off again on 31 October 2018 for one day and the reason given for this is upper limb related. With regard to this last 15 absence the claimant had become involved in an angry exchange with his father's partner and following this had punched a wall and injured his hand.
5. In November 2018 the claimant had further absences as noted below which then led to a lengthy period of absence due to anxiety which lasted until he returned to work on or about 18 March 2019.
- 20 6. The respondent have a policy entitled Health, Attendance and Sick Pay Policy and a copy of this was lodged (pages 65-66). There is also a guide to this policy entitled Health, Attendance and Sick Pay Colleague Guide which was also lodged (pages 67-79). One aspect of this policy was that a return to work meeting was usually held after an employee returned to 25 work from sickness absence. Records of the various return to work meetings which the claimant attended were lodged (pages 80-81, 82-83, 84-85). The claimant would meet with his line manager and the reasons for his absence were discussed.
7. On 2 November 2018, before the claimant commenced his long term 30 absence, the claimant was required to attend a wellbeing review meeting with his then line manager Laura Murphy. The meeting was held in terms of the policy. It was part of the informal stage of the policy. A note of this meeting was lodged (page 86-89). It is noted that the two main

5 contributors to the claimant's absence were anxiety and stomach problems. At that time the claimant understood these to be separate issues although he subsequently changed his mind about this following further discussion with his medical advisers. During the course of the meeting he was advised that his attendance was below expectations. It was noted that he had been referred to a psychologist and was waiting on appointments. It was suggested that the claimant revisit this as it had been over four weeks since the referral and he had no contact. It was also suggested that he revisit the stomach issues with his GP to see if any further tests could be done in order to provide a definitive cause.

8. The note goes on to state

15 "Jamie is at work and has confirmed he understands the absence policy and possible next steps if his attendance continues to be below expectations. As yet there is no evidence of an improvement in his attendance and this has been fully discussed and captured on RTW documentation."

20 It was also noted that there were further steps to be taken. These were (1) Jamie to contact EAP and arrange support and update line manager, (2) Jamie to read the absence policy to ensure he fully understands it and accept responsibility for health and welfare being to help with attendance, (3) recommended that Jamie contacts GP to chase referral and see if further tests could be an option – update line manager, (4) weekly check-in with line manager to review all aspects of role but cover .. on going, (5) Jamie to maintain a routine as this assists him prevent stomach issues.

25 9. The EAP support referred to in the second point in the plan is an Employee Assistance Programme which is run by a company called Activium who are contracted by the respondent to provide counselling and other medical assistance to members of staff. Members of staff including the claimant also had access to private medical treatment under BUPA. This could include referral to a psychiatrist or psychologist on a private basis.

30 10. The claimant contacted Activium on one occasion however he declined their offer of further assistance. This was on the basis that he was already

by this time on a waiting list for an appointment with a psychologist through the NHS.

11. The claimant was absent from work on 13 and 14 November. This was again due to anxiety. The claimant attended a meeting with Occupational Health on 15 November. This was organised fairly quickly. The report was lodged (pages 90-92). The adviser stated that in his clinical opinion the claimant was fit to continue in his current role with additional/continued adjustments/support from the employer. Under relevant history it is stated

“As detailed in your referral Mr McAuley is currently in work I understand there has been numerous episodes of sickness absence due to stomach related symptoms and anxiety symptoms. There is a history of significant depression and anxiety in the past. Mr McAuley reports that his mood is currently low and that he is experiencing very significant anxiety symptoms on a regular basis. He is under the regular care of his GP and indeed he is going to consult his GP again on Monday. His GP has recently referred him to see a psychologist. There is no prescribed medication in place as Mr McAuley reports being unable to take medication due to stomach related symptoms. Mr McAuley contacted Validium recently although this service report had been unable to provide appropriate therapy for Mr McAuley’s needs. Mr McAuley has a history of stomach related symptoms to include nausea, vomiting and severe stomach pains. His GP has undertaken inhouse investigations to include blood tests although has not referred him for further investigations or Consultant specialist assessment. Mr McAuley reports of troublesome family environment at home leading to him punching a wall recently at home. He reports experiencing nerve pain subsequent to this incident which is now resolved. Mr McAuley reports some performance issues at work in relation to unpleasant or difficult customers being anxiety provoking potentially affecting his interactions with customers.”

The report goes on to state that the occupational health adviser believes that disability legislation (Equality Act 2010) might apply. Under recommendations to manager it is noted

5 “You are advised to peruse your local stress management policy with
a view to undertaking a stress risk assessment. It is possible going
forward that Mr McAuley’s sickness absence/performance levels may
be affected for at least three to four months due to any ongoing
symptoms. The precise amount of adjustment to
attendance/performance expectation that the business may decide to
accommodate in respect of this is a business decision in terms of
sustainability. It would be advisable to hold regular one-to-one
meetings with Mr McAuley going forward for the foreseeable future to
10 assess how he is progressing in order to provide a platform for
encouragement and support alongside addressing any
concerns/issues which may arise. Ongoing continued support from
Mr McAuley’s employer is likely to be very beneficial going forward in
respect of his health status. It is recommended that Mr McAuley does
15 need to attend all his health/medical condition related appointments
going forward and if these cannot be arranged outside of working
hours the business should consider allowing time off work for Mr
McAuley to attend these medical appointments. At least three regular
restbreaks throughout the working day are recommended going
20 forward. It would be beneficial for the business to allow Mr McAuley
to take additional rest breaks throughout the working day where
necessary in respect of his health issues/symptoms. You are advised
to contact Human Resources to request advice and guidance in
respect of making reasonable adjustments in respect of the Equality
25 Act 2010 and to discuss the information, advice and guidance within
this report.”

Under Recommendations to colleague is recorded

30 “Liaised him with GP again on Monday to discuss all health and related
issues and symptoms and continuation of this liaison on a regular
basis. To ask the GP refer him to see a gastro-enterologist and for an
endoscopy. To chase the outstanding psychology referral to ascertain
waiting list time in hope to expedite this appointment. Perusal of the
undernoted resources ...”

12. The report then goes on to state

“It is noted that there is no value in requesting a GP/medical report at this time. Further to this report no further occupational health assessment/telephone consultation is indicated for Mr McAuley going forward. Please do refer back to health management if issues are troublesome going forward or if recommendations made throughout this report cannot be accommodated by the business. I do hope you find this information of assistance; please contact your administration to contact health management should you have any further queries.”

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13. The following day the claimant commenced a further period of absence which in the event continued to the following March.

14. The claimant lodged various fit notes covering this absence which were lodged (pages 93-95).

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15. The claimant was then invited to a first formal meeting under the respondent's health attendance and sick pay policy. The letter of invite is dated 11 January and was lodged (pages 96-97). The meeting took place on 30 January 2019 and was attended by the claimant and Laura Murphy his line manager. Mellissa McGurk also attended to take notes. Ms McGurk's notes were lodged (pages 100-103). The Tribunal considered these to be an accurate although not verbatim account of what took place at the meeting. The background of the absences was noted. It was stated that the claimant was suffering from severe anxiety and was awaiting an appointment with a psychiatrist. It was noted that since starting in May 2018 he had had one absence in August, two in October and two in November. It was noted that there were concerns about him not keeping in contact during his absence. The claimant also confirmed that he had a copy of the Health and Attendance and Sick Pay Policy. The note goes on to state

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“Laura explained they will complete this first formal review meeting and set actions for a period of 12 weeks. Jamie was made aware that if these actions were not met Jamie would go straight to a final review meeting due to Jamie's length of employment with Lloyds Banking Group being less than 12 months. Laura highlighted this in the Health

and Attendance and Sick Pay Policy. Laura also advised a final review meeting can result in dismissal.”

