



EMPLOYMENT TRIBUNALS

Claimant: Mr J Dilworth
Respondent: Ryman Limited
Heard at: Birmingham (by CVP video hearing)
On: 15-19, 22 & 23 March 2021
Before: Employment Judge Flood
Mr Davis
Mrs Pelter

Representation:

Claimant: In person
Respondent: Mr Fitzpatrick (Counsel)

JUDGMENT having been sent to the parties on 23 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Complaints and preliminary matters

1. This was a remote hearing which had been consented to by the parties. The form of remote hearing was V (by CVP video hearing). A face to face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to were in a bundle of documents divided into 3 sections headed Tribunal Documents (running to 124 pages, with page numbers identified by A1, 2, 3 etc); Documents (running to 252 pages, with page numbers identified by B1, 2, 3 etc) and Inter partes Correspondence (running to 39 pages, with page numbers identified by C1, 2, 3 etc), (“the Bundle”).
2. The claimant was employed by the respondent, from 10 May 2018 until he resigned on 19 January 2020 with immediate effect. By a claim form presented on 8 March 2020 (page A1-17), following a period of early conciliation from 29 February to 2 March 2020, the claimant brought complaints of disability discrimination (direct disability discrimination and

harassment related to disability); bullying and harassment and breach of confidentiality. The respondent submitted its response on 7 April 2020 (page A24-34) denying liability for all claims. On 10 June 2020 an application was made for the claim to be struck out on the grounds that it was scandalous, vexatious and had no reasonable prospects of success and made an application for further and better particulars to be provided (A35-37).

3. At a preliminary hearing for case management before Employment Judge Gaskell on 9 July 2020 (case management order shown at pages A50-53) the respondent informed the Tribunal that those applications were no longer pursued. The claimant was ordered to provide further details of his complaints and disability and the parties were encouraged to try and agree a List of Issues. The matter was listed for final hearing and for an Alternative Dispute Resolution hearing (ADR Hearing) under the pilot scheme operating within Midlands West for cases listed for 6 days or more. The usual orders for the production of a schedule of loss and mutual disclosure were made and the parties were also ordered to exchange witness statements on 15 January 2021. Throughout the hearing the claimant made many references to comments he says were made by Employment Judge Gaskell at the preliminary hearing on 9 July 2020 that the respondent would be required to take statements from all individuals named in the further and better particulars and that if individuals did not attend as witnesses the Tribunal would "*make of it what it will*". It appears that the claimant may have misunderstood the purpose of providing further particulars which is to clarify the allegations and give details of the claim. I explained to the claimant that, broadly speaking, in the absence of a Tribunal order, it is the choice of each party which witnesses were called to give evidence in support of their own case. If a witness is not called who could have provided relevant evidence, and there is no explanation why that is not the case, that may be something a Tribunal can draw inferences from but whether that is done or not very much depends on the facts in each individual case.
4. The claimant provided further details of his complaints (pages A54-63) and the information on his disability and the respondent conceded that the claimant was a disabled person at the relevant time (although disputes knowledge of disability). The respondent submitted an amended response (pages A71-75).

Exchange of Witness statements/ claimant's application for a witness order

5. An issue arose on 15 January 2021 as to the exchange of witness statements. The respondent sent its 7 witness statements to the claimant on that day, but the claimant did not send any statements to the respondent. The claimant appeared to be objecting to what he says was the failure to provide statements for other employees in the respondent who he believed had (or at least should have) provided witness statements. Upon application to the Tribunal by the respondent, the claimant was ordered to serve his witness statement upon the respondent by 26 January 2021 (page A76-77). The

respondent also made an application for costs in respect of what it says was the unreasonable conduct of the claimant in failing to exchange witness statements and including additional matters/allegations in the statement that had not been raised before (in particular an allegation that a rumour had been started and spread in the respondent that the claimant was a paedophile) (pages A82-104). This application also made reference to various allegations the claimant had made against the respondent and its representative during the litigation which it said were spurious and unreasonable.

6. The claimant then applied for a witness order to require the attendance of 6 employees of the respondent to give evidence (page A120-121). This came before Employment Judge Findlay who ordered the claimant to provide more information as to why the attendance of such witnesses was required. The claimant responded (page A122-124) and provided further information. The matter was discussed briefly at the conclusion of the ADR hearing which came before Employment Judge Battisby on 22 February 2021. On 26 February 2021 the claimant was informed (page A109) that his application for a witness order had been considered and refused by Employment Judge Battisby with reasons being provided as:

“The Judge refused to make a witness order because it appears that the respondent has sent you their witness statements and there is no reason to suppose that witnesses will not attend, therefore you will be able to question them.

If the respondent will not call any particular witness to deal with your assertions, the Tribunal will then be faced with your evidence alone and no contrary evidence.

In any event the witnesses, if they are co-operating with you, should be willing to attend voluntarily.

If that is not the case, you will need to produce further evidence [from the], to confirm the requirement for a witness order. “

7. The claimant raised this matter at the outset of the first day of the final hearing and stated that he was unhappy that a decision had been made by the same judge that had conducted the ADR hearing and also that he felt that none of the reasons why he required a witness order had been considered. I explained to the claimant that this Tribunal could not interfere with the decision of Employment Judge Battisby on this matter and that any challenge would lie against that decision first. If the claimant were to challenge the decision by way of an application for reconsideration or appeal, it may be necessary to adjourn the hearing listed for the next 7 days. I encouraged the claimant to seek legal advice on this and to inform the Tribunal what he intended to do by 9.45 a.m the next day (16 March 2021) when otherwise his evidence would begin (after the Tribunal had completed its pre reading). On 16 March 2021 the claimant informed the Tribunal that he was still unhappy

with the decision on the witness order application, but as he did not want to delay the hearing by making an application to adjourn, he was content for his evidence to proceed and the hearing to commence that day. On that basis, the Tribunal hearing continued.

8. In addition the parties had not agreed a List of Issues, the respondent having prepared a draft suggested document (pages 114-119) and having had no response. The claimant indicated he was unsure as to how to respond. I asked the claimant to read through this document carefully and to check that it covered, in summary terms, each and every allegation of disability discrimination he wished to pursue. I explained to the claimant that the Tribunal could not consider free standing allegations of “bullying and harassment” or “breach of confidentiality” but could do so only in the context of claims he had made and which the Tribunal had jurisdiction to hear.
9. On the morning of the second day of the hearing, the parties confirmed that they had made some progress on agreeing the List of Issues and an updated version was, after some further discussion between the parties, sent to the Tribunal by e mail and is set out below.

Claimant’s application to amend his claim

10. The claimant raised an allegation that a rumour had been started and spread in the respondent company that the claimant was a paedophile. He had indicated on the first day of the hearing that this particular allegation was not related to his disability (and was mentioned as background only) but said on the second day of the hearing that having considered the matter overnight, he considered that it was related to disability. He said he believed that MFW (see definitions below) had started the rumour that he was a paedophile linking this to his testicular cancer (namely that being a paedophile had caused this cancer). He contended that she had said this to employees of the respondent, 2 of them named in witness order application but also J Eaden, K Heath, A Davis, K Mitchell, D Chapell and RS and TY and that this had been done just after the claimant contended that TY told MFW and RS about his cancer, in around June/July 2019.
11. The claimant made an application to amend his claim to add this additional allegation of disability related harassment. He said that this was something that had come to light after he had attending the first preliminary hearing when he started to think about what had happened during his employment. He said this had been mentioned in his witness statement. He made reference to an alleged incident when he had read a story on a news website at work relating to the murder in prison of a notorious paedophile in the presence of a colleague who then made a pointed comment about this repeating the same phrase loudly so other colleagues could hear. He stated that he had not seen this matter as key evidence at the time and it was an oversight on his part that this had not been raised before.
12. The respondent objected stating that whilst it appreciated that the claimant

was a litigant in person, this was not a claim where no case management had taken place. Mr Fitzpatrick made submissions on the considerations the Tribunal needed to apply when considering amendments (based on the principles set out in the case of **Selkent Bus Co Limited v Moore [1996] ICR 836**) firstly, the nature and timing of the application. He pointed out that this was a very serious allegation and a new one, not a relabelling exercise, not further information but an allegation of an entirely new character, unrelated to other allegations. He also submitted that the claimant had already served three separate pleading documents (a grounds of claim, response to ET3, and further particulars) so this allegation could and should have been put in one of these. On timing, he submitted that although very general comments of this nature were in the witness statement, it was day 2 of a 7 day hearing before any application to amend was made. Mr Fitzpatrick also suggested that when balancing prejudice, the prospects of success can be considered and he states that this is a non sensical allegation the claimant has constructed in his mind (having confirmed that he did not overhear this rumour and that no-one told him MFW had said this). He pointed out that the claimant had other substantial claims which will be heard over next 5 days, but if the application was granted, the respondent would have to apply to have the hearing adjourned, as it could have to call up to 5 new witnesses

