EMPLOYMENT TRIBUNALS

Claimant: **Mr J Kane**

Respondent: **Barclays Bank UK PLC**

Heard at: **Southampton (by CVP)** **On: 15, 16, 17, 18, 19, 22 March 2021**

Before: **Employment Judge Dawson, Ms Collins, Mr Spry-Shute**

Appearances
For the claimant: Representing himself
For the respondents: Mr Purnell counsel

JUDGMENT

1. The respondent discriminated against the claimant in that it failed to comply with its duty to make reasonable adjustments in respect of the physical features of its branch in Westbourne, Dorset.

2. The respondent is ordered to pay the claimant the total sum of £9692.05 made up of

    a. £8000 in respect of injury to feelings and

    b. £1692.05 in respect of interest.

3. The other claims of the claimant are dismissed.

REASONS

Summary of the Decision

1. The claimant's claim of disability discrimination succeeds to the extent that the tribunal finds that he was not given sufficient access to the toilet at the Westbourne branch of Barclays and, therefore, there was a failure to make reasonable adjustments in respect of the physical features of the branch which placed the claimant at a disadvantage compared to non-disabled people.

2. The other claims of disability discrimination fail because;

a. the AIP was a proportionate means of achieving a legitimate aim,

b. there is no evidence that the PIP was imposed because of something arising in consequence of the claimant's disability,

c. reasonable adjustments were made to the respondent's capability procedure, including the triggers for action to be taken under it.

3. An award of £8000 for injury to feelings plus interest is appropriate.

Full Reasons

Introduction

4. By a claim form presented to the tribunal on 25 July 2019 the claimant brought claims of unfair dismissal and discrimination on the grounds of disability.

5. The matter came before the tribunal on 12 December 2019 when the issues were identified and the case was listed for a further preliminary hearing on 14 September 2020 to determine whether the claims were in time and whether or not the claimant was disabled.

6. Prior to that hearing the issue of disability was conceded and, at that hearing on 14 September 2020, the tribunal determined that it lacked jurisdiction to determine the claim of unfair dismissal having regard to the date on which it was presented but that the claim of disability discrimination was presented within such period as the tribunal considered just and equitable.

Issues and Procedural History

7. At the outset of this hearing the parties discussed the issues with the tribunal and, having gone through each issue in turn, agreed that the issues remained as set out in the list of issues created on 12 December 2019, subject to the following points and clarifications:

a. The claimant contended that although the list of issues referred to the imposition of two attendance improvement plans (AIPs), in fact he had been the subject of three AIPs, in November 2016, February 2017 and July 2018. The respondent denied that the claimant had been the subject of an AIP in February 2017 but did not object to the matter being listed as an issue.

b. The respondent did not accept that the imposition of the AIPs or the PIP amounted to unfavourable treatment, but did accept that the AIP was given because of something arising in consequence of the claimant's disability, namely his absence. It did not accept that the PIP was given to the claimant because of something arising in consequence of his disability.

c. Although the respondent had been given permission to serve an amended response at the hearing on 12 December 2019 it had not done so and counsel for the respondent confirmed that it sought to rely upon

a justification defence in relation to the claims under section 15 of the Equality Act 2010. The aims relied upon were identified as set out below.

d. In respect of the claim of failure to make reasonable adjustments, the respondent accepted that its capability policy and in particular the triggers for action taken under it amounted to a PCP and that the accessibility of the claimant to a toilet at the respondent's Westbourne branch would fall within the definition of a physical feature within the meaning of section 20 of the Equality Act 2010.

8. It is necessary to say something about the issue of time/limitation in connection with the hearing of 14 September 2020.

9. The claim was listed for a preliminary hearing on the question of "Whether the claim was brought in time and, if not, whether time can be extended under s. 123 of the Equality Act and/or s. 111 of the Employment Rights Act to enable the complaints to be pursued to a final hearing".

10. At the hearing on 14 September 2020 both parties proceeded on the basis that the limitation period for both the unfair dismissal claim and the disability discrimination claim expired on 27 of February 2019. That was based on the effective date of termination of the claimant's employment being 30 November 2018. At that hearing no submissions were made as to dates of the specific acts of discrimination complained of or the question of whether or not the discrimination was conduct extending over a period.

11. At the outset of this hearing Mr Purnell, for the respondent, raised the point that the tribunal had not determined whether there was any conduct extending over a period and, therefore, the situation might arise whereby an act of discrimination found proved by the tribunal was not part of a continuing act and occurred at a date such that the limitation period expired earlier than 27 February 2019.

12. Mr Kane agreed that the tribunal decision on 14 September 2020 did not address the question of whether there was conduct extending over a period.

13. Thus Mr Purnell's submission was that if that situation arose, this tribunal should consider afresh whether the claim had been presented within time or not. Mr Kane did not dissent from that proposition. We will return to this point below

Conduct of the Hearing

14. An issue arose during the course of the hearing as to whether the respondent should be allowed to rely upon an email which appeared at pages 652 and 653 of the bundle. The document had only been disclosed to the claimant on 12 March 2021, being the Friday before the hearing started. The claimant objected to its inclusion on the grounds, firstly, that it should have been disclosed earlier and, secondly, that the email was made up of extracts from other documents which recorded discussions about monthly one-to-one sessions between the claimant and his manager. He stated that the extracts could not be seen in

context and were potentially misleading as a consequence. He denied that there had been any discussions with him about performance, which is what the extracts purported to show.

15. Counsel for the respondent explained that the reason for the late disclosure was that when he had started to prepare for the case he noted that there was no evidence about one to one meetings with the claimant in the bundle and asked the respondent to look for that evidence. That evidence (at least in its primary form) did not exist but the respondent had located the email which appears at page 652 of the bundle. That was a document which was created (according to the respondent's counsel) for purposes of the claimant's grievance and is dated 7 November 2018, being two days after the claimant had given notice of resignation.

16. The respondent accepted that the question of the claimant's performance would have been known to be an issue in this case since December 2019. The date on which the document was disclosed was after the date ordered for disclosure, after the date ordered for compilation of the bundle and after the date of exchange of witness statements.

17. We considered the overriding objective and noted the lack of any good explanation as to why this email had not been disclosed sooner. We noted that it had been disclosed after the exchange of witness statements and, therefore, could not be dealt with by the claimant within his witness statement but also, significantly, he did not know what the respondent's witnesses would say about it until it was addressed in evidence. That was bound to put the claimant at a disadvantage when he was representing himself. Equally significantly, however, we considered that the document had no real probative value in circumstances where the original documents, from which extracts had been copied, could not be put before us and we would have no way of knowing the context in which the extracts had been created. Thus, even if we considered it just to overlook the failure by the respondent to comply with the directions on disclosure etc, we could not place any real weight on the document in any event. For those reasons we did not consider it just and equitable to consider the document at such a late stage.

18. The hearing had been be listed for six days to enable the tribunal to accommodate breaks which the claimant might need. We discussed with the claimant whether he would prefer the breaks to be scheduled in advance or he would simply prefer to notify the tribunal when he needed a break. He indicated the latter although at frequent periods the tribunal, nevertheless, enquired of the claimant whether he wanted a break. Breaks were provided whenever the claimant sought one.