16. The claimant is noted as confirming he understood the process. The note records that there was a discussion regarding the claimant’s barrier for coming back to work and the claimant advised that lack of sleep was his biggest issue and that he didn’t want to come back and make mistakes because he was tired. The claimant was reassured that he would not be placed back in role immediately. There was a discussion regarding reporting the claimant’s return to work with reduced hours and a phased return. With regard to the way forward there was a discussion about the claimant’s keeping in touch. The claimant indicated that he did not want to return to work before his psychiatrist appointment but wanted to return to role in March. The note records

“Laura asked Jamie if he had any further questions however he didn’t. Laura made Jamie aware he can still use EAP but he is happy using NHS solely for the moment. Due to the fact there has been a positive change in Jamie’s health agreed no further occupational therapist report required.”

The note also goes on to record

“Laura ensured that Jamie fully understood if no improvement at the end of 12 weeks this will result in final review meeting which could result in dismissal. .. Laura made Jamie aware of appeals process of her first formal review and if he wished to do it it must be done within 14 calendar days of receipt of outcome letter.

17. The process of the first formal meeting was as described in the respondent’s Health and Attendance and Sick Pay Policy at page 66. This notes that the formal process would normally include two formal reviews and a final meeting but that line managers could use a shorter formal review process in the first 12 months of employment if there is evidence of informal support activities having been in place.

18. The note of the formal meeting goes on to list agreed actions on page 103. These were

“Jamie to contact Laura after psychiatrist appointment.

Advise manager of any changes in health or situation which may impact ability to attend work or achieve the formal action plan.

5 Maintain regular contact by phone with Laura every second Tuesday at around 3.00pm.

Provide medical certificates in a timely manner.

Commence a phased return to work/rehabilitation plan.

Be able to undertake minimal requirements of role.

Attend interim discussions as set first being 27.2.19.

10 Achieve a successful return to work and that you can achieve

- sustained and stable improvement in health

- Sustained reliable attendance in work.”

19. The claimant attended a further review meeting on 6 March 2019. The claimant’s position was that by the tail end of January he had almost
15 recovered from his depression. After this, the issue he faced was simply his anxiety. He felt that he had learned how to cope with that. The claimant attended an appointment with a psychiatrist which had been arranged through his GP on the NHS. The psychiatrist advised him that his anxiety was not something medication would help and that it was
20 something that the claimant would have to live with. He was told that he needed to learn what helped him and develop coping mechanisms. He said that he required to get a routine and that his problems with sleep were largely because he was not tired enough. He required to get his sleep schedule back.

25 20. The meeting on 6 March was attended by the claimant and Laura Murphy. A note of the meeting was lodged (pages 105-109). It was agreed that the claimant would commence a phased return from 18 March onwards. He was to work reduced hours for a period of four weeks. It was noted that the claimant would return to the Leven branch.

30 21. The Leven branch was part of the pool of branches based in Glenrothes. The branches in this pool were Glenrothes, Leven and Falkland. The Falkland branch was a small branch which was only open two days a week. The Leven branch was open full time hours but was a much smaller branch than Glenrothes and much less busy. The respondent’s

management considered that the Leven branch would suit the claimant better since it would be quieter and less stressful. In addition to this the claimant had recently moved out of his family home into a house on his own. This was situated much closer to the Leven branch than to the Glenrothes branch. The respondent believed that this would also be of some assistance to the claimant. The claimant did not raise any objections whatsoever to the move to Leven and the respondent's management assumed that the claimant was happy with this move.

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22. The manager of the Leven branch was Mandy Arnott and it was agreed that Mandy Arnott would take over as the claimant's line manager from Laura Murphy who had previously been his line manager. Although the claimant was not aware of this at the time Ms Murphy had indicated to the respondent that she felt that it would be inappropriate for her to continue as the claimant's manager. She advised Ms Arnott and the respondent's HR department that she felt that the claimant looked on her as a mother figure and that as a result it would prove difficult for her to take management decisions without causing personal upset. She said that she had become uncomfortable in his presence.

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23. The claimant returned to work at the Leven branch on a phased return on 18 March 2019. The phased return called for the claimant working 20 hours in the first week, 25 in the second week, 30 in the third week and 35 in the fourth week before working full 37 hours after that. The claimant spent time during his phased return shadowing colleagues in order to build up his confidence to go back to his Customer Service Adviser role. He also completed a stress test during this period. This was lodged (page 119). The form sets out various potential stressors along with a grid in which the user can mark the stressors as being of high concern, medium concern, low concern or no concern. The claimant did not mark any stressors as being of high or medium concern. He marked nine potential stressors as being of low concern and seven as being of no concern. At the end of the claimant's period of phased return the claimant attended a formal interim meeting with his line manager Mandy Arnott. A note of this was lodged (pages 114-118). I considered the note to be an accurate record of what was discussed at this hearing. It was noted that the

claimant was reported feeling much better. The outcome of the meeting was that the claimant's plan was extended until the end of September. This is noted in the document at page 115 which states

5 "We are reviewing Jamie's health and wellbeing on a monthly basis –
I have spoken to Jamie and made him aware that I am extending the
period of this plan until the end of September so that we can see a
consistent and sustained attendance at work –
As these absences occurred during Jamie's initial period of service the
formal Health and Attendance Policy consists of only two formal
10 stages, first formal to final review. Failure to achieve the first formal
review action plan may lead to termination of employment."

This paragraph was written in bold. The note then goes on to state

15 "As this is an extension to the first formal plan if during the next five
months it becomes evident that he will be unable to demonstrate an
improved health and reliable attendance at work we have the right to
bring forward the end of the action plan and invite to a final review
meeting."

The action plan is set out on pages 115-116. The agreed actions included
the claimant consulting his GP about his stomach aches, consulting with
20 his psychiatrist around an appointment to the mental health clinic, taking
position action to improve his health and wellbeing, reviewing his lifestyle
and consider what if any impact it might have on health and wellbeing and
consider the support available from the EAP from the bank workers charity
and from BUPA under his private medical cover. The claimant was to
25 "rend a reliable service by achieving a significant improvement in
attendance level to close to full attendance within the bank's
expectations."

24. The reason the plan was extended was because the plan had initially been
put place in January to last 12 weeks. The claimant had been absent from
30 January until his return in March and Mandy Arnott believed that the
claimant should be given the opportunity to show that he could now attend
work on a regular basis. He agreed the actions were there to show the

claimant the support available and specific actions were given to the claimant to assist him in demonstrating that he could attend work regularly.

5 25. The claimant's phased return ended on 17 April. The claimant then commenced a further period of absence on 13 May which lasted three days. The reason for the claimant's absence was that he had been out in the sun over the weekend 11-12 May. When he woke up on Monday morning he felt ill and believed he had sunstroke as he had suffered from sunstroke once before. The claimant stayed off until 16 May. On 15 May he attended an appointment with his GP in the morning. His doctor confirmed that he probably had had sunstroke and prescribed Ibuprofen. 10 The claimant's GP did not sign him off work. The claimant decided not to go into work after his doctor's appointment on 15 May as he wanted to make sure that the Ibuprofen tablets did not disagree with him. He had a history of failing to keep down new medications which were prescribed to him. 15

26. The claimant went back to work on Thursday 16 May.

27. Ms Arnott was aware that since the claimant had had another absence so soon after the end of his phased return and within the period of his action plan then the next stage in the process would be to invite him to a further formal meeting which could lead to his dismissal. She was concerned that 20 despite the fact that the claimant had clearly been told the position at the interim meeting held less than a month previously the claimant seemed rather nonchalant about his most recent absence. She was concerned that when the claimant had told her that he had sunstroke he had almost made a joke of it. He had said that he ought to have known better and worn a hat because he had had sunstroke before. 25

28. Ms Arnott contacted the respondent's HR advisers to discuss the claimant's case. The respondent's HR department keeps a record of all interactions between them and management relating to the case. The claimant's notes were lodged (page 150-165). A note of Ms Arnott's discussion is set out at page 160. Ms Arnott was already concerned that 30 the claimant did not appear to have the values and professionalism required to work at the bank. She was concerned and disappointed that

he had gone absent so soon after his return to work. The HR adviser advised Ms Arnott that before inviting the claimant to a formal meeting, it would be appropriate for her to meet with the claimant informally in order to make it crystal clear to the claimant just how serious the position was regarding his attendance so as to allow him to prepare appropriately for the formal meeting.

