EMPLOYMENT TRIBUNALS

Claimant: Mr W Berry

Respondents: Alliance Healthcare Management Services Limited

This was a hybrid hearing (H). The claimant and his cousin attended the hearing in person, but the witnesses for the respondents and others attended remotely because of the current restrictions arising from Covid 19.

Heard at: Leeds **On:** 29, 30, 31 March 2021, 1, 6, 7 and 8 April 2021.

Before: Employment Judge D N Jones
Mr B Roberts
Mr G Corbett

REPRESENTATION:

Claimant: Ms F Almazedi, solicitor
Mr A Johnston, counsel

JUDGMENT having been given on 8 April 2021 and written reasons having been requested by the claimant's representative by email of 9 April 2021, in accordance with Rule 62 of the Employment Tribunals Rules of Procedure 2013 the Tribunal provides the following

REASONS

Introduction

1. The claimant alleges direct discrimination because of race, harassment related to race, discrimination arising from disability, a breach of the duty to make adjustments and having been subject to detriments on the ground of the claimant having made protected disclosures.
2. The respondent is part of the Boots Group of companies and the claimant was employed by it as a warehouse operative.

3. The claim form includes very little detail of the complaints. At a preliminary hearing before Employment Judge Wade on 1 July 2020 the claims were identified following an application to make a significant number of amendments. The claims are identified in an annex to the order of that hearing. The respondent produced a list of the 16 legal complaints which were allowed to proceed pursuant to the amendment for the purpose of this hearing. Each is addressed in the section below, entitled analysis and conclusions.

The issues

Direct discrimination

4. Was the claimant subjected to any, or all, of the detriments?

5. Was that less favourable treatment of the claimant than the respondent treated or would have treated others because of his race (defined by colour)?

Protected disclosure

6. Did the respondent act or fail to act as alleged?

7. Was that to subject the claimant to a detriment?

8. It being accepted that the claimant made protected disclosures on 6 February 2020 when he spoke to Ann Jones in respect of health and safety issues, was the detriment done on the ground the claimant had made the protected disclosures?

Disability discrimination

Disability

9. Did the claimant have a mental or physical impairment?

10. If so did it have a substantial adverse effect on his ability to undertake normal day-to-day activities?

11. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

12. Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

13. Were the effects of the impairment long-term? Did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

Breach of the duty to make adjustments

14. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

15. Did the respondent apply to the claimant a provision, criterion or practice of failing to explain thoroughly, clearly and in advance the nature of the meeting of 7 February 2020?

16. If so, did that put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

17. If so, should the respondent have taken steps to avoid the disadvantage?

18. Would such steps have been reasonable?

Discrimination arising from disability

19. Did the respondent treat the claimant unfavourably by its employees Joanne COUSINS and Louise RYCROFT threatening to subject him to disciplinary action for insubordination due to a poor, uncooperative and rude attitude towards management and a failure to follow a reasonable management request arising out of his behaviour at the meeting on 7th February 2020?

20. Was that because of something that arose in consequence of the claimant's disability?

21. Was the treatment a proportionate means of achieving a legitimate aim?
22. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability?

Harassment

23. Did the respondent, by the actions of its employee Caz COOPER, in or about October 2019, put cages between the claimant and herself, Michelle LACEY and Rachael NEWTON to segregate them?
24. If so, was that unwanted conduct?
25. Did it relate to race?
26. Did it have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
27. If not, did it have that effect, having regard to the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

Victimisation

28. Was the letter of the claimant, written by his daughter and dated 5 June 2019, a protected act?
29. Did the respondent act in the ways alleged in the annex?
30. By doing so, did it subject the claimant to detriment?
31. If so, was it because the claimant did a protected act?

Time limits

32. Were the discrimination and/or victimisation complaints brought within three months and any relevant early conciliation extension (the primary period) of the act to which the complaint relates?
33. If not, was there conduct extending over a period, the last part of which fell within the primary period?
34. If not, were the claims made within such other period that the Tribunal thinks is just and equitable?
35. In respect of the duty to make adjustments, was the claim brought within the primary period starting with when the respondent made a decision about the adjustments? Or if no decision was made, when the respondent acted inconsistently with making the decision? Or, if neither, when the respondent might reasonably have been expected to have made the adjustment?

Evidence

36. The Tribunal heard evidence from the claimant, Mr Nisbett, a former colleague of the claimant, Ms Joanne Cousins, production team leader, formerly and at the material time outbound manager, Ms Louise Rycroft, service centre manager and Mr George Walters, fleet and transport manager.
37. The parties submitted a bundle of documents of 370 pages.

Background/Facts

38. The claimant initially worked for the respondent as a warehouse operative upon supply from an employment agency, from 10 September 2012. He became employed by the respondent in that capacity from 18 February 2013.
39. In 2016, in the presence of the claimant, a colleague made an offensive remark to another employee who had returned from holiday. He had a suntan and was called a nigger. The claimant reported this to his line manager, Ms Cousins. She

spoke to the employee who had used this inappropriate term and informed him it was unacceptable, but she did not tell the claimant she had done this.

40. In 2017 the claimant raised two complaints about the conduct of his colleague Caz Cooper. He said she had had spoken to him inappropriately. Ms Cousins spoke to Miss Cooper after the second incident.

41. On 5 June 2019 another incident occurred involving an exchange between the claimant and Ms Cooper. Both the claimant and Ms Cooper complained about each other's behaviour and the matter was investigated. This led to the claimant being invited to a disciplinary hearing before Mr Heathershaw on 15 August 2019. When the claimant and his union representative attended, the meeting could not go ahead because Mr Heathershaw had left the respondent's employment.

42. The claimant was off work through work-related stress between 11 June 2019 and 14 July 2019. He was referred for an occupational health assessment. On 15 July 2019 Ms Cousins met the claimant to discuss the outcome of the occupational health advisor's report.

43. On 7 September 2019 Ms Cousins wrote to the claimant to inform him the disciplinary action would not be pursued because of an unreasonable delay in arranging it.

44. On 22 October 2019 the claimant submitted a grievance in which he complained about how Ms Cousins had investigated his complaints from 2016 to 2019. The claimant attended a meeting with Ms Rycroft to discuss the grievance. He was accompanied by his union representative Mr Algor. On 25 November 2019 Ms Rycroft wrote to the claimant with the outcome. She did not uphold the majority of his complaints, but she recognised that the claimant felt racially discriminated against in respect of the use the offensive racist term in 2016 and that there were issues to be learned with respect to reporting back to the claimant about how Ms Cousins had addressed his informal complaints. The claimant appealed the outcome of the grievance but it was not upheld.

45. On 11 December 2019 a collective grievance was raised against the claimant by Ms Cooper, Ms Newton and Ms Lacey. They accused him of having been aggressive in pushing a cage and generally being intimidating. The claimant was informed and invited to a meeting to discuss the allegations by letter of 3 January 2020. He attended the meeting on 15 January 2020. The grievance was taken no further after viewing CCTV footageiour.