19. For the respondent we heard from Ben Clayton, Jackie Nicholson, Rebecca Roach and Mark Coomber and from the claimant, in respect of liability, he gave evidence on his own behalf.

20. The claimant represented himself and we record that the careful way in which he presented and conducted the case did himself and his case a great deal of credit.

The Law

Reasonable Adjustments

21. Section 20 of the Equality Act 2010 provides in respect of the duty to make reasonable adjustments as follows:

> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
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> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

22. Section 21(1) provides that a failure to comply with the first or second requirement is a failure to comply with the duty to make reasonable adjustments.

23. Schedule 8 to the Equality Act 2010 provides

> 20
>
> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (a)…;
>
> (b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

24. *In Royal Bank of Scotland v Ashton* [2011] ICR 632 the EAT stated that: "The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect – that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it"

25. In *Environment Agency v Rowan [2008] IRLR 20*, the EAT gave guidance on how an employment tribunal should act when considering a claim of failure to make reasonable adjustments. The tribunal must identify:

"(a) the provision, criterion or practice applied by or on behalf of an employer, or;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant'.'

26. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1).

Discrimination because of something arising from Disability

27. In respect of a claim for discrimination arising from disability, under section 15(1) of the Equality Act 2010 a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

28. Under section 15(2), this 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.

29. The proper approach to section 15 claims was considered by Simler P in the case of *Pnaiser v NHS England* at paragraph 31. She held:

> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
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> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference

between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

30. In Private Medicine Intermediaries Ltd v Hodkinson, HHJ Eady QC held

> **[24]** The protection afforded by s 15 applies where the employee is treated "unfavourably". It does not necessitate the kind of comparison required by the use of the term "less favourable treatment" as in other forms of direct discrimination protection; neither is it to be understood as being the same as "detriment". "Unfavourable treatment" suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability. It will be for an ET to assess, but treatment that is *advantageous* will not be unfavourable merely because it might have been *more* advantageous.

31. In *Dr J Ali v Drs Torrosian, Lechi, Ebeid & Doshi t/a Bedford Hill Family Practice* Appeal No. UKEAT/0029/18/JOJ, HHJ Eady QC helpfully summarised the principles in relation to justification as follows.

> 15. Section 15(1)(b) thus allows that the unfavourable treatment relevantly identified for the purposes of section 15(1)(a) - here, the Claimant's dismissal - might be justified if it is a proportionate means of achieving a legitimate aim. To be proportionate, the conduct in question has to be both an appropriate means of achieving a legitimate aim and a reasonably necessary means of doing so (see Chief Constable of West Yorkshire Police & Another v Homer [2012] ICR 704 SC , and Allonby v Accrington & Rossendale College & Others [2001] ICR 1189 CA).
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> 16. Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (see Ojutiku v Manpower Services Commission [1982] ICR 661 CA per Stephenson LJ at page 674B-C, Land Registry v Houghton & Others UKEAT/0149/14 at paragraphs 8 and 9, and Hensman v Ministry of Defence UKEAT/0067/14 at paragraphs 41, 42 and 44).
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> 17. It is, further, common ground that when determining whether or not a measure is proportionate it will be relevant for the ET to consider whether or not any lesser measure might

nevertheless have served the employer's legitimate aim (see the EAT's judgment in Naeem v Secretary of State for Justice [2014] ICR 472).

18. More specifically, the case law acknowledges that it will be for the ET to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer (see Hensman at paragraph 44). In that context, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence will, no doubt, be a significant element in the balance that will determine the point at which their dismissal becomes justified, albeit, the evidence that may be required in this respect will be primarily a matter for the ET (see per Underhill LJ at paragraph 45 of O'Brien v Bolton St Catherine's Academy [2017] ICR 737 CA).

19. In O'Brien , a particular concern was raised as to what was said to have been the conflation by the ET in that case of the test applicable under section 15 of the EqA and that in the unfair dismissal claim, brought under section 98 of the Employment Rights Act 1996 ("ERA"). As Underhill LJ acknowledged in O'Brien , in carrying out the assessment required for the purposes of section 15 EqA , the ET is applying a different legal test to that arising in the context of an unfair dismissal claim under section 98 ERA . That said, Underhill LJ went on to deprecate the introduction of additional complexity where the substantive assessment is likely to be the same. Specifically, as he identified, where an ET is concerned with both such claims in the context of a dismissal for long-term sickness absence, the factors that are relevant for its determination of one claim are likely to be substantially the same as those to be weighed in the other (see paragraphs 53 to 55 of O'Brien).

20. As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied (see Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] ICR 1197 EAT at paragraph 42). When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification (see Ministry of Justice v O'Brien [2013] UKSC 6 , see in particular the judgment of the Court at paragraph 48; although the test remains an objective one, see O'Brien at paragraph 47).

The Burden of Proof

32. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision 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.

33. In *Madarassy v Nomura International plc* [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment 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.
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> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant 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 contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

34. In *Hewage v Grampian Health Board* [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

35. In respect of a claim of failure to make reasonable adjustments, we accept the summary of the law set out in the closing submissions of the respondent as follows:

9. In a reasonable adjustments case, the burden will not shift to the employer until:

a. The tribunal is satisfied that on the balance of probabilities the claimant was substantially disadvantaged within the meaning of the reasonable adjustment provisions.

b. The claimant or tribunal has suggested an adjustment that it is alleged the employer should have made, in sufficient detail to enable the employer to deal with it.

c. There is evidence that is at least capable of leading a tribunal to conclude that the proposed adjustment would have been reasonable and would have eliminated or reduced the disadvantage.

10. If the burden shifts, the employer must prove that the proposed adjustment was not reasonable (*Project Management Institute v Latif* [2007] I.R.L.R. 579 per Elias P at §53-55).

Time

36. Section 123 Equality Act 2010 provides:

> (1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
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> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable

37. In *Matuszowicz v Kingston-Upon-Hull City Counc*il [2009] IRLR 288, the Court of Appeal held, in respect of when time starts to run for a reasonable adjustments claim "In terms of the duty to make reasonable adjustments that seems to require an enquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. Necessarily, the employer has not made the reasonable adjustments, since otherwise the complaint would not arise, but it has done nothing inconsistent with making them in future, since otherwise the matter would be within para. 3(4)(a). In this case, however, the person in question is to be treated as having decided upon the omission as a deliberate omission at the time when he might reasonably have been expected to have done the thing omitted."

Findings of Fact

38. The claimant was employed by the respondent from 2012, initially as an Apprentice Customer Adviser. By 1 April 2015 he had attained the role of Moment Banker and by February 2016 he was promoted to the role of "Go To" Banker.

39. In May or June 2016 the claimant was diagnosed with Crohn's disease. As a consequence he had time off work.

40. On 5 May 2016, the claimant went off sick for 24 days until 8 June 2016 and from 22 June 2016 he was off for 8 days. On 18 July 2016 the claimant was off for a further day. We find that those absences were due to Crohn's disease.

41. On 15 August 2016, an occupational health report was provided to the respondent's "ER Direct" department which provided human resources advice to the claimant's managers in this case. The report records that the claimant loved his job and felt extremely well supported by management and the report confirmed that the writer's professional opinion was that the claimant's inflammatory bowel condition would fulfil the definition of disability under the Equality Act 2010. The writer recommended flexibility to attend any medical review/treatment appointments and to take account of the claimant's condition in consideration of any attendance and performance figures. However she stated that "the amount of flexibility that can be sustained is ultimately for the business to decide." She recommended micro-breaks throughout the day and that toilet and washroom facilities should be near at hand. She recommended regular reviews between the employee and the line manager.