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29. During the course of the morning Ms Arnott invited the claimant to attend a private meeting upstairs with her and Stacey Cummings. Stacey Cummings was the Senior Manager of the Glenrothes pool standing above Ms Arnott in the hierarchy.

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30. Ms Cummings made a note of the meeting which was lodged (page 121). The Tribunal considered this to be an accurate although not verbatim account of what took place at the meeting. The claimant appeared very confident at the meeting. He already knew Ms Cummings having worked alongside her in Glenrothes. It was informal and took the form of more of a conversation than a meeting. As noted above Ms Arnott felt that the claimant was not understanding the impact of his absence and she was not convinced that the claimant was taking the absence policy seriously. At the beginning of the meeting the claimant was asked if he wanted to be accompanied by a colleague or a trade union representative. The claimant was a member of the trade union having joined at the same time as he started with the bank. It would have been possible for him to arrange for a trade union representative to be present. There was one available in the bank that day. The claimant asked if he could be accompanied by Ms Murphy who had previously been his line manager. Both Ms Arnott and Mr Cummings were aware that Ms Murphy had made a call to HR to indicate that she was very uncomfortable working with the claimant and felt that the claimant had begun to identify her as a mother figure rather than a manager. Both were aware that the claimant was probably unaware of this but in any event they considered that she would not be willing to accompany the claimant in those circumstances nor would it be appropriate given that she was another manager. They advised the claimant that it would not be possible for him to have Ms Murphy

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accompanying him. The claimant then agreed to proceed without having anyone else.

31. Ms Cummings specifically offered the services of the union representative who was in the branch that day Ms Dickson. The claimant declined this.
5 The claimant was asked about his motivation for applying for the job in the bank. Ms Arnott felt this was an opportunity for the claimant to say something like he had always wanted to work for the bank or he wished to make a career in banking but instead the claimant was fairly non-committal basically saying that he needed a job. The claimant was asked if he had
10 any hobbies or interests and mentioned football. He indicated that he had at one stage hoped to make a career in football training. He also indicated that at one point he had considered joining the Armed Services.

32. The conversation then moved on to a discussion about the claimant's health and wellbeing plan including the action plan which had been agreed
15 a few weeks previously. At this point the claimant became slightly upset. The claimant made Ms Arnott aware that he had not shared the plan with other members of his family. He said he was wanting to deal with it himself. The claimant was offered a break to take some air. The claimant accepted this and went outside. During the break he telephone his father
20 who was at work. He advised his father what was happening. He said he felt upset and he felt that he might be sacked.

33. The claimant then returned to the meeting. He said that he had spoken to his father. He said that his father had offered to come down and support him at the meeting but the claimant had declined this. Ms Arnott and
25 Ms Cummings told the claimant that this was an informal meeting and that if he wanted his father to attend then they would allow this. They suggested that the claimant take an early lunch and that would give his father time to come down to attend the meeting. The claimant agreed to this. He called his father who set off from his place of work to Leven. The
30 meeting was then adjourned.

34. After about thirty minutes the meeting reconvened with the claimant's father present. The claimant's father discussed with Ms Arnott and Ms Cummings his own struggles with mental health over the years. He

also advised them of the claimant's own history of suffering from anxiety. There was a discussion of the support which the claimant had received from Lloyds Banking Group and from the various branch managers. Ms Cummings said that rather than simply issue the claimant with a letter inviting him to a final review meeting they wanted to discuss matters informally with the claimant so as to ensure that he fully understood the position. The claimant's father indicated that he felt they had done the right thing.

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35. The claimant indicated that he had been expecting to receive an invite to a final review meeting. The claimant was asked what he wanted to do for the rest of the day. He was offered the opportunity to go home without continuing working to the end of the day if that suited him better. The claimant agreed that this was what he would do and he duly left. The atmosphere at the meeting on 16 May was friendly and cordial. The conversation was led by Ms Cummings and the claimant. The meeting was relaxed.

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36. The claimant attended work as normal on 17 May and on 20 May. On 20 May the claimant was handed a letter of invitation to the final formal meeting. The letter was lodged (pages 122-123). The letter notes that the purpose of the meeting was to review the progress against the expectations set in the formal action plan, discuss any further medical reports and any resulting actions which could be taken to help improve his recovery, attendance or return to work and make a final decision regarding his ongoing employment with the bank. He was told in bold letter "please be aware that this could result in your employment being terminated." The claimant was offered the right to be accompanied by a trade union official or colleague.

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37. The claimant worked as normal the week 20-25 May. At some point during that week he had a conversation with Ms Arnott about representation. She confirmed to him that his father would not be permitted to attend the formal meeting as his representative. It required to be either a trade union representative or a work colleague.

38. The claimant attended the formal meeting on 29 May 2019. He was not accompanied. The meeting was conducted by Ms Arnott and Marie Walton took notes. Ms Walton's note of the meeting was lodged (page 124-135). The Tribunal considered this to be an accurate although not verbatim record of what took place at the meeting. At the commencement of the meeting Ms Arnott asked the claimant to turn off his telephone which the claimant did. She did not take the claimant's telephone away from him. The claimant confirmed that he was happy to proceed without being accompanied. There was then a discussion of the claimant's absences which are recorded on page 125. It was noted that the claimant's wellbeing review had started in Kirkcaldy branch on 2 October and Ms Arnott went through the various meetings and supports which had been provided to the claimant since then. It was noted that the claimant had returned on a phased return to work on 18 March. It was also noted

15 "It was agreed that Jamie would not have to answer the phones due to his anxiety - and his break was to be broken up to allow time during the day. Agreed plan for his return to carry out stack training – observation of colleagues –
Stress test completed and reviewed by line manager - Jamie felt everything was going well and we agreed to repeat this stress test week commencing 27 May.
20 13 May – Jamie called in sick."

39. There was a discussion of the support provided to the claimant. The claimant's position was that he considered he had good support from the bank. He felt that there was no more the bank could do for him and that it was outside assistance which he needed. The claimant set out his view that the issues he had with his stomach which had been labelled in earlier absences as "gastro-intestinal" were in fact linked to his anxiety. He said that his GP and psychiatrist had advised him of this. He said that the only totally independent absences he had had were the absence when he had been suffering from cold/flu and the absence which he had had from sunstroke. It was his view that his other absences including the absence having injured his hand after hitting a wall were all related to his anxiety. The claimant went on to say that he felt that the change of branch was not

in his best interests. Ms Arnott was very surprised at this since she was aware that the bank had felt they were assisting the claimant by changing the branch. She sought to explore this with the claimant. The claimant's position was that he had first been told of the proposed move in a phone call from Laura Murphy. Then being discussed at the meeting he had with Laura Murphy in February. At that stage he was focusing on getting back to work and he had not indicated in any way that he was opposed to the transfer or that he felt the transfer was not in his best interests. The claimant did express the view that he understood the principal reason for his move was to suit the bank as one of the employees previously based at Leven had left to go to another branch.

40. Ms Arnott spoke to the claimant trying to get to the bottom of exactly what his problem was. She asked the claimant why he had not raised this earlier. He confirmed that he just wanted to be back at work. He then said that back in March his GP had wanted him to stay off work a bit longer but that he had returned on 17 March and had had to fight his GP to allow him to do this. The claimant had in fact discussed matters with his psychiatrist who had indicated that a return to work might be of assistance to him in helping him establish a routine. Once again, Ms Arnott questioned the claimant about this since this was the first time the claimant was raising it. She asked the claimant why they were having this conversation after 10 weeks. She pointed out the claimant was not shy and could be vocal when he wanted to be. The claimant said he was not comfortable however he then went on to say once again that he felt he had had plenty of support from the bank and plenty of time taken on him. The claimant then handed Ms Arnott a statement which he had prepared in advance of the hearing. The statement was lodged (page 136). The claimant was asked if he wanted to read it out but he said that he was happy if Ms Arnott simply read it herself. Ms Arnott read it.