13. Following an adjournment, the Tribunal decided that we did not permit this application to amend as it was not in the interests of justice or within the overriding objective to hear cases fairly and justly. Our reasons were that this was a substantial allegation of entirely new factual matters which was not a relabelling or providing of further information. The first time even a hint of this allegation being made was on 26 January 2021 when the claimant's witness statement was provided. As to the timing and manner of application, it was very late to ask for such a substantial amendment, and we concluded that the claimant had the opportunity to raise this at various earlier stages including during the case management hearing, or when further particulars were provided, but he did not do so. Although the claimant may be prejudiced by not being able to bring this claim, he does have many other claims. We were concerned as to merits of this allegation as it did not appear to have any evidence to support it other than the claimant's mere assertion this is what he believed was happening. The balance of prejudice in this instance fell most heavily on the respondent if the amendment was allowed, as it would have to call significant witness evidence to counter these allegations and even if, as suggested by the claimant the statements already exist, they may not have addressed these particular allegations. This was likely to require an adjournment and derail and significantly delay the hearing. It was therefore not in the interests of justice, proportionate or in the overriding objective to allow claim to be amended in this way.

Strike out application

14. Towards the end of the claimant's evidence, Mr Fitzpatrick made an

application for the claim to be struck out under rule 37 (1) (a) on the basis that it had no reasonable prospects of success. The Tribunal indicated that this would be considered once the claimant's evidence was complete. Having heard from both parties on this application, the Tribunal decided to dismiss the application for strike out, taking close note of the authorities that warn Tribunals against strike out other than exceptional circumstances, especially in discrimination cases unless the central facts are not in dispute, and where there is a dispute about inferences to be drawn (see for example **Anyanwu v South Bank Students' Union** [2001] ICR 391). We decided that we must hear the evidence of both parties in order to determine the claim.

15. The claimant was reminded several times that the respondent's witnesses were not required to give evidence on the steps they took to prepare for this claim (as this was the subject of legal privilege) and was also encouraged to be careful about making allegations that the respondent and its legal representatives were suppressing or hiding evidence (in particular statements he suggests were taken but have not been provided).
16. After a seven day hearing, the Tribunal gave an oral judgment confirming the unanimous decision of the Tribunal that all the complaints against the respondent were not well founded and were dismissed.

The List of Issues

Disability

17. The respondent conceded disability in respect of the claimant's testicular cancer and SAD. However, no concessions were made as to knowledge of disability. The issues between the parties were therefore as follows:

Harassment

Harassment related to disability: Testicular cancer

1. *Did the respondent engage in the following conduct:*
 - a. *DK informing TY that the claimant had cancer;*
 - b. *MFW asking TY if the claimant had cancer;*
 - c. *TY informing MFW that the claimant had cancer;*
 - d. *RS asking the claimant what his hospital treatment had been for;*
 - e. *TY informing others that the claimant's time off was due to hospital treatment;*
 - f. *TY asking the claimant, in front of other employees, 'how did it go last week?'*
 - g. *MFW informing CD that the claimant had cancer;*

- h. CD informing others that the claimant had cancer;
- i. RS informing others that the claimant had cancer;
- j. MFW making 'horrendous, sickening, perverted and depraved comments' about the claimant's cancer;
- k. The claimant's cancer being 'spread around the business'; and
- l. In or around July 2019, MFW twice made a joke to TY in front of other members of staff saying, 'how would you know what it's like to have ball-ache Tracey' and by doing so made reference to the claimant's cancer.

Harassment related to disability: "Seasonal Affective Disorder ("SAD")

- 2. Did the respondent engage in the following conduct:
 - a. RS and MFW would close the blinds when the claimant was away from his desk;
 - b. RS and MFW 'laughed aggressively' at the claimant when he re-opened the blinds;
 - c. MFW ordered the claimant to leave the blind in an 'aggressive and belligerent tone';
 - d. In November 2019, MFW informed CD that the claimant demanded that the blinds were kept fully open;
 - e. Informing others of this / that the claimant suffered from SAD; and
 - f. RS and J Cassidy discussed Suicide Squad and 'sniggered' at the claimant.

Harassment: Other

- 3. Did the respondent engage in the following conduct:
 - a. Following the claimant's meeting with TY and SR, SL saying 'there would be no investigation and [that] he wanted [the claimant] out of the business' and that he would tell the owner of the business that the claimant was causing trouble to have him dismissed.

The claimant says this conduct led to his dismissal. The claimant alleges this goes to both his testicular cancer and SAD.
- 4. Did the conduct happen as alleged or at all?
- 5. Was it unwanted?

6. *Did it have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account:*
 - a. *the perception of the claimant;*
 - b. *the other circumstances of the case; and*
 - c. *whether it is reasonable for the conduct to have that effect.*
7. *Did the conduct relate to the claimant's disability, namely testicular cancer or SAD?*

Direct Discrimination

8. *In the alternative, the claimant relies upon the conduct above as instances of less favourable treatment:*
 - a. *At para. 1 because of his testicular cancer;*
 - b. *At para. 2 because of SAD; and*
 - c. *At para. 3, the claimant to clarify.*
9. *Did the respondent subject the claimant to this treatment as alleged or at all?*
10. *Was this less favourable treatment?*
11. *If so, was it because of disability?*
12. *The claimant to confirm the comparator relied upon.*

Jurisdiction

13. *Does the Employment Tribunal have jurisdiction to hear the claimant's complaints of direct disability discrimination or disability related harassment?*
14. *Was the claimant's claim brought outside the ordinary time limit set down in s. 123(1) Equality Act 2010, as adjusted for early conciliation?*
15. *Do the incidents complained of constitute conduct extending over a period, within the meaning of s. 123(3)(a) Equality Act 2010?*
16. *If the claimant's claim was not been brought in time, has he shown grounds under which it is just and equitable to extend time for the presentation of his claim?*

Findings of Fact

18. *The claimant attended to give evidence and Ms C Daly ("CD"), Ms M Fallows-Ward ("MFW"), Ms D Kent ("DK"), Mr S Lakin ("SL"), Mr S Rinaldi ("SR"), Mr R*

Smith (“RS”) and Ms T Yearsley (“TY”), gave evidence on behalf of the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