42. On the same day, the claimant went off sick for 11 days until 30 August 2016. The fitness for work statement (page 163) confirms that the absence was due to Crohn's disease. The claimant was then off sick, again, for two days until 22 September 2016 and a further seven days between 25th of October 2016 and 2 November 2016. We find those absences were related to the claimant's Crohn's disease.

43. On 4 November 2016 the claimant was required to attend an Attendance Review Meeting in respect of capability. The summary of that meeting, at page 164, states "as Jon has hit all three attendance triggers we have agreed to put an attendance improvement plan in place to support him moving forward". The triggers referred to were those in the respondent's ill-health policy. It is not disputed that those triggers had been met by the claimant.

44. The Attendance Improvement Plan (AIP) stated that the support which would be provided to the claimant was "an OH referral has been made and Jon is being supported by AXA" and "regular reviews with line managers". The AIP also set out how attendance must be improved and recorded that there were agreed amended absence triggers as set out. They were,

    a. in respect of the number of days absence in 52 weeks "10 days plus an additional five days"

    b. in respect of the number of absences in 52 weeks "5 absences plus an additional two" and

    c. in respect of the number of absences in any 12 week period, "4 absences".

45. One unsatisfactory feature of the evidence in this case is that we were not told by the respondent's witnesses how those additional allowances were calculated. Both Mr Clayton and Mr Coomber expressly stated that they did not know. As will become apparent this is particularly odd given that the occupational health reports consistently state that the decision of the number of allowances to be granted is one for the business, taking account of business needs. It is apparent that, in this case, no one spoke to the branch managers in setting those allowances to discover what the business needs were. The branch managers/assistant managers who were involved in the claimant's case were simply told by the ER Direct department what the allowances should be. We have been given no insight as to how that number of allowances was selected and whether or not it was by reference to the effect of Crohn's disease on the claimant.

46. On the other hand, at both this AIP meeting and the subsequent one to which we will return, the claimant did not suggest that the allowances he had been given in respect of his triggers were inadequate.

47. At page 85 of the bundle is a flowchart setting out the steps in the respondent's capability procedure. The AIP is a step in that capability procedure. Indeed it is the second step, when more informal action has failed. In the introductory section page 85 states "this procedure should be used when there is a problem with the employee's performance or attendance." Thus in respect of any employee who is placed on an AIP, there is a requirement that their performance or attendance is a problem.

48. In respect of the use of an AIP, the flowchart states "if the employee fails the PIP/AIP by not achieving all the objectives and standards set, you should consider progressing to a formal capability meeting."

49. For an employee to be placed on an AIP would inevitably create anxiety for them, Firstly they are being told that their attendance is problematic. Secondly they are in the second stage of a process and being told that if they do not achieve all of the objectives and standards set out in the AIP they will be treated as "failing" it and matters may progress to a formal capability meeting. The claimant reasonably and understandably was upset at being placed on an AIP.

50. Following the implementation of the AIP the claimant was off sick for two days in January 2017 and for 13 days in February 2017. As a consequence he was invited to a capability meeting on 16 May 2017. The meeting was carried out by Nicholas Merry who decided that no further action was required. He told the claimant in the meeting "in this case I don't feel a sanction is warranted, what I do feel is to ensure you get support needed OH referral and some further counselling – we will need to put further plan in place, these triggers will be comprehensive" (sic. page 208). It is apparent from the records which appear at page 405 of the bundle that Mr Merry felt that that the AIP adjusted figures may not have been evaluated properly and may have set the claimant up to fail. We do not find that, if that was the case, it was done deliberately. Nor do we think that was what Mr Merry was intending to convey that it was done deliberately.

51. A further occupational health report was obtained which appears at page 216 of the bundle, by that time the claimant had stepped down from his Go To banker role which he advised had been helpful. The occupational health report states that the claimant reported no work-related issues. The report again recommended flexibility but said that was for the business to decide and stated that "toilet and wash room facilities should be near at hand and the employee may require additional comfort breaks when symptomatic".

52. We find that in June 2017 a further draft AIP was prepared for discussion with the claimant. However, we accept the respondent's evidence that because of the claimant's sickness absence, which started on 8 June 2017 and lasted for 29 days to 25 July 2017, that AIP was not discussed with the claimant or implemented. In his evidence the claimant had no recollection of that plan being discussed with him and we conclude that, having been given a copy of the draft AIP on disclosure, the claimant has convinced himself that such an AIP was implemented although, in reality, it was not..

53. The absence to 25 July 2017 was, again, Crohn's related and required hospital admission .

54. A further occupational health report was obtained as a consequence of that absence and the recommendations were largely the same as before. Flexibility was recommended in relation to working hours, breaks were advised, there was a need for ongoing flexibility around comfort breaks and toilet facilities were to be near to hand.

55. In December 2017, the claimant transferred from the Poole branch of Barclays to the Bournemouth branch. At that point Mr Clayton became his line manager. Mr Clayton had known the claimant before the move and was aware that he was not especially happy at the Poole branch. A gap had developed in Mr Clayton's team and he contacted Jackie Nicholson to see if she would be happy for the claimant to join his branch. She was and the claimant agreed to transfer to the Bournemouth branch. We find that Mr Clayton was well disposed towards the claimant.

56. The claimant was then off work with Crohn's related illness between 2 January 2018 and 9 February 2018, being a period of 29 days. When the claimant returned, Mr Clayton had a meeting with him. Mr Clayton stated that he wanted to refer the claimant to occupational health again. The claimant was upset by that because he took the view that nothing had changed, in terms of his health, since the previous occupational health referrals and so little would be achieved. Mr Clayton decided not put the claimant on a further AIP because to do so would put him under more stress, even though he saw it as an informal measure. He stated, and we accept, that he wanted to start the claimant at Bournemouth on a clean slate.

57. The claimant was then off sick for one day on 2 March 2018, five days from 5 March 2018 and 10 days from 8 May 2018. Those absences were Crohn's related.

58. As a consequence of that absence, a further occupational health report was sought and obtained on 30 May 2018. That report stated "the employee reports that he can experience symptoms of fatigue, poor energy levels, disrupted sleep patterns, mild to severe pain and cramps around the abdominal area, loss of weight, be poorly nourished, dehydration, poor concentration, poor motivation and an increase in anxiety around getting to a toilet in adequate time." It also stated that the claimant had advised that he felt very well supported by his manager. In addition to other recommendations it was suggested:

    a. "The business to consider being flexible with absence triggers and performance targets due to his chronic health condition and his current recovery period from surgery. However, it is for the business to consider what level of absence it can tolerate" and

    b. "The business to consider allowing for the employee to work from the office on the middle floor which is the closest to a toilet, as per discussion, to alleviate any concerns around using the bathroom at very short notice." (Page 243).

