EMPLOYMENT TRIBUNALS

Claimant: **Mr L Gonzales**

Respondent: **ContractAir Ltd**

Heard at: **Bristol** **On: 15, 16, 17 and 18 March 2021 and 1 April 2021 (in Chambers) and 3 May 2021 (writing).**

Before: Employment Judge Midgley
Mrs A Sinclair
Mrss C Earwaker

Representation
Claimant: In person
Respondent: Mr R Kohanzad, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claims of discrimination contrary to sections 13, 15, 20 and 26 of the Equality Act 2020 are not well-founded and are dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 19 November 2011, the claimant brought claims of disability and race discrimination against the respondent. He was employed as a sales consultant between 8 May 2018 until his resignation on 19 September 2019 as a Senior Recruitment Consultant.

2. The respondent is a subsidiary of Resource International Investments Group AG, which is a privately owned company which carries on business as a recruitment and training facilitator for the Aviation and Aerospace sectors, offering a variety of human-resource based services and solutions to them. The respondent operates solely in the flight crew services division and is a leading global flight crew leasing company, offering services both to

commercial and VIP operators.

3. The respondent operates from premises, amongst others, in Hartlebury and Basingstoke.

Procedure, Hearing and Evidence

4. The hearing was conducted remotely by use of the Video Hearing Service given the restriction on in person hearings as a consequence of the Covid-19 pandemic. At various stages throughout the hearing Mr Kohanzad was regrettably disconnected from the platform due to issues with his internet connection. When that occurred, the hearing was adjourned to enable the issue to be resolved.

5. The parties had agreed a bundle of documents of 207 pages and a bundle containing the statements of the witnesses. The claimant had produced a witness statement. The respondent had prepared statements from the following witnesses each of whom had produced a statement:

   5.1. Rachel Allott, Head of HR for the respondent

   5.2. Jonathan Ruckwood, the respondent's Director of Operations

   5.3. Jonathan Price, the Chief Operating Officer and director of the respondent

The first day of the hearing

6. The claimant had not appreciated that he needed to read the bundle of documents or the statements in readiness for the hearing, suggesting that he knew the truth and just wanted to read his statement to the Tribunal. We therefore adjourned until 3pm to enable the Tribunal and the claimant to read the documents and statements, and to permit the claimant to prepare his cross-examination of the respondent's witnesses. We advised the claimant that he would need to challenge the witnesses in relation to those parts of the statements that he disagreed with, suggesting to them what had in fact happened, as he alleged.

7. At 3pm the claimant had read the statement of Ms Allott and Mr Price but had not read Mr Ruckwood's statement, and so we proposed that we should adjourn until 9:30am on the second day to permit him to do so. Prior to adjournment, the claimant stated that he had diary entries relating to relevant events which he wished to rely on. It became apparent that those diary entries (a) had not be disclosed and (b) were in Romanian. We therefore ordered that the claimant should take photographs of the entries for the relevant days and send by email a typed version of the original Romanian text and the English translation to the respondent. We would determine whether he would be permitted to rely on them on the morning of the second day.

The second day: diary entry and the claimant's statement

8. On the second day of the hearing, regrettably, whilst the claimant had sent a photo of a single page from his diary to the respondent, he did not comply with our direction to provide a typed version and a translation. The claimant

then indicated that the diary contained some Spanish and some Romanian. The respondent objected to its admission. For reasons which we gave orally at the time, we found that the prejudicial effect of admitting the diary as against it probative value was such that we would not permit it to be introduced into evidence at that very late stage. The claimant would be able to give evidence as to what occurred and to ask Mr Ruckwood about it in cross-examination; he did not need to do so by reference to the diary.

9. The claimant then stated that he had taken legal advice and if he were not permitted to read his statement aloud then the hearing would be "null and void." I advised the claimant that that advice was not accurate and that it had long been the case that statements were treated as read, but we indicated that the claimant could read his statement if he wished, however, the time we permitted for his cross-examination of the respondent's witnesses would have not be increased, and thus if he chose to read the statement aloud, he would have less time to challenge the respondent's witnesses. The claimant agreed that he would not read the statement aloud.

10. The claimant then agreed to proceed with the hearing. The claimant did not seek to rely on the statement from an additional witness as she was not available to give evidence. Due to difficulties with Mr Kohanzad's connection to the VHS platform, the hearing could not commence until 11:34 when the claimant began to give his evidence. He gave evidence by affirmation, confirmed the content of his statement was true and answered questions from Mr Kohanzad and from the Tribunal.

Day 3: The strike out application

11. When asked questions by Mr Kohanzad as to whether he had threatened Mr Ruckwood after his resignation, the claimant stated that if he were to see him now, he would probably "take a swing at him." On the morning of the third day, the respondent consequently applied for the claims to be struck out on the grounds that such conduct was vexatious and unreasonable, and a fair hearing was not possible. We directed that the respondent should make a written application, to enable the claimant to consider it and respond and should serve a statement from Mr Ruckwood addressing the fear that Mr Kohanzad argued Mr Ruckwood had experienced as a consequence of the claimant's threat. We permitted the claimant to file and serve a statement addressing the content of screen shots allegedly form his Instagram account which the respondent relied upon in support of its application and which the claimant alleged had been fabricated for the purposes of the application. We therefore adjourned from 11:30 until 2pm for those matters to be attended to and for us to read the application and statements.

12. At 2pm we heard the application and the competing submissions from the parties, we adjourned until the morning of the fourth day to consider out decision and the arguments.

13. On the fourth day, we gave judgment on the application and, for reasons which were given orally at the time, dismissed it. The hearing therefore proceeded. It is sufficient to note by way of summary reasons for our decision that the claimant suffered a severe brain injury in September 2018 as a consequence of a very significant overdose of insulin, and that one symptom

of that injury, which the respondent conceded for the purpose of the application, was that it caused the claimant to say unpleasant and hostile things. (It was that overdose and the subsequent protracted period in intensive care which caused the delay in the claim's progress to a hearing).

