EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Tristian Brown	**v**	**Royal Mail Group**
Heard at: Watford by Cloud Video Platform		**On**: 30 November 2020 & 1 December 2020

Before: Employment Judge Bedeau
Mrs Safia Boot
Mr Richard Clifton

Appearances

For the Claimant: Mr W Brown, Solicitor
For the Respondent: Ms S Percival, Solicitor

RESERVED JUDGMENT

1. The claim of direct age discrimination claim is not well-founded and is dismissed.

2. The claim of harassment related to disability is not well-founded and is dismissed.

3. The claim of harassment related to sexual orientation is not well-founded and is dismissed.

4. The claim of failure to make reasonable adjustments is not well-founded and is dismissed.

5. The claim of unauthorised deductions from wages is not well-founded and is dismissed.

6. The provisional remedy hearing listed on 1 April 2021 is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 8 May 2019, the claimant made claims of direct age discrimination; harassment related to age; failure to make reasonable adjustments; harassment related to sexual orientation; unauthorised deductions from wages; and public interest disclosure detriment.

2. He asserts that he suffers from the following disabilities, namely diabetes type 1; anxiety; a nut allergy; asthma and borderline personality disorder.

3. In the response presented to the tribunal on 12 July 2019, the respondent avers that the claimant was employed as an operational postal grade postman from 18 March 2019 to 27 April 2019, working only Saturdays. He had not particularised his claims and it had requested further and better particulars. There is then a general denial of each claim. Disability is not admitted, and knowledge of disability is also denied.

4. In the narrative, it sets out its reasons for challenging each of the claims which we do not propose to repeat in this judgment.

5. At a preliminary hearing held on 11 March 2020 before Employment Judge Alliott, the case was set down for a final hearing on 30 November and 1 December 2020. Attached to the case summary and orders was an agreed list of the legal and factual issues in the case which we replicate below.

The Issues

6. Age Discrimination s13 Equality Act 2010

   6.1. Did the Respondent treat the claimant less favourably because of his age by William Wall on 30 March 2019 refusing the Claimant a rest break because of his age?

   6.2 If so, has the Claimant proofed primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

   6.3 The Claimant relies upon the hypothetical comparator is an Operational Postal Grade worked in their 50s.

   6.4 If so, what is the Respondent's explanation? Can the Respondent prove a non-discriminatory reason for any proven treatment?

   Harassment related to age, Section 26 Equality Act 2010

   6.5 Did the Respondent engage in unwanted conduct related to the Claimant's age which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The act of harassment being;

6.5.1 On 30 March 2019 William Wall saying, "you appear to be a young lad and should be fine" (given as a reason for refusing request for a rest break)

Disability Discrimination s 6 and s20/21 Equality Act 2020

6.6 It is disputed that the Claimant is a disabled person in respect of his

6.6.1 Diabetes;

6.6.2 Anxiety;

6.6.3 Nut allergy;

6.6.4 Asthma;

6.6.5 Borderline personality disorder;

6.7 If the claimant is a disabled person, whether the respondent could have reasonably been expected to know that the claimant had the disabilities?

Whether the Respondent failed to make reasonable adjustments s 20/21

6.8 Did the Respondent apply a provision, criterion or practice that was discriminatory in relation to disabled person. The PCP alleged by the Claimant is a practice of not giving employees rest breaks when sorting mail in the Delivery Office.

6.9 Does the PCP place disabled persons at a substantial disadvantage in comparison with nondisabled persons?

6.10 If so were there steps that were not taken that could have been taken by the Respondent to avoid such disadvantage; the burden of proof does not rely on the claimant but it helpful to establish what steps should have been taken. These are identified as follows:-

6.10.1 Allowing the Claimant a period away from his work as a break.

6.11 If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim.

Sexual Orientation Discrimination s26 Equality Act 2010

6.12 Did the Respondent engage in unwanted conduct related to the Claimant's perceived sexual orientation which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The act of harassment being:

6.12.1 William Wall saying to the claimant on 30 March 2019 "you must be gay because your wife should be looking after the kids".