19. The claimant gave a significant amount of evidence. As a general comment, we had difficulties in accepting the credibility of the evidence that the claimant gave on many issues. Much of his evidence related to matters that he perceived were taking place or thought that others were thinking or saying about him, in many cases when he was not present and had no possible way of knowing whether any of these perceptions or thoughts were accurate. In many cases, the claimant was making assumptions as to what individuals had said or done based on pure conjecture and not apparently grounded in any substantive matters he had seen or heard. The claimant was focusing on certain incidents and exaggerating and embellishing the significance of these in the overall narrative. We accepted that on the whole the claimant is entirely convinced that the matters he described took place, and he is perhaps not setting out deliberately to mislead or be dishonest at all times. However we struggled with the plausibility and reliability of much of his evidence. As a Tribunal we reminded ourselves that our findings of fact must be based on evidence and not conjecture and speculation. Whilst those facts can be found based on inferences, there must be some underlying evidence for us to make inferences from. The claimant based much of his case on the fact that the respondent had not called witnesses who he said would give evidence to corroborate what he was saying and that the witnesses they did call were all lying. He made references to witness statements he was convinced had been taken by the respondent from other people and invited us to infer that the absence of such statements suggested that they corroborated what he was saying. We were simply not able to make this conclusion. There is no real suggestion that any witness would be able to corroborate his version of events. The claimant did not contact anyone at the respondent to see if anyone would be prepared to give evidence to support his case. His application for a witness order was refused. We doubt that the claimant would have been able to obtain the evidence he says he could from any individuals even if they had attended to give evidence. Mr Fitzpatrick made reference to the claimant relying on “mental leaps” to ask the Tribunal to conclude that events had occurred without any direct evidence of this taking place and this was indeed what the claimant expected the Tribunal to do throughout.
20. The respondent’s witnesses gave evidence that was more credible and consistent with the contemporaneous documents (albeit that there were very few of these). In particular we found TY, SL, DK and SR entirely straightforward, robust and convincing witnesses. RS, MFW and CD were more guarded in their evidence and gave more defensive answers in cross

examination by the claimant, perhaps understandably, as they came in for some harsh and personal criticism by the claimant in his evidence. The claimant admitted that some of the allegations he made against employees were made in retaliation for things he said had happened to him. However, whilst they were not able to recall every event, we found them honest in their answers and their evidence was internally consistent and broadly consistent with other witnesses where any detail was available.

21. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background as there may have been relevance to drawing inferences and conclusions. We made the following findings of fact:

21.1. The claimant is a disabled person by reason of having previously been diagnosed with and treated for Testicular Cancer; and also because he suffers from Seasonal Affective Disorder (SAD). This is conceded by the respondent. The claimant has no doubt had a difficult time dealing with a serious illness and managing an ongoing and apparently chronic mental health condition for which the claimant has our sympathy.

21.2. The respondent is a retail business comprising 2,040 employees with 203 stores operating within the United Kingdom. Its head office is registered and located in Crewe, Cheshire. The claimant started work at the respondent in May 2018 as a Purchase Ledger Assistant in the respondent's Crewe head office. His contract of employment was shown at pages B17-45. As well as the contract of employment, the respondent has a detailed Employee Handbook which was at pages B46-165 in the Bundle which included a grievance and dignity at work procedure.

21.3. The claimant told us that when he first joined the respondent he was met with hostility from MFW and mentioned her pulling faces and sneering. He made reference to an occasion where MFW asked him about previous employment and was condescending. This was denied by MFW who contended that she was civil with the claimant, but did not have much of a reason to get into a conversation with him as their jobs did not often cross over. We did not accept that this behaviour took place as described. There is no independent evidence to support this. We accepted that the claimant and MFW did not communicate much when the claimant started, and may not have had a particularly friendly relationship, but we have not been able to conclude that this equated to hostility from MFW.

21.4. The claimant told us of an incident when RS was showing him how to complete the payment run and described RS being aggressive and angry with him and looking at the claimant as if he was "*disgusted*" and then aggressively pointing at the claimant's computer screen with instructions as to what to do. RS recalled assisting the claimant on occasion, although not this specific incident. He told us that the standard process with training to do the payment run as a new employee was that someone

would sit with the person the first time doing a payment run and the second time, the person would do it themselves from the written instructions with someone around available to help if needed. RS acknowledged that when he is providing assistance to colleagues he did sometimes become frustrated and remembers becoming frustrated with the claimant sometimes as he felt the claimant was not listening to him. We accepted that the relationship between the claimant and RS was difficult from the outset and not a particularly friendly one, and an incident as described by the claimant probably did take place. There may have been some friction between the two personalities. However at that point there was nothing to suggest that it was particularly problematic. The claimant made reference to a conversation he instigated with RS about films, and then borrowing a DVD from RS at his suggestion which indicated to us a fairly standard colleague interaction rather than any particular hostility in the relationship.

21.5. The claimant referred to a situation when RS on returning from lunch started to talk to him and ask him personal questions (which he described as an interrogation) about what he did outside work and whether he had his own house (with the claimant suggesting he was in no position to do as RS lived with his mother, which we did struggle to see the relevance of). RS recalled general conversations of that nature which he says were an attempt to make polite conversation with a colleague and nothing more. The claimant mentioned occasions when friends of RS would come to see him at work and that he noticed them staring at him. We did not accept the claimant's unsupported evidence that there was anything unusual about the way RS and other colleagues interacted with him which suggested anything more than ordinary office discourse. The claimant went on to give evidence that he believed that RS and his friends were discussing him in his absence in the work canteen and that rumours were circulating about him. The claimant did not suggest he ever heard any comments being made nor that anyone told him that such comments were being made. He said he reached this conclusion because RS and his friends were giving him "*strange looks*" which would suggest they were hearing things about him. We could find no basis to make any findings that this was taking place from anything the claimant told us. This appeared to be pure speculation by the claimant on discussions he suspected were happening in his absence.

21.6. The claimant suggested that both RS and MFW were then spreading gossip about him and discussing him with the receptionist, CD and another employee, K Heath was also involved and was unpleasant to him. CD gave evidence that she was not involved in making any comments about the claimant nor did she hear any nasty comments about him from anyone. She said that she did not speak to MFW that often. We found her a plausible witness and accepted that she had not been involved in gossip about the claimant.

- 21.7. The claimant had some absence from work from 25 July 2018 until 2 August 2018 as he was having some chemotherapy treatment for his cancer. He informed DK of this, as she was his line manager, and DK informed SR at the time. Following discussion with SR, DK told the claimant that the absence would be treated as paid leave (e mails at pages B176-178). The claimant was in his probationary period at the time and so would not otherwise have been entitled to paid sick leave. The claimant acknowledged that DK was being supportive of him in doing this.
- 21.8. The claimant contended that DK informed TY at this time that the claimant would be absent from work because he had cancer. He suggested that this information was passed during one of the various meetings DK and TY held, although he was not present at any such meeting, nor did he overhear this being said, nor was he told by anyone that this happened. Both DK and TY denied that this took place. DK said she told TY that the claimant would be absent from work for a hospital appointment (as she needed to be aware of absence for operational reasons) but that she did not tell TY what the hospital appointment was for, nor did TY ask her. We find that this was indeed what took place and that DK did not inform TY at this time that the claimant had cancer. DK appears to have exercised discretion when informing payroll about the claimant's absence (page B181) and there is nothing to suggest that this information was disclosed by DK to TY at this time or at any point after this. The claimant suggested that TY told others in the department that he was having time off for hospital appointments. TY acknowledged that if asked, she may have told colleagues that the claimant was at an appointment but did not spread rumours about this and did not know what the appointments were for. We accepted her evidence on this.
- 21.9. The claimant contended that on his return from work, both RS and TY asked him about his absence with RS asking him what he was off for and TY asking him how did it go. We accepted that both RS and TY made a general enquiry of the claimant as to how he was after a week's absence, but did not find that this was in reference to cancer or any particular condition at all. We did not accept the claimant's contention that TY stood up and made this comment in front of everyone with a slight smirk on her face with the view that the claimant would start talking about his cancer as he alleged. We found it was much more likely to have been a general enquiry as to whether the claimant was OK, as might be the case by any colleague after absence. The claimant also gave evidence about an occasion after he returned from his absence, when an issue arose with filing documents which led RS to speak to him about the way he had filed various items and that the claimant then raised his voice with RS. The claimant said that following this incident at the end of the day, TY called RS into a meeting where she told RS that the claimant had recently returned from a serious illness and that might explain why he was feeling unwell. The claimant suggested that it was at this point that RS suspected

he had cancer and became determined to find out about it. RS and TY had no recollection that any of this took place. TY was clear she never spoke to RS about the claimant's illness at this time. We concluded that an incident about filing may have taken place as we can accept that this is a normal office occurrence. However we did not accept that there was a subsequent conversation between TY and RS. This appears to be something that the claimant speculated had taken place as he was not present at such a meeting, he did not overhear anything, nor was he told by anyone he says was present that this was what was discussed.