The Issues

14. The issues to be determined were identified at a telephone case management preliminary hearing before EJ Goraj on 12 August 2019. Following that hearing the respondent conceded that the claimant's type 1 diabetes was a disability for the purposes of s.6 and schedule 1 EQA 2010. At the outset of the hearing, I raised with the parties that the claimant's claim in respect of failure to provide a sharps bin was better categorised as a failure to provide an auxiliary aid. The parties consented to that approach.

15. The issues for us were therefore:

Harassment

15.1. Did the respondent engage in unwanted conduct as follows:

15.1.1. Publicly accusing/abusing the claimant in respect of his use and/or disposal of insulin needles at work (Mr J Ruckwood in eary August 2019)?

15.1.2. Publicly mocking the way in which the claimant pronounced his own surname (Mr J Ruckwood on or around 6 August 2018)

15.1.3. Accusing the claimant of having inadequate personal hygiene (Mr J Ruckwood on or around 17 August 2018)

15.1.4. Excluding the claimant from a drinks meeting which had been proposed by the claimant (Mr J Ruckwood on or around 18 September 2018).

15.2. If so, did the conduct relate to the claimant's disability or national origin?

15.3. If so did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or offensive environment for him?

Direct discrimination

15.4. Did the respondent submit the claimant to the following treatment:

15.4.1. Dismissing him (this was accepted)

15.4.2. Harassing him as alleged at paragraph [x].1 above (this was denied)

15.4.3. Failing to make reasonable adjustments as detailed below (this was denied).

15.5. If so, did that respondent thereby treat the claimant less favourably

than it treated or would treat a hypothetical comparator (a) who did not have type 1 diabetes and (b) who was not of Spanish origin.

15.6. If so, are there primary facts from which the Tribunal could conclude that the difference in treatment was because of the protected characteristics?

15.7. If so, can the respondent prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability

15.8. The allegations of unfavourable treatment are:

15.8.1. The claimant's dismissal;

15.8.2. The allegations of harassment at paragraph [x] above;

15.8.3. The allegations of failure to make reasonable adjustments below.

15.9. Can the claimant prove that the respondent treated him as set out in paragraph [x] above because of something arising in consequence of his diabetes, namely the associated use and /or disposal of needles used to inject insulin?

15.10. The respondent showed that the treatment was a proportionate means of achieving a legitimate aim?

Failure to provide an auxillary aid

15.11. Did the claimant require an auxiliary aid for the use or disposal of his insulin needles, namely the provision of a sharps box?

15.12. Did the failure to provide a sharps box put the claimant at a substantial disadvantage in comparison with persons who are not disabled? In particular, because:

15.12.1. the claimant was unable to ensure the proper disposal of his insulin needles; and/or

15.12.2. the claimant was subject to criticism and/or abuse by Mr J Rockwood in respect of his disposal of insulin needles?

15.13. Did the respondent take such steps as were reasonable to have to take to provide the auxiliary aid?

Factual Background

16. It has been relatively difficult to piece together a chronological narrative of events, given that the claimant's statement jumps from incident to incident without following any particular chronological structure, and the respondent's statements focus upon the specific allegations. In addition, there is a relative sparsity of documentary evidence in relation to the factual matters in dispute. Doing the best we can, we make the following findings of fact and on the

balance of probabilities in light of the evidence we heard and read.

17. The claimant was recruited to the respondent to commence work on 8 May 2018 as a Senior Recruitment Consultant, following an interview with Mr Price, the respondent's Chief Operating Officer, on 14 March 2018. The claimant was experienced in the recruitment sector having previously worked for Hays Recruitment and Capita in similar roles. He was offered the role on 12 April 2018. The claimant was employed at the respondent's Basingstoke premises, where approximately 20 employees were located.

The claimant's nationality and disability

18. The claimant speaks seven languages; his mother tongue is Spanish, and he is of Spanish origin, despite having been raised in London. He therefore speaks English with a London accent, and Spanish with a strong Spanish accent. The claimant is a loudly spoken individual, who is very talkative and loquacious. When speaking he becomes very animated and can tend to let his thoughts roam away for the initial matter he was addressing.

19. The claimant is a type 1 diabetic and injects insulin regularly throughout the day. He declared this disability in his application, however, the claimant told us that he does not regard himself as disabled and is very proud of how much he has achieved despite his diabetes.

20. On 12 March 2018 the claimant informed Mr Price at a meeting that he had type I diabetes and that his condition necessitated, from time to time, attendance at medical appointments. He explained that he controlled his symptoms through the injection of insulin. The claimant did not at that time suggest that he needed the respondent to provide him with a sharps bin, or any other receptacle, for the safe and appropriate disposal of his needles.

21. Mr Price did not have any concerns about the claimant's diabetes as the respondent employed two other known diabetics, one of whom was a type I diabetic who also injected insulin.

22. On 8 May 2018 Ms Allott, the respondent's Head of HR, conducted the claimant's induction. During the meeting the claimant advised her that he was type 1 diabetic, but stated, when asked by Ms Allot whether he needed any support, that he was able to manage his condition through diet alone and did not require any assistance.

23. The claimant told us, and we accept, that his practice at the respondent (as it had been at previous employers) was to inject insulin using needles in the men's loos, before bending the needle over and disposing of it in his office bin. He did not accept, when it was suggested to him by Mr Kohanzad, that the needles posed any risk to other employees when they were disposed of in this way. The basis for that view was that he did not have any blood-borne infections. That is to overlook the risk of a needlestick injury, a significant part of which can be psychological, and the uncertainty in the mind of any employee unfortunate enough to be so injured as to whether there was any infection and the needle.

The claimant's line management

24. The claimant's initial line manager was Mr Price. As Mr Price role required him regularly to travel across Europe, the claimant was required to report to him by phone. Mr Price found the claimant to be both a very enthusiastic and a very effective and successful recruitment consultant for the respondent, if one who was a little emotional needy, in the sense that he would telephone Mr Price seeking assurance that he had acted appropriately in certain circumstances. Despite that, Mr Price believed that the claimant was a productive and well-liked member of the team and had integrated well in the office. The claimant was, as he himself described, constantly on the phone making sales and/or contacting contacts.