Unlawful deduction of wages s23 Employment Rights Act 1996

6.13 Has the Respondent paid to the Claimant all wages which are properly payable to him. The Claimant alleges that he is owed:

6.13.1 One month's notice pay;

6.13.2 3.2 days' holiday pay; and

6.13.3 Arrears of pay for three weeks for 13, 20, and 27 April 2019.

The evidence

7. The claimant gave evidence and did not call any witnesses. On behalf of the respondent, evidence was given by Mr William Wall, Delivery Office Manager.

8. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 186 pages. Further documents were adduced in evidence during the course of the hearing. Wherever appropriate reference will be made to page number of the document in the bundle.

Findings of fact

9. The respondent is a national postal service and employs about 130,000 people. It has several delivery offices, one which is in Muswell Hill, London.

10. In response to an advertisement, the claimant applied for the position of Postman Operational Grade, working Saturdays only. He was interviewed on 16 January 2019, by Mr William Wall, Delivery Office Manager, Muswell Hill Delivery Office.

11. In his application form for the position, in answer to the question: "Do you consider yourself to have any form of disability or health condition disability?" The claimant replied: "Yes". (page 170)

12. In answer to the question, "The Equality Act 2010, defines a disabled person as someone with a 'physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day to day activities'. Do you consider yourself to have such a disability?" His reply was: "Yes". (page 173)

13. In response to the question, "Do you have any health condition which may affect your ability to perform the proposed job activities?". He wrote, "No".

14. "In relation to your health, do you consider that any adjustments would be necessary to allow you to perform the proposed job activities?". His response was, "No". (174)

15. He said in evidence that, in relation to his not applicable reply to adjustments, it was with reference to his driving duties as a Postman. He said that because he had not done the role before, he would not know whether he would need any adjustments.

16. It is unclear to us at what point, if the successful applicant having stated on the form that they have a disability, the respondent then refers them to occupational health.

17. During his interview Mr Wall did not have the claimant's application form but followed a proforma document with set questions and blank spaces for the answers. There are no questions about applicant's medical conditions and

any reasonable adjustments. It seems to be competency-based questions. (82-96)

18. The claimant was successful, and Mr Wall offered him the role with a start date being 18 March 2019. This was confirmed in an offer letter dated 25 March 2019. The offer of employment was that of a Postman with driving duties to be based at Muswell Hill Delivery Office. He was informed in writing by Ms Gabriela Grigore, Royal Mail Recruitment Services, that he was required to attend an induction day on 18 March 2019, and that his first day at work would be Saturday 23 March 2019. He understood that he would be working seven hours from 7am to 2pm. Ms Grigore wrote that any enquiries in relation to the content of her email or attached documents, he should contact her and gave her email account. She wrote:

> "In preparation for your induction could you please ensure you have familiarised yourself with the Welcome to Royal Mail Booklet and Codes of Business Standards as these will be discussed with you at your induction. Please follow this Next Steps link to access the documents." (182-186)

19. The claimant would be paid for working Saturday on a weekly basis.

20. The respondent had at the time of the claimant's employment an Equality and Fairness Policy which covers age, disability, sexual orientation, and other protected characteristics. It also sets out the treatment of those who have the protected characteristics. (44-50)

21. There is also a policy on sick pay and sick pay conditions. It states that during the first twelve months of service, the employee is only entitled to receive Statutory Sick Pay. (52-56)

22. In the policy on Unauthorised Absence, it states, amongst other things, in relation to when an employee fails to make contact with the respondent, the following:

> "If the employee is not at work and has not made contact, there should be at least two attempts at telephoning the employee at home. Where possible, after the first phone call, the manager should leave a message requesting the employee to make contact with them. A second phone call should be made within a reasonable amount of time following the first call (2-3 hours later). After the second phone call, where possible, the manager should leave a message explaining that the employee's next of kin will be contacted if there are details of a nominated contact on the employee's PSB record. A record of these attempts should be kept by the manager.
>
> Where there is still no contact and the employee continues to be absent from work their manager should refer to the "Leaving the Business Without Notice Policy." (57-59)

