EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr L Palmer	AND	Network Rail Infrastructure Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By CVP) **ON** 17 to 20 May 2021

EMPLOYMENT JUDGE J Bax
MEMBERS: Mr K Ghotbi-Ravandi
Mr H Launder

Representation

For the Claimant: Ms A Hart, Counsel
For the Respondent: Mr J Crozier, Counsel

JUDGMENT

1. **The Respondent contravened section 39(2)(d) of the Equality Act 2010 and the Claimant succeeded in his claims of discrimination arising from disability, that the Respondent had failed to make reasonable adjustments and harassment related to disability.**

2. **The Claimant's claim of victimisation was dismissed upon its withdrawal.**

Remedy

1. **The Respondent is ordered to pay the Claimant the sum of £15,656.43**

2. **The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply in this case.**

Breakdown of Award

The award is made up the following sums:

(a) Injury to feelings	£8,500
(b) Interest on injury to feelings	£1,155.07
(c) Loss of Earnings	£5,620.06
(d) Interest on loss of earnings	£381.30
Total	£15,656.43

REASONS

1. These are written reasons following unanimous extempore judgments given in relation to liability and remedy on 19 and 20 May 2021 respectively.

The claim

2. In this case the Claimant, Mr Palmer, claimed that he had been discriminated against on the grounds of disability. The Respondent denied the claims.

Background

3. The Claimant notified ACAS of the dispute on 23 October 2019 and the certificate was issued on 23 November 2019. He presented his claim to the Tribunal on 4 December 2019. The claim form detailed that the Claimant was bringing claims of discrimination arising from disability, a failure to make reasonable adjustments, harassment, victimisation and an unlawful deduction from wages. The Claimant withdrew the wages claim, which was dismissed upon that withdrawal on 7 September 2020.

4. The claim form detailed a number of allegations spanning from 2010 to 5 September 2019. At a Telephone Case Management Preliminary Hearing on 19 May 2020, Employment Judge Livesey identified the issues in the case. By a letter dated 14 July 2020, the Claimant withdrew a large number of the allegations.

5. The Claimant originally alleged that he was disabled by reason of migraines and anxiety and depression. The Respondent conceded that the Claimant was disabled by reason of migraines at all material times, but denied that he was disabled by reason of anxiety and depression

6. On 7 September 2020, at a Telephone Case Management Preliminary Hearing before Employment Judge Bax, it was confirmed that the Claimant no longer relied upon depression and anxiety as disabilities. The issues to

be determined were clarified and agreed as set out in the list of issues attached to the Case Management Summary.

7. Before closing submissions were made at the final hearing, the Claimant withdrew his claim of victimisation.

Amendment application

8. During closing submissions, the Claimant applied to amend his claim to add a further provision, criterion or practice ("PCP") for the purposes of the reasonable adjustments claim, namely 'a requirement to attend work at Bristol W&G'. The application was made after the Respondent had made its closing submissions in which it had been said that the PCP, as originally pleaded, did not place the Claimant at a disadvantage because it was not the place but the people working within it that put him at a disadvantage. The Claimant's principal argument was that the PCP as originally pleaded did place him at a substantial disadvantage, but sought to add a further PCP in the event that it did not. It was submitted by the Claimant that it was a minor clarification, should it be required, and that it did not change the nature of the claim, because the claim had been about placing the Claimant within the Welding and Grinding Team in Bristol. The Respondent submitted that the application was made too late, that the PCP had been set out in the claim form and there had been two Case Management Preliminary Hearings at which the issues had been clarified. Further if the PCP, as originally pleaded, did not place the Claimant at a substantial disadvantage the amendment was not minor and that the Claimant and Mr Kingsbury might need to be recalled to give further evidence and that the focus would need to be on relationships and not location.

9. We applied the principles set out in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650, Selkent Bus Company Ltd v Moore [1996] ICR 836, Abercrombie v Aga Rangemaster Ltd [2013] IRLR 953, Ladbrooks Racing Limited v Traynor EATS/0067/06 and that in the Employment Tribunal there is not the doctrine of relation back. It was also necessary to take into account all of the circumstances of the case and the hardship to the parties. We concluded that if the Claimant did need to make an application, because the original PCP was not sufficiently defined, that it would be a new allegation and therefore would not be a minor amendment or clarification. It was therefore a new allegation made very late in the hearing and after the Respondent had made closing submissions. If allowed, further evidence might need to be called, although it seemed that much of the potentially relevant evidence had already been heard. We took into account that what is set out in a claim form is not something to set the ball rolling, as per Langstaff P's observations in Chandhok v Tirkey [2015] IRLR 195. A Respondent must know the case it has to meet and should not be expected to try and hit a moving target. In all the circumstances of this case, the timing

of the application significant and a fresh allegation was potentially being made. Taking into account the overriding objective, we concluded that the hardship to the Respondent in granting the application was greater than that to the Claimant in refusing it, and the application was refused.