46. On 9 January 2020 the claimant wrote to Ms Cousins to query whether he might have been overpaid the previous year. Ms Cousins replied on 21 January 2020 and stated all was in order. The claimant took advice from the citizens advice bureau who set out in detail his concerns in a letter dated 31 January 2020.

47. On 5 February 2020 a 'near miss' report was prepared in respect of clutter which had been left in an aisle in which the claimant had worked. On 6 February 2020 the team leader, Ms Hunter, spoke to the claimant and criticised him for not cleaning the aisle at the end of his shift. It was recorded in a file note.

48. On the 6 February 2020 the claimant made a telephone call to Ms Ann Jones, the regional manager. He informed her that on the two previous Sundays he had noticed that colleagues in the warehouse had not been wearing protective footwear and that a fire escape was blocked by three sets of ladders. Ms Jones asked the claimant if he had removed the ladders. He said, incorrectly, that he had. She said she would take the matters up with Ms Rycroft.

49. Ms Jones spoke to Ms Rycroft later that day. Ms Rycroft contacted Ms Cousins by telephone and asked her to inspect the fire escape. Ms Cousins noticed that the ladders were there and took a photograph.
50. On 7 February 2020 the claimant was asked to attend a meeting with Ms Cousins. When he arrived he noticed that there was another person present to take notes. She was a human resources partner, Ms Sidelska. Ms Rycroft joined the meeting. Ms Cousins attempted to discuss the claimant's concern about his wages. She had prepared a detailed letter in response. The claimant became upset. He wished to be represented. He was offered the services of one of two union representatives who were working in the warehouse, but he wished to have his own union representative, Mr Algor. Ms Rycroft wanted to discuss the health and safety issues he had raised. The claimant became agitated and attempted to leave the room but was told to sit down. He was then allowed to leave the room when he became more agitated and spoke over Ms Rycroft and Miss Cousins.
51. Ms Rycroft and Ms Cousins took the decision to suspend the claimant and initiate an investigation into insubordination, failure to comply with a management instruction and failing to follow health and safety procedures. He was suspended that day. Following an investigatory interview, the insubordination and failure to follow management instruction allegation was dropped. The health and safety allegations proceeded to a disciplinary hearing on 26 February 2020. The claimant was subject to a final written warning for one year having been found to have committed gross misconduct. He did not appeal the decision.
52. The claimant has been off work through ill health since his suspension and has not returned to work.

The Law

Discrimination

55. By section 39(2) of the Equality Act 2010 (EqA):

> *An employer (A) must not discriminate against an employee of A's (B)—*
> *(a) as to B's terms of employment;*
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
> *(c) by dismissing B;*
> *(d) by subjecting B to any other detriment*.

56. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.
57. Direct discrimination is defined in section 13 of the EqA:

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

58. By section 9 of the EqA, race includes colour.
59. By section 23 of the EqA:

> *On a comparison of cases for the purpose of section 13… there must be no material difference between the circumstances relating to each case.*

60. By section 26 of the EqA,

(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.

Disability

61. Section 6 of the Equality Act 2010 defines disability as a physical or mental impairment which has a substantial long-term and adverse effect on a person's ability to undertake normal day-to-day activities. By section 212(1) of the EqA substantial means more than trivial or minor.

62. Paragraph 2 of Schedule 1 to the Act defines "long-term effect". An impairment will have been long-term if it lasted for at least 12 months or was likely to last for at least 12 months or was likely to last for the rest of the life of the person affected. In **SCA Packaging Limited v Boyle [2009] UKHL 37** the House of Lords held that likely, in this context, meant 'could well happen'.

63. By paragraph 2(2) of Schedule 1 of the EqA, if an impairment has ceased to have a substantial adverse effect on a person's ability to undertake normal day to day activities it is to be treated as continuing to have that effect if it is likely to recur.

64. Paragraph 5 of Schedule 1 provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect.

65. Guidance on the definition of disability has been issued by the Secretary of State pursuant to section 6(5) of the EqA.

Discrimination arising from disability

66. By section 15(1) of the EqA, a person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

67. By section 15(2) of the EqA, subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

The duty to make adjustments

66. By section 20(3) of the EqA, there is a requirement to take such steps as is reasonable to avoid a substantial disadvantage which a disabled person is placed at by a provision, criterion or practice applied by the employer.

Victimisation

67. By section 27(1) of the EqA, a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.

68. By section 27(2)(d) of the EqA a protected act includes making an allegation (whether or not express) that A or another person had contravened the Act.

69. In **Nagarajan v London Regional Transport [1998] 1 AC 501** and **Chief Constable of West Yorkshire v Khan [2001] ICR 1065 t**he House of Lords held that the essential issue is whether the employer consciously or subconsciously subjected the claimant to the detriment because he had done the protected act. It is not a simple "but for" test, nor is it a question of motive. Lord Nicholls pointed out that most people will not admit to acting in a discriminatory way and are often unaware they are doing so.

Burden of proof

70. In respect of complaints of discrimination, victimisation and harassment, by section 136(1) of the EqA, 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. Section 136(2) provides that does not apply if A shows that A did not contravene that provision.

71. The Court of Appeal has approved and revised guidance to the application of the burden of proof under previous legislation which remain applicable to the EqA[1].

71.1 In deciding whether the claimant has proved such facts [to discharge the burden] it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers will be prepared to admit such discrimination even to themselves.

71.2 The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. The Tribunal does not have to reach a definitive determination that such facts would lead to it concluding there was discrimination but that it could.

71.3 In considering what inferences or conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts.

71.4 When the claimant has proved facts from which the inferences could be drawn, that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed that act.

71.5 To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that his treatment was in no sense whatsoever on the protected ground.

71.6 That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts proved by the claimant from which the inferences could be drawn, but that explanation must be

[1] **Wong v Igen Ltd [2005] ICR 931, Barton v Investec Henderson [2003] ICR 1205, Ayodele v Citylink Ltd [2019 ICR 458**

adequate to prove on the balance of probabilities that the protected characteristic was no part of the reason for the treatment.

71.7 Since the respondent would generally be in possession of the facts necessary to provide an explanation the Tribunal would normally expect cogent evidence to discharge that burden.

72. In **Madarassy v Nomura International plc**, the Court of Appeal held that a difference in status, namely that of the protected characteristic alone, was not of itself sufficient to discharge the burden of proof. In **Glasgow City Council v Zafar** the House of Lords held that because an employer acted unreasonably did not mean that it had acted discriminatorily. If the employer treated those with and without the protected characteristic equally unreasonably there would be no discrimination.

Public interest disclosures

73. By section 43B of the ERA, a qualifying disclosure is defined as a disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest, and tends to show one or more acts of wrongdoing as defined. Such wrongdoing includes that the health and safety of an individual has been, is being or is likely to be endangered, section 43(1)(d).

74. Such a disclosure is protected if made to a specified category of persons or in defined circumstances in sections 43C to 43K of the ERA.

75. By section 47B of the ERA a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

76. It is for the employer to show the ground on which any act, or deliberate failure to act, was done, see section 48(2) of the ERA.