59. Mr Clayton was concerned by the level of absence and decided that it was now time to place the claimant on an AIP. The AIP appears at page 246 of the bundle and showed that the claimant would be supported by being allowed time off for doctors' appointments, flexibility in absence triggers, short breaks to manage discomfort and locating his workstation on the first floor. Absence triggers under the absence policy were adjusted but, as set out above, it is not clear to us how those adjustments were decided upon. Mr Clayton confirmed that no one spoke to him about the appropriate level of absences in terms of the business needs of his branch and what level of absence it could tolerate, he was simply told by ER Direct what the revised triggers should be. The minutes of the meeting, which were signed by the claimant, record that the claimant was happy with the agreed actions within the AIP.

60. In July 2018 the respondent had an opening for a moment banker in the Westbourne branch. Initially that was for two days per week but later three days. Mr Clayton identified the claimant as being somebody who might benefit from moving to the Westbourne branch since it would give him a quieter space to focus on his performance. At that stage Mr Clayton had concerns about the level of contact which the claimant was having with customers and the claimant's ability to sell insurance products etc to those customers. Although all of the respondent's witnesses suggested that the respondent did not have targets for sales (Ms Roach rejecting the term "target" in favour of the term "aspiration"), it is clear that employees in the position of the claimant were expected to sell insurance and other products to customers. The fact that the claimant was perceived as not selling sufficient amounts of products was a concern to Mr Clayton. Mr Clayton suggested that he thought the move would be beneficial for the claimant, we accept that may have been the case, subject to the issue with the toilet to which we will return. We find that Mr Clayton approached the claimant about moving branch and the claimant was happy to move to the Westbourne branch. We do not find that he was put under any pressure to do so and he could have stayed at the Bournemouth branch.

61. The premises at the Westbourne branch were such that the toilet is within the secure area of the branch and on another floor to the area where customers were seen. The claimant was able to work within the secure area except when he was seeing customers. When the claimant seeing customers he would work outside the secure area. If the claimant was outside the secure area and needed the toilet he would need to go through the security door and to the upper floor. However, when money was being moved the floor was locked down and no access was permitted to people coming in. Thus the claimant could not access the toilet at that time. We find there were two occasions when the claimant was at the Westbourne branch when he was not able to access the toilet quickly and had to go to local business in order to go to the toilet.

62. Because of his Crohn's disease, the claimant, sometimes, needed quick access to a toilet in order to avoid the risk of embarrassment. It would have been distressing for him to be in a situation where he could not access the branch's toilet when he needed to use it. It would also have been stressful for him to be in the situation where there was a possibility that he might need the toilet when he could not access it. For instance, even if, in fact, the claimant did not need the toilet whilst serving a customer, he would have remained anxious that he might do so at any point.

63. When the claimant moved from the Bournemouth branch to the Westbourne branch no assessment was carried out as to whether he would be able to access a toilet and we find that issue was simply overlooked.

64. We also find, however, that the claimant did not raise that situation with any members of staff of the respondent before meeting with Mr Clayton on 21 September 2018. Although the claimant suggested that he had raised it at an earlier meeting with Ms Beaumont, his evidence in that respect was not satisfactory. His witness statement deals with the point at paragraph 41 but does not expressly say that he discussed the toilet issue with her and, if he had done, we would have expected him to say that in his statement. On balance we prefer the respondent's evidence that the first time the issue was raised was on 21 September 2018.

65. The claimant started working three days per week at the Westbourne branch from around the middle of August 2018.

66. The fact that the claimant did not raise the issue of the toilet facilities at the Westbourne branch prior to 21 September 2018 suggests that whilst the issue did cause him some anxiety and, on two occasions, distress when he could not access the branch's toilet, the issue was not as significant for the claimant then as he perceives it to have been now.

67. On 3 September 2018 a meeting took place between the claimant and Mr Clayton about the implementation of a Performance Improvement Plan (PIP) . The PIP itself records that the manager implementing it must detail how the employee's actions could be "in direct contravention to the Barclays Values". In answer to that Mr Clayton has written "Your energy, skills and resources are not being utilised efficiently/effectively to deliver the best sustainable results. On exploring toolbox and prompt usage year to date shows an average of 17.4

interactions a week and 4.5/10 prompts delivered. You should be having quality toolbox interactions with a minimum of 25 customers and delivery 6/10 prompts exploring a relevant range of solutions —this indicates you are not putting our customers at the centre of what we do".

68. The respondent's case is that the data relied upon in the PIP in respect of the average number of interactions per week and the average number of prompts delivered is assessed by computer and does not take account of days when the claimant was not present at work. Thus in respect of the statement that the claimant had had an average of 17.4 interactions a week, days when the claimant was not at work would not have counted towards the calculation of the average. In respect of the ratio of prompts delivered (4.5/10), that is assessed by reference to the number of customers seen by the claimant and, therefore, on days when the claimant was not present and did not see any customers, the ratio would not be affected. In cross examination Mr Kane largely agreed with that. It was put to him that the statistics are only recorded on the days when he was present and he said "yes". It was put to him that if he was not in and saw no customers then the statistics would not be affected and he stated that sometimes there would be problems with systems but when it was again put to him that records only relate to the days when he was in the office replied "yes". We accept the respondent's case in this respect.

69. The claimant did not challenge the data which is set out in the PIP and we accept that Mr Clayton was genuinely concerned that the claimant was underperforming and that was the reason for implementing the PIP.

70. Although some of the occupational health records referred to above suggest that the Crohn's disease may have affected the claimant in terms of his concentration etc. it is not the claimant's case that the quality of his work was affected by his disability. His case, in this respect, is forcefully set out in his written closing submissions which state:

> In between toilet trips, I am the same intelligent, kind, thoughtful, helpful and diligent employee that I always was.
>
> In between hospitalisations and periods off sick as a result of my disability, I am still the same capable, professional, colleague that I always was.
>
> I didn't change, I didn't become incompetent, I became incontinent and that is not the same thing at all.
>
> There was no problem with the work I produced, at no point in all my time at Barclays did the quality of my work suffer.

71. It would, inevitably, have been upsetting for the claimant to be put on a PIP. The suggestion by Ben Clayton that a PIP is no more than a proactive, helpful and supportive tool, designed to achieve "key performance targets" is naive if it is intended to convey that the claimant should have regarded being placed on a PIP as something beneficial. We have already quoted from the PIP itself which requires the manager to state how the employee's actions could be in

direct contravention of the Barclays Values. For an employee to be told that their actions are in contravention of the Barclays values and, further, that their energy, skills and resources are not being utilised efficiently/effectively is bound to upset them. It is also a step in the capability procedure and failing it can lead to a formal capability meeting (p85).

72. On 12 September 2018 the claimant went off work due to ill-health. He did not return again prior to his resignation on 5 November 2018. He was, again, referred to occupational health. The occupational health report of 21 September 2018 stated that the claimant had depression and was being prescribed medication for that condition. It also referred to his Crohn's disease. The report stated that the claimant was experiencing functionally limiting symptoms and remained unfit for work.

73. On 5 November 2018 the claimant sent a letter resigning from his employment with the respondent. He listed the causes of his resignation they were, in summary:

    a. the capability meeting in April 2017

    b. being told by his line manager at the Poole branch that he would have another capability meeting in August 2017, which did not happen,

    c. not being supported at the Poole branch by December 2017,

    d. that it was suggested the claimant had another referral to occupational health in January 2018,

    e. that in July 2018 the claimant went to the Westbourne branch and there were a few incidents when he could not use the branch's toilet

    f. in September 2018 he was placed on a Performance Improvement Plan.