The issues

10. At the start of the hearing the parties confirmed that the issues to be determined were as follows:

Discrimination arising from disability

11. The allegation of unfavourable treatment was:
    a. On about 5 September 2019, failed to provide the Claimant with a permanent alternative role to his normal place of work;
    b. Instructing the Claimant to return to the Welding and Grinding Team in Bristol (Mr Kingsbury's direction on 5 September 2019).

12. The something arising in consequence of the disability relied upon was, that, "The reason that the Claimant was originally moved from his normal place of work was because of the effect that location/working environment had on his disabilities." The Respondent accepted in its closing submissions, that if the unfavourable treatment had occurred that it was because of the something arising in consequence of his disability.

13. The Respondent relied upon a justification defence with a business aim or need of ensuring that the Claimant was in a suitable post. The Claimant accepted that if this was an aim, it was legitimate.

Reasonable Adjustments

14. The Provision, Criterion or Practice ("PCP") relied upon was, the requirement to undertake duties at an employee's normal place of work. Counsel for the Respondent accepted that it was a PCP and something which was in operation.

15. The substantial disadvantage alleged was that "The Claimant was unable to work at his normal place of work due to his disability. Returning to that workplace put him at a substantial disadvantage because of the risk of experiencing bullying again or it happening in the future would exacerbate the symptoms of his disability."

16. The Respondent confirmed in its closing submissions that it did not dispute it had knowledge of disability or that it knew that the Claimant perceived that there was a substantial disadvantage. It disputed that the Claimant was put to a substantial disadvantage.

17. The following matters were suggested in the list of issues as reasonable adjustments:

    (a) The Claimant wanted to work other than in Bristol. He asked to work in Westbury and/or Taunton in order to escape the treatment he was being subjected to at Bristol Welding.
    (b) Redeploying the Claimant to a permanent role in a different workplace.

Harassment

18. The alleged unwanted conduct was that “On 5 September 2019, Paul Kingsbury, Infrastructure, Maintenance and Delivery Manager, told the Claimant that he would be moved back to his original place of work at Bristol Welding. Despite knowing that the Claimant would return to work with managers who had bullied him in 2013.

19. The parties also agreed a set of facts for the period during which the Claimant worked in the Bristol Welding and Grinding Team.

20. Counsel for the Respondent did not object to the Claimant relying on an additional witness or including an additional occupational health report in the bundle.

The Evidence

21. We heard from the Claimant and also from Mr Kinsey on his behalf. We heard from Mr Kingsbury on behalf of the Respondent.

22. We were also provided with a bundle of documents of 363 pages. Any references in square brackets, in these reasons, are references to page numbers in the bundle.

23. There was a degree of conflict on the evidence.

Facts

24. We found the following facts proven on the balance of probabilities, after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

25. The Respondent, among other things is responsible for the maintenance and inspection of the railway track network in the United Kingdom. The network is divided into 14 routes and 5 regions. On the Western route there were 4 delivery units: Bristol, Reading, Swindon and Plymouth. After a

restructure in February 2020 there were 2 delivery units, East Central and West and the boundary lines were redrawn.

26. The Claimant is a welder by occupation. On 17 February 2003, he commenced work for Carillion as an Infrastructure Maintainer Level 1 in the Grinding and Welding ("W&G") Team. As member of the W&G Team the Claimant's normal place of work became the W&G team at Queen Ann Road, Bristol. On 23 October 2003 the Claimant was promoted to the position of IM2 Welder. On 1 April 2011, the Claimant's employment transferred to the Respondent.

27. The parties agreed that whilst working in the W&G team:
    (1) The Claimant's perception was that he was bullied by other members of the W&G Team;
    (2) The W&G Team perceived the Claimant to be difficult to work with and refused to work with him;
    (3) There was objectively a breakdown in the relationship between the Claimant and the W&G Team;
    (4) The Claimant had periods of absence for stress at work and for migraine during his time on the W&G Team and subsequently.

28. The Claimant suffers from migraines, which the Respondent accepts were a disability at all times material to the claim. The migraines cause the Claimant symptoms of blurred vision, vomiting, numbness in his hand, pins and needles in his mouth, light/aura in his vision and severe headaches. The Claimant takes medication to control the migraines and his anxiety levels. When experiencing a migraine, he takes prescribed pain and anti-sickness medication. When not under significant stress the Claimant would have a migraine every 6 or 8 months, and if he did not take medication it could happen once a month. Whenever he has a migraine he has to stop everything and rest. When stressed the frequency of migraines increases. During the course of his employment with the Respondent the Claimant from 2006/2007 suffered an increase in his migraines. This coincided with his perception that he was being bullied.

29. The Respondent accepted that it has and had a requirement that employees are required to undertake duties at their normal place of work. The Claimant's normal place of work, as a Welder and Grinder, was the W&G Department at Queen Ann Road. The Claimant's evidence, which we accepted, was that it was not the physical place of work which caused him difficulty but the people working in the W&G team at the place of work

30. The Respondent's Internal Secondment Position Statement, defined secondment as "the planned temporary transfer of an employee to another role within Network Rail lasting for a minimum of 6 months up to a maximum of 12 months." Under the heading 'Secondment role becomes permanent',

it provided, “Where a secondment has the potential to become a permanent role this should be made clear in the initial advert. There will then be no requirement to re advertise at a later stage - providing the seconded employee accepts the permanent placement.”