The cleaners' concerns

25. In late May or early June 2018, one of the cleaners contracted to work at the Basingstoke office reported that they had suffered a needlestick injury when emptying a bin next to his desk. Fortunately, the needle did not break the cleaner's skin. The matter was reported to the respondent by the company to whom the cleaning services was contracted.

26. Mr Price instructed Daniela Howard, the respondent's Head of Resourcing, to obtain a quote from the cleaning company for a sharps' bin. The quote was provided by email on 2 July 2018, with varying options as to weekly, fortnightly or monthly, or 3 monthly collections. The respondent accepts that the cost of each of those services was minimal and it would have been reasonable to have engaged the sharps bin service if there were a need. The quote was forwarded to Mr Price on the same day, under cover of an email stating, "FYI – it is because Luis has been putting his needles in the bin". Mr Price simply replied "Right…" He maintains that he was thereby indicating his consent for the purchase if necessary, but he left that matter to Ms Howard to arrange and determine.

27. In the event, the respondent did not purchase a sharps bin service. There is a dispute between the parties as to the reason for this. The respondent argues that the claimant agreed to obtain one from his GP in place of the respondent ordering one. The claimant accepts that Miss Howard took him aside to explain that the cleaners had found needles in the bin, however, he asserts that he spoke to Mr Price who agreed to obtain a sharps bin, but it never arrived. We resolve that dispute in our conclusions below.

28. The parties agree, however, that at some stage following the discussion of the need for a sharps bin the claimant brought a small pot into the office which he used to put his put needles in, and which he would take home to empty.

The appointment of John Rockwood

29. Mr Rockwood was appointed as Director of Operations for the respondent with effect from July 2018 and became the claimant's line manager upon his appointment. The claimant and Mr Rockwood formed a close working relationship and a developing personal friendship, with the effect that the two would often socialise outside of work. The bundle contained numerous email and text messages between the two which demonstrated their familiarity and ease in communicating with the other. Mr Rockwood had previously worked with the claimant's brother which no doubt helped.

30. When Mr Rockwood first met with the claimant, shortly after his appointment, the claimant disclosed his type I diabetes to him.

Mr Ruckwood's discussion with the claimant concerning the disposal of needles

31. On 16 July 2018, the claimant emailed Mr Rockwood to inform him that he had had a "bad hypo this morning" and that he was not his usual self. Mr Rockwood was not aware that a hypo referred to a hypoglycaemic episode, and misunderstood, believing it to be a reference to being positive. He therefore replied, "don't be silly, we can't be happy and hypo every day." The email was a supportive, friendly and uncritical communication, but also we find demonstrates Mr Ruckwood's lack of knowledge of diabetes and its symptoms and management.

32. On the same day, Miss Howard received an email from the cleaning company's director in which she complained that a member of the respondent's staff had been leaving used needles in the waste bins in the office and the men's toilets. Miss Howard forwarded the email to Mr Rockwood. Mr Rockwood was unaware of the discussions in June when concerns had been raised by the cleaners, but Miss Howard advised him of those events. Mr Ruckwood did not explain how Miss Howard had suggested that that incident in June had been resolved. In particular he made no reference to the claimant agreeing to obtain a sharps bin.

33. On balance therefore, we think it more likely, there was a misunderstanding between Miss Howard and Mr Price as to whether a sharp's bin service should be obtained, and the matter was simply overlooked. However, the claimant was not concerned by the fact that the respondent had not provided a sharp's bin as he had never used one in the past and he believed that the manner in which he disposed of the needles was safe and provided no cause for concern. We suspect therefore that in the claimant's eyes the issue had simply fallen away and he carried on disposing of his needles as he had before, whether in his bin or in his pot.

34. In consequence on 17 July 2018, Mr Rockwood spoke to the claimant about the way he disposed of his needles. Again, there is a dispute between the parties as to whether Mr Rockwood took the claimant into his private office for a discussion concerning the appropriate means of disposal (the respondent's case), or whether he called over to the claimant in the open office and loudly asked him "are you throwing needles in the bin?" before showing him photographs of needle caps (the claimant's case). The parties agree that the images that Mr Rockwood had been provided with by the cleaners were in fact of needle caps.

35. On balance, we do not accept that event occurred as the claimant alleged because Miss Mitchell, whom the claimant suggested had heard the discussion during his grievance, indicated that she would find such a discussion in appropriate and yet said that no such discussion had occurred. We therefore accept Mr Ruckwood's account.

36. Mr Ruckwood accepts, however, that at a later date, which he cannot precisely recall, he found a needle on the floor of the men's toilets. He

accepts that having made that discovery, he raised the issue quietly with the claimant at his desk and asked him to pick it up and dispose of it. Mr Rockwood maintained that a couple of days after that discussion the needle was still on the floor, and he asked claimant to pick it up. Mr Ruckwood maintained that claimant appeared unhappy and said that the needle was safe as it was capped and therefore anyone could pick it up. Mr Ruckwood told claimant that he was not his cleaner and that he should dispose of the needle. The claimant accepted in evidence that it was his practice to inject insulin in the men's toilets and it was possible that a needle may have fallen out of his pocket whilst he was in there. We therefore accept Mr Ruckwood's account of this second incident, given that on balance was likely to have occurred as Mr Ruckwood described.

37. The parties agree that whatever the discussion was, the claimant and Mr Ruckwood agreed that the claimant would dispose of his needles at home at the end of each day. The claimant's evidence was that he would do so by taking his pot home and emptying it.

38. The claimant made no complaint at the time that the way in which the issue had been dealt with by Mr Ruckwood upset or offended him, whether to Mr Ruckwood or to any other employee or manager of the respondent. Rather, the claimant described in his evidence to us how, as he came to review what had happened after his employment ended, that he concluded that Mr Ruckwood had treated him badly and was motivated either by jealousy, because the claimant was, in his words, "a young handsome man who was attractive to the ladies in the office," or because of his Spanish origins.