21.10. In the run up to Christmas 2018, the claimant told us that CD had asked him whether he was visiting his parents at Christmas (and he informed her that his parents were deceased) and that this was shortly followed by MFW asking him whether he was visiting his parents. The claimant contended that CD had informed MFW of her conversation with the claimant and that he had told her his parents were deceased, and so encouraged MFW to ask the question in order to mock him. Both CD and MFW agreed that they did ask the claimant about his plans for Christmas that year. CD recalled that she has similar conversations with various employees around this time of year as they passed through reception. CD denied telling MFW that the claimant's parents were deceased. MFW also denies that CD told her this and remembers the conversation as having taken place when she was on her own with the claimant, as the rest of the team were attending a meeting in the canteen. We find that both CD and MFW had a routine conversation of a seasonal nature with the claimant about what his plans for the Christmas period were. We do not accept that any suspicion arose (or could reasonably have arisen) from both CD and MFW having a similar conversation with the claimant and can find absolutely no evidence to suggest that there was any communication between the two about this matter. We found this allegation was troubling and puzzling, as such a difficult subject as the death of the claimant's parents, we felt was a highly unlikely topic for jokes to have been made. The claimant went on to say on several occasions that rumours were circulating about his parents' death but did not give any further examples as to anything he witnessed or was told about to suggest this took place. We found that no such rumours or gossip circulated about the claimant during his employment.

21.11. In February 2019 the claimant and other employees at the respondent seem to have been involved in various discussions about the choice of radio station playing in the respondent's office. SL told us that the respondent had an outdated music system situated at reception which played the radio to all areas of the building including the office and warehouse. He explained that this was problematic as it was not easy to change the station, due to poor reception, and it was not possible for different radio stations to be played in different areas. The claimant described it as unusual that the radio was played in the office area, and

was unhappy with the choice of radio station, describing it as annoying and depressing. The claimant asked CD if it could be changed and this was done. There then seemed to follow a period where there was a dispute between different individuals in different parts of the office about the radio station choice. We do not need to make specific findings of fact about what took place as it is not part of the claim, but we find that this involved the claimant, CD, as receptionist who was near the radio, and other employees mentioned by the claimant not in the purchase ledger team. The claimant said that RS had also made comments to him at this time about this. RS admitted that he became frustrated with the dispute about the choice of radio station and said at one point said to the claimant that he did not care what station was on. RS said that after this comment was made the claimant stopped speaking to him. It is clear that the relationship between the claimant and RS and perhaps other employees was fractious at this point.

- 21.12. On 18 February 2019 the claimant e mailed DK to ask whether it was possible to have a chat (page B188).

“regarding the situation surrounding me, and the person I sit next to.

I think the time has come for me to have a say on the issue rather than Chinese whispers and one persons spurious opinion being taken as fact.

I would hope this can be resolved within the Department however I feel there is a case for bullying and intimidation, against myself, and if necessary, will request an intervention from HR”

- 21.13. Having received this e mail, DK met with the claimant that day to discuss the issue. The claimant told us he told DK was suffering from abuse from RS and that it was making him feel depressed and going home unable to eat but look for jobs on the internet. He also said he told DK that MFW had a bad attitude towards him. DK told us that the claimant told her during the meeting that he was having problems with RS and that they were not getting on, as he did not think that RS liked him, and that he was thinking of looking for another job. She said he did not mention that he was being abused by RS but that he felt uncomfortable around him. We find that the version given by the claimant is broadly consistent with how DK recounts this meeting but perhaps it is described by the claimant with a higher level of intensity than actually took place. Solutions to the problem were discussed between DK and the claimant, including the claimant discussing the issue with RS himself or DK having a conversation with RS to see if she could find out what the problem was. The claimant agreed to this proposal and DK met with RS later that day. This was a brief meeting as RS informed DK that he did not have a problem with the claimant as far as he was aware and had no issues with him. DK met again with the claimant to provide this feedback to the claimant and said that the claimant

was happy with this and no further action was taken. It is clear to us that DK thought she had resolved this dispute informally. When asked whether with hindsight she would have reported the matter to HR she said she would not. We accepted that she did not think it was an issue to be worried about following the meetings with the claimant and RS. The claimant was still involved in issues around the radio stations around this time and sent a further e mail to DK complaining re radio stations choice (page B190) which she responded to by suggesting that a compromise is reached (page B191). The claimant replied by saying he will ask CD if this is possible (page B192). The claimant suggested that he then had ongoing issues with CD and others about the radio station, but no further complaints were made to DK or other members of a management about this matter.

21.14. DK followed up on the earlier meeting she had with the claimant and sent an e mail to the claimant on 21 March 2019 asking whether the claimant was feeling more comfortable after the last conversation to which the claimant replied *"Yes, everything's fine now"* (page B196). There were no further matters raised by the claimant in writing after this point. He gave evidence that things became really nasty at work and he felt he was subject to a hate/smear campaign carried out by RS and MFW (and facilitated by TY) in the purchase ledger team and another hate/smear campaign coordinated by other employees including S Wright, K Dunn, C Taylor and CD at the other end of the office. This was completely denied from the four witnesses we heard from who are alleged to have been involved, RS, MFW, CD and TY. As with other allegations of this nature, the claimant suggested that had the respondent called other witnesses he had named in his further particulars, they would have been able to confirm that his version of events was correct. However the claimant had no information as to what any such witnesses would or might have said about such matters. Given what we have said above about differing credibility, we preferred the evidence of the respondent's witnesses on this matter. We did not find that such a smear/hate campaign was being conducted in any way as suggested by the claimant. We accept that the claimant was unhappy at the respondent at this stage and did not appear to have socially integrated with other employees. This is some way off supporting the extreme allegations about hate conspiracies being perpetrated against him by multiple employees.

21.15. The claimant acknowledged that the relationship between RS and him seemed to improve after DK had met with him and we did not hear of any other specific problems for several months. The claimant said that sometime around June 2019 RS decided that he would further explore his suspicions that the claimant had cancer and told MFW that he suspected that the claimant had cancer and instructed her to ask TY if this was the case. The claimant then contended that MFW asked TY this question and

was told by TY that the claimant had been treated for testicular cancer. The claimant then alleges that MFW told RS and CD and that they went on to tell others in the business that this was the case. The claimant refers to the fact that he had cancer being spread around the business. He specifically alleges that MFW made horrendous, sickening, perverted and depraved comments about his cancer. All of the above individuals deny that they ever knew that the claimant had cancer and that they ever informed any other individual that the claimant had cancer or spread rumours of this nature. We accepted their evidence. The claimant had not witnessed anyone talking about his cancer nor heard any such rumour in the business or any of the comments allegedly made by MFW. He also said he had not been informed by any other employee in the business that any of this had been said nor that they had heard a rumour or comment of this nature. We could not accept the claimant's allegation that this was taking place as there was simply no evidence at all that this was the case or that anyone outside DK or SR was even aware of the claimant's cancer, let alone discussing it or making unpleasant comments. The claimant appears to have reached this conclusion on the basis of one particular comment (see below) which he says was made and then his own assumptions as to what was happening.