31. The Respondent’s reasonable adjustment policy identified issues to consider when deciding on adjustments, which included: (1) “When considering costs and resources you need to look across the whole of Network Rail, not just your team, department or depot. The size of our organisation means that we would be expected to make considerable efforts to remove, reduce or prevent barriers in employment.”; (2) “If an adjustment would increase the risk to the health and safety of anybody, including your disabled employee then you should consider this when deciding what is reasonable. Your decision must be based on a thorough assessment of risks and not on assumptions.”; and (3) “Any adjustments made should not make a health condition worse.” The policy also recognised that they should be asking all staff on a regular basis if they faced health related barriers at work, and many employees were not aware of support available and many individuals might not class themselves as disabled, even though they would be in law.

32. In a Health Risk Management Feedback Form dated 3 July 2013 sent to the Claimant’s manager, Mr Skirton, it was recorded that the Claimant reported that “*He has a longstanding history of migraines but has not experienced these for many years. He tells me that his migraines have become worse in the last 12 to 18 months and it is his perception that his migraines are triggered by stressful events at work*.”

33. In September 2013, the Claimant was seconded to the Railway Testing & Lubrication (“RT&L”) Team, also based at Queen Ann Road. This was due to the Claimant feeling bullied and that his relationship with the W&G team had broken down and he no longer felt able to work there. The stress had been exacerbating the Claimant’s migraines. This was a temporary move and the Claimant remained part of the W&G department. It was open to the Claimant to apply for a substantive role in RT&L or elsewhere within the Respondent. The Respondent considered that it there was not a vacancy within RT&L, at the end of the secondment, the Claimant would return to W&G. The Claimant was unaware of that intention.

34. On 11 December 2013, the Claimant requested to downgrade to a technician role, with an associated pay decrease, and to continue work in RT&L. He formally transferred in January 2014. We accepted that he requested this to avoid returning to Bristol W&G.

35. On 24 May 2016 the Claimant was involved in a road traffic accident and was off sick until 11 January 2017.

36. On 20 July 2017, the Claimant raised a grievance in which he said that he had been forced to request a downgrade and that he had been given the letter [p166] to sign. He referred to the move being due to bullying and victimisation by his colleagues and since his transfer he had not been bullied or victimised. During the investigation Mr Skirton said, in relation to the Claimant, “He took matters personally when it was just banter” and in relation to when the Claimant’s mask had been spray-painted, that it was prank, but things had also happened to others. Mr Skirton accepted that he possibly said that the Claimant was the problem in the team and that he seemed to be the root cause of things happening and he would have said to the Claimant that he was difficult. The Claimant did not receive an outcome until 28 December 2018 when he was informed that it had not been upheld. It was said that the evidence was inconclusive in relation to whether he was suffering from bullying and harassment from his colleagues, but it was accepted there were strained relationships. It was not accepted that he was bullied by his line managers. The Claimant appealed against the outcome. The appeal was heard on 5 March 2019 and was dismissed.

37. On 10 October 2017, the Respondent was sent a report from Occupational Health, detailing that the Claimant suffered from Migraines and that stress increased them. It was considered likely that the Claimant was disabled within the meaning of the Equality Act 2010.

38. In 2018 the Claimant was shouted at by Andy Hocking (RT & L Manager). Mr Hocking accepted he had shouted at the Claimant but said it was because he had been clinically depressed, and the Claimant was on the receiving end. The Claimant was signed off work with stress from 24 June 2018 to 7 August 2018 as a result.

39. In August 2018 the Claimant had a meeting with Paul Kingsbury (Infrastructure Maintenance Delivery Manager) at which the Claimant told him that he suffered from migraines. Mr Kingsbury understood that the Claimant had various disagreements with his colleagues and mangers whilst working for the Respondent and that the migraines were being caused by the stressful environment he had been in. At the meeting the Claimant said that he wanted to work in the W&G section , but only if he did grinding work and only worked with one particular employee and did not have dealings with management. This was not feasible for the Respondent. Mr Kingsbury understood that the Claimant otherwise did not want to return to Bristol W&G. The Claimant told Mr Kingsbury that he thought Bristol W&G was trying to get him dismissed. Mr Kingsbury sought to convince the Claimant that there was not a conspiracy against him. In order to try and find a solution Mr Kingsbury offered the Claimant an opportunity to work in the Signal and Telecommunications Department (“S&T”) to see if it was a department he could move to. The Claimant agreed to the move.