23. As regards the Leaving the Business Without Notice Policy, this sets out the procedure the manager should follow in cases where an employee is absent from work and that absence is deemed to be unauthorised. The employee is first informed that their absence had been noted by the manager after making

two attempts to contact them. Where the employee has only been working for the respondent for less than 12 months, on the second day of the employee's absence, the manager is required to send a first letter warning them that their absence may lead to dismissal. If there is no response to the first letter or the response is unsatisfactory, a second letter is sent with the policy inviting the employee to attend a meeting and that failure to do so without a satisfactory explanation, may be treated as gross misconduct. (61-65)

24. There is also a grievance policy (66-69).

25. We find that during the interview with Mr Wall, the claimant did not mention his claimed disabilities of diabetes, anxiety, nut allergy, asthma, and borderline personality disorder. We make this finding because he told the tribunal that on 30 March 2019, he again mentioned to Mr Wall that he had these conditions, and they were disabilities. At which point Mr Wall said that if he had known of his medical conditions, he would not have offered the claimant the job. We find that had the claimant informed Mr Wall about his conditions during the interview, there was no need for him to have mentioned on 30 March, as the claimant alleged, that had he known of the claimant's medical conditions he would not have offered him the job. If the claimant is right about having told Mr Wall about his conditions during the interview, Mr Wall would have been aware of them when he offered him the position. We find that the accounts given by the claimant are inconsistent, unreliable, and plainly not credible.

26. There was at the time of the claimant's employment, a signing-in book outside Mr Wall's office. The book is still there. Staff are required to sign in when they start their shift and to sign out after their shift. At the start of their employment, they are issued with a personal log-in. This is used to log into the Postal Digital Assistance device (PDA). The PDAs are used to record deliveries and to obtain a customer's signature when required. The claimant was not given PDA and log in details.

27. As part of their duties, the postmen/postwomen would organise their own mail and packages to be delivered on their rounds.

28. The claimant's first day at work was on 23 March 2019, when he accompanied another more experienced postman to learn more about his duties as a postman. He commenced his shift at 7am and ended at 2pm. On that day, Mr Wall was on leave and was not in a position to speak to him.

29. The claimant's next shift was on Saturday 30 March 2019. He said that he approached Mr Wall at the delivery office to request reasonable adjustments for his disabilities, but before he could say anything, Mr Wall apologised for not being able to give him an induction to the workplace the previous week as he had been on leave. He was sat behind a computer in his office and was looking at the screen. He asked the claimant to keep the 8 and 19 April 2019 free to complete his training for his role as it involved driving a vehicle. The claimant at the time had a full-time job at a school working five days a week on a 52 weeks' contract. He said that he had earlier made Mr Wall aware,

during the interview, that he could only book days off school with proper notice being given to the school and subject to the approval of their Head Teacher. As the dates the claimant was required to keep free involved the Easter holiday, it was changed to 16 April 2019. The claimant told us that he could not attend on the 16 April because he had to attend the funeral of a close family member and had informed Mr Wall of this.

30. Of central importance to the claimant's case is what he said occurred after discussing the training dates. He said that he made a reasonable request to Mr Wall for a rest break or flexible time in order for him to take his medication for diabetes and asked whether he could take his break straightaway. He said that Mr Wall asked him if he had a medical condition to which he replied that he suffered from diabetes, anxiety, nut allergy, asthma, and borderline personality disorder. At that point he alleged that Mr Wall responded by saying that if he knew that he had those conditions he would not have offered him the job and went on to say that he did not think it appropriate, in his opinion, for the claimant to have rest breaks. The claimant said that he was shocked because the respondent is an equal opportunities employer and was under a legal obligation to make reasonable adjustments in view of his disabilities.

31. He then went on to say that Mr Wall gave as his reason for refusing rest breaks, that he, the claimant, appeared to be "a young lad" and that he should be fine, and the older men needed rest breaks because they have no energy but as he, the claimant, was a "young chap", he had the energy the others did not have. The claimant said that he required rest breaks to take his Metformin, Insulin, Codeine and Pregabalin for his medical conditions.

32. In evidence he said that at the time his blood sugar had dropped to about 3, which is very low, and he needed some sugar intake to raise that level.

33. Mr Wall denied the allegations made by the claimant and said discussions with him only lasted a few minutes and was about training.