30 41. There was then a discussion regarding the claimant's medication. He indicated that he was supposed to be getting referred for an endoscopy but he was still waiting on an appointment. He was asked if he had chased up the appointment but said he hadn't.

42. Ms Arnott asked the claimant if he wanted a break and the claimant said that he did. During the break the claimant went across to the Costa coffee shop just opposite the bank. He had arranged that his father would be present in the coffee shop so that he could meet with his father during any
5 breaks in the meeting.
43. Following the break the claimant returned to the meeting. His father remained in the coffee shop.
44. There was a discussion about whether the claimant had been in touch with his psychiatrist again. He confirmed he had not. He once again confirmed
10 he needed professional help.
45. Ms Arnott asked the claimant about his relationship with his GP. He said that he did not see the same GP all the time but saw whoever was available and that he had to keep explaining everything and they needed to read his notes. He said that his doctors always said they wanted to see
15 him again in so many weeks but he was then booked in to see any GP. He said he had his psychologist on speed dial if he needed him but had not used this service since he felt he was not bad enough at the moment.
46. Ms Arnott referred the claimant to his statement and what he had said about his most recent absence. The claimant had said in his statement
20 that the day in question was sunny but not warm and that he had covered up wearing a tracksuit top. He has stated that he knew this sickness had triggered the review but that he felt disheartened and he felt he was being encouraged to quit. He referred to the impact of his absence on the bonus of his colleagues. Ms Arnott confirmed that the bonus scheme did not
25 work that way. The claimant said that he had contacted the doctor on the Monday but Wednesday was the earliest appointment he could get. He confirmed that he understood the absence policy. He confirmed that he had been fit to work on the Wednesday but he wanted his doctor to confirm it was sunstroke. He confirmed his appointment had been at 9:30. He
30 said he had not come in after the meeting because he had wanted to make sure he was okay on the medication prescribed even although it was only Ibuprofen. He then referred again to having come back earlier than his GP recommended him to back in March. Ms Arnott asked if he had had

an adult conversation with his GP about returning to work. By using the word adult she did not intend to disparage the claimant but simply wished to confirm that what she understood had happened had happened which was that the claimant had sat down and discussed matters properly with his GP and that between them they had decided that it was appropriate for the claimant to return to work for the reasons previously given relating to routine.

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47. Ms Arnott then suggested to the claimant that he had mentioned on the day he came back to work that he had had sunstroke in the past. She wondered if he had taken extra precautions. The claimant did not respond. Ms Arnott then sought to explore with the claimant his understanding of the effect of his absence on the resourcing of the branch. The claimant shrugged his shoulders. Ms Arnott then explained to the claimant that the bonus scheme did not operate in the way he had suggested in his statement. She asked the claimant if he understood an absence could have an impact. She advised that she was concerned about the likelihood of future absences. She then noted that the claimant had said in his statement that he had good feedback from colleagues about how well and quickly he had picked the role up for being so young. She pointed out that he was currently on a number of action plans. These are listed on page 133. He was on a cash error action plan, risk support plan, discussion record around timekeeping on file and verbal discussions around his appearance. Ms Arnott said to the claimant that under the policy employees had to be presentable for work and wear the uniform and she said she had had to ask the claimant to shave before coming in to work. She asked the claimant that if he was having a bad day did this impact on how he appeared and how he approached work. The claimant indicated that it impacted on everything, even making a cup of tea. Ms Arnott then asked the claimant how she could be confident that matters would change in the future. She was aware that in order to support a continuation of the plan she would have to have something which showed that although the claimant's attendance record to date was well below what was acceptable that something was going to change for the future. The claimant's answer to this was that he did not want to be off. The claimant then said, "I don't know what to do I'm stuck in a bubble." He

said he didn't know what to do or say. Ms Arnott then offered the claimant a break and he left the room.

48. The claimant then went across to Costa where he met with his father. He was upset in Costa. His father believed he was having a panic attack. His father decided that the meeting could not continue. Rather than the claimant go back to the meeting the claimant's father then went back to the meeting and met briefly with Ms Arnott. He explained that the claimant was close to taking a panic attack. Ms Walton who had been taking notes indicated that Ms Arnott had suggested the break realising that the claimant needed it. Ms Arnott said that she was not in a position to discuss the meeting that had taken place with Jamie. Ms Arnott contacted HR briefly to seek guidance. The claimant's father had said that the claimant could not continue with the meeting. Ms Arnott asked the claimant's father if Jamie could return so that Ms Arnott could make sure that the claimant was okay from a duty of care point of view. The claimant's father then left and Jamie came back into the branch. He confirmed that he could not continue with the meeting. Ms Arnott asked if the meeting could be stopped and reconvened after a few hours. The claimant said, "I am done". Ms Arnott's understanding of what the claimant was saying was that he had said everything that he wanted to say and was not prepared to attend a reconvened meeting. Ms Arnott then asked the claimant a few questions about his welfare to make sure that he had someone to take him home and that he would not be on his own for the rest of the day. The claimant confirmed this was the case. She asked the claimant to contact her on her mobile later that afternoon. The claimant then left.

49. Ms Arnott's position was that she understood that the claimant did not wish the meeting to be reconvened. For record purposes she decided that she would ask the note taker to note down what she would have continued to ask had the meeting continued. She said that she would have asked the claimant again what he was going to do to improve his health attendance moving forward and what evidence he had for this. She would also enquire as to what the claimant meant when he said in his statement that he felt he was being picked on for the slightest thing. She also wanted to discuss the Leven branch move in more detail as the claimant had

completed a Getting to Know You visit with a Leven colleague prior to returning to work.

50. Despite noting these points Ms Arnott felt that she could make a decision based on the information she had to date. She came to the decision that the claimant's employment should be terminated. At some point during the afternoon the claimant was advised that he would not require to attend the branch the next day and that they would be in touch with him as regards the outcome of the meeting.
51. The following day, the claimant telephoned Ms Arnott on her private mobile phone at around 9:19 am. The claimant took a record of the time of the call which was lodged (page 137). Ms Arnott told the claimant that the decision had been made that he would be dismissed. She enquired if he was alone in the house or had someone with him. The claimant confirmed he had family with him. Ms Arnott was aware that the claimant had previously advised her that speaking on the telephone was something which was a stressor for him. As a result of this he had not been required to answer telephone calls at the branch. She said to the claimant that she was aware that he did not like discussing things on the phone and that he would be getting a letter. The call was short.
52. Ms Arnott then wrote to the claimant confirming his dismissal. The letter was dated 4 June 2019 and was lodged (page 138-140). Ms Arnott set out the position which was that since joining Lloyds Banking Group in May 2018 the claimant had had 85 days of absence over eight occasions. She set out the various supports which had been provided to the claimant. She then went through various points which the claimant had made in his statement and at the meeting. She noted that the claimant now said that he had returned to work against his GP and psychiatrist's advice, she pointed out that this was not something he had mentioned before. She pointed out that on 17 March the claimant had indicated that his psychiatrist had thought that returning to work was a good idea because he would then have a routine. She referred to the fact the claimant was now saying that he had not wanted to move to Leven branch. She pointed out again that this was not something which had been mentioned. She then referred to the points made by the claimant that whilst acknowledging

his attendance hadn't been what he would have liked that he had picked the role up quickly for being so young and that he was being picked up for the slightest of things. She pointed out that the reality was that he was on numerous action plans in respect of cash handling and failing to follow procedures. She noted he had also received feedbacks about his behaviours towards customers and colleagues and a documented conversation regarding timekeeping to be an issue experienced in both Glenrothes and Leven. She then went on to state

“Unfortunately due to your health you chose to leave the meeting before we were able to conclude so we were unable to fully discuss if there were any further actions that could be considered to help you achieve a reliable attendance at work. Whilst your statement demonstrates a desire to improve you have not provided any evidence or assurance of what action you will take or changes you will make to achieve that.