40. In September 2018, the Claimant was moved to the S&T team at Bristol Temple Meads Station. He became the fourth member of a three man team. One of the team moved to a different region on 24 September 2018. The Claimant was not qualified to undertake the technical electrical work, which included work on signals and points on the railway network and telecommunications. The Claimant undertook the driving of the vehicle to various sites and acted as lookout for trains whilst work was being undertaken trackside. The Claimant did not have the technical skills to be the third member of the team and the technical duties of the employee who moved were covered by other staff working overtime.

41. The Claimant's evidence was confused in relation to whether at that time he wanted return to W&G work or whether he wanted to join S&T. In evidence the Claimant said that was not sure which role he wanted to do. He told Mr Lulham, in the grievance meeting, that he was upset that he had lost his welding skills. His union representative, Mr Kinsey, told Mr Kingsbury that the Claimant wanted to make use his welding skills. It was more likely that the Claimant was not sure what he wanted to do, but his preference was to return to W&G work.

42. Mr Kingsbury was involved in the discussions for the proposed reorganisation of the route, due to occur in February 2020. He knew that the delivery units were being changed from four to two and that there would be a need for welders to move to Taunton. Mr Kingsbury identified a move to Taunton would potentially resolve the difficulties for the Claimant.

43. In June 2019 the Claimant had a meeting with Mr Kingsbury at which he was told that permanent roles were coming up in S&T and there would be a new W&G team in Taunton. He was told about the restructure and that some welders would need to transfer from Bristol to Taunton as part of the new West Delivery Unit. The Claimant had not undertaken welding assignments since 2013 and had failed his engineering supervisors course. As a consequence, the Claimant had lost his competencies. At that time, Taunton was in the Plymouth Delivery Area, which was outside of Mr Kingsbury's jurisdiction and therefore he was unable to send the Claimant there to regain his competencies, without consulting further up the management chain nor without HR support, unless there was agreement from his opposite number in Plymouth. The Claimant was told that to move to Taunton he would first need to undertake formal training courses and go to Bristol W&G to regain his competencies. In order to regain his competencies, the Claimant needed to undertake 6 welds in live situations and work with a mentor for up to four months, so that he was fully qualified. The Claimant said that he did not want to return to Bristol W&G due to his previous experiences and the effects on his health. The Claimant was not clear as to the role he wanted to perform

in the future, however Mr Kingsbury was given the impression that the Claimant preferred to return to a welding role.

44. Following the meeting, Mr Yandell, section manager at Bristol W&G, on 25 June 2019 asked for the Claimant to be fast tracked to undertake training courses to regain his competencies and when the re-organisation happened to move him to Taunton. Mr Yandell listed the courses which the Claimant needed to attend [p270B]. The Claimant did not attend the first course. Mr Yandell was not the Claimant's manager when he left Bristol W&G in 2013.

45. In July 2019 Mr Kingsbury arranged for a mock interview with the Managers of the S&T Department. The Claimant accepted that the purpose of the interview was to see if he wanted to apply for the forthcoming S&T role and to see if he would perform well enough to be appointed to the position. At the interview the Claimant said that he was interested in working for S&T because it was, 'easy going, there is scope for development.' The Claimant explained in evidence that it was the team who were easy going and easy to get on with. The purpose of the interview was for the Claimant to understand his desire to have a role in S&T and was a gauge to see how much he had learnt and whether he would need more coaching or mentoring before an application for the role, although this was not fully explained to him.

46. In August 2019 the Claimant had a further meeting with Mr Kingsbury. The Claimant said that he would not return to Bristol W&G, but that he would do welding in Taunton, Westbury or Gloucester. The Claimant said in his witness statement that during the meeting Mr Kingsbury was abrupt, raised his voice and said, 'so what can we do to help Lee Palmer.' This had not been referred to in the claim form. Mr Kingsbury could not recall this. After considering all of the evidence we did not accept that Mr Kingsbury raised his voice, otherwise we accepted that he had asked the Claimant how he could be helped.

47. On 5 September 2019 the Claimant attended a meeting with Mr Kingsbury. The mock interview was discussed, and Mr Kingsbury said that it was important for the Claimant to let him know his intentions. Discussion took place about the Claimant returning to a welding role outside of Bristol W&G. Mr Kingsbury explained that there was an opportunity that had arisen in Taunton as a result of the restructure and that in order to be relocated he would have to regain his competencies in Bristol W&G for a maximum of four months. The Claimant told Mr Kingsbury that he would be working for the same managers and colleagues he had an issue with before he moved to RT&L, which would cause anxiety and in turn trigger migraines and therefore he could not go back to Bristol. Mr Kingsbury accepted that many of the people who were working in Bristol W&G in 2013 would still be there. The Claimant's union representative, Mr Kinsey, supported the idea of a move to Taunton, but he expressed his concern that the Claimant was unhappy about

having to return to Bristol. The Claimant was told that if there were any problems at Bristol W&G he should immediately contact Mr Kingsbury and his trade union. The Claimant was then told that he would be placed back on the roster for Bristol. A couple of days later Mr Kinsey told Mr Kingsbury that the Claimant did not want to return to Bristol W&G and asked him to reconsider. The Claimant said in his witness statement, for the first time, that when he told Mr Kingsbury he could not return to Bristol, Mr Kingsbury had said 'I don't care you are going back.' Mr Kingsbury did not recall saying this. Mr Kinsey did not refer to such a comment in his witness statement and was not questioned about it. We accepted that Mr Kingsbury was looking for a solution to help the Claimant and we considered it unlikely that he said the words 'I don't care', but it was likely that he told the Claimant that he would be going back to Bristol W&G.