34. We find that the respondent's policy in relation to rest breaks for postmen operational grade, is that they can be taken at any time. There are canteen facilities on the first floor and kitchen facilities on the ground floor. The postmen can take their rest break prior to going on their rounds, on their rounds, or after returning from their rounds. We were not taken to any provision which states an employee is required to have his or her rest break at a particular time during their shift. The claimant was not, we find, prevented from taking his rest break after speaking with Mr Wall.

35. He said in evidence that the older postal workers aged 50 and older, were allowed to have their rest breaks whereas he and two younger employees were not. When asked whether or not those younger employees took their breaks while on their rounds, he did not know. There was no evidence in support of this assertion made by him. He was not with each postal worker, or a group of them, on their shifts and was, therefore, unable to say whether or not the postal workers took their breaks.

36. He told the tribunal that shortly after his conversation with Mr Wall he went upstairs to take his medication and unfortunately was injured as his blood sugar was so low and he fell injuring himself. There is no record of this incident ever being reported by him, nor recorded in the accident book, nor were we shown medical evidence consistent with his account.

37. Mr Brown, solicitor on behalf of the claimant, invited the tribunal to consider an alternative provision, criterion, or practice, namely that younger people around 25 years, were not allowed to take rest breaks. We find that there was no evidence adduced by the claimant that younger postal workers, around that age, were denied rest breaks. The claimant was not present during their shifts and he was not in a position to say whether or not they took their rest breaks.

38. Clause 9.1 of his terms and conditions of employment, under hours of work/overtime, states the following:

> "Subject to clause 9.2 of this statement, your weekly hours of attendance will be 7.00 hours per week (including meal breaks)."

39. This would suggest that a postal worker can take his or her meal break during a seven-hour shift and, as they are mainly on their rounds, they are likely to exercise this right outside of the Delivery Office.

40. If the claimant is right, that he had been discriminated by Mr Wall on 30 March 2019 in being denied rest breaks as reasonable adjustment for his diabetes, he wrote in an email on 1 April 2019, the following:

> "Hi Will
>
> Hope this finds well.
>
> It has been a pleasurable two weeks working at Royal Mail – I am really enjoying my time here.
>
> Last Saturday I forgot to take my uniform trainers home with me, but I can collect it on my next shift.
>
> As discussed on Saturday, please could you confirm if driver training would be on either Monday 8th or Tuesday 9th April so I could book annual leave from work? Kind regards Tris." (119)

41. We find that this email accurately reflected the claimant's state of mind at the time. He had an induction training on 18 March, worked on 23 and 30 March and for him they amounted to an initial pleasurable two weeks and was enjoying his time working for the respondent. However, he was concerned about the driver training and he raised that in the email. Driver duties were part of the role. We do not accept, as the claimant asserted, that his email was an attempt on his part to try to "reset the clock" in his relationship with Mr Wall. The email is again further evidence in support of our finding that on 30 March 2019, Mr Wall did not deny him rest breaks.

42. As stated earlier, we find that the respondent allowed its postal workers to have their rest breaks at a time that was convenient to them. The claimant was not denied a rest break on 30 March 2019. He took his rest breaks as he told the tribunal.

43. On 6 April 2019, the claimant sent an email to Mr Wall to report that he would be absent on that day due to food poisoning from what he ate the previous night. (121)

44. He was paid, in advance, on 5 April 2019 for 'working' on 6 April.

45. On 13 April 2019, he attended work, but Mr Wall was on annual leave.

46. The claimant complained that he had not been paid for working on 13 April. However, the matter was resolved on the basis that as he did not work on 6 April and was not entitled to be paid for that day, that payment would cover his work on 13 April.

47. On 20 April 2019, he said he attended work and worked his shift. This was disputed by the respondent. We find that the claimant did sign in on 13 April 2019 as this is clearly stated on the sheet. However, on 20 April, on the sign-in and sign-out form against the claimant's name, there is a completely different signature. We accept Mr Wall's evidence that the claimant did not turn up for work on that day, instead another postal worker was instructed to cover his round and signed against his name. That postal worker was paid overtime for doing so. (135, 139)

48. Furthermore, Mr Wall was present on 20 April and did not see the claimant at the Delivery Office. He acknowledged that he did not contact the claimant by making two telephone calls in relation to his absence, in accordance with the policy.