77. In **Fecitt v NHS Manchester [2012] ICR 372**, at paragraphs 43 and 45, the Court of Appeal held that the liability would arise if the protected disclosure materially influenced the employer's decision to subject the employee to a detriment. The protected disclosure did not need to be the sole or principal reason for the detriment.

Remedies: public interest disclosures

78. By section 49 of the ERA:

(1) Where an [employment tribunal] finds a complaint [under section 48(1)…] well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

(2) [Subject to [subsections (5A) and (6)]] The amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement to which the complaint relates, and

(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

79. In respect of an award for injury to feelings, guidance has been issued by the Presidents of Employment Tribunals of England Wales and Scotland with regard to discrimination cases. The guidance summarises the effect of the case law in which the higher courts have suggested the proper approach. There are three brackets: the top bracket is for the most serious cases and ranges between £27,400 and £45,600, the middle bracket ranges from £9,100 to £27,400 and the lower bracket is from £900 to £9100. In the case of **Chief Constable of West Yorkshire Police -v- Vento [2003] ICR 318** the Court of Appeal stated the top bracket is for the most serious cases such as where there has been a lengthy campaign of discriminatory treatment on the grounds of sex or race, the middle bracket is for serious cases which do not merit an award in the highest bracket and the lowest bracket is for less serious cases such as where the act of discrimination is isolated or one-off occurrences.

80. In the authority of **The Metropolitan Police Commissioner v Shaw [2204] ICR 464**, the Employment Appeal Tribunal held that the Tribunal should assess injury to feelings in respect of a detriment claim of this type in the same way as discrimination awards are calculated. In respect of aggravated damages Underhill J recommended that they may be included in an overall award which encompassed injury to feelings, provided that is specified, recognising these are not to punish the respondent but to compensate for any aggravated injury to feelings, focussing on the effect on the claimant of the aggravating features. They may include the motive behind the act, the manner in which it was committed, and any subsequent conduct by the perpetrator.

Discussion and Conclusions

Direct discrimination

By Joanne COUSINS, in June 2019, failing to carry out any investigation and/or take any action against Caz COOPER when she allegedly shouted and displayed aggression towards the claimant on 5 June 2019.

The claimant relies upon a hypothetical comparator and/or Caz COOPER, Rachael NEWTON and Michelle LACEY (re the collective grievance).

81. On 5 June 2019 an incident occurred in the warehouse which led to complaints being raised by the claimant and Ms Cooper about each other's behaviour. The claimant's daughter assisted him write a letter of complaint on 5 June 2019. He started Ms Cooper had been abusive, having said, "*why the heck you looking at me, I'm not talking to you*". The claimant said he wanted to take the matter further because of an incident in 2017 after which both had kept their distance. He said there had been another incident two days previously when Ms Cooper pushed a cage into a position to obstruct the bins which he had been dealing with at the time. He was very upset by her actions. He handed his letter of complaint to Ms Cousins on 7 June 2019.

82. Ms Cooper had spoken to Ms Cousins about the incident on 5 June 2019 and submitted her own written grievance about the claimant on 7 June 2019. This document was not initially disclosed, but was served when counsel for the respondent made enquiries of his client about this obvious document. In addition, a letter to Ms Cooper from Ms Cousins inviting her to an investigatory meeting was also disclosed late. Ms Cooper alleged that the claimant had been nasty and aggressive, accused her of clock watching and stirring the pot, towered over her, shouted and said she needed to scrub and have a bath. She said this reduced her to tears. She stated that

the claimant had approached her union representative on 6 June. She had told the claimant he had been bang out of order speaking to a woman in that way particularly with respect of the nasty bath comment. The letter continued, "*he then proceeded to tell her she shouldn't be racist then, she told him with allegations like that he needs to back his mouth up, he said well we all have opinions don't we*".

83. Ms Cooper instructed Caroline Hunter, a team leader, to investigate the matter on 6 June 2019. She took statements from two witnesses, Mr Glover and Mr Joseph. Mr Glover stated that the claimant had told him that Ms Cooper had asked where he was and that she was clock watching. He said the claimant was stirring it a bit. He said the claimant said aggressively, just go away, there was tit-for-tat between them and as Ms Cooper walked away the claimant said, "*go get a wash, get a bath, you smell*". Mr Joseph said that he saw the claimant looking at Ms Cooper, she asked what he was looking at, he said shut up. "*Then it started*". He said the claimant got more angry. Mr Joseph and Mr Glover tried to calm the claimant down and he said something along the lines of go get a shower. Ms Cooper replied, "*Berry, I aren't talking to you*" and walked away.

84. Ms Cousins interviewed Ms Cooper on 7 June 2019 and the claimant on 10 June 2019. She viewed CCTV footage which she considered supported Ms Cooper's account. She recommended that the claimant be invited to a disciplinary hearing for verbal abuse to a fellow member of staff. On 25 July 2019 the claimant was invited to a disciplinary hearing before the transport manager, Mr Heathershaw. The claimant and his union representative attended for the hearing scheduled on 15 August 2019, but it could not proceed because Mr Heathershaw had left his employment by then. On 7 September 2019 Ms Cousins wrote to the claimant to inform him that no disciplinary action would be taken because of a failure to conduct the disciplinary hearing within a reasonable timeframe. She recommended that if the claimant was exposed to any further issues with Ms Cooper he should report them to his line manager and if he required one-to-one support he should again speak to his line manager.

85. On 11 December 2019 a collective grievance was submitted against the claimant by Ms Cooper and two other work colleagues, Ms Newton and Ms Lacey. They accused the claimant of having become aggressive on 3 December 2019 by pushing cages across the warehouse floor with the result that one became jammed and Ms Cooper hurt herself when releasing it. It was said he accused Ms Lacey of breaching health and safety and they felt intimidated by the claimant who constantly watched their work so they could not concentrate.

86. Ms Lewis, a driver team manager, investigated the grievance. On 13 January 2020 she wrote to the claimant and invited him to investigatory meeting. That took place on 15 January 2020 when the claim was accompanied by his union representative, Mr Liam Algor. The claimant denied the allegations and, after viewing the CCTV footage in the meeting, Ms Lewis accepted there was no evidence to support the complaint. She took the matter no further as confirmed in a letter dated 15 January 2020.

87. The claimant says that it was an act of direct discrimination of Ms Cousins to fail to investigate his allegation against Ms Cooper and take action against her for her behaviour on 5 June 2019. On his behalf, Miss Almazedi submits that the treatment of his white colleagues was different, in that Ms Cooper was not subject to a disciplinary hearing but the claimant was and the collective grievance was investigated, insofar as the claimant was interviewed. She also says that the late disclosure of documents

was unacceptable and that it can be inferred that this was because they contained material which was unhelpful, or even harmful, to the case of the respondent. She drew attention to the reference of the claimant saying that Ms Cooper should not be a racist, in a conversation with her union representative on 6 June 2019 and a difference in the form of the letters inviting the claimant and Ms Cooper to investigate the meeting. The purpose of the meeting in the letter to the claimant was to investigate verbal abuse to a fellow member of staff but, in contrast, the letter to Ms Cooper was to investigate an incident which took place on 5 June between herself and the claimant. The notes of the interview with Ms Cooper were also disclosed during the hearing and, Miss Almazedi submitted, demonstrated a different tone to the meeting with the claimant, being one of sympathy and encouragement in contrast to accusatory and critical.