Mr Rockwood's discussion of the claimant's pronunciation of his name

39. On or about 6 August 2018 Mr Rockwood made a comment to the claimant about the way in which the claimant pronounced his surname after the claimant had completed a telephone call. When the claimant used his surname while speaking to clients and prospective clients on the phone he would adopt the native Spanish pronunciation. The claimant alleges that Mr Rockwood said "it makes me laugh how you pronounce your name." In his evidence during cross-examination the claimant asserted for the first time that when he said that Mr Rockwood mimicked the manner in which he said his surname, and in so doing stuck out his tongue and was obviously mocking him. He was unable to explain why that description was not contained in his witness statement. The respondent avers that Mr Rockwood merely stated" I love the way you say your surname."

40. The claimant made no complaint at the time of the incident to Mr Ruckwood or to another other manager or employee about what had happened.

41. The claimant initially accepted in cross-examination that Mr Ruckwood had said "he loved the way I pronounced my surname," later he suggested that Mr Ruckwood had said "it makes me laugh, how you say your name." However, the claimant accepted in his evidence that he did not regard Mr Ruckwood's comment as harassment until after his employment ended, at which point he looked back at the course of conduct and concluded that Mr Ruckwood must have acted as he did (for the reasons we have described above). In those circumstances, we prefer the account of Mr Ruckwood, given that if Mr

Ruckwood had acted as the claimant alleged (in a truly mocking way, rather than merely saying he loved the way the claimant said his surname) then the claimant would inevitably have viewed it as harassment at the time, given that the mocking and offensive manner in which the claimant suggested Mr Ruckwood acted could only be reasonable be regarded in that way.

The Cargo Logic Meeting

42. On 6 August 2018, Mr Ruckwood undertook the claimant's first performance review. He awarded the claimant average or good scores across the assessment categories.

43. Later that day a meeting was scheduled to discuss the Cargo Logic account. Mr Ruckwood, Chris Simsek (Group Head of Sales & Marketing Director), Chloe Hawke (Sales Executive), Stuart Johnson (Sales Executive), Alison Bartlett (Recruitment Consultant) and the claimant were to attend. Some of these individuals had travelled from Bristol for the sole purpose of attending the meeting. The primary purpose of the meeting was to discuss the rates and roles attached to the Cargo Logic account.

44. In the event, when all the attendees who did not work in the Basingstoke office were present, Mr Price decided to start the meeting. At that stage the claimant was using the telephone to call another client. Allison Bartlett told the claimant that the meeting was about to take place, but the claimant gestured that he was preoccupied with the call. The meeting took place in his absence. The claimant did not seek to join the meeting once he had concluded his call.

45. After the meeting Mr Ruckwood told the claimant that he was to work on the account, but the claimant said that he was too busy as he had a very heavy workload. Mr Ruckwood therefore allocated the account to Ms Barlett. The claimant made no complaint about that at the time but felt that he was thereby being excluded and preferential treatment was being shown to Ms Bartlett. We do not find that that was the reason, rather it was as Mr Ruckwood describes, a product of the claimant stating he was too busy to work on the account and Ms Bartlett being able to cover it in circumstances where she had attended the meeting to discuss the account.

Mr Ruckwood's comments about the claimant's personal hygiene on or around 17 August 2018

46. There is a dispute between the parties as to the events. The claimant alleges that on or about the 17 August 2018 he caught Mr Ruckwood endeavouring to log onto a colleague's computer. He alleges that the next day Mr Ruckwood called him into his office, asked the claimant to close the door, before telling him that a colleague had made complaints about his body odour and that there was strong smell around his desk. The claimant alleges in his statement that the reason for the comment may have been a stereotypical view of Spaniards having body odour.

47. Mr Ruckwood denied ever having made such a remark to the claimant or ever having spoken to him about body odour or a colleague's remarks about a smell. He had, he said, spoken to a female member of staff about such issues, but not the claimant.

48. We resolve that dispute in our conclusions below, although (unusually) we record the allegation in the background facts section despite the fact that we have not here made any finding about it so that it can be seen within context.

The visit of a Spanish colleague

49. On 10 September 2018 an employee of the respondent's Spanish division of Resource International Investments Group AG visited the UK. Mr Ruckwood and the claimant discussed taking the Spanish colleague out for a meal and drinks.

50. On 13 September 2018 Mr Ruckwood therefore held a discussion at work with those in the Basingstoke office as to which day of the week most people were available and therefore which would be the most suitable. In the event, Mr Ruckwood decided that they would entertain him on a Monday night. The claimant had stated that he was not available on the Monday night, but on balance we are satisfied that Mr Ruckwood did not hear him and fixed the date by reference to the day when the greatest number of people could attend.

51. The claimant suggested in cross-examination that there were three days of the week which everyone could attend and that Mr Ruckwood had deliberately chosen a date he was not available so as to isolate him, but we reject that account because it was not referred to in the claimant's meeting with Mr Ruckwood on 14 September (see below), his email containing his complaints sent on 19 September or in his statement. We do not accept his explanation that he simply forgot to include it; had it have happened, and he was as unhappy about it as he was, he would have referenced it in the contemporaneous documents and in his statement. Moreover, the claimant accepted that Mr Ruckwood noticed that he was upset, asked him what the matter was and suggested as a solution that the two of them should go out for drinks the following Friday. That conduct is not consistent with the animus the claimant ascribes to Mr Ruckwood, but rather was consistent with an increasing sense of paranoia which the claimant described he experienced, albeit that that paranoia was unjustified in the circumstances.

The claimant's letter of resignation

52. On 13 September 2018 the claimant sent a text message to Mr Ruckwood in which he complained that he did not fit at work, because he was loud and the social event with the Spanish colleague had been planned when he could not attend. He observed "I'm obviously not welcome there" and then indicated that that had tipped him into accepting an offer of employment that he had previously been uncertain about. The claimant had not in fact received a formal offer but had only discussed roles with another employer.