I am confident that throughout the process it has been recognised that you have a genuine health condition and have provided all reasonable adjustments to support you to achieve sustained health and reliable attendance.”

She then went on to state (page 140)

“The difficult reality is that your level of attendance is not at a level that the business can support due to the continuing effect of your absences. Branch resourcing needs are calculated on the level of colleagues and expected customer demand, high levels of absence impact the customer directly with longer wait times.”

The letter went on to say that the claimant would receive four weeks' pay in lieu of notice. A copy of the notes of the meeting held on 29 May were enclosed. These were the notes lodged at page 132-135. The notes erroneously state the date of the meeting as being 30 May. It was in fact 29 May.

53. The claimant appealed. The claimant's letter of appeal is dated 14 June 2019 and was lodged (page 141). He set out five grounds of appeal in bullet points. He stated that he had made the respondent fully aware that

he had been medically advised he was suffering from anxiety and panic attacks during his life. He complained regarding the unofficial meeting on 16 May. He stated that the unofficial meeting on 16 May and the final review meeting were conducted in a way which was designed to maximise his anxiety and exploit his health and wellbeing. He complained of the aggressiveness of the final meeting which meant that he took a panic attack and was unable to continue for health reasons. He said he had not presented all his evidence but complained that the respondent had decided based on an incomplete meeting to make the final decision of termination. He also disputed the comments within the minutes relating to performance. The respondent wrote to the claimant on 24 June acknowledging his appeal and saying that they were taking his letter as setting out his full grounds of appeal (page 142). The claimant was invited to an appeal meeting to take place on 12 July 2019 by letter dated 3 July. The letter was lodged (page 143). The claimant was advised of his right to be accompanied.

54. The appeal meeting took place as planned on 12 July. The meeting was conducted by Elaine Kinghorn a Senior Manager with the respondent. She was manager of a pool of five branches in Dundee. She had not met the claimant before. She was accompanied by Jan Morris who took notes. The claimant attended and was accompanied by John Dickenson a union representative from Accord Union. Mr Dickenson is an extremely experienced trade union official. Ms Morris' notes of the hearing were lodged (page 144-149). The Tribunal considered that these were an accurate although not verbatim account of what took place at the meeting. Ms Kinghorn had met him before and as he had represented colleagues at previous meeting she had conducted. He is Assistant Chair for Scotland of Accord Union.

55. At the meeting Ms Kinghorn explored with the claimant his view that the final meeting on 29 May had never finished. She asked the claimant if there was anything else he would have added if the final meeting had been reconvened. The claimant confirmed that there was not anything that he would have wanted to add.

56. The claimant handed over to Ms Kinghorn two statements prepared by his father relating to his father's involvement in the meetings on 16 May and 29 July. These statements were lodged (page 166-177). Ms Kinghorn advised the claimant that she would read them later after the meeting.

5 57. At the end of the meeting Ms Kinghorn advised that she would not be making her decision today as she would need time to reflect and she would also wish to speak to others. Following the meeting Ms Kinghorn interviewed Mandy Arnott and Stacey Cummings. She spoke to them separately. She explored the reason for the meeting on 16 May. She
10 noted that they both felt that the claimant was not taking the matter sufficiently seriously and did not understand the full seriousness of his position. She accepted that they had called the meeting out of care and concern for the claimant. She did not uphold the first ground of appeal. Ms Kinghorn also interviewed Marie Walton who had taken notes at the
15 meeting on 29 July. She confirmed Ms Arnott's position which was that the tone of the meeting had been of a professional standard. They both confirmed that it was a more formal and structured meeting but both confirmed that the tone had not in any way been aggressive. Ms Kinghorn is familiar with Ms Arnott's experience and considered it highly unlikely that she would have been anything other than professional in the way she
20 conducted the meeting. With regard to the third point she confirmed from those present that performance issues had not in fact been discussed at any of the meetings. The only time the matter had been raised was when Ms Arnott had responded specifically to a point made by the claimant in
25 his statement. Ms Arnott was simply pointing out to the claimant that parts of his statement about picking things up quickly and doing well were simply incorrect. She also corrected the erroneous view he appeared to have formed about the effect of absence on the bonus scheme.

30 58. Ms Kinghorn also addressed the issue regarding the move to Leven since this had been raised by the claimant. She spoke to Laura Murphy who confirmed that all decisions had been made with the claimant's interests in mind. The managers felt that this was good support for him. The claimant had not himself raised any concerns at the time and appeared to be in favour of it. Laura Murphy had arranged Keeping in Touch meetings

with the claimant and also a Getting to Know You visit for the claimant with the staff at Leven in advance of his move there. All of this had been done with a view to supporting the claimant.

59. Following the meeting she also read the statement produced by Kevin
5 McAuley the claimant's father. She felt that this was very much
Mr McAuley's interpretation of what had happened. It was opinion rather
than anything based on his own observation. She was satisfied that the
claimant had been supported by his line manager. She considered that
10 having had a good discussion with the claimant and his union
representative at the meeting there were no further grounds of appeal
which had been raised. She felt there was absolutely nothing to indicate
that a further occupational health report had been required. The evidence
which was provided was enough to go on. She had asked the claimant
15 what support he was getting from his doctor. There was nothing to
suggest his attendance was going to improve. At the end of the day she
considered that she would have come to exactly the same decision as
Ms Arnott. The claimant had been provided with all appropriate supports
and it was clear that he was unable to maintain attendance at the level
20 required by the bank. She was aware of the effect of the absence of any
Customer Service Adviser on the bank. The resourcing of bank branches
is worked out fairly precisely and is based on customer demand. If a
colleague is absent this means that the basic resourcing of the branch is
not being met. This will result in a reduced service to customers. At the
25 very least customers will have to wait longer on being served. There is
also additional pressure on other staff. She felt that despite all of the
supports which had been given to the claimant it was abundantly clear that
the claimant was not in a position to provide an appropriate level of
attendance going forward.

60. Ms Kinghorn wrote to the claimant confirming her decision by letter dated
30 24 July 2019. It was lodged (page 178-179). There was no further appeal
possible in terms of the bank's rules.

61. Following his dismissal the claimant applied for benefits. The claimant's
symptoms of anxiety got worse and as a result of this the claimant was not
required to seek work by the Benefits Agency. The claimant's initial

thoughts were that he would not seek another full time job but would do a university course. He applied for a course at the Open University and was successful. He decided not to proceed with this however as he found that although the course would require him to study full time it was classed as a part time course and funded on that basis. He would therefore require to take a part time job as well. The claimant applied for some jobs and was successful in obtaining short term contract with Amazon over the Christmas period. He was then successful in obtaining a job at Edinburgh Airport which was due to start in February. In the event, he did not proceed with this but instead decided to take up a job with Sky which started in April 2020. He considered that the job with Sky was a much better proposition than the job at the airport. It was closer to him and paid better. In addition he would have had difficulty travelling to early shifts at the airport from his home.

15 **Matters arising from the evidence**

62. In general terms the Tribunal accepted the evidence of the two respondent's witnesses as being both credible and reliable. They gave accounts which were entirely in line with the contemporary documents. Both witnesses answered the questions that were put to them carefully and it was clear that they were trying to assist the Tribunal by giving honest evidence and making concessions where appropriate. The Tribunal felt that the claimant and his witness were seeking to give honest evidence to the Tribunal as they saw it however the Tribunal felt that the evidence of both witnesses was coloured by their perception that the claimant had been treated badly. A feature of the case was that in many respects the claimant's evidence did not in fact support the contentions made in his claim. He clearly accepted on several occasions that the atmosphere at the meeting on 16 May was friendly. The claimant also confirmed that he was aware that he would require to attend a meeting when he returned to work. He also accepted in evidence that he was not actually complaining about the lack of notice of the discussion. On the other hand the claimant and his father's account of what concerned him about the meeting on 29 July differed from that in the claim. He raised a number of issues which were not foreshadowed in the claim at all. Furthermore the claimant and

his father both indicated for the first time that there were matters discussed at the meeting which were not in the minutes provided.