88. To be subjected to a disciplinary investigation is a detriment. It is, objectively, disadvantageous. The question for the Tribunal was whether it was less favourable treatment of the claimant because of his race. His white colleague was not subjected to a disciplinary hearing.

89. Whilst we accept that Ms Cousins appeared sympathetic to Ms Cooper in the interview and worded the letters slightly differently, we do not accept that this was motivated in any way by the claimant's race. The fundamental difficulty for the claimant in respect of this claim is that his comparators were in materially different circumstances to him. Two independent witnesses, one of whom was black, supported Ms Cooper's account that it was the claimant who had been aggressive. In addition, the claimant accepted in the interview with Ms Cousins that he had made a disparaging remark to Ms Cooper about going to get a wash. Although the CCTV footage was of limited value, it did demonstrate the claimant moving his arms and in an agitated state but did not incriminate Ms Cooper at all. In short, there was compelling evidence that the claimant had behaved abusively to Ms Cooper and the claimant's counter allegation was wholly unsupported by the witnesses present. It is true to say that Ms Cousins did not interview the claimant first and did not put the claimant's allegation to Ms Cooper in her interview. In addition, as we indicated Ms Cousins showed empathy to Ms Cooper, for example saying she did right by walking away. However, we find the reason she took this approach and did not pursue Ms Cooper in respect of the claimant's allegation is, quite simply, because the evidence overwhelmingly supported Ms Cooper's complaint that the claimant had behaved badly and did not support his. This had become clear shortly after the claimant had submitted his grievance on 6 June 2019, when the independent witnesses were interviewed. That was what influenced the direction of Ms Cousins' interviews.

90. In **Hewage v Grampian Health Board [2012] IRLR 870**, the Supreme Court considered the shifting burden of proof provisions which preceded section 136 of the EqA. Lord Hope approved the comments of Underhill J (as he then was) in *Martin v Devonshires Solicitors [2011] ICR 352,* at paragraph 39, that 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*". This allegation is an obvious example of that. The reason the claimant was disciplined and Ms Cooper was not is clear and it is down to the fact that all of the supporting evidence was against the claimant. Race had nothing to do with it.

91. In respect of the comparison with the three white colleagues which included Ms Cooper who bought the collective grievance, there was no independent evidence and this was not pursued upon examination of the CCTV footage. These were material differences in the circumstances as a comparison under section 23 of the EqA.

Harassment

Caz COOPER, in or about October 2019, putting cages between the claimant and herself, Michelle LACEY and Rachael NEWTON, segregating him from them.

92. There is very little evidence about this. At paragraph 21 of his witness statement the claimant addresses the collective grievance brought against him, categorically denies being aggressive and states he was "*very hurt and distressed to be accused of this especially as I felt that I had been segregated by them by the fact that Caz Cooper insisted on putting cages between me and these girls*".

93. When he was interviewed by Ms Lewis in the company of his union representative, the claimant made no suggestion that these three colleagues had acted as they had because of his race. By contrast, he had previously made the suggestion that Ms Cooper had been motivated by race in his discussion with her union representative on 6 June 2019. When Ms Cousins interviewed the claimant, on 10 June 2019, *she* raised the issue of race. We infer that this is because she had read the grievance of Ms Cooper of 7 October 2019. The discussion is as follows: "*WB wasn't the first time, spoke to her – every time she sees me has something to say. JC Deborah approached me to see you approached her. She told you it wasn't on what you said. WB not first time she has sworn at me. JC racist? WB asked if she thought Kaz was racist as only one she has an issue with. My opinion form of bullying happened before*".

94. The first difficulty we have is determining what is the unwanted conduct. There is very little evidence at all about when and how Ms Cooper placed cages between herself and the claimant to segregate him from the others. It is limited to this short passage quoted above in paragraph 21 of the witness statement.

95. Even if we accept that this happened and was unwanted conduct, there is no evidence on which we could determine in the absence of any other explanation that it related to race. The action of itself is not ostensibly anything to do with race. Even if the term "related to" embraces because of, or on the grounds of race, we are not satisfied that connection could be made on our findings of fact. The claimant did not allege such a connection in his interview with Ms Lewis, shortly after it happened, which suggests he had no such belief then. In an earlier interview with Ms Cousins the claimant was given the opportunity to adopt the suggestion she invited that Ms Cooper's previous actions were racist. The claimant did not say it was, but turned this question around to ask Ms Cousins if she believed that and left the question unanswered. He never raised it himself at any other stage. We find no such a connection.

Victimisation

96. The amendments to the claim which were allowed by Employment Judge Wade on 1 July 2020 are contained in a schedule to the order. In respect of the protected acts a number are alleged and are contained in the penultimate column of the schedule, but not all allowed. In respect of the first victimisation allegation, at paragraph 4 page 9 of the schedule, the protected act is described as the letter sent

by the claimant which his daughter had helped him write concerning the third aggressive incident concerning Caz Cooper. It stated that the letter raised issues of race discrimination in relation to Ms Cooper and the act of bullying the claimant. It is accepted that this refers to the letter of 5 June 2019.

97. In respect of the further allegations of victimisation they are allowed as amendments but only with the same protected act and not a collection of other acts or complaints. No application to amend was made during the hearing, perhaps because of the difficulty it would have faced in the light of the early decision of Employment Judge Wade.

98. The letter of 5 June 2019 is not a protected act. It was submitted that it would fall within section 27(2)(d) of the EqQA "*making an allegation (whether or not express) that A another person has contravened the Act*". Mr Johnston said the reference to '*whether or not express*' is to address the fact that most people would not know the terms of the Equality Act and therefore would not usually refer to it. The ambit of the protection would be very limited if a claimant had to say there had been a contravention of the Equality Act 2010. Provided the accusation is one which would be unlawful under the Act, it need not be expressly referred to. We agree. The essential question is whether an allegation of some form of discrimination has been made. In the letter of 5 June 2019 the claimant accused Ms Cooper of verbal abuse and pushing cages to create an obstruction, but he made no allegation of discrimination or anything else which would be a contravention of the EqA.

99. Miss Almazedi argued that when taken together with other documents and comments made by the claimant it should be interpreted as alleging a contravention of the Act. That argument faced the problem that it had been rejected at the preliminary hearing. The claimant had unsuccessfully sought permission to amend the bare claim form to "*the combined reporting of discriminatory incidents*". It was not possible for this Tribunal to cure that deficiency by construing the letter of 5 June 2019 in a different context to that which it has. That was not a case the respondent had prepared to meet and it was entitled to rely upon the rulings at the preliminary hearing.

100. In any event insofar as the grievance of Ms Cooper dated 7 June 2019 drew attention to an allegation the claimant had made to her union representative that she had been racist, this was queried in the interview with the claimant by Ms Cousins but, as we described above, not adopted and pursued by him. Even if it is to be suggested that we could add a further document to 5 June 2019 letter (contrary to the express terms of the order for 1 July 2020) the answer given by the claimant in the interview to the question of race was, at best, equivocal.