Conclusions

74. In this part of our judgment we set out how we have applied the law to the findings of fact in order to decide the issues.

75. We commence our analysis by reference to paragraph 11 of the list of issues set down by Employment Judge Livesey following the hearing on 12 December 2019.

76. In respect of paragraph 11.1, we find that two AIPs were imposed on the claimant and a PIP was also imposed.

77. We accept the claimant's case that it is unfavourable treatment to be placed on either an attendance improvement plan or a performance improvement plan. In both cases we accept that they were steps along a process which could lead to a formal capability meeting and the imposition of those programs would have caused the claimant distress and anxiety. We have given our reasons for that above.

78. In respect of paragraph 11.2, we must consider whether the claimant was placed on an AIP or a PIP because of something which arose in consequence of his disability.

79. It is conceded by the respondent that the AIP was given to the claimant because of his absence.

80. The more difficult question which we have had to consider is whether there is evidence from which we could conclude that the PIP was imposed upon the claimant because of something which arose from his disability.

81. In answer to a question from the tribunal as to how the claimant asserted that the PIP was imposed because of something which had arisen in consequence of his disability, the claimant said that the amount of time he had had off meant that he was not seeing enough customers and not getting enough business for the bank and that there should have been adjustments in terms of the time that he had off.

82. Having reviewed the evidence, we conclude that the respondent is right in its argument that the amount of time the claimant had off did not have any impact on the data which led to the imposition of the PIP. That data only measured the claimant when he was at work and ignored periods when the claimant was off work. Thus the claimant is mistaken in his view that in some way the PIP was imposed because he had time off. It was not.

83. Further, given the claimant's clear case that the Crohn's disease did not affect his ability to do work when he was present, there is no evidence from which we could conclude that the PIP was imposed upon the claimant because of something which arose in consequence of his disability.

84. In respect of paragraph 11.3, this question now only arises in respect of the AIP. The aims relied upon by the respondent are said to be supporting the claimant by referring him to occupational health and to amend the standard sickness absence triggers and ensuring necessary levels of attendance within a team to ensure adequate levels of service and to mitigate the impact of absence on other staff members.

85. We accept that those aims are legitimate.

86. The next question for us is whether the use of an AIP is proportionate. We must balance the distress that being placed on an AIP causes, and the fact that it is a step in the capability process, against the need for the respondent to have a system in place which enables all those who need help to access it.

87. A structured system is manifestly preferable to an ad hoc system, especially in an organisation the size of Barclays. The AIPs take account of the need for adjusted triggers to take account of disability. Although we have not been shown how the adjusted triggers were calculated we note that the claimant did not object to them at the time. Moreover, because of the way the respondent operated its capability procedure, including not only the adjusted figures but also the decision by Mr Merry to impose no sanction at the capability meeting

he conducted, the claimant never did receive any sanction in respect of his absence. In that sense the AIPs succeeded in that they enabled the claimant and the respondent to access advice from occupational health, the respondent was given advice as to how to best accommodate the claimant's disability and the claimant was not sanctioned because of his absence. The fact that Mr Merry imposed no sanction shows that the AIP is not used in a way which inexorably leads to a sanction if it is failed. Balancing all of those things we find that the use of an AIP was a proportionate means of achieving the respondent's aims.

88. In those circumstances we do not need to consider paragraph 11.4 although the respondent did not seek to argue that it did not know that the claimant had a disability.

89. We turn then to the question of reasonable adjustments and paragraph 12 of the list of issues.

90. In respect of paragraphs 12.1 and 12.2, the respondent accepts that the capability policy and the triggers for action to be taken under it amounted to a PCP and it also accepts that the physical features of the claimant's workplace in the Westbourne branch would fall within the wording of section 20(4) Equality Act 2010. The particular physical feature which is relevant for the purposes of this issue is that the toilet in Westbourne was situated in the secure part of the branch and on a different floor to that on which the claimant was situated when he was seeing customers.

91. In relation to paragraph 12.2 we find that the capability policy and the triggers for action to be taken under it did place the claimant at a disadvantage compared to non-disabled people. If one takes a hypothetical non-disabled employee, that person would not have as much absence as Mr Kane did, since his absence was mainly attributable to his Crohn's disease. Thus, Mr Kane would be more at risk than a non-disabled employee of hitting the triggers and, ultimately, being subject to a formal warning and, eventually, dismissal.

92. We also find that the location of the toilet in the Westbourne branch put the claimant at a disadvantage compared to non-disabled persons. The respondent's closing submissions state that it is unclear how not being able to gain immediate access to a toilet put the claimant at a substantial disadvantage as compared to non-disabled comparators. It argues that the disadvantage suffered by somebody who desperately needs a toilet but cannot gain immediate access would affect anyone.

93. We do not accept that submission and it seems to us to fail to take on board the respondent's own occupational health advice. For instance in the occupational health report 13 June 2017 it is stated that symptoms of Crohn's disease can include abdominal/bowel pain and spasms, frequency and urgency for bowel motions and often diarrhoea (page 218). Paragraph 43 of the claimant's witness statement (which was unchallenged in cross examination) states "I had the constant worry about soiling myself in case I couldn't access the toilet". The claimant was more likely to need a toilet urgently than a person who did not have Crohn's disease and was much more likely to soil himself if

he could not access the toilet. Even if, as a matter of fact, in the time that the claimant was at the Westbourne branch he did not soil himself, that does not mean that he was not at a disadvantage compared to somebody who was not disabled. He still had the anxiety which accompanies the risk of an accident. Moreover we accept that on two occasions the claimant had to leave the bank in order to find a toilet in a local business; generally speaking a non-disabled person would have been able to wait until there was access to the staff toilet again. Those matters were a substantial disadvantage compared to somebody who does not have a similar disability.

94. We turn then, to paragraph 12.3 of the list of issues and whether the respondent took such steps as were reasonable to avoid the disadvantage.

95. In respect of the triggers under the capability procedure, the respondent did make adjustments. Firstly it extended the triggers within the AIPs, meaning that the claimant would be able to have more absence before progressing to the next stage and, secondly, even when the claimant's absence resulted in the meeting with Mr Merry, the respondent took no action against the claimant but, instead, referred matters back to occupational health. Both of those things were steps which avoided the disadvantage to the claimant of the capability procedure. The claimant was not progressed down the capability procedure any further.

96. Whilst we accept that as long as the claimant was on the AIP he would have been anxious about whether he would hit absence triggers in the future, we do not find that it would have been a reasonable step to remove all absence triggers or, alternatively, simply to remove the claimant from the AIP altogether. The respondent is entitled to manage the sickness absence of its employees, including disabled ones. In placing the claimant on two AIPs, but altering the triggers before the claimant would progress to the next stage and, at the same time, generally giving the claimant support as advised by occupational health, the respondent acted reasonably. For the purposes of completeness, we do not find that the fact that the respondent failed to comply with the occupational health advice regarding the toilet situation when the claimant had moved to the Westbourne branch, meant that the respondent had not made reasonable adjustments in respect of the triggers under the capability procedure.