49. We find that the claimant is not entitled to be paid for 20 April. We accept the respondent's evidence that he did not attend work on that day and the evidence supports its position.

50. The claimant alleged that on 20 April 2019, he had a conversation with Mr Wall during which Mr Wall is alleged to have said that he, the claimant, was "gay and should be acting like a man because your wife should be looking after the child." This was with reference to the claimant being unable to work beyond 2pm because he had childcare responsibilities. His daughter was at home being looked after by his cousin while he was at work. He said that he explained to Mr Wall that he needed to go home to look after his child. His belief was that Mr Wall perceived him to be gay and that he, the claimant, considered the comment derogatory and discriminatory.

51. We have already made the finding that the claimant did not attend work on that day, and it follows from this that the conversation, as asserted by the claimant, did not take place. Mr Wall told the tribunal that he has children and he put his children first before his work, as did the claimant which he understood.

52. The date when this alleged conversation took place was not clear to the tribunal. Even if it was on 30 March 2019, we do not find that Mr Wall had made this statement questioning the claimant's sexuality as we did not find the claimant's account of events and his alleged treatment credible.

53. On 20 April 2019, Mr Wall sent a letter to the claimant informing him that he failed to attend for work on that day and it was a cause of some concern. He instructed the claimant to contact him to discuss his absence by 21 April 2019 otherwise his absence would be treated as unauthorised, resulting in his pay being stopped. (144)

54. On 23 April 2019, a further letter was sent to the claimant as he did not contact Mr Wall. It was headed "Authorised Absence request to attend a formal interview under the Royal Mail Conduct Code." It referred to his absence on 20 April 2019, as amounting to gross misconduct as he failed to provide a satisfactory explanation. The interview was to be held on 23 April at 9 o'clock, on the very day the letter was sent. It referred to the claimant's right to be accompanied by a companion and warned him that one possible outcome may be his dismissal. (149)

55. It is clear to this tribunal that the claimant was unable to attend the interview on 23 April in view of the fact that the letter was sent on or around that date. He told the tribunal that he received it on or around 25 April 2019 and intended to attend work on 27 April but by then the interview date had passed.

56. He also told the tribunal that he attended work on 27 April but was turned away. The identity of the person who turned him away we did not discover, and the claimant did not disclose it to the tribunal. There was no evidence that he had contacted Mr Wall by phone to find out why he had been turned away. There is no record that he was present on the premises. We find that he did not attend for work on 27 April 2019. It is his case to establish that he was present on 20 April and 27 April and he produced no corroborative evidence that he did attend work on those two days.

57. We were told that a Leaver's Pack was sent to him, but we do not know the date. However, as far as Mr Wall was concerned, he wanted the claimant to contact him and had left his position open for 4-5 weeks, but the claimant failed to get in touch with him.

58. The claimant lodged a grievance on 25 April regarding his alleged treatment. It was acknowledged by Mr John Tipler, Operations Manager, North London on 2 September 2019. There was no grievance outcome.

59. The claimant wrote on 13 September 2019, a "without prejudice" letter setting out his case for settlement in which he claimed wages of £173.60 and compensation for discrimination, constructive dismissal, and injury to feelings in the sum of £76,568. He stated that his offer would close on 27 September 2019. (158-162)

60. He agreed that he waived his right not to allow this "without prejudice" correspondence to be included in the hearing bundle.

61. We find that he was dismissed by the respondent on 27 April 2019 and received a Leaver's Pack in which it stated that his last day of employment was 27 April 2019, due to "abandonment of service". As already found, it was not clear precisely when he received the Leaver's Pack. The operative date of termination would have been when he became aware that his employment had terminated. This may be on or around 27 April 2019. In any event the reason for his dismissal by the respondent was gross misconduct, namely unauthorised absence. In so doing, the claimant had breached the terms and conditions of his employment in a fundamental way, entitling the respondent to terminate summarily without paying him notice pay or allowing him to work his notice.