21.16. The claimant also told us about an incident when RS raised the subject in conversation of an employee of the respondent who had died of cancer, again suggesting that this had been done to provoke the claimant to disclose details of his own illness. RS accepted that he had spoken to the claimant about a colleague and friend who had recently died of cancer. This had come up with the claimant as there had been a memorial service in the respondent's office for those employees who knew that individual. This was a logical and plausible explanation for this conversation and we did not attribute any sinister motive to RS in raising this matter.

21.17. The claimant told us that the conversations he suspected were taking place amongst other employees about his cancer coincided with him deciding to find another job and starting to go for interviews. The claimant was of the view that as his colleagues had discovered he was thinking of leaving, they then decided to spread the rumours about the claimant's cancer. He told us about an interview he attended on 9 July 2019 on his lunch break and that he felt that MFW, RS and TY had noticed him return slightly late, dressed smartly and carrying a take away coffee, and had concluded that he had been at an interview. None of the three individuals named had any recollection of this happening. We accepted that the claimant did attend an interview on this day and may well have returned a little later but we do not find any evidence to suggest that this was noticed or particularly noted as unusual by any of his colleagues on that day. We considered it is too far a logical leap to make to then suggest that even if there had been a suspicion that the claimant was attending interviews, that

this inevitably led to discussions about the claimant having cancer and rumours spreading. There was no basis in logic or evidence for this conclusion.

- 21.18. The claimant described in detail an incident he recalls taking place in or around July 2019. He said that TY innocently made a comment that something she was doing was a “*ball ache*” and immediately became aware that she should not have said it (as it may have been seen as a reference to the claimant’s testicular cancer). He then alleged that MFW repeated that same phrase twice back to MFW very loudly with a huge smile on her face, asking TY how she would know what it was like to have a ball ache. Both TY and MFW denied that this exchange ever took place. RS and DK told us that they had not heard this exchange in the office. Our finding is that the exchange as described by the claimant did not take place. We do accept that the claimant may well have heard the phrase “*ball ache*” being used by someone in his team, perhaps around this time. This is a colloquialism that is used by some, but we do not accept that this was used by anyone at the respondent either accidentally or deliberately with reference to either the claimant or testicular cancer more generally. We do not accept that MFW or TY had any knowledge of the claimant’s cancer at this point. The claimant has conflated a comment that we accept may have been made by TY or someone else, and misinterpreted this as an accidental or deliberate reference to his cancer. The claimant may have genuinely felt that this was a reference to cancer at this time but we do not accept that it was in any way the case, or that this was a reasonable assumption to have made. The way that MFW is described as reacting to this comment was highly implausible and not credible.
- 21.19. The claimant described a strange atmosphere in the office where people were looking at him in a sinister manner and that when he was absent from the office that MFW, RS, TY and others were gossiping and making snide remarks about the claimant’s cancer making horrendous, sickening, perverted and depraved comments about him. As a panel we struggled to accept any of the claimant’s evidence on this and found it completely implausible. Once again the claimant never heard any such comments being made nor did he hear from anyone else that such remarks were made.
- 21.20. The claimant went on to describe his view that the rumours at this stage morphed from being just about his cancer but that he was also a paedophile with some connection between those two matters being made. The claimant was not permitted to add this allegation of disability related harassment but we have considered it as background. The claimant supported his view that rumours were being spread by saying he noticed that people who had spoken to him in the past stopped speaking to him, he was receiving strange looks and people were staring and deliberately

looking the other way. He went on to describe how he felt that alarm bells were ringing and that the building was shaking with these rumours being viciously spread. He recounted an incident where an employee had brought her daughter into work and when the claimant entered the office, she had scowled at him and stepped in front of her daughter as if to protect her. He mentioned an occasion where he says RS observed him reading on news website a story about the death of a notorious paedophile, and went on to loudly ask the claimant if he had read the article about the paedophile with particular emphasis on that word. This was denied by RS and we note it was not mentioned in any of the pleadings nor in the claimant's witness statement. We find this was entirely fabricated. We could not accept any of the claimant's evidence on this and find that this was something that the claimant had imagined to have taken place if he genuinely believed it at all. There was no basis to make any findings that this was going on and could not infer that this must have been happening as the claimant asks us to by the respondent's failure to bring what the claimant describes as independent witnesses. The claimant is suggesting that the respondent has to prove a negative by calling other individuals who the claimant says must have heard such rumours. However the claimant never actually heard this rumour himself, and could not point to anyone who he believes heard such a rumour or even told him that they thought this rumour was being circulated. We conclude that this was entirely of the claimant's own imagining and was a conclusion reached after piecing together unrelated and unsupported suspicions the claimant had about his colleagues.

21.21. The claimant had an appraisal with DK in August 2019 which was also attended by TY (who was in a supervisory position). The claimant described TY during that meeting staring at him with a smirk on her face and that her eyes had welled up with tears of joy as she was trying not to laugh. The claimant said that TY was, during the entire meeting, reliving the afternoons spent listening to the disgusting depraved and perverted comments made by MFW and thinking it was funny. The claimant offered no basis for suggesting that this was what was going through TY's mind during this meeting other than this is what he thought. TY denied all of this and we entirely accept her evidence on this and reject the claimant's. There is simply no evidence to support what the claimant says here, which is really a complaint about what TY was thinking, something about which he simply cannot have known.

21.22. The Finance team of which the claimant was a part went through a restructure which was announced on 9 September 2019 (page B218-9). There were group and individual meetings relating to this and employees were informed that they would need to apply for available roles. The claimant applied for and was successful in obtaining the Purchase Ledger Assistant role he had been performing and was informed that his job role

was unchanged after restructure on 30 October 2019 (letter at page B235). The claimant told us that whilst the restructure was going on he noticed that the atmosphere improved and the rumours about him were not so apparent. We find that this must have been a difficult time for all of the respondent's Finance employees which may have caused uncertainty within the organisation.

21.23. The second part of the claimant's disability discrimination complaint arises out of problems involving opening/closing office blinds which appear to have arisen in November 2019. The claimant suffers from SAD and in the winter needs to get as much daylight as possible and so likes to leave the window blinds in the office open. The claimant did not tell anyone at the respondent that he had SAD nor that he required the blinds open because of this. The claimant told us that the only person affected by the sun coming through the blinds in the afternoon who may have needed them closed would have been the person sitting directly opposite him. This was initially TY and then another employee called Jenny. MFW sat diagonally opposite along from the claimant and the claimant said that there was no way she could be affected by the blinds. MFW gave evidence that she was affected by the glare from the windows at a certain time each day and had to close the blinds as she was unable to work. TY supported this evidence. Whilst we cannot conclusively say how each individual was affected, we did accept the evidence of MFW and TY that they were affected at times from glare from the open blinds. This is a common issue that arises in workplaces and can affect different positions during the day and at different times of the year depending on the position of the sun and the sensitivity of the individual. We do not think it likely that this was something concocted by MFW entirely to irritate or annoy the claimant. The claimant pointed out that this was not something raised the previous winter by anyone in particular and MFW specifically. However we conclude that it was perhaps not noted of being of any significance at this earlier time, and it is only after a particular flashpoint arose that the claimant appeared to consider the matter significant.