63. The Tribunal's view was that there was a conflict of evidence between the evidence of Ms Arnott and the evidence of the claimant and to some extent the claimant's father regarding certain aspects of what occurred at both meetings. With regard to the first meeting the claimant's position was that there had been a suggestion that he should resign and that if he did not resign he would be dismissed and that this would result in a black mark to reflect his future job prospects. Ms Arnott denied that either she or Ms Cummings had said any such thing. The claimant also said that he had been told at the meeting by either Ms Cummings or Ms Arnott that he would be allowed to bring his father along to accompany him at the final meeting. Ms Arnott denied that she had said this and said she had not heard Ms Cummings say this. She also said that this would have been very surprising since both were well aware of the respondent's policy in the matter. They had been happy for the claimant's father to attend the meeting on 16 May which was an informal meeting but the whole point they wished to get over to the claimant was that the next meeting would be a formal final meeting. The claimant's father indicated in his evidence that the claimant was having a panic attack in the coffee shop and that he told Ms Arnott that the claimant was having a panic attack. Ms Arnott's account which is in accordance with the note of meeting prepared by the note taker was to the effect that the claimant's father had said the claimant was on the point of having a panic attack but he was not actually having such a panic attack. The Tribunal noted that Ms Arnott's evidence was entirely in accordance with the note of meeting which in each case had been taken by someone else. The note of the first meeting had been taken by Ms Cummings and the note of the second meeting was taken by Ms Walton. The Tribunal also considered it very significant that the claimant had not raised any issues about the minute of the meeting of 29 May prior to the Tribunal hearing. His own evidence on the subject was somewhat vague in that he initially denied that he had seen the minute but then accepted that it had been sent to him along with the letter of dismissal. He gave no explanation as to why he had not raised the issue before. The claimant's father accepted that he had seen the note

and said that he had raised the issues which he disputed with Mr Dickenson the trade union official who represented the claimant at the appeal. What is noteworthy is that Mr Dickenson has not raised any of these issues at the appeal hearing. Given that he was an experienced trade union official one would have thought that if there were discrepancies these would have been noted.

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64. There was a degree of disputed evidence in relation as to whether the claimant understood that the meeting on 29 May was being adjourned to be reconvened at a later date or whether it was finished. At the end of the day the claimant's final position on what he had actually said was somewhat unclear but it appeared to us that he was to some extent accepting that he had said words along the lines of what is shown in the minute and what was Ms Arnott's own recollection. It appeared to us that Ms Arnott was perfectly entitled to take it that when the claimant said, "I am done", what he meant was that he had nothing more to say and that there was therefore no point reconvening the meeting. This was in the context where Ms Arnott was trying to get him to come back to a reconvened meeting that afternoon. There was certainly no suggestion that the claimant said that he was not able to continue with the meeting that afternoon but wanted to come back the following day.

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65. The claimant's father was not in the room at that point and it may well be that given that he had been talking to his son about getting the meeting adjourned and then reconvened later on that he assumed that this was what his son had conveyed to Ms Arnott. At the end of the day where there was any dispute in the evidence the Tribunal preferred the evidence of the respondent's witnesses to that of the claimant's witnesses.

Issues

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66. A Scott Schedule had been prepared in the case setting out the various claims which were being made. The final version of the Scott Schedule was lodged at page 47-49. It was noted at the earlier preliminary hearing on time bar that the claimant wished to reserve the right to argue that certain earlier claims were not time barred on the basis that they formed part of a continuing act. The claimant's representative indicated at the

outset of his submissions that he would not be pursuing this line and the Tribunal proceeded on the basis that the only claims before it were those set out in the Scott Schedule in respect of the period from 16 May 2019 onwards.

5 **Discussion and decision**

67. Both sides made full submissions. Both lodged written submissions which they expanded upon orally. Rather than seek to repeat or paraphrase these they will be referred to where appropriate in the discussion below.

68. It is as well to deal with the issue of knowledge of disability first. Although
10 the respondent had conceded that the claimant was disabled in terms of section 6 of the Equality Act at the relevant time they made no concession in respect of knowledge of disability. In general terms the Tribunal were satisfied that the respondent in the form of Ms Arnott and Ms Kinghorn the two decision makers did have knowledge that the claimant was disabled
15 as a result of suffering from anxiety and depression. Both had seen the occupational health report which indicated that it was likely that the claimant would be regarded as disabled. Both were also aware of the advice from HR that whether the claimant was disabled or not he ought to be treated as if he was disabled in terms of applying the bank's policies.

20 69. The specific claims of discrimination are dealt with below in turn.

70. The claimant made claims of harassment under section 26 of the Equality Act in respect of four matters. This related to the behaviour of Mandy Arnott during the meeting on 16 May, the behaviour of Mandy Arnott during the final meeting on 29 May, the decision of Mandy Arnott to refuse
25 to adjourn the final formal meeting at the request of the claimant's father until the claimant came back into the branch following a panic attack and the decision of Mandy Arnott to phone the claimant to inform him of his dismissal.

71. It is probably as well to set out the terms of section 26 –

30 “(1) A person A harasses another B if

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

- (b) the conduct has a purpose or effect of
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B ...

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

10 We were referred by the claimant's representative to the cases of ***Pemberton v The Right Reverend Richard Inwood*** [2018] ICR 1291 which refers to the fact that harassment must be assessed both subjectively and objectively. The perception of the individual is important as are the other circumstances surrounding the conduct including the

15 context.

72. With regard to the claim that the claimant was subject to discriminatory harassment at the meeting on 16 May the Tribunal did not consider that the evidence showed that this was what had happened. Even the claimant's own evidence was that the atmosphere in the discussion which

20 took place on 16 May 2019 was friendly.

73. The Tribunal's view of the evidence was that both Ms Arnott and Ms Cummings were attempting to assist the claimant. The Tribunal accepted that the note of the meeting prepared by Ms Cummings was an accurate record of what took place.

25 74. The context here was that the claimant was on an action plan to improve his attendance. Although he had been with the bank for around 12 months he had clocked up a large number of absences including a very substantial absence from November until March. He had only just completed his phased return and then within a very short time was having another

30 absence. Both Ms Arnott and Ms Cummings were aware that the next stage would be that the claimant would be invited to a final meeting. The Tribunal accepted Ms Arnott's evidence that she was extremely concerned that the claimant did not quite appreciate the seriousness of

his position. They wished to impress this on him so that he could prepare for the meeting and be aware that if he wished to keep his job then he was going to have to provide some good answers to very difficult questions. The tribunal felt that the complaints of the claimant's father to the effect that this meeting was not held in accordance with the respondent's policy were misdirected and unfortunate. This was an additional informal support being provided to the claimant outside the formal policy. It was a friendly discussion rather than the more structured approach which would be necessary at the formal meeting which was eventually scheduled for 29 May. Ms Arnott was aware the claimant might find the formal meeting difficult. Every-one is going to have a problem with a formal meeting which may lead to their dismissal. Her aim was to make sure, in a friendly way, that the claimant was fully aware of his situation so that he could prepare for the meeting and have the best chance of providing evidence that might help him keep his job.

75. The Tribunal accepted that the claimant become upset during the meeting but this does not mean that he was harassed by Ms Arnott. We accept that he may well have told his father that he thought he was going to be sacked. If so, then this meant that Ms Arnott and Ms Cummings had succeeded in bringing home to the claimant the seriousness of the position that he was in.

76. The Tribunal's view was that it was surprising that the claimant was not already aware when he went off sick on 13 May that this was very likely to have a serious effect on his continued employment.

77. The Tribunal's view was that at the meeting the claimant was hearing something that he did not want to hear. The Tribunal's view was that Ms Arnott was acting perfectly properly in having the meeting with the claimant as suggested by the respondent's HR department and that she did absolutely nothing during the course of that hearing which amounted to harassment. On any objective scale nothing done by Ms Arnott was likely to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant or violating the claimant's dignity.