53. Mr Ruckwood replied reassuring the claimant that he did fit 'really well' and that the two men should meet the following day to discuss the position. The claimant replied indicating that he would send his letter of resignation the following day.

54. The claimant met with Mr Ruckwood on 14 September. The claimant raised a series of concerns with Mr Ruckwood about events that had occurred; he accepted in his evidence that he was quite aggressive and forceful in the

manner in which he did so, which upset and confused Mr Ruckwood. In addition, the claimant recorded the meeting, although he did not disclose that fact to Mr Ruckwood. The Tribunal was provided with a transcript of 41 pages detailing what was discussed. The salient points are as follows:-

54.1. Mr Ruckwood confirmed that the claimant's notice period was a week.

54.2. The claimant asked why he had not been invited to attend the meeting with Cardio Logic and was told that it was because he was on the telephone meeting, and the meeting had been instigated suddenly because all those form other offices were in the building and available.

54.3. At one stage Mr Ruckwood was so alarmed because the claimant referred to being "the only foreign person in the office" that he asked whether they should have a witness present.

54.4. Mr Ruckwood insisted that he had not heard the claimant say that he could not attend the night out with the Spanish colleague on the Monday night. The claimant acceptance later in the meeting that he might be wrong to have believed that Mr Ruckwood heard him.

54.5. The claimant accepted that he was a sensitive person and 'held on to things.'

54.6. Mr Ruckwood explained to the claimant that he was so alarmed by the messages the claimant sent the night before the meeting that he had been in two minds as to whether to accept his resignation. He told the claimant "then I thought "if he comes in and if he is still the same tomorrow and he still wants to go, he goes."

54.7. Mr Ruckwood told the claimant that he needed to think about whether he wanted to resign, in the sense that he had to decide for himself whether he wanted to stay.

54.8. The claimant did not make any complaint in relation to the disposal of his needles, either that a sharps bin had not been provided or that Mr Ruckwood had challenged him inappropriately.

55. After the meeting, the claimant emailed Mr Ruckwood to apologise, saying,

> "I'm sorry if the way I approached that made it feel like I was attacking you. You've been a real good boss…. Point is, my problem was never with you, I just felt a bit upset about not fitting in and I need to toughen up."

56. Later in the day on 14 September at 14:27 the claimant emailed Mr Price and Mr Hickman, stating "I think my 'shift' is done but I send you personally so that you know what is going on." He sent them a copy of the recording of his meeting with Mr Ruckwood but did not copy the message to Mr Ruckwood. Half an hour later he emailed the two men again stating, "If you don't respond: I'll start a case – up to you – as the only foreign born employee my case is clear." Mr Ruckwood was made aware of the emails but not of the content. He emailed Ms Allott setting out an account of what had happened, as detailed above.

57. Mr Ruckwood spoke to either Mr Price or Mr Hickman by telephone. He was told that as the claimant was in his team the decision as to what to do was his. Mr Ruckwood concluded that he could not overlook the way that the claimant had, in his view, overreacted to the decision to take the Spanish colleague out on a day which the claimant could not attend and his subsequent behaviour in resigning, whilst referring to other job offers, and then conducting himself in an aggressive manner during the meeting on 14 September 2018. Mr Ruckwood was told by Ms Allott that he could permit the claimant a cooling off period in which to reflect upon whether he truly wished to resign, but he decided that the claimant had crossed the Rubicon and burnt the bridges in the process. Consequently, he informed Ms Allott that the claimant's employment should be terminated on the grounds that he had failed his probationary period.

58. On 17 September 2018, Ms Allott wrote to the claimant dismissing him for that reason. He was given one week's notice of termination, but was not required to work his notice. He employment therefore ended on 24 September 2018.

The claimant's grievance

59. Prior to receiving the letter, the claimant emailed Mr Price and a client (that later unintentionally as a consequence of using the wrong email address for Mr Hickman. Within the email he wrote:

> "As you are both aware, Friday I raised a concern on being myself excluded from meeting to which I was invited and social events, without an an understanding of the reasoning from my exclusion….
>
> I have emailed you… in case this results in grounds of discrimination on either my nationality or the fact I'm a type one diabetic at a work tribunal."

60. That was the first occasion on which the claimant had linked, even theoretically, any of the conduct about which he now complains and his disability. The email was treated as a grievance and investigated by the respondent.

61. On 19 September the claimant emailed Ms Allott who was to conduct the grievance investigation. Within the email the claimant raised the following complaints for the first time:

    61.1. Possible discrimination on the grounds of his diabetes when cleaners stopped emptying my bin and "this was discussed in open in front of the entire office."

    61.2. The failure to obtain a sharp's bin, when one had been promised.

    61.3. Possible race discrimination in respect of "numerous comments about Hispanic people in general."

62. The claimant's evidence to us, which we accept, was that after his dismissal at some stage over the weekend he had reflected on events which had occurred, which had not offended him at the time, but which, as he reviewed them he concluded were acts of race discrimination or disability discrimination.

63. On 20 September the claimant emailed Ms Allott an email he had sent himself. The email consists almost of a witness statement which details the matter which the claimant was then unhappy about. Within the account the following relevant matters appear:

    63.1. The claimant spoke to Mr Price after his discussion with Daniella Howard, and was promised that the respondent would provide a sharps bin. It did not arrive so the claimant placed his needles in a pot.

    63.2. After Mr Ruckwood joined he called the claimant over to his desk in the office and asked him whether he was throwing his needles in the bin.

    63.3. He referred finding Mr Ruckwood trying to log in to an employee's computer, Donya, and then observed "If she was going to be pulled up about hygiene and writing in a blog, why do I, as a colleague know this?"

    63.4. Mr Ruckwood challenged the claimant about why he'd taken so long in the loo. The claimant was injecting insulin, he explained that and offered to send Mr Ruckwood a link explaining diabetes.