48. Mr Kingsbury considered that the decision was reasonable because the move was temporary, and that the Claimant would have a permanent welding role in Taunton at the end. Further it was necessary for the Claimant to gain the competencies from a health and safety perspective. The allegations of bullying against the Claimant's colleagues and line managers had not been upheld and the incidents had occurred in 2013. Mr Kingsbury accepted, during cross-examination, that the offer of working in Taunton was conditional on the Claimant regaining his competencies in Bristol W&G.

49. In cross examination, it was put to Mr Kingsbury that during the grievance process in 2018, Mr Woollacott and Mr Skirton, the Claimant's managers in W&G, still held a negative view about him. We accepted Mr Kingsbury's evidence that they had since left Bristol W&G and that Mr Skirton had been the Claimant's direct line manager in 2013. Mr Kingsbury did not make any enquiries with the Bristol W&G team as to whether there would be any problem with the Claimant returning and he had no idea if the remaining team members ideas had changed. There had not been any form of attempted mediation between the Claimant and the W&G team since his departure. Mr Kingsbury also accepted that he was taking a risk that the Claimant's health could be adversely affected by the move.

50. Mr Kingsbury did not seek any HR advice before making the decision and had not appreciated that the Claimant was disabled. He also accepted that he could have gone up the chain of command via HR to see if the Claimant could be moved to another area so that he could regain his competencies.

51. The Claimant suggested that he could have been based at Gloucester to regain his welding competencies, which was also part of Mr Kingsbury's delivery unit. He had raised this as a possibility with Mr Kingsbury. We accepted the Claimant's evidence that he had got on well with the W&G team in Gloucester. Mr Kingsbury discounted this option because the management team was in Bristol W&G. We accepted the Claimant's

evidence that Gloucester would have been a different environment for him. In cross examination, Mr Kingsbury accepted that this could have been an option. Mr Kingsbury did not know whether there were fewer people that the Claimant had difficulty with at Gloucester. There was no evidence that Mr Kingsbury made enquiries with Gloucester W&G as to the viability of the Claimant completing his competencies there.

52. It was suggested by the Claimant that he could have been relocated to Westbury or Taunton to undertake his training and regaining his competencies. Mr Kingsbury accepted that it was an option, but that he could not make the decision and he would need support from HR and the management team at those delivery units. He spoke to the delivery managers and they objected to such a move before the reorganisation on the basis that they were concerned that they were being given the problem.

53. The Claimant is currently working in the Permanent Way Team at Swindon, whilst undertaking his welding training, and has been assured that he will not have to return to Bristol W&G to regain his competencies. It was suggested to Mr Kingsbury that this would also have been an option. Mr Kingsbury was unaware of how the Claimant could be mentored so that he obtained his competencies whilst working in that team. We accepted that because the Claimant would need to complete 6 welds in a live situation and spend up to four months under a mentor in in order to regain his competencies, this meant that he would have to work within a W&G team.

54. The Claimant also suggested that he could have remained in an S&T role. Mr Kingsbury had interpreted what the Claimant told him was that he had a greater interest in returning to welding and grinding, rather than pursuing a career in S&T. Mr Kingsbury accepted that the Claimant was undecided throughout the meetings and had not made it clear that he wanted to stay in S&T. We accepted the Claimant's evidence that he had not ruled out a permanent move to S&T. It was clear to Mr Kingsbury that the Claimant did not want to return to Bristol W&G. Mr Kingsbury interpreted what he thought the Claimant wanted to do, which was a return to welding and grinding, but not at Bristol W&G. Mr Kingsbury wanted to satisfy the Claimant's technical desire to return to welding, but accepted that there was a risk of the Claimant suffering from health problems if he went back to Bristol W&G.

55. We accepted Mr Kingsbury's evidence that his decision was not made to punish the Claimant and that he was trying to find a permanent role for him, in which the Claimant would be happy and not subject to the stresses he had faced when at Bristol W&G. Mr Kingsbury considered that the move to Bristol W&G was temporary and were necessary means to enable the Claimant to transfer to Taunton after the reorganisation. We accepted his effective evidence that the decision was made with the best intentions.

56. The Claimant considered that the bullying issue had never been resolved and he had simply been moved and he could not see any reason why the issues would have disappeared if he returned to Bristol W&G. The Claimant was concerned because the same managers and colleagues would have been there, although he acknowledged that some of the team had left. The thought of going back to Bristol caused the Claimant a high degree of stress and he could not face returning to Bristol W&G because he believed that the problems he experienced up to 2013 would reoccur. As a consequence, he went on sick leave on 9 September 2019. Initially, whilst on sick leave, he felt unable to get out of bed. During his subsequent absence he had very little contact from the Respondent which he also found stressful.