21.24. The claimant contended that RS and MFW picked up on the fact that the claimant liked the blinds open and started to deliberately close the blinds that were situated behind him when he was not present in the office (such as on breaks and at lunch time). He alleged that when he returned to the office and re-opened the blinds, that RS and MFW would laugh aggressively. The claimant contended that RS and MFW had worked out that he suffered from SAD after noticing he was opening the blinds and they were then doing this to harass him. RS and MFW both denied that they were deliberately closing blinds when the claimant left the room. RS said that he was not bothered by the blind positioning and never adjusted the blinds unless someone asked him to (as he was situated like the claimant in front of the window). MFW said that she did sometimes adjust

the blinds or ask others to do this as the light did cause some glare preventing her from working. There was clearly an incident involving blinds and the claimant and his colleagues at this time and we saw an exchange of internal chat messages between MFW and K Heath mentioning an occasion when another colleague closed the blinds and asking about the claimant's reaction in a joking manner. We found that there was some tension between the claimant and his colleagues about this matter. However we do not accept that RS or MFW laughed aggressively when the claimant returned to the office. We did not find that what was taking place amounted to anything other than a petty office dispute on both sides with the claimant consistently opening blinds despite employees asking for them to be closed, and other colleagues (not exclusively MFW and RS) then closing them again. We equated this to the dispute also involving the claimant regarding the choice of radio station. This might have been dealt with more maturely by all employees by having an honest discussion about preferences and trying to reach a solution.

21.25. The claimant gave evidence about a time when he came back from lunch to find the blind closed and went to open it up again. He said that MFW "*screamed out like a psychopath and ordered him to leave the blind closed*". MFW recalled an incident when the claimant returned and opened the blinds and she asked him firmly not to open them as the sun was in her eyes. She then said that the claimant challenged her on this and said to her that the sun was not in her eyes and she told him that she knew when the sun was in her eyes not him. RS recalls a similar conversation. We accept that there was an altercation between the claimant and MFW on this occasion, although we have difficulty accepting that MFW screamed to the claimant on this occasion having seen the nature of her evidence in the Tribunal. This seemed to us to be an exaggerated and embellished account of a relatively minor incident. The claimant decided he would no longer speak to MFW or RS because of this incident. RS told us he was upset that the claimant had decided to not speak to him at this stage, particularly as he was not involved in any discussions about blinds. We accepted that the claimant's upset around the blinds issue may well have been related to his SAD and requirement for sunlight but at no point was this in the knowledge or even contemplation of anyone at the respondent. We found it was again too much of a mental leap to conclude that what appeared to be a minor workplace dispute about the position of blinds, was as a result of or related to a specific mental health condition that the claimant suffered from. Even accepting that the employees of the respondent knew of the condition of SAD, there was nothing of any substance which might have alerted them to the fact the claimant was a sufferer.

21.26. The claimant gave evidence that MFW told CD that the claimant demanded blinds be kept open at all times when everyone else wanted them closed, and that CD went on to spread this around the business along with rumours that the claimant suffered from SAD. Again the claimant did not overhear anything to suggest this took place, nor did anyone tell him that this took place. This was denied by both CD and MFW and we accepted their evidence entirely. There is simply no evidence we can rely on to suggest that this ever took place. CD said she was aware that there was an issue with the blinds because RS had told her about it and mentioned that the claimant was not speaking to him. She said that the claimant had told her similarly that RS was not speaking to him. It is clear that the claimant's relationship with a number of his colleagues and in particular RS had deteriorated at this stage and they were not getting on well. However we conclude that this was an issue of a relationship at work not going well rather than anything else.

21.27. The claimant told us about a conversation he says took place between RS and a colleague, J Cassidy on Christmas eve regarding the mention of the film *Suicide Squad*. On his account, during a discussion about *Star Wars*, there was then mention by Mr Cassidy of *Suicide Squad* at which point RS repeated in an exaggerated manner the words "*yeh Suicide Squad*" whilst both he and RS looked over at the claimant and sniggered. The claimant suggested that this was an implicit reference to his SAD, as one of the symptoms of SAD can be suicidal ideation. RS had no recollection of this conversation about *Suicide Squad*, although he did recall discussing the *Star Wars* film with Mr Cassidy (explaining that films were a mutual interest of theirs). He suggested that the film may have come up in discussion at some point but has no recollection of this and he in no way made any connection to either SAD or the claimant at any point. We conclude that this did not occur as suggested by the claimant and although a conversation may have at some point taken place about this film, there was no sniggering or looking at the claimant. We find that the claimant has embellished a comment that may well have been made at this or another time, and attributed it to RS mocking or making fun of him. It is again too far of a mental leap to suggest that mentioning a film that happened to have the word suicide in it was referring to a particular condition suffered by the claimant (of which RS had no knowledge). The claimant made very similar allegations on three occasions of different colleagues using repeated words loudly to mock him about different conditions. This does not seem credible or plausible and is more likely to be something that the claimant had manufactured or imagined had happened by taking words entirely out of context.

21.28. Things had not improved after the Christmas break and on return to the office the rift that had developed between the claimant and RS was still present. TY became aware of the issue on Wednesday 8 January 2020

as RS sent her an e mail to her that evening asking her to ask the claimant to pause a payment run he was about to start. TY spoke to RS the next day and asked him why he was not able to ask the claimant himself (as he sat next to him) and RS told TY that he and the claimant were not speaking. DK was on annual leave at the time so TY went to speak to SR about how to handle it who suggested meeting with everyone involved.

21.29. The claimant was invited to a meeting with SR and TY on Thursday 9 January 2020. There was some dispute between the parties about exactly what was said in that meeting, although the broad structure and content of what took place is not that different. The claimant claimed that at the start of the meeting, SR made a comment to him along the lines of "*The last time we spoke you told me you did not like winter*" which the claimant found strange and said he felt SR was making an oblique reference to his SAD and inviting him to disclose to SR that he had the condition. He contended that at this stage TY had told SR that she thought the claimant might suffer from SAD (which she denied). SR denied saying this but acknowledges he started the meeting with what he described as an ice breaker, by saying something like "*Don't you just hate winter!*". He explained this was a common technique he adopted to talk about the weather when he was having a meeting with a junior team member to put them at their ease. He denies having any knowledge that the claimant did or might suffer from SAD and that this was not in his contemplation at all when making this comment. We prefer SR's version of how this comment went which is much more plausible. This also makes sense in the context of the conversation and the previous relationship between SR and the claimant which was that they only spoke very occasionally in passing on work matters. It would be an odd comment to make referring to a previous conversation that neither the claimant nor SR suggested took place. It is much more plausible that this was a general comment about the weather which the claimant has read too much into. We accept that neither SR or TY had any knowledge or even suspicion that the claimant suffered from SAD at this time.

21.30. SR discussed communication within the team and that it had been noticed that there was some friction. The claimant said that SR mentioned the issue with the window blinds. SR said he did not raise this, as he was not aware of a problem at the time, but he accepted that window blinds were raised by either the claimant or TY. We concluded that the claimant mentioned the issue with window blinds as he informed SR and TY that RS and MFW did not like him. The claimant said he became angry and upset and starting ranting about the abuse he was suffering and that he felt rumours were being spread about him. The claimant acknowledged that he did not mention disability nor that anything was related to cancer or SAD. The claimant said he mentioned bullying during the meeting but both SR and TY say that this did not take place. We conclude that whilst

the problems more generally were raised, the claimant did not make a specific complaint about bullying during this meeting. We were satisfied that had this been done, SR or TY would have explored this further. The claimant suggested that SR made a comment along the lines of "*I don't believe that any of you are bullies*" which was denied by SR. We accepted SR's evidence that bullying was not mentioned. The meeting progressed with SR speaking with the claimant about differing perceptions of situations. He left the room briefly and got what he described as insight cards which explained and explored issues of perception further. SR discussed how communication issues might be resolved and felt that the meeting ended positively. He told the claimant that he could come and see RS privately if he had any further concerns. SR says he mentioned to the claimant that he could raise a grievance if he wished to pursue this further (which the claimant disputes). We find it wholly believable and plausible that this was said to the claimant by SR.