101. There were later allegations which do refer to race, including the grievance submitted by the claimant about Ms Cousins handling of his complaints which was subsequently handled by Ms Rycroft. That included a reference to the abusive racist term used about a colleague in the claimant's presence, in 2016 which Ms Cousins had investigated but not reported back, in respect of which Ms Rycroft partly upheld the grievance. Although the claimant had not accused Ms Cousins of racial motivation for not handling his complaints properly in the grievance letter of 22 October 2019, we are satisfied that he did read out the statement at the hearing, dated 20 November 2019, in which he stated that he felt a sense of unconscious racial bias levelled against him. Ms Rycroft did not recall this having being read out and had made no note of it, which led Mr Johnston to submit that it was unlikely to have been said as Ms Rycroft was meticulous in her note keeping. It is dated 20 November 2019, the

same date of the meeting, and we consider it unlikely to have been created for any other purpose. We are satisfied it was probably read out on behalf of the claimant when his union representative was present.

102. This may have been a protected act but it is not one upon which the case was allowed to proceed when the amendments were addressed and it cannot invest the letter written five months before with a feature it did not have.

103. In the circumstances the victimisation claims cannot succeed.

104. Even had there been one or more protected acts, we were not satisfied that any of the allegations were made out in any event. We address them in turn.

C being subjected to spurious allegations of aggressive behaviour by Caz COOPER and 2 other white colleagues (Rachael NEWTON and Michelle LACEY) which resulted in C being subjected to disciplinary action.

105. This concerns the collective grievance. It was raised in December 2019. It was discontinued in January 2020. When interviewed by Ms Lewis, the claimant made no suggestion that it had been motivated by an earlier allegation he had made against Ms Cooper of racist conduct. There are no facts from which we could decide, in the absence of any other explanation, that it was because the claimant had made an accusation of racist conduct against her or anyone else.

Joanne COUSINS, in July/August 2019, insisting on being involved in the disciplinary process despite the fact that she was implicated in the complaints.

106. On 25 July 2019 Ms Cousins met the claimant to discuss an occupational health report which had been prepared following a referral she had made after he had been absent from work for work-related stress from 11 June 2019 to 14 July 2019. The report, dated 17 July 2019 stated, *"[the claimant] described a poor relationship with his manager feeling unsupported and being treated unfairly when he has raised concerns about the behaviour of some colleagues towards him… As you are aware [the claimant] reports issues with literacy and relies on help from family to read documents and assist in completing forms etc. He went on to tell me that after he had meetings with management, he was given transcripts of the meeting, but no one is able to read them to him*". The occupational health advisor responded to a number of specific questions and stated the claimant was fit to return to work. In respect of question eight she was asked, "*is the colleague fit to attend meetings?*". She advised, "*yes, with support. This may involve the accompaniment [of a] friend or family member. I advise any meetings take place at a pace that is comfortable for him with frequent pauses to have a drink of water and for you to check his understanding of the proceedings. He should also be given assistance to enable him to pursue any documents*". In her general recommendations, the adviser suggested that the claimant should be offered the opportunity to raise his concerns with a manager who was independent of the situation and that, in addition, an individual stress risk assessment with a manager who was neutral to the situation be undertaken.

107. Ms Cousins did not follow this advice and gave no adequate explanation in her evidence for not doing so. She made a note of the meeting and said it had gone well. The note does not support that. Virtually immediately after the meeting started, the claimant said he had been unsupported by his line management and there was discussion about the history of his complaints which he felt had not been adequately addressed. The claimant stated that he would bring this up if he were disciplined. In her note Ms Cousins stated she felt the claimant was trying to blackmail her into not following the Cooper complaint with a disciplinary, but added that the disciplinary had

been already arranged with Mr Heathshaw and was out of her hands. This was true. She was no longer in control of the disciplinary process. The only involvement she later had was to discontinue the disciplinary action, which could not possibly be a detriment. The remarks made in her letter that if the claimant were exposed to any further problems from Ms Cooper he should raise them was supportive. The allegation is misconceived.

Joanne COUSINS telling the claimant in August 2019 [seemingly at the meeting to discuss the OH report in July 2019] that he had been the aggressor in the incident reported by Caz COOPER and that she had seen CCTV to prove this and aggressively asking the claimant why he had made a complaint about her.

108. Ms Cousins stated the evidence demonstrated that the claimant was the aggressor. This was no more nor less than a fair assessment of the investigation. As such, it could not be a detriment. She was stating the truth. This was not because of any protective act, but because it was what the investigation revealed.

109. We are not satisfied on the disputed evidence that Ms Cousins did aggressively ask the claimant why he had made a complaint about her at the meeting on 25 July 2019.

The alleged refusal by Joanne COUSINS to accept the recommendation of the OH report of 17 July 2019 that she offer the claimant the opportunity to raise any concerns with a manager who was independent of the situation, and her failure to carry out an individual stress risk assessment with a manager who was neutral of the situation.

110. This was poor management. The occupational health advisor had identified a course of action which was ignored. We have summarised it in paragraphs 106 and 107. The proposition advanced by Ms Cousins that the meeting went well is undermined by her own note, in which she revealed she believed the claimant was trying to blackmail her. It was a detriment.

111. There was no connection between this failure and any protected act. There are no primary factual findings which would support the inference. By this stage, Ms Cousins had become aware of the fact that the claimant had accused Ms Cooper of being a racist, but there is no sensible basis to suggest this would create an animosity towards the claimant on the part of Mr Cousins with a view to disregarding the advice. She had given the claimant the opportunity to address that issue in the investigation meeting herself and he had not pressed it, simply posing the question back to her. The decision not to implement the occupational health advice was clearly a detriment, but it was not because of a protected act.

Joanne COUSINS accusing the claimant of smelling of alcohol when he hand-delivered his sick note when making the referral to OH in July 2019.

112. The claimant had handed his sick note to Martin Price. It was he who had said the claimant smelled of alcohol. Ms Cousins referred to this when instructing the occupational health advisor. The claimant denied he had had any alcohol in evidence, although it appears he told the occupational health advisor that he had not consumed excessive alcohol on that day which would not of itself exclude smelling of any alcohol.

113. Ms Cousins had not made up an allegation that the claimant had smelt of alcohol but was merely reporting what Mr Price had told her. The claimant had been absent for over a month due to work-related stress. In that context, it is not

inappropriate for a manager to draw attention to an issue which might arise in respect of alcohol intake for the adviser to explore. This is not a detriment.

114. In any event there is no evidence to infer it was because the claimant had made a complaint of race discrimination against a colleague. The claimant does not overcome the initial burden of proof.

Joanne COUSINS summoning the claimant without warning to a meeting on the 7 February 2020 on the pretence that she was just giving the claimant a letter regarding wages he had queried and subjecting the claimant to intimidation and stress at that meeting.

Joanne COUSINS and/or Louise RYCROFT not allowing the claimant to be accompanied to the meeting, and the meeting being conducted with a note taker (Suzanna SIDELSKA) and other senior manager (Louise RYCROFT) present.