97. However, in respect of the physical features of the Westbourne branch, the respondent accepts that it did nothing by way of taking steps to alleviate the disadvantage to the claimant until 23 September 2018 and the claimant was told he could carry on working at the Bournemouth branch when he came back to work. By that time, however, the claimant was off sick.

98. The claimant, under the PIP, was required to have eight interviews with clients per week. Those interviews were likely to last up to one hour. It seems to us likely that with some planning the respondent could have ensured that the upper floor of the Westbourne branch did not need to be locked down when the claimant was meeting customers or, as Mr Purnell suggested in closing, customers could have been accommodated in some way within the secure area.

99. In the list of issues, at paragraph 12.3.2 the claimant has suggested an adjustment which could have been made, including something akin to the working arrangement at the Bournemouth Branch. The respondent has produced no evidence to show that that adjustment was not reasonable

100. Thus, we find that the respondent did fail to take such steps as were reasonable to avoid the disadvantage in respect of the physical features of the Westbourne branch.

101. Paragraph 12.4 of the list of issues requires us to consider whether the respondent did not know or could not reasonably have been expected to know that the claimant had a disability or was likely to be placed at the disadvantage. This is only relevant in respect of the physical features aspect of the claim. Having regard to the various occupational health reports, we find that the respondent ought to have known that the claimant was likely to be placed at a disadvantage compared to non-disabled people as a result of the toilet arrangement at the Westbourne branch.

102. That leaves the question of whether the claim of failure to make reasonable adjustments in respect of the features of the Westbourne branch was presented within time. We have set out above the way in which that issue has arisen before us again notwithstanding the judgment of the tribunal on 14 September 2020. Given the wording of the judgment of 14 September 2020 and the fact that neither party sought to appeal the judgment or sought reconsideration of it, we have some concerns as to whether it is proper for the respondent to seek to reopen the issue, now, of whether or not this aspect the claim is in time.

103. The difficulty in reopening the issue at this hearing (and in particular only putting the claimant on notice at the outset of this hearing that the respondent intended to do so) is that, understandably, the claimant has not produced any evidence on the issue within his witness statement. As far as the claimant was concerned that matter was dealt with in September 2020. Thus the submission made in paragraph 118 of the respondent's closing submissions, that the claimant has not advanced a positive case to displace the statutory time limit, is somewhat unfair.

104. It is also not entirely accurate because the bundle contains some of the same evidence that was presented to the hearing in September 2020. At page 648 of the bundle, is a letter from the claimant's general practitioner dated 8 July 2019 dealing with the failure by the claimant to bring a claim in time. Part of the letter is worth reproducing as follows:

> In September of 2018, I saw him and diagnosed him with depression. This was due to the pressure of his work. He was, at that stage, working for Barclays Bank. He stated that the work pressures and need to work to a Performance Improvement Plan, and the problems with his bowels, were the reason for his depression. He sensibly sought counselling. He was reviewed twice in September and then into October of 2018. He continued to suffer with depressed mood, bouts of crying, a

> sense of despair and loss of pleasure in life. On the 5th November 2018 he decided to hand in his Notice, saying that he could not return back to Barclays. He felt they were not supportive of his illness as represented by him not having any easy access to a toilet for when his inflammatory bowel disease flared up. I changed his medication and added in a drug called Mirtazapine. In December 2018 his depression continued, but he was more positive about his future away from Barclays Bank. On the 24th January 2019, he was seen by Dr Luk, Gastroenterologist at Poole Hospital, who phoned through to the surgery as Dr Luk was very concerned about his "very mentally fragile state". He had walked out of the appointment with the hospital specialist.
>
> So in summary, I have clinical evidence that Mr Jonathan Kane has suffered from depression since September of 2018 and one of the main causative agents is the treatment he has received from Barclays Bank in relation to work performance and his access to a toilet. I am not aware of any other factors within his life that were contributing to his depression. He continues to take Sertraline 100 mg and Mirtazapine 15 mg. On the several occasions that we have met up, he does appear to struggle with making decisions and sticking to his plans so I would have the opinion that his symptoms would have affected his ability to bring a claim against Barclays in a timely fashion.
>
> I hope this information is useful in assessing his ongoing depression.

105. Although that is a letter written for the purposes of seeking an extension of time, it is borne out by other medical evidence in the bundle. For instance there is a letter dated 10 February 2019 from Dr Luk to the claimant's general practitioner stating:

> It is unfortunate that Jonathan was in a very fragile state of mind in clinic today. He explained to me he had felt suicidal recently and was started on antidepressants by yourself. He has just recently lost his job in the bank. He is finding it difficult to sleep at night due to the stresses in life. He appears tearful on consultation and left the room halfway through despite persuasion by his partner and myself to discuss the management of his Crohn's disease…." (p645)

106. It follows from the findings that we have made that it would have been reasonable for the respondent to make adjustments in respect of the physical features of the premises from the date the claimant moved to the Westbourne branch or shortly thereafter.

107. The evidence from both the claimant and the respondent does not disclose when in July 2018 the claimant started working in the Westbourne branch. In those circumstances we take the date by which the respondent

should have put in place the reasonable adjustments as being the end of July 2018. Thus the primary limitation period expired on 29th October 2018 but that could have been extended by one month to allow for early conciliation and, therefore, the claim could have been presented at any time up to 29 November 2018. The claim was, therefore, presented around eight months out of time.

108. The delay is, therefore, substantial, but having regard to the medical evidence it seems to us that there is a reasonable explanation for the delay, given the claimant's depression and the fact that it caused the claimant to struggle to make decisions and stick to plans.

109. The respondent has been able to defend this aspect of the claim without any difficulties caused by the delay in its presentation, it has not been suggested that there has been any loss of records in this respect or that its witnesses recollections have been affected by the delay in presentation.

110. There would, of course, be prejudice to the claimant if he was not able to present his claim in that he would not be able to obtain judgment in respect of a wrong which has been done to him. That of itself is far from conclusive in circumstances where Parliament has deliberately imposed a short period for bringing a claim but is not entirely irrelevant.

111. We have concluded that even if it were permissible for the respondent to reopen the question of limitation in this respect, we would find that the claim was presented within such period as is just and equitable having regard to the length of the delay, the reason for the delay and the lack of any prejudice to the respondent.

Overall Conclusions on Liability

112. In summary, therefore, the claimant's claim of disability discrimination succeeds to the extent that the tribunal finds he was not given sufficient access to the toilet at the Westbourne branch of Barclays bank and therefore there was a failure to make reasonable adjustments in respect of the physical features of the branch which placed the claimant at a disadvantage compared to nondisabled people.

113. The other claims of disability discrimination fail because

a. there is no evidence that the PIP was imposed because of something arising in consequence of the claimant's disability,

b. the AIP was a proportionate means of achieving a legitimate aim,

c. reasonable adjustments were made to the respondent's capability procedure, including the triggers for action to be taken under it.

Decision on Remedy

114. The remedy part of this hearing was dealt with after the above decision on liability had been given.

115. By way of remedy in this case the claimant claims loss of salary, past and future, loss of pension rights, loss of benefits the cost of counselling to date and in the future, damages in respect of injury to feelings and damages for personal injury.

116. We will address those claims, largely in turn, setting out, as we go, the relevant legal principles, our findings of fact and the conclusions that we have reached.