21.31. Following the meeting with the claimant, SR and TY also held meetings with RS and MFW. A similar discussion took place about the communication issues that were apparent. Both RS and MFW stated during the meetings that they did not have a problem with the claimant. As with the claimant SR asked both RS to try to work together with the claimant to resolve any issues and ensure that work tasks were completed. The claimant suggested that both RS and MFW were told during this meeting that they would be subject to investigation by HR regarding bullying. He concluded this on what he thought, rather than anything that he heard being discussed or was reported to him by anyone as being discussed. This was denied by RS, MFW and SR. We accepted that nothing of this nature was mentioned to RS or MFW by SR.

21.32. After the weekend on Monday 13 Jan 2020, DK came back to work after some annual leave. The claimant gave evidence that as soon as she arrived in the morning that SR immediately called her and TY into a meeting with him, before they had even taken their coats off. He suggested that SR was angry during this meeting and informed TY and DK that a full investigation into bullying would be undertaken by HR. The claimant suggested SR was angry because a complaint had been made by the claimant previously and had not been addressed by DK. SR, DK and TY acknowledged that a meeting took place, but described this as a routine meeting to update DK (who was a direct report of SR) about things that had taken place when she was off. All three said that they discussed the issue that came up on the Thursday previously about communication. SR was asked whether during that meeting DK told him that there had been previous allegations of bullying, which made him angry, which he denied stating that bullying was not mentioned. He said that DK was appraised of the issues raised regarding communication and how it had been left so that she knew what was going on with her team. SR denied

being furious as suggested, and said that nothing was discussed during that meeting which would cause any consternation or anger. SR was very clear in his evidence that he did not inform TY or DK that an investigation would be started during this meeting, stating that this would not have happened in the absence of a formal complaint. TY and DK both supported SR's version of what was discussed. We preferred the evidence of SR on this not least because the claimant was not at that meeting and cannot have known what was discussed during it.

21.33. The claimant said SR left that meeting and then went straight to HR to instruct them to start an investigation and that DK and TY returned to their desks looking shell shocked. This is denied by the respondent's witnesses. SR was very clear he did not go to HR and never instructed anyone to start an investigation. He had two other departments to oversee and said it was very common for him to leave the finance area during the day and go to other parts of the building for meetings or conversations, so this may have been where he was going. We accepted this evidence. The claimant then gave vivid evidence that he noticed that there was an atmosphere around the building and a buzz around the office. He said he felt that something big was going on as everyone in the building became aware that something was happening and started staring at him and whispering. He mentioned gossip spreading around the building like wild fire. We found that this was entirely lacking in credibility and something that the claimant had invented from his own assumptions and conclusions about what he thought was happening. This appeared to have no basis in fact. We found no evidence that an investigation was ever mentioned to anyone and for whatever reason, the claimant has perceived something happening that simply did not take place.

21.34. He went on to describe observing MFW and RS looking worried and sheepish over the next day or so as they realised their job was at risk. The claimant then described attending a job interview on Tuesday and by Thursday he said he noticed that the atmosphere changed again and RS and MFW's mannerisms towards him changed describing MFW as "*swanning around*" again. The claimant said that this was because SL had instructed SR that there would be no investigation (he suggested that SL had already taken against him having heard rumours about the claimant at an earlier stage). SL totally denied that this was the case and said that he had never heard any gossip about the claimant (and that if there had been any he would have heard it as he became aware of most things going on at the respondent). He said that he was not aware of any investigation that was taking place and that he did not cancel any such investigation. We accepted SL's evidence in its entirety. The claimant mentioned that SR who had previously smiled at him earlier that week when passing him in the corridor, looked at him dismissively and it was then the claimant knew things had changed. We did not accept any of these contentions

and they are based on assumptions and observations perhaps incorrectly made. The claimant was not informed by anyone that there would be an investigation or that it had been stopped at this time. We find that none of the events as contended by the claimant took place and there is simply no evidence at all that this is the case. We have concluded that the claimant concocted this whole scenario within his own imagination from things he perceived he was observing in the business, which in many cases simply were not happening.

21.35. The claimant told us at the hearing after cross examination was complete and in response to the Tribunal's question, that on Friday 17 January 2020 around 4pm as he was going to get a coffee, he walked through reception and SR was in front of him about to leave the building. He said that SR passed A Forshaw, one of the receptionists, and she beckoned him back to speak. The claimant then said he overheard SR saying to her when she asked about an investigation, that there would be no HR investigation and that SL was going to ask the claimant to leave the business when the owner of the respondent (Theo Paphitis) was here on Monday. The claimant told us that she looked directly at him and SR walked out of the business. SR denied that such an exchange ever took place. We concluded that this did not happen and is an invention of the claimant. The claimant had not mentioned this in his witness statement nor at any point previously in the pleadings and the first time this arose was during the hearing this week. He could not explain why this seemingly key evidence had been omitted. It was also an inconsistent version of events to the underlying allegation he did mention in his witness statement, which was that SL had *"said he was going to tell the owner of the business that I was causing trouble in order to get me dismissed"*. We find that this whole exchange and the underlying premise that it is all based on is entirely a figment of the claimant's imagination and simply did not happen.

21.36. The claimant told us that he felt he was then left with no option but to resign from his employment which he did by email on 19 January 2020 (page B239). This email stated that it was necessary to resign due to unforeseen circumstances and that he would not be able to work his notice. There was no mention of any of the matters now relied upon in his resignation letter. DK wrote to the claimant on 21 January 2020 saying she was sorry to hear this and that she hoped everything was OK (page B242). DK explained that she was concerned about the claimant and had been surprised by his e-mail and she did not know why the claimant had resigned. She said she had not made any connection with the claimant's previous complaint in February 2019. She said she was concerned and had thought that something might have happened in his personal life that meant he needed to resign and that is why she sent the email. The

claimant did not reply to this and this was not followed up by the respondent.

The Law

22. The relevant sections of the Equality Act 2010 (“EQA”) applicable to this claim are as follows:

“4 The protected characteristics

The following characteristics are protected characteristics: ... disability;”

“6 Disability

(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.”

“13 Direct discrimination

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

“23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case.”

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

“136 Burden of proof

(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.”

23. The relevant authorities that were considered were as follows:

- 23.1. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL – *“the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class”*.
- 23.2. Anya v University of Oxford & Another [2001] IRLR 377 - it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer’s judgment. This is particularly so when establishing unconscious factors.
- 23.3. Igen v Wong and Others [2005] IRLR 258 The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.
- 23.4. Madarrassy v Nomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not “without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent” committed an act of unlawful discrimination”. There must be “something more”.
- 23.5. Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'*
- 23.6. Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for ...'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'*

23.7. Richmond Pharmacology V Miss A Dhaliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

23.8. Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."*

Conclusion

DISCRIMINATION / HARASSMENT – DISABILITY

Direct disability discrimination

24. In order to decide the complaints of direct discrimination, we had to determine whether the respondent subjected the claimant to the treatment complained of (which is set out at paragraphs 1 a. to l. of the List of Issues above and then go on to decide whether any of this was "less favourable treatment", (i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We had to decide whether any such less favourable treatment was because of the claimant's disability or because of disability more generally.

25. We take note of the two stage burden of proof referred to above. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of disability. The next stage was to consider whether the respondent had proved that the treatment was in no sense whatsoever because of disability. We also had to determine whether the allegations were presented within the time limits set out in

123(1)(a) & (b) of the EQA and if not whether time should be extended on a “just and equitable” basis. We have considered first the substance of the complaints.