62. In the claimant's disability Impact statement, he made reference to his five conditions as being disabilities. He said because of his disabilities he finds it difficult to read but also stated that he is a slow reader and struggled to recall information. He wrote that it takes 10 minutes to read a newspaper but uses specialist computer software to assist in. The software has a facility to read text aloud. He then wrote the following: –

> "4. I also have difficulty maintaining concentration. As an example, I struggle to meet deadlines and complete tasks. This also affects other areas of my life such as being unable to manage my medication conditions, which is why I have support through Adult Social Care.
>
> 5. My disabilities have also had an impact on my working life in that as the medication I take limits my day-to-day. For instance, my pain medication causes me to become drowsy, noxious and fatigue.
>
> 6. I am currently taking medication in the form of pregabalin, sertraline, insulin, Metformin, salbutamol, and codeine. As a result of taking these medications, I experience drowsiness and confusion on a daily basis. I also attend the outpatient's department of Whittington Hospital for diabetes.
>
> 7. My health had deteriorated further since the date I filled and submitted my application to the employment tribunal. I attend my outpatient appointment at Whittington Hospital on a mobility scooter with a crutch due to the sciatica pain, neurological pain and plantar fascia which I experience. I am unable to stand and move between one to five metres with a crutch before having to take a seat.
>
> 8. I also have poor self-care due to lack of energy and drive as a result of low self-esteem which is related to my anxiety and Borderline Personality Disorder. For instance, I struggle to get out of bed and maintain appointments. This is also reflective with my disabilities getting out of the house due to anxiety that I suffer. In particular, I struggle to open my front door to accept parcels or even walk to the local shop.
>
> 9. I am also on a Freestyle Libre programme to manage my glucose levels. This treatment is provided to me is [in] relation to diabetes. This monitors my glucose levels which allows the health care professionals to see if my glucose is too high or too low."

63. It was not clear to the tribunal precisely what alleged disability has substantial adverse effects on the claimant's day to day activities. He also referred to going to hospital in a mobility scooter with a crutch, yet he does not rely on any mobility issues as a disability. In addition, it was not clear to us the adverse effects of his nut allergy, asthma, and Borderline Personality Disorder. The onus is on the claimant to establish at the point in time when he alleges, he had been discriminated, that he was suffering from a disability.

Submissions

64. We have considered the submissions both oral and in writing by Ms Percival, solicitor on behalf of the respondent, and the oral submissions by Mr Brown, solicitor on behalf of the claimant. In addition, we have taken into account the authorities they have referred us to.

The law

65. Section 6 and Schedule 1 of the EqA 2010 defines disability. Section 6 provides:

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

66. Section 212(1) defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1).

67. Under section 6(5), the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

68. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24

69. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

70. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1) Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put 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 is reasonable to have taken to avoid disadvantage."

71. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

72. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1) the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2) the physical feature of premises occupied by the employer;
>
> (3) the identity of a non-disabled comparator (where appropriate), and
>
> (4) the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.
>
> A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

73. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section

20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

74. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

75. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion, or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

76. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

77. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

78. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and must be determined objectively.

79. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition

directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

80. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

81. Harassment is defined in section 26 EqA as;

> **"**26 Harassment
>
> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
>
> (i) violating B's dignity, or
>
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B"

82. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

83. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

> (1) the respondent had engaged in unwanted conduct;
>
> (2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;
>
> (3) the conduct was on one of the prohibited grounds;
>
> (4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and
>
> (5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable

for the claimant to have felt that their dignity had been violated, or an adverse environment created.

84. Whether the conduct relates to disability "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

85. Under section 13, EqA direct discrimination is defined:

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

86. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

87. Section 136 EqA is the burden of proof provision. It provides:

> "(1)This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

88. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

89. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

90. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

91. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

92. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

93 Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

94. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant

about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex, Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

Conclusions

Disability

95. The claimant has not established that his anxiety, nut allergy, asthma, and Borderline Personality Disorder are disabilities within the meaning of section 6, schedule 1 Equality Act 2010. The evidence he provided was not clear and cogent.

96. In relation to his diabetes, he said that on 30 March 2019, he needed to take his insulin medication as his blood sugar was low. Without his medication he would experience either a hypoglycaemic or hyperglycaemic episode and would either faint or go not a coma. He is likely to feel tired and unable to concentrate. This is based on our knowledge of having dealt with diabetic claimants. The claimant told us that he would require breaks to take his medication.