Loss of earnings

117. The claim for loss of earnings does not expressly state when it runs from but we understand it to run from the end of the claimant's notice period.

118. The claimant's claim does not assert that his resignation amounted to a discriminatory dismissal. Having considered matters, the respondent accepts that, nevertheless, the claimant can in principle recover damages by way of loss of earnings, if those losses flow from the act of discrimination which we have found proved (*McLeary v One Housing Group Ltd* paragraph 33 applies)

119. The respondent, however, asserts that there are various reasons why we may not award damages for loss of earnings in this case.

a. It asserts that the failure to make reasonable adjustments was not a reason for the resignation.

b. It asserts that the claimant's resignation amounted to a break in the chain of causation, using the Latin phrase novus actus interveniens, which, literally, means a new act intervening.

120. The tribunal also raised with the parties that even if we were against the respondent in those matters, applying *Chagger v Abbey National Plc* [2010] IRLR 47, we have to decide what would have occurred if there had been no unlawful discrimination, although that is a decision which we can reach on the basis of a percentage chance (i.e. what is the percentage chance that something would have still happened).

121. In respect of the respondent's argument on causation, we note that in the case of *Corr v IBC* 2008 ICR 372 Lord Bingham stated

> 15. The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible…. In such circumstances it is usual to describe the chain of causation being broken but it is perhaps equally accurate to say that the

> victim's independent act forms no part of a chain of causation beginning with the tortfeasor's breach of duty

122. In respect of this part of the claim, we find that the claimant's lack of satisfactory access to a toilet was a reason which operated on his mind at the date of his resignation. However there were also a number of other reasons as set out in his letter of resignation, as well as being placed on an AIP in July 2018. We find that the main motivation of the claimant in resigning was the fact that he felt he should not have been on an AIP or a PIP. We also find that it was being placed on the PIP which prompted the claimant going off sick in September 2018.

123. That is a conclusion based on the evidence which we heard from the claimant and, also, the contemporaneous documents including the minutes of a meeting with the claimant on 12 November 2018. In that meeting the following exchange is recorded. "J" is the claimant. The extract is significant because it indicates that it was the performance management issues which would stop him returning to work, suggesting that it is those which primarily caused breakdown in the relationship.

> K- I want to…try to support you through sickness absence process and get you back to work. Is that what you want?
>
> J- I can't do it, all my efforts [unclear] PIP I can't do it anymore feel punished
>
> …
>
> K- Anything I can do to convince you that it was to support you
>
> J- No it went from well done to you will be on capability
>
> …
>
> K- its not, if you want to stop we can. I just wanted to say I want to support you back
>
> J- This situation is because of work, I've resigned so no coming back, if I did I feel I would just be managed out
>
> K-Is there anything I can do to help and support you back
>
> J-No
>
> Pages 269-271.

124. Having considered all the matters we are satisfied that even if the respondent had provided the claimant with access to toilet facilities at the Westbourne Branch, the claimant would still have resigned due to the other

matters which were ongoing and which he found to be upsetting, namely the AIP and the PIP.

125. Because the claimant was, in resigning, motivated in part by the failure to make reasonable adjustments, we do not think the respondent is correct to say that claimant's resignation was a new intervening act. It cannot be said that the claimant's resignation formed no part of the chain of causation beginning with the failure to provide the claimant with reasonable adjustments.

126. However, because we are satisfied that the claimant would have resigned even if the respondent had complied with its duty to make reasonable adjustments, it follows that the loss of earnings which the claimant claims as a result of his resignation would have been suffered even if the claimant had been provided with the required reasonable adjustments.

127. In those circumstances we are unable to award damages in respect of past or future loss of earnings. The same reasoning applies to the claim in respect of loss of pension rights and loss of benefits.

128. We now turn to deal with the claims for personal injury and cost of counselling

Damages for Personal Injury

129. The respondent says that a claim for personal injury is not permissible because such a claim was not set out in the claim form or in any list of issues. Moreover in the case management hearing in March 2020 the claimant stated that he was not relying upon any medical evidence (although that was in the context of future loss of earnings). The claim was not highlighted until the schedule of loss was served recently.

130. The claim is a claim of discrimination by way of failure to make reasonable adjustments and one of the losses alleged to be flowing from the act of discrimination is that the claimant has suffered personal injury. In those circumstances we think that a personal injury claim does not need to be pleaded before the tribunal can consider awarding a sum in respect of personal injury.

131. The question, then, arises as to whether the claimant should be able to refer to the medical evidence in the bundle given what he said at the preliminary hearing in March 2020. We consider that the claimant should be able to do so for the following reasons;

a. in argument the respondent accepted that the claimant could do so for the purposes of his injury to feelings claim,

b. the respondent has been able to address the evidence in its submissions and

c. the respondent has not sought an adjournment to get its own evidence.

132. The next question for us is, therefore, whether the claim for damages for personal injury is made out on the evidence before us, acknowledging that it is not always necessary for a claimant to have expert medical evidence to succeed in such a claim.

133. It is clear that the claimant has suffered with mental health issues and an inflammatory bowel condition from at least 2016. The medical evidence in the bundle includes the following:

a. In 07/09/16 Dr Snook observed that the claimant "does admit to ongoing anxiety issues which he feels have worsened since starting steroid therapy, with a development of a degree of agoraphobia. He is also quite clearly anxious about his abdominal symptoms and in particular of recurrent abdominal "twitching" – on examination we established that this is due to pulsation of his (non-aneurysmal) abdominal aorta. On examination he looked well though really quite anxious, and was sweating quite profusely…My suspicion…is that his steroid-refractory symptoms are actually manifestations of IBS, fuelled by an ongoing anxiety state. I have broached with him the option of a formal psychiatric assessment" p635.

b. On 14/09/16 Dr Snook stated "[the claimant] clearly has a chronic anxiety state. He reported a number of recent life events including a house move, a "breakdown" at work and the death of his brother-in-law at the age of 28 from bowel cancer. There has been an element of agoraphobia accompanying his anxiety state, which he feels has been exacerbated by corticosteroid therapy. He has been extremely anxious each time I have seen him, with profuse sweating, and he admits to worrying about the possibility of serious abdominal pathology that might require surgery. My suspicion is that we won't get his IBS under control until the underlying emotional issues have been addressed…Unfortunately, his private health insurance does not cover psychiatric referral, so I wonder if you would consider referring him on the NHS to see a psychologist, or psychiatrist if you feel more appropriate" (p637).

c. On 09/08/17 Dr Snook reported that the claimant "had a noticeably flat affect today, and not unreasonably reports being "fed up with feeling bad". I understand that there have been major issues at work relating to the amount of time he has needed to take off for illness over the last year. He found a course of counselling unhelpful a while back, and intimated that he would not be keen to consider a trial of antidepressant therapy" p641.