    63.5. Mr Ruckwood said "it makes me laugh how you pronounce your name"

    63.6. He recorded the incident involving Cargo Logic and stated, "no I knew my role wasn't secure."

    63.7. He suggested that his conduct on 13 and 14 September was caused by low blood sugar.

64. The claimant was interviewed in relation to his grievance on 20 September 2018. He suggested that Rosemarie Mitchell had heard Mr Ruckwood's comment in the open office in relation to the discovery of needles. He indicated that he had not chased up a sharps bin after one was promised, but believed if one had been provided then his exchange with Mr Ruckwood would not have occurred.

65. On 25 September 2018, Alison Bartlett was interviewed as part of the grievance investigation. She stated the claimant had told her that he could not attend a social gathering for the Spanish colleague on a Monday, because he was picking up his son. She stated that the claimant had not told Mr Ruckwood that, only her. She further stated that the claimant was speaking to clients on the telephone when the Cargo Logic meeting had begun, but he had not appeared upset at the time.

66. Mr Ruckwood was interviewed on the same day. His account of the Cargo Logic meeting was identical to that of Ms Bartlett in the material details (he believed the meeting lasted for a shorter period than Ms Bartlett but that was not relevant to the issue in question which was why the claimant was alleged not invited into the meeting. He stated that he had not heard the claimant suggesting that he could not attend drinks with the Spanish colleague on a Monday. He described the events of the 13 and 14 September as detailed above. When asked about the Claimant's diabetes, Mr Ruckwood noted that the claimant would openly discuss it with him in front of the team. He accepted that he had spoken to the claimant when the cleaners found a

needle cap in the bin, and a second time, in the open office when Mr Ruckwood found a needle on the toilet floor. He said the claimant has said "it's got a cap on it, so it's not going to stab anyone." Mr Ruckwood asked him to pick it up, as he was not going to.

67. Rosemarie Mitchell was also interviewed on 25 September 2018. She confirmed that the claimant would discuss his diabetes openly "100s of times a day." She denied ever having heard Mr Ruckwood or anyone else speaking inappropriately about diabetes.

68. Daniella Howard was interviewed on 2 October 2018. She confirmed that when she discussed the need for the claimant to dispose of his needles safely, the quote for the sharps bin had been obtained but the claimant had said that he would take them home and dispose of them himself.

69. On 3 October the respondent wrote to the claimant rejecting his grievance.

The Relevant Law

70. The claimant brings four claims under the Equality Act 2010. The first for direct discrimination (s.13 Equality Act 2010 ("EQA"), the second that the treated him unfavourably because of something arising from his disability (s.15 EQA), the third that the respondent failed to provide him with an auxiliary aid contrary to s.20 EQA, and lastly that he was harassed contrary to section 26 EQA 2010.

71. The relevant law is contained in sections 39 and 13, 15, 20, 23 and 26 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

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.

s.15 Discrimination arising from disability

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

s. 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
…
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

23. Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

s.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.
(2) A also harasses B if—
  (a) A engages in unwanted conduct of a sexual nature, and
  (b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
  (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(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.

<u>The reverse burden of proof</u>

72. The tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on 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.

73. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

74. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e. that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

75. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

76. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

77. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154). Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

78. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

79. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Detriment and unfavourable treatment (s.15)

80. The test of a detriment within the meaning of section 39 EQA 2010 is whether the treatment is "of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (per Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337 , para 35).

81. The Equality and Human Rights Commission's Code of Practice (2011) observes at 5.7

> "For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage "

And at 4.9

> "'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."

82. The same approach must be adopted in relation to unfavourable treatment within the meaning of section 15 (see Williams v Trustees of Swansea University Pension & Assurance Scheme and anor per Langstaff J in CA (paras 28-29) of the word "unfavourably", which formulation was approved in the Supreme Court (at para 27):

> "… it has the sense of placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person … The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life."

Justification

83. If a respondent is shown to have treated a claimant unfavourably, it may still defeat the claim by showing that that unfavourable treatment was justified. In Homer the Supreme Court considered the necessary elements of and approach to a defence of justification:

> "20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:
>
> > '… the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.'
>
> He then went on at [165] to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:
>
> > 'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'
>
> As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] IRLR 726 [31], [32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.
>
> 24 Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer."

84. In R (Tigere) v Secretary of State for Business, Innovation and Skills [2016] 1 ALL ER 191, the Supreme Court again identified the need, when considering justification, for a Tribunal to both analyse the justification of the PCP and then carry out an analysis of the discriminatory effect of the relevant measure:

> "It is now well established in a series of cases at this level, beginning with Huang v of State for the Home Dept, Kashmiri v Secretary of State for the Home Dept [2007] UKHL 11, [2007] 4 All ER 15, [2007] 2 AC 167, and continuing with R (on the application of Aguilar Quila) v Secretary of State for the Home Dept , R (on the application of Bibi) v Secretary of State for the Home Dept [2011] UKSC 45, [2012] 1 All ER 1011, [2012] 1 AC 621, and Bank Mellat v HM Treasury (No 2) [2016] 1 All ER 191 at 204 [2013] UKSC 39, [2013] 4 All ER 533, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the

interests of the community?" (Tigere paragraph 33)."

85. The burden of establishing justification rests upon the Respondent. In Hardy & Hansons Plc v Lax the following was said of the concept of justification of indirect discrimination (albeit in respect of the then applicable provisions of the Sex Discrimination Act 1975):

> "32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry v Midland Bank plc [1999] ICR 859) and I accept that the word "necessary" used in Bilka-Kaufaus [1987] ICR 110 is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word "reasonably" reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the employers' submission (apparently accepted by the appeal tribunal) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
>
> 33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby [2001] ICR 1189 and in Cadman [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal."
>
> 35 The employment tribunal, at para 9, referred to Allonby and stated:
>
> > "It is understood that it was necessary to weigh the justification put forward by the [employers] against its discriminatory affect. Accordingly, it proceeded to consider the matters on which the [employers] relied in order to refuse the applicant's request that the RRM job be done on a job share or part-time basis."