78. With regard to the hearing on 29 May 2019 the Tribunal's view was that this was similarly a situation where Ms Arnott was trying to help the claimant by giving him the opportunity to provide her with information which would enable him to keep his job. The Tribunal considered that the record of the meeting, which was taken by an independent note taker, was an accurate record of what had been said. The claimant's own evidence was that he considered that Ms Arnott had acted aggressively. When pressed, he could not point to any words she had said which appeared aggressive but said that it was her tone in which she had said them. The Tribunal's view was that Ms Arnott had behaved in an entirely business-like manner. The context is that this was a very difficult situation. As Ms Arnott said the unfortunate fact was that, on the evidence, the claimant did not seem to be in any position to meet the attendance criteria required by the bank. It was going to be up to the claimant to demonstrate that his attendance would improve going forward. It was up to him to show if there were any further supports which he could be provided with or which he could provide himself with which would improve his attendance.
79. The Tribunal notes that during the course of the meeting the claimant himself said that there was no further support which could have been offered. He also said that he had received good support from the bank and that some jobs would not have given nearly as much support as what he had had.
80. The Tribunal's view on the evidence was that the claim of harassment at the formal meeting on 29 May was not made out.
81. The claimant also claims that the decision of Mandy Arnott to refuse to adjourn the final formal meeting at the request of the claimant's father until the claimant came back into the branch following a panic attack amounted to harassment.
82. The Tribunal's view was that we entirely agreed with the respondent's representative that the requirements of section 26 of the Equality Act were not satisfied. The claimant's own evidence was that he accepted that he did not have any objection to returning to the branch and he could understand why he had been asked to do it. There was no unwanted

conduct by Ms Arnott. Furthermore, the Tribunal accepted Ms Arnott's evidence that she wanted the claimant to come back in so that she could check on his welfare. She wanted to make sure that he was not in distress and that he had someone to go home with and someone to be with afterwards. This was not conduct which was likely to have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant or violating his dignity. Quite the contrary.

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83. Finally, the claimant claimed that the decision of Mandy Arnott to phone the claimant to inform him of his dismissal on 30 May 2019 amounted to harassment. The first problem with this claim, as pointed out by the respondent's representative, is that it is abundantly clear from all of the evidence including the claimant's own evidence that Mandy Arnott did not phone the claimant on 30 May. The claimant phoned Mandy Arnott. The claim therefore falls at the first hurdle. That having been said, the Tribunal's view was that even if one were to take the claim as meaning that the whole conduct of the telephone conversation on 30 May by Mandy Arnott amounted to harassment, such a claim is not well founded. The claimant telephoned Ms Arnott to find out the outcome of the meeting. Ms Arnott told him that he had been dismissed. The context was that Ms Arnott knew that she was in the course of preparing a letter which would set out the reasons for dismissal in great detail. She was aware that the claimant had previously said that he was uncomfortable speaking on the telephone because of his condition and he had in fact been relieved of the duty of speaking to customers on the telephone. Given this latter point one can see that effectively Ms Arnott was in a cleft stick. If she tried to discuss matters with the claimant then that might lead to a suggestion that the claimant was being disadvantaged. Ms Arnott's decision was entirely reasonable and could not in any way be said to amount to harassment.

84. The claimant also made a number of claims of discrimination arising from disability under s15 of the equality Act.

85. Section 15(1) of the Equality Act 2010 states

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

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86. The claimant’s position is that the decision of Mandy Arnott at the final formal meeting not to reconvene the meeting amounted to discrimination arising from disability. Once again the Tribunal proceeded on the basis that the minutes were an accurate record of what took place. It was not the Tribunal’s view that the decision made by Ms Arnott not to reconvene the meeting was made because of something arising from the claimant’s disability. Her decision was made because the claimant told her “I am done” from which she believed the claimant had nothing else that he wanted to contribute. Further and in any event the Tribunal did not accept that the failure to reconvene the meeting was unfavourable treatment. Ms Arnott had noted the questions which she would have asked. The principal one was giving the claimant a further opportunity to say what he would do in order to improve his attendance going forward. The claimant had already been asked that question and given his answer. Ms Arnott no doubt felt that she wanted to give him a further opportunity since his answers were not very good but when the claimant said that he was done then it was clear that there was nothing more to be discussed. Furthermore and in any event the claimant was asked at the appeal meeting what else he would have added and he said that there was nothing he would have wanted to add.

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87. By the time of the Tribunal hearing all the claimant could say was that he would have asked why certain questions were asked in the way they were asked. The Tribunal’s view was that given those circumstances the decision not to reconvene the meeting was not unfavourable treatment and in any event was not something arising from the claimant’s disability.

88. The claimant considered that his dismissal was itself an act of disability discrimination amounting to unfavourable treatment arising from his disability. The Tribunal agreed that he had been treated unfavourably by being dismissed. The Tribunal also agreed that this was at least in part because of something arising from his disability namely his disability related absences (although he did have other absences).
89. The Tribunal then required to go on to consider the second part of the test namely whether his dismissal was a proportionate means of achieving a legitimate aim. The respondent's position was that the respondent had a legitimate aim in managing employees who are unable to sustain an acceptable level of attendance given the impact that sickness absence has on the respondent's branch operations and levels of customer service. The Tribunal entirely accepted the evidence of Ms Arnott as to the effect of absence on the operations of the bank. The Tribunal considered that in all the circumstances dismissing the claimant was a proportionate means of achieving that aim. The respondent had supported the claimant during his initial period of employment when he had had a number of instances of short absences prior to going on a lengthy period of disability related absence in November. They had provided him with a considerable amount of assistance and support. He could have obtained the services of a private psychiatrist or psychologist through BUPA. He could have used the services of the EAP provided by Activium and at the end of the day had only made one call to them. Despite the substantial number of measures which the respondent had put in place the claimant had demonstrated that he was not in a position to provide an acceptable level of attendance. The Tribunal was struck by Ms Arnott's evidence that she was genuinely asking the claimant what more the respondent could do.
90. The claimant's representative referred to cases where employers have been criticised for looking backwards at an employee's absence record and making the decision to dismiss based on effectively punishing an employee for periods of past absence. It was clear to the Tribunal from the evidence that this was not the approach which Ms Arnott took in this case. She was very much forward looking and trying to find something which would allow her to reasonably conclude that there was a reasonable

probability that the claimant's attendance would attain an acceptable level in the future. The decision she came to was that there was nothing in what the claimant was saying which suggested that he would be able to do this. The claimant's attitude at the meeting appeared to be that the respondent would simply have to accept that he would not be in a position to provide acceptable levels of attendance going forward.

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91. Assessing proportionality requires the tribunal to look hard at whether there was any alternative way forward which would allow the employer to achieve their legitimate aim without causing the disadvantage to the claimant. In this case we were satisfied there was none. The Tribunal's view was that the dismissal was not discriminatory.

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92. The claimant also claimed that the failure to manage disability related absence in line with sickness absence policy amounted to discrimination arising from disability. The claimant's position is that the respondent had failed to manage in line with the policy. At the first meeting on 17 April 2019 it was agreed that the claimant was to "render a reliable service by achieving a significant improvement in attendance level close to full attendance within the bank's expectations". The claimant's position appeared to be that since the claimant was then dismissed following one further period of absence a requirement for 100% attendance had been imposed rather than "close to 100%". The Tribunal understood the claimant's position to be that the action plan did not require 100% attendance by the claimant and that the claimant's attendance had significantly improved. The Tribunal's view was that Ms Arnott was perfectly entitled to conclude that it had not and that the claimant had not met the terms of the action plan. The claimant had been back to full time hours for less than a month before he went off sick again for three days with an unrelated minor condition. Ms Arnott considered that this did not amount to a significant improvement in attendance level close to full attendance in the bank's expectations and the Tribunal would agree with her. The claimant referred to the suggestion that the occupational health report indicated that the claimant would have symptoms for three to four months and that interactions with unpleasant or difficult customers were anxiety provoking. His representative referred to the fact the claimant had

5 been placed on a cash error action plan for several cash differences and that he had received feedback in relation to his behaviour towards customers and colleagues when he was at the Glenrothes branch and similar issues at Leven. The occupational health report had indicated that if issues were troublesome going forward the claimant should be referred back to occupational health. Although the Tribunal did not hear a great deal of evidence in relation to the cash action plan or the feedback given regarding interactions with customers it was clear from the evidence of Ms Arnott that steps had been taken to protect the claimant by for example
10 telling him that he did not have to answer the telephone calls to customers. It was also clear that Ms Arnott had considered that the issues raised were matters that could be dealt with by an action plan and there had been no suggestion from the claimant that these were in any way related to his disability. This was not suggested in evidence by the claimant at any point
15 during the hearing.