57. On 11 November 2019, Mr Bambridge, Rail Management Engineer, e-mailed the Claimant, saying that following their conversation, the Claimant was advised the S&T posts had been advertised and he was strongly advised to apply. The Claimant did not recall speaking to Mr Bambridge and said that he was off with stress and did not have access to the e-mails. The assessment in the occupational health report dated 28 February 2020 said that the Claimant was showing some signs of anxiety and depression. We accepted that the Claimant did not recall speaking to Mr Bambridge and did not see the e-mail. It was more likely that the Claimant was spoken to, but had not felt able to take the matter further forward.

58. Subsequently the Claimant tried contacting the Respondent to find out if work was available.

59. The Occupational Health report dated 28 February 2020, recorded the following matters:

“*Mr Lee Palmer told me that he has been off work for nearly 6 months with stress which he stated was as a result if issues at work.*

Mr Palmer told me that he was experiencing frequent migraines which he felt were triggered by the stress at work, since he has been off work the frequency of these has significantly reduced and he only has had two episodes during the last 6 months.

Mr Palmer is on medication for migraines which he takes daily and has other medication that he takes at the onset of migraines to relieve the symptoms.

My assessment of Mr Palmer showed that he was experiencing some symptom (sic) of anxiety and depression …

In my opinion Mr Palmer could return to work. However he states that there are issues at work which have caused him to become stressed and that a resolution of these issues would be necessary to enable him to return.”

60. In about July to September 2020 the Claimant was put in touch with Paul Dixon, trade union representative, who spoke to the Respondent and in about September a welfare manager was appointed to assist the Claimant.

61. On 26 October 2020 the Claimant attended an occupational health appointment. The report concluded that the Claimant was fit to return to work and recorded the following matters:

"In September 2019, Mr Palmer said he was informed he will be moving back to the department where he perceives he was bullied and victimised … He said he experienced a decline in his mental health, including flare of (sic) of migraine symptoms as a result of the stress. He contacted his GP, who assessed and signed him off work and prescribed beta blockers for his migraine symptoms. He was not progressed onwards for any other specialist medical opinion or intervention and has remained under the care of his GP.
…
Mr Palmer disclosed improvements in his symptoms however, he said the only thing causing him stress at present is not knowing what is going on at work, with regards to his return to work. I completed a validated mental health assessment on Mr Palmer and this indicates mild symptoms for both depression and anxiety, which is not a barrier for him returning to work.

The only blockage to a return to work is the idea of returning to the department where he perceives he felt bullied and victimised."

62. On 3 February 2021, the Claimant began temporary work in Swindon in the Permanent Way Department, whilst he was receiving welding training at Bristol Parkway Training School, Swindon Training School and Newport, rather than the Bristol Queen Ann Road W&G. He had been assured that he would not have to return to Bristol W&G.

63. We accepted that the Claimant was stressed and suffered from a low mood from the time of his starting sick leave in September 2020. Initially he had little motivation. During that period of sick leave his waking thoughts were about the situation at work and until he had received assurance that he would not have to return to Bristol W&G those stressful feelings and upset remained.

64. On 26 March 2020 the Claimant's pay reduced to half pay in accordance with the Respondent's sick pay policy. After the oral Judgment on liability the Respondent accepted that the Claimant had suffered an attributable loss of earnings of £5,620.06 which attracted interest of £381.50.

The law

65. The claim alleged discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complained that the Respondent had contravened a provision of part 5 (work) of the EqA.

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

67. The provisions relating to the duty to make reasonable adjustments are found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

68. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

69. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

70. The remedies available to the Tribunal are to be found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate

recommendation. In addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.

71. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation. The current applicable rate is 8%.

Discrimination arising from disability

72. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England [2016] IRLR 170, EAT, at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the “something” was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment, but it must have a significant (or a more than trivial) influence on it. (b) The ET must then consider whether it was something "arising in consequence of B’s disability”. The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

73. When considering a complaint under s. 15 of the Act, we had to consider whether the employee was “*treated unfavourably because of something arising in consequence of his disability*”. There needed to have been, first, ‘*something’* which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that ‘*something*’ (Basildon and Thurrock NHS-v-Weerasinghe UKEAT/0397/14). Although there needed to have been some causal connection between the ‘*something*’ and the disability, it only needed to have been loose and there might be several links in the causative chain (Hall-v-Chief Constable of West Yorkshire Police UKEAT/0057/15 and iForce Ltd-

v-Wood UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (Pnaiser-v-NHS England [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (Sheikholeslami-v-University of Edinburgh UKEATS/0014/17).