Joanne COUSINS and/or Louise RYCROFT stopping the claimant from leaving the meeting when he became distressed and upset.

Joanne COUSINS [now asserted to by Louise RYCROFT], at the meeting on 7th February 2020, banging her knees with her fists and telling the claimant "you are giving us too much paperwork", forcing the claimant to flee the room with nerves.

R [no individual identified, but presumed to be Joanne COUSINS and/or Louise RYCROFT] accusing the claimant of health and safety breaches and insubordination and deliberately exaggerating his conduct to Andy DIXON for the purpose of getting the claimant suspended and trying to bring about his dismissal.

115. The background to this meeting and what occurred are relevant to the complaint in respect of protected disclosures in addition to this complaint of victimisation.

116. On 5 February 2020 the claimant had been asked by the team leader, Ms Hunter, to clean under the pallets of the bulk aisles. He finished work at 3:05pm. That aisle was observed shortly afterwards to have boxes and other clutter in the walkway which was regarded as unsafe and it was noted in the prime safety system as a 'near miss'. A photograph was taken of it. Ms Hunter spoke to the claimant the following day, showed him a photograph, and said that if there were a further instance she would consider it a breach of health and safety rules. She regarded the claimant as responsible as he could easily have swept up before he left. A file note was made of the discussion. The record stated it only took a few minutes to clear. In his evidence the claimant said that he had left the area clean and so had not been responsible for the untidy walkway. When subsequently interviewed by Mr Walters the claimant stated he had been asked to clear the area at 2:20pm and had been doing it for 40 minutes.

117. At 15.36 on 6 February 2020, the claimant made a phone call to Ann Jones who was the regional manager with responsibility for health and safety. He informed her that five warehouse colleagues had not been wearing protective footwear on the Sunday, that four colleagues had not worn protective footwear on the Sunday before and that a fire escape had been blocked by three sets of ladders. Ms Jones asked the claimant if he had removed the ladders and he said that he had. She informed the claimant she would contact Mr Rycroft to address the issue.

118. On 7 February 2020 Ms Hunter asked the claimant to go to see Miss Cousins who was in a conference room. When he entered the room, the claimant noticed Ms Cousins was sitting with Ms Sidelska, a human resources business partner who had a pen and paper pad. The claimant had raised concern about overpayment of his wages on 9 January 2020. Ms Cousins had replied on 21 January 2020 and stated that, having made enquiries, he had not worked overtime and had not been overpaid in previous years, as he had feared. The claimant then obtained further advice from the citizens advice bureau (CAB) who had prepared a letter on his behalf on 31 January 2020. Ms Cousins had prepared a detailed reply which she proposed to provide at the meeting.

119. In addition to a discussion about the wages issue, Ms Rycroft intended to speak to the claimant in respect of a number of concerns. She entered the meeting after a few minutes. The presence of two managers and a human resources adviser alarmed the claimant. He said he did not wish to discuss the letter concerning the wages matter but wished to consult with the CAB. Ms Cousins persisted and attempted to explain the contents of her letter to the claimant but he became more concerned and stood with a view to leaving. Ms Rycroft asked him to sit down which he did. The claimant said he would wish to be represented but was told it was an informal meeting. He was offered representation in the form of one of two union representatives who were on shift, but the claimant wished for Mr Liam Algor to attend as he had represented him in the past. The claimant became agitated and stood up to leave the room. He said that Ms Rycroft banged her knees with her fists and said he was giving them too much paperwork. At the preliminary hearing that was said to be Ms Cousins. It was denied by both Ms Rycroft and Ms Cousins and in the circumstances of the inconsistency in the claimant's recollection about who it was, we were not satisfied this was established. From every account it is clear that the claimant had become distressed. He spoke over Ms Cousins.

120. He left the room and returned to the warehouse, where he carried on with his work. Although Ms Cousins said she had made the decision to suspend the claimant, we find it likely this had been in discussion with Ms Rycroft, her manager, immediately after the claimant left the meeting and that the decision to formalise disciplinary action had been taken by both managers. Ten minutes later Mr Newsome asked to speak to the claimant in a room upstairs. He and Mr Dixon read out a letter to inform the claimant he was suspended on suspicion of gross misconduct which was to be investigated. The allegations were firstly, a serious breach of failure to observe company procedure mainly reporting process and failure to rectify the health and safety concerns, secondly, a wilful disregard to health and safety procedures and regulations, thirdly, insubordination mainly due to poor, uncooperative and rude attitude to management and for a failure to follow a reasonable management request.

121. The claimant attended an investigatory meeting with Ms Hanson on the 13 February 2020. Having listened to his response, she was of the view he had been put in a situation in which he became anxious; he had believed it was a formal meeting because three managers were present. She recommended that, in those circumstances, the third and fourth allegations should not proceed.

122. A disciplinary hearing took place before Mr Walters. He concluded the claimant had been culpable of a serious breach and failure to observe company procedures and wilful disregard to health and safety procedures and regulations in that he had not removed the hazard he reported to Ms Jones and had misled her and that he had not completed the cleaning task Ms Hunter required on 5 February. He found this to

be gross misconduct and issued a final written warning to last for one year. He offered the claimant the right to appeal which he did not exercise. The claimant has been off work sick since this time.

123. We had concerns about the way in which Ms Cousins and Ms Rycroft approached this meeting and handled it, given that they were both aware of the occupational health advisor's recommendations the previous year. The claimant's anxiety about attending a meeting with three people in authority was understandable. He had had no notice of this meeting and was very unsettled by the imbalance, three managers to himself. It was stated that it was informal, but the allegations in respect of health and safety proceeded to a disciplinary hearing and a final written warning. Ms Rycroft was already aware of the fact the ladders blocking the fire exit had not been removed by the claimant, because she had contacted Ms Cousins the previous evening to check. Ms Cousins had taken a photograph. It must have been foreseeable to Ms Rycroft and Ms Cousins, in those circumstances, that this discussion could lead to disciplinary proceedings. With respect to the response to the wages query, it was foreseeable the claimant would wish to have time to consider the contents of the letter with someone else. The occupational health advisor had suggested a family member or friend attend with the claimant at meetings. Although that was not a legal obligation, because the claimant was not a disabled person and so no adjustment was required by law, it was a material consideration for the managers to take into account when the claimant reacted as he had. The claimant had not engaged in a discussion but requested assistance and manifested his anxiety by speaking loudly, talking across others. The claimant did not use any abuse, threaten anyone or act aggressively. When questioned about this, Ms Cousins said he tutted and shook his head. The context within which he became upset and spoke over his managers with a wish to leave was one which we find was wrongly categorised as insubordination or an unreasonable refusal to comply with a management instruction.

124. We consider that in more detail with respect to the protected disclosure detriment complaint, below. Whilst there was reason to consider Ms Cousins had become concerned about complaints the claimant made against her in his grievance, this was not a protected act which had been allowed upon amendment. There was no evidence from which to infer that the calling of the meeting on 7 February 2020 and the actions which followed, which we have described above, had anything to do with the letter of 5 June the year before, in which the claimant had raised his complaint about Ms Cooper.