93. The Tribunal's view was that Ms Arnott was entirely correct and acting within the procedure in deciding that there was little point in obtaining a further occupational health report. The occupational health report which they had set out the position regarding the claimant's anxiety. The
20 absence which led to him being referred to a final meeting had nothing to do with his anxiety. It appeared to the Tribunal to be abundantly clear from the evidence that Ms Arnott had fully complied with the respondent's policy.

94. The respondent's representative pointed out that the Scott Schedule
25 refers to a Sickness Absence Policy and that strictly speaking should be struck out since the respondent did not have a Sickness Absence Policy. The Tribunal agreed that in action fact the respondent has a Health, Attendance and Sick Pay Policy but even as noted above we consider that in any event Ms Arnott fully complied with this.

30 95. The claimant made a number of claims of indirect disability discrimination. These related to the dismissal. It is their position that the respondent applied a PCP of requiring employees to sustain attendance at work and/or have a level of absence that falls below a certain level or percentage in line with the respondent's calculation of branch resourcing needs based

on the level of colleagues and expected customer demands. They also considered that a second PCP was also discriminatory namely the practice of applying a modified sickness absence process to employees with less than 12 months' service. The respondent operated a two stage absence process for employees with less than 12 months' service as opposed to three stages if they had longer than twelve months service.

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96. With regard to both PCPs the claimant offered absolutely no evidence whatsoever of group disadvantage. The claimant's representative in submissions essentially asked the Tribunal to make discriminatory stereotypical assumptions about disabled people or people who suffer from the claimant's disability in general. The Tribunal was not prepared to do this. The Tribunal observes that it is well within judicial knowledge that many people who suffer from anxiety and depression maintain regular attendance at work. The Tribunal considered that there was absolutely no evidential basis for the claim that the PCPs mentioned had a disparate impact on people with whom the claimant shared his disability. These claims do not get off the ground and are dismissed.

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97. The claimant claimed a failure to make reasonable adjustments in respect of a number of matters. The first is that the failure to provide notice of the meeting on 16 May 2019 was a failure to make reasonable adjustments. Once again there is an evidential difficulty for the claimant in that in his own evidence he indicated that he was expecting to have a meeting on his return to work on 16 May. The claimant also accepted in evidence that there was not any lack of notice of the meeting that he was complaining about. He was complaining about the nature of the discussions that took place at the meeting. The claim therefore does not succeed.

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98. The respondent's representative also indicated that in the respondent's view the claimant had not identified a relevant provision, criteria or practice. The Tribunal also agreed with this point. A one-off act is not a PCP. We were referred by the claimant's representative to various cases including *Ishola v Transport for London* [2020] ICR 1204, *British Airway plc v Starmer* [2005] IRLR 863 and *Mr C Williams v The Governing Body of Alderman Davis Church in Wales Primary School* UKEAT/0108/19/LA. Having considered the authorities we would tend to

agree with the respondent that the claimant would not have established the existence of the PCP contended for in this case in this case even if he had established that he had not known in advance he would be called to a meeting. Furthermore, it did not appear to the Tribunal to be established that the lack of notice placed the claimant at any particular disadvantage. The meeting was a meeting convened in addition to the respondent's normal policy with a view to supporting the claimant and explaining to the claimant just exactly what his situation was in terms of the policy. This claim does not succeed.

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10 99. The claimant complained that the behaviour of Ms Arnott during the informal meeting was a failure to make reasonable adjustments. The Tribunal would again make the points which it has set out above in relation to this meeting. The suggestion appears to be that the claimant's disability puts him at a substantial disadvantage in that his anxiety causes him to struggle to think on his feet. The suggestion was that a person without the claimant's disability would have been able to properly represent himself at this meeting.

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20 100. As noted above the meeting was convened with a view to assisting the claimant. There was no need for the claimant to think on his feet, this was not a meeting where the claimant was required to provide answers. The claimant's own evidence was that this was a friendly discussion. The Tribunal's view was that nothing that happened at the meeting could be said to have placed the claimant at a disadvantage because of his disability.

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30 101. The Tribunal accepted that the claimant probably did not like having it pointed out to him that his position at the bank was now extremely precarious and that the next stage would be for him to be invited to a final meeting. The claimant has not said what the reasonable adjustments he considers ought to have been applied but for the avoidance of doubt it is the Tribunal's view that it would not have been a reasonable adjustment to not tell the claimant what his actual position was. The whole point of the meeting was to get the claimant to take the matter seriously particularly as Ms Arnott evidence was that she had felt that the claimant had reported

his latest absence in a nonchalant, relaxed and somewhat jokey way to her. This claim does not succeed.

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102. The claimant makes a claim in respect of the failure by Ms Arnott to permit Ms Murphy as a companion during the informal meetings. The Tribunal could see no evidence that the claimant was placed at a disadvantage by this particularly as the respondent allowed the claimant's father to represent him; adjourning the meeting for a considerable period of time to allow the claimant's father to come from his place of work to the branch. In any event it would not have been a reasonable adjustment in the circumstances to allow Laura Murphy to accompany the claimant. Laura Murphy had said that she felt uncomfortable in the claimant's presence. It would not have been appropriate for the respondent to try to force her to come. It is also likely that it would have caused the claimant more distress had he been told the reason why it was not a good idea to have Laura Murphy as his representative at the meeting. Finally and in any event Laura Murphy was a Manager at the same level as Mandy Arnott and it would not have been appropriate for that reason also.

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103. The claimant complains that the decision of Mandy Arnott during the final formal meeting not to reconvene the meeting was a failure to make reasonable adjustments. Once again we would observe that this is a one off decision and not a PCP. We would also observe that the decision was made because the claimant said, "I am done". It is also unclear whether even if this was a PCP why it would have a disparate impact on the claimant because of his disability. It is also not clear why it would amount to unfavourable treatment in a situation where the claimant has said he has nothing more to say and confirms this at the appeal meeting. This claim also fails.

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104. The claimant complains that the failure to implement the occupational health report recommendations was a failure to make reasonable adjustments. This again is a reference to the claimant's belief that he ought to have been referred back to occupational health if there were further issues. Once again the Tribunal considered that the claimant had not identified a relevant PCP that put him at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not

disabled. In any event the Tribunal considered that it would not have been a reasonable adjustment for the respondent to obtain up to date medical evidence and or determine the claimant's disability. The claimant's own position at the meeting was that there was no further support that the respondent could provide for him. The claimant had agreed at the formal meeting in January that no further occupational health report was required. There was no evidence that a further referral to occupational health would have changed anything

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105. The claimant's particular contention is that the further occupational health report ought to have been ordered by Ms Kinghorn at the appeal meeting on 12 July. This is reasonable adjustment number 13 on the Scott Schedule. The Tribunal simply does not see why this would have been a reasonable adjustment. The first point is that the claimant's final absence which had triggered the process was not disability related. This was not something new which would have required the respondent to obtain further advice. What the respondent was looking for was something from the claimant to demonstrate that he would be in a position to maintain acceptable attendance target going forward.

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106. For all the above reasons we considered that all the claims made by the claimant are not well founded and should be dismissed.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Ian Mcfatridge
16 February 2021
16 February 2021