Failure to make reasonable adjustments

86. The burden of proving the PCP and the substantial disadvantage lies on the claimant (Dziedziak v Future Electronics Ltd EAT 0271/11*)*.

Harassment

87. The words 'related to' in S.26(1)(a) have a broad meaning; conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it, what is required is some connection even if not directly causal between the conduct and the protected characteristic — Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT. The context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic— particularly in cases where the conduct cannot be described as 'inherently' racist, homophobic, etc. (see Warby v Wunda Group plc EAT 0434/11). It is not enough however that the conduct complained occurs 'in the circumstances of' a disability, it must be related to it.

Discussion and Conclusions

Failure to provide an auxillary aid

88. There is no dispute that the claimant would have been assisted by the provision of a sharps bin to dispose of his needles. The issue between the parties is whether the respondent's failure to provide one was reasonable and, if not, whether that placed the claimant at a disadvantage because he was subjected to criticism and/or harassed by Mr Ruckwood in relation to the manner in which he disposed of his needles.

89. There is no dispute that following the complaint from the cleaners, the respondent obtained a quote to obtain a sharps bin but did not in fact provide one. The argument between the parties is whether that occurred because the claimant agreed to obtain a sharps bin himself, with the effect that it was not reasonable to provide one as a consequence of that agreement. Having carefully reviewed the evidence we have concluded that the reason that a sharps bin was not provided was because the claimant told Mr Price that he would take the needles home and dispose of them. That was Ms Howard's clear recollection at the time she was interviewed in September, some four months later.

90. Moreover, it is inconceivable that if the claimant were truly of the view that the was a subsisting agreement for the respondent to obtain a sharps bin, that the claimant would not reference that agreement and raise it vociferously when he spoke to Mr Ruckwood, whether at the time or when setting out his grievances on 14 September 2018. Rather, we are satisfied that the claimant did not regard the disposal of his needles as creating any health risk to his colleagues, in particular we noted his response in cross-examination that firstly he did not have aids and secondly, in his previous employment he had had no need for a sharps bin, and finally that by bending the needles he disposed of them safely, and in that context we satisfied that the claimant did not insist upon the provision of a needles bin as had originally been agreed because he was more than satisfied that the use of the pot he provided safely resolved the issue of disposal.

91. We are satisfied, therefore, on the facts of this case that the respondent took the steps that were reasonable to provide the auxillary aid, and its failure to provide one was reasonable. The reason that it did not in fact provide one was because the claimant told it that it was unnecessary to do so. Nevertheless, the Tribunal is concerned that having identified the clear need

for a sharps bin the respondent did not actively review the situation to determine whether the claimant had obtained one (as the respondent had anticipated, on its case) both for his protection and that of other employees and contractors or agents, such as the cleaning staff.

92. If we are wrong in our conclusions on that point, we would have found that the claimant was not put at the disadvantages alleged by the failure to obtain the auxiliary aid. The claimant was not disadvantaged because he disposed of the needles in a manner in which he had proposed and with which he was happy, and which had been agreed with Mr Ruckwood. Further, for the reasons we detail below, we do not accept that Mr Ruckwood censured the claimant or unreasonably criticised the manner in which he disposed of the needles.

93. The claim that the respondent failed to make reasonable adjustments by providing the auxiliary aid of a sharps bin is not well founded and is dismissed.

Harassment

Did the respondent publicly accuse/abuse the claimant in respect of his use and/or disposal of insulin needles at work (Mr J Ruckwood in early August 2019)?

94. The claimant suggests that Mr Ruckwood spoke to him on two occasions in relation to the disposal of his needles. Once when the cleaning staff had raised concerns about them being placed in the bins, and the claimant says called out to him across the open office.

95. We do not accept that the incident occurred as the claimant alleged. Rather, as detailed in our findings, Mr Ruckwood spoke to the claimant about the complaint from the cleaning staff in his office, and on a second occasion when he found a needle left by the claimant in the loos. Whilst that conduct certainly related to the claimant's disability because its cause was his form of disposing of the needles he needed to manage his diabetes, it was not unwanted nor could it reasonably have been perceived by the claimant as having had the prohibited effect because the claimant was very open about his condition. The discussion of his diabetes, his injections or the needles he used did not of itself cause the claimant any embarrassment, on the contrary, as Miss Mitchell observed, he would openly discuss those matters with anyone and did so regularly, as he was very proud of how he managed his condition. He willingly instigated a conversation about those matters with Mr Ruckwood after his appointment. Secondly, the claimant had a very good and friendly relationship with Mr Ruckwood as evidenced by the text messages and emails passing between them, and the claimant's stance during the meeting on 14 September. Thirdly, it was reasonable to alert the claimant to the cleaner's concerns and to discuss how the needles might be disposed of and, later, to alert him to the fact that he had left a capped needle in the men's toilets. Finally, there is no evidence that the claimant himself regarded that conduct as unwanted or having the prohibited effect at the time – he did not complain to Mr Ruckwood, to Ms Howard or Ms Allott, or raise a grievance, and he did not refer to the incident on 14 September or in any document until his email of 19 September 2018, when he had looked back

over past events and decided that they were tainted by discrimination.

Publicly mocking the way in which the claimant pronounced his own surname (Mr J Ruckwood on or around 6 August 2018)

96. Clearly the manner in which the claimant says his surname relates to his nationality. The issues are what was said and what its effect was. We have found that Mr Ruckwood told the claimant, "I love the way you pronounce your surname," and rejected the claimant's account of that incident. However, it is possible that such a comment if said sarcastically might potentially amount to harassment. Here, however, we conclude that the comment did not undermine the claimant's dignity or create the prohibited environment because the claimant did not regard the comment at the time as having that effect. He did not make such a complaint to anyone at the time. As with the allegations relating to the discussion of needles, which we have detailed above, it was only after his dismissal that he reviewed the events through a prism of discontent with Mr Ruckwood and decided that the comment was discriminatory. It was not therefore reasonable for the comments to have had the effect that the claimant now alleges, and the claimant did not perceive them in that way at the time of their making.