97. We have come to the conclusion that he has established that he is disabled by reason of his diabetes.

Failure to make reasonable adjustments

98. The claimant's case as set out in the agreed list of issues, is that the provision, criterion, or practice, was the respondent not giving employees rest breaks when sorting out mail in the Delivery Office. There was no evidence adduced by the claimant in support of this contention. Quite the contrary, the evidence was to the effect that the respondent's employees did and do take their rest breaks when convenient to them.

99. After having realised that the respondent's employees took their rest breaks, the claimant changed his position and submitted an amended pcp, namely that those 25 years of age and younger, were denied their rest breaks. This was changed during the course of the hearing without any evidential basis in support of it. It transpired, in evidence, and as we have found, the claimant was unable to tell the tribunal whether the younger employees were denied their rest breaks.

100. We came to the conclusion that the claimant had not put forward a credible pcp in support of his claim of failure to make reasonable adjustments. The claim is without merit. It is not well-founded and is dismissed.

Direct age discrimination

101. The claimant has to establish less favourable treatment because of age or because of his age. We found that he was unable to establish whether those of 25 years and younger, were denied their rest breaks. He was also unable to show that is to work colleagues were denied rest breaks and acknowledged that they could have taken their rest breaks while on their rounds. In any event, the claimant did take his rest break after his discussion with Mr Wall on 30 March 2019.

102. Further, we accepted that the respondent's policy is to allow its staff to take their own rest breaks without any specific conditions being attached. Mr Wall had no input in when the claimant took his rest breaks.

103. We bear in mind that in the claimant's email to Mr Wall dated 1 April 2019, he did not raise the denial of his rest break as an issue. He was enjoying his time with the respondent.

104. In considering section 136 Equality Act 2010, and the case of Madarassy, the claimant was unable to establish less favourable treatment. The burden, therefore, did not shift to the respondent for a non-discriminatory explanation. Accordingly, this claim is not well-founded and is dismissed.

Harassment related to age

105. The claimant asserted that on 30 March 2019, in refusing to allow him to take a rest break, Mr Wall said that he appeared to be a young man and should be fine, and that older men needed rest breaks because they have no energy but as the claimant was a "young chap", he had the energy which the others did not have.

106. We do not accept that Mr Wall made that statement attributed to him by the claimant. As we have repeatedly stated, the respondent did not have any specific times when its postal workers were required to take their breaks. The claimant did in fact take his break after meeting Mr Wall. He was, therefore, not denied his break on 30 March 2019.

107. In addition, the claimant's inconsistent evidence in relation to Mr Wall's statement about his disabilities, and his 1 April 2019 email showing he was enjoying his time with the respondent, have led us to conclude that his account of events is not credible.

108. He had not established facts from which it can be shown that the respondent had engaged in unwanted conduct related to age or that of his age. The first requirement in the Richmond Pharmacology case had not been established. Accordingly, this claim is not well-founded and is dismissed.

Harassment related to sexual orientation

109. Did Mr Wall say to the claimant on 30 March 2019, "you must be gay because your wife should be looking after the kids". We have not found that the statement was made by Mr Wall. There were no facts from which we could conclude that the respondent had engaged in unwanted conduct related to sexual orientation or the claimant's perceived sexual orientation. This claim is not well-founded and is dismissed.

Unauthorised deductions from wages

110. In relation to the claimant's claim for arrears of pay for 20 April 2019, we have found that he was not in attendance at work on that day. Therefore, he is not entitled to a full day's pay.

111. In relation to notice pay for one week, which is one day's pay, we found that the claimant did not attend work on 27 April 2019 and that his job was kept open, but he failed to make contact with the respondent. His absence was unauthorised. He is not entitled to notice pay or payment in lieu of notice as the respondent was entitled to treat his unauthorised absence as gross misconduct disentitling him to notice pay or pay in lieu of notice.

112. The respondent acknowledged that it owes the claimant 3.2 hours unpaid holiday, and this would be paid to him.

_____
Employment Judge Bedeau
4 February 2021
Date: ……..

Sent to parties on: .
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For the Tribunal Office