<u>The protected disclosures – detriment</u>

125. It is accepted by the respondent that the communication with Ms Jones by the claimant on 6 February 2020 was a public interest disclosure. It was disclosure of information which, in the reasonable belief of the claimant, was in the public interest and tended to show that the health and safety of an individual had been, was being or was likely to be endangered. It was made to his employer. There are three alleged detriments.

The claimant C was aggressively challenged by his manager Joanne COUSINS at the meeting on 7th February 2020.

126. The aggressive challenges are not further defined but, if they are that she banged her knees and said the claimant was giving them too much paperwork, for the reasons we set out above at paragraph 119 we do not find that occurred.
127. At paragraph 28 of his witness statement the claimant said that Ms Cousins raised her voice and mentioned the health and safety issues and became angry. None of this is recorded in the witness statement which the claimant made on 7 February 2020. We bear in mind the claimant was in a very emotional state at this time and the reliability of his recollection as to precisely who said what may be fallible. Because of these considerations we are not able to find, on a balance of probabilities, that Ms Cousins aggressively challenged the claimant in the way he now describes. That allegation is dismissed.

The claimant was accused of health and safety breaches and evidence was created to bolster these allegations.
The claimant was suspended and subject to retaliatory disciplinary action, and accused of insubordination and rudeness to management.

128. In respect of the leaving of work on 5 February 2020, having failed to clear the walkway, a file note was made following a discussion between the claimant and the team leader Ms Hunter. The evidence was that this would normally be the end of the matter. Some explanation is required as to why it was later converted into a disciplinary allegation.
129. In respect of the failure to remove the ladders which were blocking the fire exit and which the claimant had misleadingly said he had removed, a disciplinary investigation could have been anticipated, but this would involve inviting the claimant to a meeting to discuss that possibility. Although it would not entitle the claimant to representation, it would have a formality because of its potential outcome. It would have been governed by the ACAS code of practice on discipline and grievance procedures. It would not have been tagged on to the end of the discussion about wages in what was portrayed as an informal meeting or not been foreshadowed with notice about its subject matter.
130. Ms Rycroft said that she wished to discuss "*some of his recent behaviours and address these so I can understand why he was choosing to behave in the [manner] he was as this was very concerning to me in general*". In her evidence Ms Rycroft said that the concerns related to why he had reported health and safety matters externally to the regional manager rather than to his manager or herself, which she said would have been the proper procedure, and why he had concerns about his wages. She suggested that the discussion was more in the nature of a welfare meeting. She said that the health and safety allegations became formal because the claimant would not discuss matters informally.
131. At the very least, Ms Rycroft and Ms Cousins demonstrated a lack of empathy. They failed to recognise the claimant felt outgunned, as a person who had literacy difficulties and who had previously expressed reservations about how Ms Cousins had dealt with his complaints. In respect of a lack of feedback concerning seriously unacceptable abusive racial term used in his presence but not about him that had merit, as acknowledged in the grievance outcome.

132. The witness statement of Ms Cousins, at paragraph 27, stated that the health and safety concerns which Ms Rycroft was to discuss included the rubbish left on the floor and the blocked fire exit, not simply the issue about why the claimant had not reported the matter in-house, as suggested by Ms Rycroft in evidence. That was also the reason for the presence of Ms Sidelska, as stated by her in the statement she prepared on 12 February 2020 where she describes the purpose of the disciplinary hearing.

133. Ms Jones had spoken to Ms Rycroft on 6 February 2020 about the claimant's health and safety complaint. She suggested that he had said safety shoes had not been provided; although he had never made that complaint it was doubtless a matter of embarrassment to Ms Rycroft, but she was able to clarify she had always provided personal protective equipment. Regardless of that particular issue, we are satisfied Ms Rycroft was concerned that the claimant had escalated all the health and safety matters externally and that influenced how she then addressed the matter with the claimant. She downplayed the seriousness of the matters she wished to discuss in her evidence, by suggesting they were limited to why the claimant had raised matters externally and expressed concerns about his wages. We are satisfied she intended to investigate the health and safety issues more broadly, having obtained evidence in photographic form of the blocked stairway. The presence of two senior managers and the human resources partner would have unnerved any employee, but particularly the claimant. We cannot avoid drawing the inference that this must have been known to Ms Rycroft. Arranging the meeting this way was a reaction to the irritation that a health and safety concern had been raised with someone to whom she would have to account.

134. The justification for the suspension advanced by Ms Cousins was that the claimant was in no state to return to the warehouse in the light of his behaviour at the meeting. In fact he had returned and recommenced work without any identifiable problem. The allegation of insubordination and a failure to comply with a reasonable management instruction was a disproportionate representation of how the claimant had behaved and this must have been known to both must Ms Cousins and Ms Rycroft. It is noteworthy that the investigator, Ms Hunter, did not consider it had substance to proceed to a disciplinary hearing. Without it, it is unlikely the claimant would have been suspended for the health and safety issues and the incident of 5 February 2020 concerning the aisle would have remained no more than a file note. Whilst his reaction in the meeting in not discussing matters was the catalyst for the suspension, we are satisfied that the fact he had raised health and safety concerns with Ms Jones, going above the heads of his manager and her line manager was a significant contributory factor to the decision to suspend and formalise health and safety issues into disciplinary action. The burden is upon the respondent to satisfy us that the detriments complained of were not on the ground of this protected disclosure and that it was not a contributory factor. They have failed to do so. The inference that it was is irresistible.

135. We do not find that evidence was created to bolster health and safety allegations, because the material which gave rise to the file note was already in existence prior to the meeting and the claimant's failure to remove the ladders which he had reported as unsafely blocking the fire exit was not disputed. In his evidence to the Tribunal the claimant accepted he had wrongly said he had removed them. We therefore reject that alleged detriment.

136. We find the claimant was suspended and subjected to retaliatory action and accused of insubordination and rudeness to management because he had made the protected disclosures; the protected disclosures materially influenced those decisions.

Disability discrimination

Disability

137. At the preliminary hearing the disabilities were said to be a learning difficulty, cognitive impairment anxiety and depression. In a witness statement which was served pursuant to a tribunal order for the purpose of establishing whether the claimant was a disabled person, the claimant stated that his conditions were dyslexia, processing difficulties, severe and enduring anxiety, depression and schizophrenia which he had suffered from for 15 years from 2006. He stated that his mental health conditions were complex and permanent and had to be controlled with medication without which he would be overwhelmed. He stated that the schizophrenia caused hallucinations and hearing voices which caused panic and stress to the point he could not concentrate on the simplest of tasks. He said his anxiety interfered with his sleeping. He has taken tablets to assist, on prescription. He said he had suffered from mental health issues throughout his life from teenage years.

138. In support, the claimant has served the medical records of his general practitioner.

139. The task of the tribunal is to determine whether the claimant had a mental impairment which has a substantial and long-term adverse effect on his ability to undertake normal day-to-day activities. Analysis of the significant and long-term difficulties with day-to-day activities can inform the Tribunal respect of whether there is an impairment, but there must be a conclusion on both impairment as well as adverse effect.