134. In support of the claimant's claim for personal injury is his general practitioner's letter dated 8 July 2019 which was sent for the purposes of seeking an extension of time. That letter states

"In September of 2018, I saw him and diagnosed him with depression. This was due to the pressure of his work. He was, at that stage, working for

> Barclays Bank. He stated that the work pressures and need to work to a Performance Improvement Plan, and the problems with his bowels, were the reason for his depression. He sensibly sought counselling. He was reviewed twice in September and then into October of 2018. He continued to suffer with depressed mood, bouts of crying, a sense of despair and loss of pleasure in life. On the 5th November 2018 he decided to hand in his Notice, saying that he could not return back to Barclays. He felt they were not supportive of his illness as represented by him not having any easy access to a toilet for when his inflammatory bowel disease flared up.
>
> …
>
> So in summary, I have clinical evidence that Mr Jonathan Kane has suffered from depression since September of 2018 and one of the main causative agents is the treatment he has received from Barclays Bank in relation to work performance and his access to a toilet. I am not aware of any other factors within his life that were contributing to his depression".

135. The letter was created for the particular purpose of supporting the claimant in arguing that his claim was presented within a reasonable period. It is not a full consideration of the claimant's medical records and states that the writer is not aware of any other factors in the claimant's life that were contributing to his depression, which suggests that the writer of the letter may not have had access to or considered the documents we have quoted above. The letter makes no attempt to quantify the extent to which the claimant's ongoing symptoms were caused or contributed to by the access to the toilet issue rather than any other work-related factors.

136. In addition there is a letter from Christine Yarrow dated December 2020 which also supports the claimant's position. She states

> During his time at Barclays' Jonathan was asked to work part time (two days per week) at the Westbourne Branch. When he commenced work at the branch, he was not near a toilet as recommended by Occupational Health and in fact the nearest toilet was on another floor, behind a secure pass door that required someone to let him in. Despite voicing his concerns to the management, instead of accommodating his needs, they increased his days at the branch from 2 - 3 days. He tells me they still did nothing to provide a toilet nearby, which Jon tells me he believes was part of the deterioration of his mental health and impacted his performance at work, in my opinion seems to be a fair judgement. Not providing this very basic requirement did have a negative affect on his mental health increasing his anxiety and embarrassment of needing the toilet urgently and having it some distance away instead of close at hand as advised by occupational health. (p368)

137. Ms Yarrow makes no real attempt to analyse the extent to which the failure to make reasonable adjustments contributed to the claimant's

deterioration in his mental health, although her view that it would have increased his anxiety and embarrassment is not unreasonable.

138. If we were to make an award of damages for personal injury in this case we would be doing so in circumstances where we have no real help from any medical evidence as the extent to which the failure to make reasonable adjustments contributed to the claimant's physical or psychological injuries and we would be forced, essentially, to guess what contribution was from the failure to make reasonable adjustments and what contribution would be from other matters.

139. We have considered the case of her *Majesty's Prison Service v Salmon* [2001] IRLR 425 where, at paragraph 29, the EAT stated

> But at the upper end the victim is likely to be suffering from serious and prolonged feelings of humiliation, low self-esteem and depression; and in these cases it may be fairly arbitrary whether the symptoms are put before the tribunal as a psychiatric illness, supported by a formal diagnosis and/or expert evidence. It appears from an article to which we were helpfully referred in *Equal Opportunities Review* for September/October 2000, in which recent compensation awards in discrimination cases are reviewed, that tribunals in such cases do sometimes treat 'stress and depression' as part of the injury to be compensated for under the heading 'injury to feelings'; and we can see nothing wrong in principle in a tribunal taking that course, provided it clearly identifies the main elements in the victim's condition which the award is intended to reflect (including any psychiatric injury) and the findings in relation to them

140. We have decided that it is preferable in this case to deal with the question of personal injury within the injury to feelings award. We have done so because;

a. we have not been provided with expert evidence (we repeat our acknowledgment that such evidence is not essential, but it is useful)

b. we would be unable to say how much the failure to make reasonable adjustments contributed to the claimant's mental health or other problems,

c. we are satisfied that it would have so done to some extent,

d. even if we dealt with the claims for personal injury and injury to feelings separately, we would still need to avoid any double recovery.

141. We return to the award for injury to feelings below.

Costs of Counselling

142. Because we are unable to say to what extent the failure to make reasonable adjustments has increased the claimant's mental health problems,

it is impossible for us to say, even on the balance of probabilities, that the claim for counselling arises as a result of the respondent's failure to make reasonable adjustments. We find that counselling would have been required in any event as a result of the other matters which had happened to the claimant. The claim in respect of costs of counselling fails for this reason.

Injury to Feelings

143. Turning then to the claim of injury to feelings, we have considered the guidance in *Prison Service v Johnson* [1997] IRLR 162 and in *Vento v CC West Yorkshire Police* [2003] IRLR 102.

144. The updated guidelines in respect of injury to feelings (Presidential Guidance Employment Tribunal Awards 3rd Addendum) are:

- Upper Band: £27,000 to £45,000 (the most serious cases);
- Middle Band: £9,000 to £27,000 (cases that do not merit an award in the upper band); and
- Lower Band: £900 to £9,000 (less serious cases).

145. Having unsatisfactory access to a toilet when one suffers from Crohn's disease is distressing, the risk of soiling oneself is particularly upsetting. Between July and September 2018 the claimant would have been upset and finding the situation stressful. Although he did not complain that is, to some extent, because he was a diffident person and was also concerned about his job- being on a AIP.

146. The stress and anxiety which the claimant suffered would not have ceased simply because he went on sick since there was always the chance of him coming back to work, although he was told in September that he could move back to the Bournemouth branch which would deal with the issue.

147. It is likely that, at least to some extent, the failure to have access to a toilet would have aggravated the claimant's mental health difficulties and possibly, his Crohn's disease, as he told us.

148. In all the circumstances we consider the appropriate award for injury to feelings is £8000.

Contributory fault

149. The respondent argues that in respect of any award made the damages should be reduced by 50% to reflect that the claimant contributed to his loss or failed to mitigate it. The respondent argues that is because the claimant had worked voluntarily at Westbourne throughout the relevant period, did not raise the issue with anyone until 21 September 2018 and voluntarily resigned on the 5 November 2018. It also argues that he refused to engage with the respondent's offers to support him back to work on 12 November 2018.

150. For an individual to be guilty of contributory negligence (as the respondent avers in this case) their conduct must both be blameworthy and contribute to the loss.

151. The fact that the claimant resigned on 5 November 2018 does not contribute to the injury to feelings which he has suffered as a result of the respondent's failure to make reasonable adjustments. Those adjustments should have been made by the end of July 2018. The injury to feelings arises as a result of the fact that the claimant was required to work under those circumstances not because he resigned. Likewise the claimant's failure to engage with the respondent's offers to support him back to work, in circumstances when he had resigned, did not contribute to the respondent's failure to make reasonable adjustments in July 2018 or the claimant's need to work under those conditions until September 2018..

152. Whilst it might be said the claimant could have complained earlier or refused to go to Westbourne branch, this is a claimant who was, as we have said, somewhat diffident and concerned about his job security given that he was on an AIP. In circumstances where the respondent asked the claimant to work at Westbourne, had been clearly told what adjustments needed to be made in the occupational health reports and had not made those adjustments, we do not think that the claimant's failure to complain earlier or refuse to work at Westbourne can be said to be either blameworthy conduct which contributed to his loss or a failure to mitigate. The claimant did not behave unreasonably.

153. The parties agree that the appropriate award of interest on injury to feelings of £8000 is £1692.05.

Employment Judge Dawson
Date: 23 March 2021

Judgment & Reasons sent to the parties: 30 March 2021

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP
The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so.