26. Based on our findings of fact at paragraphs 21.8, 21.15 and 21.18 above, looking at the allegations of direct disability discrimination based on the claimant’s cancer set out at paragraph 1 in the List of Issues (paragraph 17 above), we conclude that the respondent did not engage in the conduct alleged by the claimant at paragraphs 1.a, b, c, g, h, i, j and k of the List of Issues. This did not take place as alleged by the claimant and so those allegations of direct discrimination (and indeed harassment) are dismissed on the basis of the underlying facts not being found.
27. We did find that the conduct alleged at paragraphs 1 d, e, f and l of the List of Issues were made out on the facts (at least in part). Following the claimant’s absence from work for chemotherapy in July 2018 we found that RS and TY asked the claimant whether he was OK (see paragraph 21.9) and TY informed others that the claimant’s time off was due to hospital treatment (see paragraph 21.8). We also found that although not said by either TY or MFW specifically, the phrase ball ache was used by one of the respondent’s employees at some time during the claimant’s employment (see paragraph 21.18).
28. The next question is whether the claimant has shown that the respondent has in respect of this conduct found to have occurred treated him less favourably than anyone else or that this was on the grounds of his disability. In the first instance, we doubt whether the conduct referred to above can even amount to less favourable or detrimental treatment at all as in the main it describes two colleagues enquiring of the wellbeing of someone after a week off work and a manager informing staff that a colleague will be absent from work because of a hospital appointment. Both of those matters appear to amount to mundane matters that take place in workplaces everywhere on a daily basis and we cannot see how this can amount to less favourable treatment at all. The comment ball ache again is a colloquial term which was not directed to or even in reference to the claimant (see paragraph 21.18) and it is hard to see how it could be objectively seen as less favourable treatment of the claimant.
29. In any event, the claimant has not been able to show that any other employee real or hypothetical who was not disabled would have been treated any differently at all. The first two allegations are routine conversations that might take place after or in relation to any period of absence or hospital attendance, irrespective of the reason and the last is an offhand comment made in the workplace where people use casual language.
30. Significantly the claimant has not been able to show us that any of these matters had any link to his disability, namely his cancer. The claimant is not even near to satisfying the first stage of the burden of proof on this matter in showing any facts from which we could conclude that the treatment

complained of could be because of his cancer. In the main this is because the two parties who carried out these acts, TY and RS had no knowledge of the claimant's cancer at this time. Mr Fitzpatrick says knowledge is required for this claim to succeed. Whilst there is no statutory provision that knowledge of the protected characteristic is necessary for a section 13 EQA claim, in the context of this and most such claims, if the person said to have carried out the discrimination does not know of the protected characteristic, here being the claimant's cancer, it is hard to see how any such treatment could be said to have been because of it. There was no mention of cancer more generally, and looked at objectively none of the comments made were in any sense related to cancer or disability more generally. We accept that the claimant suffered from testicular cancer, and the phrase "*ball ache*" could at least be said to have some very loose connection at a stretch with testicular cancer. However this phrase was not used in any way in connection with cancer as suffered by the claimant or anyone else. It is a phrase commonly in usage to denote something that is difficult, a nuisance or troublesome. It was not about cancer at all. We find it highly unlikely that any individual would be so crass as to make a link between that phrase and a sufferer of a serious condition. These complaints for direct disability discrimination therefore fail and are dismissed.

31. The claimant also makes complaints of harassment in the alternative relating to the exact same allegations that are said to be direct discrimination as set out above. In order to determine these complaints, we need to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to disability. We are then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.
32. Based on our findings of fact at paragraphs 21.8, 21.15 and 21.18 and conclusions at paragraph 26 above, we have already found that the respondent did not engage in the conduct alleged by the claimant at paragraphs 1.a, b, c, g, h, i, j and k of the List of Issues. The allegation of harassment relates to this same conduct and although whether it is harassment is a different test, as set out above we do not find that the underlying facts are proved. As the conduct relied on did not take place, these claims can go no further and these complaints of harassment are dismissed.
33. The facts behind allegations numbered d, e, f and l were made out at least in part. The next question for these allegations is whether the conduct in question is related to disability. On this point we make the overall conclusion on all of the remaining harassment allegations made that none of the conduct complained of was related to the claimant's cancer which is the pleaded disability. It is a key component of harassment under section 26 EQA that it has to relate to the protected characteristic. Our findings of fact above and

conclusions on the direct discrimination claim at paragraph 30 above make it clear that none of the actions were related to or on the grounds of disability. Therefore the harassment claim of the claimant must fail on this ground alone. It is not necessary to go on to answer the remaining questions as to whether the conduct was unwanted, what its purpose or effect is. In any event our view is that none of the conduct could be said to have the purpose that is required and we also doubt that given the findings of fact and the evidence of the claimant even at its highest, none of the allegations could even have said to have had this effect.

34. This complaint of harassment fails and is dismissed for the above reasons.
35. Moving on to the second part of the claim which are the claimant's complaints of direct disability discrimination and harassment related to the disability of SAD. Based on our findings of fact at paragraphs 21.24, 21.25 and 21.26 above, we conclude that the respondent did not engage in the conduct alleged by the claimant at paragraphs 2 b, d and e. RS and MFW did not 'laugh aggressively' at the Claimant when he re-opened the blinds; MFW did not inform CD that the Claimant demanded that the blinds were kept fully open and employees of the respondent more generally did not tell others that the claimant suffered from SAD (as no-one at the respondent was aware that he had this condition). This conduct did not take place as alleged by the claimant and so those allegations of direct discrimination (and indeed harassment) are dismissed on the basis of the facts not being found.
36. We did find that the conduct alleged at paragraphs 3 a, c and f were made out at least in part in that RS and MFW both did on occasion close the blinds when the claimant was away from his desk (see paragraph 21.24); MFW did ask the claimant on one occasion not to close the blind, although we did not conclude that this was an order or was done in an aggressive or belligerent tone (see paragraph 21.25) and we concluded that RS and J Cassidy may have had a conversation which referenced Suicide Squad, although we did not find that they sniggered at the claimant (see paragraph 21.27).
37. However once again, the claimant has not been able to show that any other employee real or hypothetical (but who did not suffer from SAD) would have been treated any differently at all. These conversations and discussions about blinds were routine office disputes about who liked what and when. Whilst we found it was not handled by all in the most mature or appropriate manner, the claimant was equally involved in the disputes. The claimant has not been able to show us that any of these matters had any link to his disability, namely SAD. The conversation about Suicide Squad was a general conversation about a film. The claimant is again not near in satisfying the first stage of the burden of proof on this matter in showing any facts from which we could conclude that the treatment complained of could be because of SAD. This is even more apparent than in the first part of the claim as no-one at the respondent had any knowledge that the claimant suffered from SAD whilst he was employed (see paragraph 21.25). This was not in the mind of

anyone said to have been involved. We could not conclude that this would have been apparent from anything that was going on. There was no mention of SAD and looked at objectively none of the comments made or actions taken were related to SAD or disability more generally. The claimant has taken matters out of context and retrospectively tried to link these to a condition he suffered from. This is not a rationale for direct discrimination.

38. On the same basis, the claims for disability related harassment also fail. Our findings of fact and conclusions make it clear that none of these actions were related to or on the grounds of SAD. The harassment claim must also fail on this ground alone. It is not necessary to go on to answer the remaining questions as to whether the conduct was unwanted, what its purpose or effect is. In any event our view is that none of the conduct could be said to have the purpose that is required (as no employee had any awareness of disability) and we also doubt whether of the allegations could even have said to have had this effect. The claimant is retrospectively raising issues and making links to a disability that simply were not there at the time.
39. In respect of the remaining allegations of harassment and direct discrimination at paragraphs 3 and 8c in the List of Issues i.e that SL said that following the claimant's meeting with TY and SR, SL saying '*there would be no investigation and [that] he wanted [the claimant] out of the business*' and that he would tell the owner of the business that the claimant was causing trouble to have him dismissed, our findings of fact at paragraphs 21.34 and 21.35 above make it clear that this conduct did not take place. The claims of harassment related to disability and direct disability discrimination fail and are dismissed.
40. As none of the claimant's complaints were successful, it was not necessary to examine the issue of jurisdiction on the basis of time limits.

Employment Judge Flood
11 May 2021