Accusing the claimant of having inadequate personal hygiene (Mr J Ruckwood on or around 17 August 2018)

97. We do not find that Mr Ruckwood made any comments to the claimant in relation to his hygiene. We reject the claimant's evidence in that regard on the basis that he was mistaken in his recollection and he had confused the occasion on which he learned that Mr Ruckwood needed to speak to a female colleague about her hygiene (which he referred to in his email of 19 September 2018). We note that there is no reference to the allegation in the transcript of the 14 September or of the comment being made to the claimant in the email of 19 September.

Excluding the claimant from a drinks meeting which had been proposed by the claimant (Mr J Ruckwood on or around 18 September 2018).

98. Mr Ruckwood did not exclude the claimant from the social drinks with the Spanish colleague. We prefer Mr Ruckwood's account that he did not hear the claimant's comment that he could not attend on a Monday. That account is supported by Ms Bartlett's evidence, which was given within a month of the meeting, that the comment had been made to her but Mr Ruckwood did not hear it. We note, in addition, that Mr Ruckwood was, as we have found, very supportive of and friendly towards the claimant as evidenced both by the emails and text messages passing between them, and Mr Ruckwood's actions in noticing that the claimant was unhappy after the decision was made, investigating the cause of that unhappiness and offering a further date for drinks on a Friday.

99. The claims of harassment are not well founded and are dismissed.

<u>Direct discrimination and discrimination arising from a disability</u>

100. Since we have concluded that the claimant was not harassed and that the respondent did not fail to make reasonable adjustments, the only allegation of

direct discrimination, alternatively of unfavourable treatment arising from his disability that we need to resolve is the allegation that the claimant was dismissed either because of his disability or because of his Spanish nationality (s.13) or because of something arising from his disability (s.15).

101. We address the direct discrimination claim first. The dismissal of the claimant was not inherently discriminatory; that is to say there was nothing in the dismissal which directly referenced the claimant's disability or his nationality. Similarly, there is nothing which is obviously connected to any matter which arose because of the claimant's disability. The claimant must therefore prove primary facts from which we could, properly directing ourselves, conclude that the reason for the dismissal was either of those factors (s.13) or that it was because of something which arose from his disability (s.15).

102. As we understand the claimant's case, he asks us to draw inferences from the following matters:

102.1. Mr Ruckwood's alleged comments about the manner in which he pronounced the claimant's surname. We have found that comment was not made as the claimant suggests and therefore do not draw any inference from this matter.

102.2. The respondent's failure to provide a sharps bin and his general lack of comprehension about diabetes. We have found that the reason the respondent did not provide a sharps bin was the claimant's proposal to bring a pot of his own to put his needles in and to dispose of the needles at home. Moreover, generally, whilst Mr Ruckwood was clearly not knowledgeable about Diabetes or its potential effects, he was nevertheless very supportive of and understanding towards the claimant in relation to it. There is nothing in his conduct which would permit us to draw the inference the claimant asks.

102.3. The fact that he was the only employee from of European nationality in the office. We do not accept that as factually accurate. There were other employee of European nationality employed within the office, the respondent's evidence on that point was unchallenged. Moreover, the respondent is a multi-national company as demonstrated by the visit of a Spanish colleague from Madrid. Accordingly, we do not draw any inference on this basis.

102.4. Mr Ruckwood told the claimant that he should think about his decision over the weekend but then dismissed him before he communicated his decision. This engages with the respondent's reason for dismissal, which we address below. However, for the reasons given below we decline to draw any inference.

103. We then consider the respondent's reason for dismissal. It argues its reason was a non-discriminatory one in the sense that the claimant's disability and/or nationality was not more than a minimal influence on the decision to dismiss and he was not dismissed because of anything which arose from his disability. The respondent argues that those factors were not considered at all and therefore had no influence on the decision. Rather, the respondent

asserts that the claimant's conduct through the events of the 13 and 14 September 2018 destroyed their trust and confidence in the claimant because:

103.1. He had reacted wholly disproportionately to an innocuous event, namely, the arrangement of one night for drinks with a Spanish colleague.

103.2. In addition, he appeared to demonstrate a degree of unjustified paranoia as to the manner in which he was viewed by his colleagues, believing that no one wanted him to be employed when in fact he was a well-liked popular member of the team.

103.3. His reaction to those matters was to resign, suggesting that he had jobs with competitors, and then repeatedly to ask Mr Ruckwood whether he wanted him to stay.

103.4. He then acted aggressively and inappropriately in a meeting with Mr Ruckwood.

103.5. All of those matters led Mr Ruckwood to fear that that scenario was likely to be repeated if there was another innocuous incident which the claimant overreacted to, and Mr Ruckwood did not wish to be put through the stress and trouble of trying to resolve matters again.

104. We accept that this was the true reason for the respondent's decision to dismiss. We found Mr Ruckwood's evidence on the point to be credible, it was consistent with the contemporaneous documents, most particularly, with the views he expressed to the claimant himself during the meeting on the 14 September. The claimant's diabetes and his nationality were not in any way an influence or a factor in that decision.

105. Similarly, they were not matters which arose from his diabetes. Whilst the claimant alleged after the event that he may have had low blood sugar which contributed to his conduct during the meeting on 14 September, we reject that explanation. First, that explanation came late in the day. Secondly it was speculative at best; the claimant was not arguing that he definitely had low blood sugar, only that he may have done. Thirdly, the claimant's reaction on 13 September arose because he believed Mr Ruckwood had heard him say that he could not attend on Monday and had deliberately chosen a day he could not attend to schedule a social outing. The claimant's view of his unpopularity and his actions in asking Mr Ruckwood whether he wanted him to stay were similarly derived from his sensitivity, not his disability. The suggestion that he had another job was not something which arose from his disability.

106. The claims of direct discrimination and discrimination arising from a disability are therefore not well founded and are therefore dismissed.

Employment Judge Midgley

Date: 12 May 2021

Judgment & Reasons sent to the parties: 13 May 2021

FOR THE TRIBUNAL OFFICE