140. Aside from the assertions in the witness statement, the evidence did not support the case for disability in respect of any of the conditions at the time to which these claims relate; in some respects, the records undermined that issue. On 26 February 2020 the claimant is recorded as having stated he had no history of mental health issues. He had been describing his condition of low mood, poor sleep and appetite which had arisen through stress at work and that he had been talking to his deceased mother daily for up to 5 hours. This led the following month to a referral to the Leeds and York Partnership NHS Trust for a mental health assessment. Although the referral stated the claimant's mother had been treated for schizophrenia for 30 years, it did not report any symptoms the claimant had reported in his medical history, save for the discussions he was having with his mother at that time. The only other mention of schizophrenia is on 1 January 1996 which states "H/O schizophrenia", but in his impact statement, the claimant said this had been diagnosed in 2006. There is no reference to such a diagnosis then. The reference to a history of schizophrenia may have been to a family history, but it is remarkable that there is no record of this significant mental health condition anywhere else.

141. The claimant said he had been prescribed promethazine for the schizophrenia. The medical records include promethazine from 6 March 2020 which was after the events of which complaint is made. The claimant produced a benefits award of Personal Independence Payments and a written appeal to the initial decision rejecting his claim. This placed reliance upon his hallucinatory conversations. The appeal was allowed, but to be backdated to 27 April 2020, after the events with which we are

concerned. This evidence did not assist us. We were unable to find the claimant had schizophrenia during the relevant period on the evidence.

142. In respect of drugs for anxiety and depression, the claimant was last prescribed diazepam in March 2006, paroxetine in June 2003, before his employment, and mirtazapine in August 2020, after these events. The claimant says that since childhood he has had bouts of depression and this can be a recurring condition. That would overcome the obstacle of establishing that the condition is likely to last for more than 12 months, by virtue of paragraph 2(2) of Schedule 1 of the EqA. However, the Tribunal had no medical evidence to assist with the nature of this. It was not able to deduce from the medical records and the claimant's own statement whether or not his depression or anxiety was a disability, within the legal definition. In **Royal Bank of Scotland v Morris [2012] UK EAT/0436/10** Underhill J said, "*The fact is that while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the Act, give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance. It may be a pity that that is so, but it is inescapable given the real difficulties of assessing in the case of mental impairment issues such as likely duration, deduced effect and risk of recurrence which arise directly from the way the statute is drafted*".

143. In respect of the learning difficulty, it was accepted the claimant had literacy problems. What is not clear is whether this was a consequence of any particular physical or mental impairment as opposed, for example, to educational lack of achievement. Dyslexia is not referred to anywhere in the records. Moreover this aspect to the case was undermined by the application form of the claimant for this post in which he declared he had GCE in maths and English (1977– 1980), C and G adult literacy and numeracy (2010-2011). In his evidence the claimant said this was incorrect, but he could provide no explanation for the application form. There were a number of documents in the bundle which the claimant had written and although they contained errors, they demonstrate an ability to write intelligibly. The claimant had the assistance of his cousin in reading the documents in the bundle during the hearing. In respect of answering questions, the claimant was able to understand and address the points raised sensibly. We are not satisfied the claimant established he has a learning difficulty which constitutes a disability.

144. It follows therefore that the disability discrimination claimant cannot succeed as we are not satisfied he was a disabled person at the relevant time.

<u>Remedy</u>

145. We find that the claimant has suffered stress and anxiety as a consequence of the detriments which we have found he was subjected to. As Mr Johnston acknowledged, that would be for a period from 7 February 2020 until the disciplinary hearing, a matter of three weeks when he was suspended, but we are also satisfied that the consequence of the unlawful conduct we have found has had longer-term consequences in the form of the continued feelings of hurt that the claimant has, in particular by way of a lack of trust and confidence in his immediate line manager and her line manager, Ms Rycroft. The context is that the claimant was penalised for raising health and safety issues by suspension, retaliatory disciplinary action and

accusations of insubordination and rudeness. He makes no complaint of the ultimate disciplinary decision of Mr Walters, who he and Mr Nisbett spoke of favourably.

146. In his witness statement, at paragraph 32, the claimant said that he had suffered a relapse in his mental health and felt close to suicide, and his confidence and faith in authority has been destroyed, his working life ruined. He says that his mental health and schizophrenia have worsened and he had to adjust his medication. We are not able to find on the medical records available, and only the claimant's opinion, that either schizophrenia or any other mental health condition has been exacerbated by the detriments for which we are awarding compensation. That would require expert medical opinion. We make no award for personal injury. However we find the injury to feelings included anxiety and stress and a mistrust in management which has continued throughout since the claimant was suspended. No doubt our finding in his favour will alleviate this to a degree.

147. We are satisfied that there were two aspects to which we should have regard by way of aggravated damages as expressed in the **Shaw** authority. One is the fact the claimant was called into a meeting which was described as an "informal meeting" which hid the ulterior motive, which was to question him about health and safety issues which could have, and did, lead to disciplinary action. This was concealed from him until he was in the meeting. Secondly, in accusing the claimant of acting insubordinately the claimant's managers acted in a high-handed manner. There is an overlap with the injury to feelings award which needs to be considered and we bear in mind the award is to be compensatory not punitive.

148. Ms Almazedi says that the authorities invite us to consider the consequence, reaction and effect the unlawful conduct has had upon the victim. That is the traditional approach to the assessment of damages in civil litigation which does not have particular regard to the unlawful conduct itself. The categorisation of injury to feelings awards in **Vento** focusses on the acts of discrimination, such as one-off acts or courses of conduct, but recent authority emphasises the impact on the individual may then be reflected by where the award falls within the three brackets.

149. We recognise that the injury to feelings the claimant has suffered were not solely attributable to the acts which constituted detriments on 7 February 2020 which had continuing consequences, but seven previous months of his managers' conduct which he believed was unlawful discrimination and victimisation, which we have not found to be established. Had the claimant succeeded on all his claims, the award would relate to a seven-month period of injured feelings culminating in the claimant being off work sick for over a year. That would have attracted an award in the top of the middle or lower end of the upper bracket, bearing in mind by comparison that Ms Vento herself sustained a period of 18 months of harassment which fell at the lower end of the upper bracket.

150. The issue of causation complicates matters, in that we have to exclude those parts of the hurt and offence which stem from those earlier acts of the respondent which were not, on our findings, unlawful. The injury to feelings must be those attributed to the events of 7 February 2020 which we have addressed and its aftermath, which included a 3-week suspension and continuing hurt and loss of trust in his managers. In reality, the claimant's feelings were injured by a continuing build-up of events, of which this was the last. In that sense it is artificial to attribute and ascribe a portion of that continuing hurt and loss of trust to only the conduct of the one day, but the law requires us to do that, albeit recognising the principle that a

tortfeasor takes his victim as he finds them and the last unlawful act may have tipped him over the edge.

151. Bearing all these factors in mind we place the award at the bottom of the middle bracket, which is £9,100. We enhance to £10,000 to reflect the aggravated damages.

152. There will be interest from 7 February 2020 to the present date, which is a period of 14 months, at 8%, which comes to £933.

Employment Judge Jones

Date: 11 May 2021

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