74. In IPC Media-v-Millar [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability.

75. No comparator was needed. '*Unfavourable*' treatment did not equate to '*less favourable treatment*' or '*detriment*'. It had to be measured objectively and required a tribunal to consider whether a claimant had been subjected to something that was adverse rather than something that was beneficial. The test was not met simply because a claimant thought that the treatment could have been more advantageous (Williams-v-Trustees of Swansea University Pension and Assurance Scheme [2019] ICR 230, SC). It is identified in the ECHR Code of Practice on Employment at paragraph 5.7, that even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

76. In assessing the legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc [2008] IRLR 846).

77. In Hensman v Ministry of Defence UKEAT 0067/14/DM, Singh J held that when assessing proportionality, while and an Employment Tribunal must reach its own judgment, that must in turn be based upon a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. Proportionality in this context meant 'reasonably necessary and appropriate' and the issue required us to objectively balance the measure that was taken against the needs of a respondent based upon an analysis of its working practices and wider business considerations (per Pill LJ in *Hensman-v-MoD* UKEAT/0067/14/DM at paragraphs 42-3). Just because a different, less discriminatory measure might have been adopted which may have achieved the same aim, did not necessarily render it impossible to justify the step that *was* taken, but it was factor to have been considered (*Homer-v-West Yorkshire Police* [2012] IRLR 601 at paragraph 25 and *Kapenova-v-Department of Health* [2014] ICR 884, EAT). It is for the tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc v Lax [2005] IRLR 726 CA).

78. A leading authority on issues of justification and proportionality is Homer v Chief Constable of West Yorkshire Police [2012] ICR 704 in which Lady Hale, at paragraph 20, quoted extensively from the decision of Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1WLR 3213

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213 para 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 went on, at para 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] ICR 1565 , paras 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."

79. At paragraph 24 Lady Hale said

"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."

80. Pill LJ's comments at paragraph 32 in Hardy & Hansons plc v Lax [2005] IRLR 726, in relation to the Sex Discrimination Act 1975, also provide assistance:

*"Section 1(2)(b)(ii) [of the Sex Discrimination Act 1975] 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…"

And further at paragraph 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."

81. A tribunal will err if it fails to take into account the business considerations of the employer (see Hensman v Ministry of Defence), but the tribunal must make its own assessment on the basis of the evidence then before it.

82. The Respondent must produce some evidence to support their assertion and not rely upon mere generalisations.

Reasonable adjustments

83. In relation to the claim under ss. 20 and 21 of the Act, we took into account the guidance in the case of Environment Agency v. Rowan [2008] IRLR 20 in relation to the correct manner that we should approach those sections. The Tribunal must identify

    (i) the provision, criterion or practice applied by or on behalf of the employer; or
    (ii) the physical feature of the premises occupied by the employer,
    (iii) the identity of the non-disabled comparators (where appropriate); and
    (iv) the nature and extent of the substantial disadvantage suffered by the claimant

    before considering whether any proposed adjustment is reasonable.

84. It is necessary to consider whether the Respondent has failed to make a reasonable adjustment in applying the PCP and whether reasonable steps were taken to avoid the substantial disadvantage to which a disabled person is put by the application of the PCP (Secretary of State for Justice v Prospere UKEAT/0412/14/DA).

85. It was not disputed that the Respondent had the alleged PCP, however when considering the other aspects of the test we kept in mind the principles identified in paragraphs 35 to 39 of the decision of the Court of Appeal in Ishola v Transport for London [2020] EWCA Civ 112.

86. In relation to the second limb of the test, it has to be remembered that a Claimant needed to demonstrate that he or she is caused a substantial disadvantage when compared with those not disabled. It is not sufficient that the disadvantage is merely some disadvantage when viewed generally. It needs to be one which is substantial when viewed in comparison with persons who are not disabled, and that test is an objective one (Copal Castings-v-Hinton [2005] UKEAT 0903/04). 'Substantial under s. 212 EqA is defined as more than minor or trivial.

87. Para 20(1) of Sch. 1 says that the employer will only come under the duty to make reasonable adjustments if it knows not just that the relevant person is disabled but also that his or her disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). In view of this, the EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

    (i) first, did the employer know both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially?

    (ii) if not, ought the employer to have known both that the employee was disabled and that his or her disability was liable to disadvantage him or her substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

    It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

88. Further, in terms of the adjustments themselves, it is necessary for them to have been both reasonable and to operate so as to avoid the disadvantage. There does not have to have be a certainty that the disadvantage would be removed or alleviated by the adjustment. A real prospect that it would have that effect would be sufficient (Romec-v-Rudham UKEAT/0067/07 and Leeds Teaching Hospital NHS Trust-v-Foster [2011] EqLR 1075).

Harassment

89. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (Bakkali-v-Greater Manchester Buses [2018] UKEAT/0176/17).

90. As to causation, we reminded ourselves of the test in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

91. 'Related to' is a broad term and does not required a direct causal link, but there needs to be an association or connection with the protected characteristic (R (EOC) v Secretary of State of Trade and Industry [2007] ICR 1234. As identified in Unite the Union v Nailand [2019] ICR 28 the relationship to the protected characteristic is either inherent in the act itself or was done due to mental process of the of the alleged harasser.

92. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in Grant-v-HM Land Registry [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in Betsi Cadwaladr Health Board-v-Hughes UKEAT/0179/13/JOJ.

Remedy

93. We had to assess the injury to the Claimant's feelings. We considered the original bands of awards set by the case of Vento-v-Chief Constable of West Yorkshire Police [2003] IRLR 102 CA, as uplifted by the case of Da'Bell-v-NSPCC [2010] IRLR 19 EAT and then the further case of Simmons-v-Castle [2013] 1 WLR 1239 (an uplift on all awards of general damages of 10% which has been held to have applied to Tribunal litigation (see for example De Souza-v-Vinci Construction (UK) Ltd EWCA Civ 879). Since then, in the Presidential Guidance issued on 9 April 2019, the following bands were said to applied in respect of claims issued on or after 6 April 2019; £900 to £8,800 in respect of less serious cases, £8,800 to £26,300 the cases which did not merit in awarding the upper band and £26,300 to £44,000 for the most serious cases, with the most exceptional cases capable of exceeding £44,000.

94. When reaching a figure for injury to feelings, we remained aware that the award that we made had to be compensatory and just to both parties. It should have been neither too low nor too high, so as to avoid demeaning the respect for the policy underlying the anti-discriminatory legislation. We also tried to bear in mind the value in everyday life of the particular sum that we chose to award, particularly in the context of the Claimant's salary. We had an eye on the range of awards made in personal injury cases, although we did not find that yardstick particularly useful in this case. We also took into account the guidance at paragraph 36 of the EAT's decision in Base Childrenswear Limited v Otshudi UKEAT/0267/18.

Conclusions

Discrimination arising from disability

95. The 'something arising' from the Claimant's disability was the effect of the working environment of Bristol W&G on his migraines, namely that the stress of the perceived bullying and breakdown in relationships had significantly increased their frequency whilst he had been working there until his move in 2013.

Was the failure to provide the Claimant with a permanent alternative role to his normal place or work unfavourable treatment?

96. We agreed with the parties that the historical context was relevant. The Claimant had left the Bristol W&G Team in 2013, after a lengthy period of time in which he had perceived he was being bullied, his teammates considered that he was difficult to work with and refused to work with him. It was agreed that there was breakdown in the relationship between the Claimant and the team. That breakdown was serious, as demonstrated by the Claimant requesting a demotion and pay cut in order to avoid having to return to Bristol W&G. The seriousness was further demonstrated by the Claimant raising a grievance about what had happened four years after he had moved from Bristol W&G.

97. The decision of Mr Kingsbury to move the Claimant to Taunton after the restructure was a potentially permanent move, however the move was conditional on the Claimant returning to Bristol W&G first. The Claimant would have had to agree to return to the Bristol W&G team in order to access a permanent alternative to his role. Until he had regained his competencies he would not have been transferred. We rejected the Respondent's submissions that this alleged unfavourable treatment was a mischaracterisation. The permanent role was not available to the Claimant until he had undertaken the training courses and regained his competencies. The Claimant was not in a permanent role and as such was in a position of

limbo. Both parties wanted to find a permanent solution so that the Claimant would be able to work utilising his skills to the best of his and the Respondent's abilities.

98. We rejected the Respondent's submission that only the overall picture should be considered and that the ultimate goal was that the Claimant would undertake a W&G role in Taunton and overall, it was to his advantage. The events giving rise to the Claimant leaving the Bristol W&G team were significant and damaging to him. The Claimant's migraines had increased, and he had sought his removal from the environment causing them. Although some of the team members had left Bristol W&G many of them remained and those team members had previously said that they were not prepared to work with the Claimant. The Claimant was being asked to return to work with many of the same people he had difficulty with, in order to access a permanent role away from the Bristol W&G team. The Claimant told Mr Kingsbury that he could not return to that environment due to the effect on his health. We accepted that the failure to provide the Claimant with a permanent alternative to working at Bristol W&G was not beneficial to him, due to the effect on his health it was more than minor or trivial, and it was unfavourable treatment.

Was instructing the Claimant to return to the Bristol W&G team unfavourable treatment

99. We rejected the Respondent's submissions that the overall outcome that the Claimant would end up in a permanent position in Taunton meant that there was not less favourable treatment for the same reasons as set out above. The Claimant had made it clear to Mr Kingsbury that he could not return to Bristol W&G because many of the same team members were present. The Claimant, when he had previously worked in Bristol W&G had suffered a significant increase in the migraines he suffered and his remaining in the situation had been so untenable that he had requested to be moved. The extent of the situation was emphasised by the Claimant's subsequent request to be downgraded and take a pay cut in order to avoid a return. The requirement to return to Bristol W&G was an integral part of Mr Kingsbury's plan for the Claimant to regain his competencies so that he could transfer to Taunton. This was not a minor aspect of what the Claimant was required to do. Although Mr Kingsbury was trying to act favourably towards the Claimant, the effect was that the Claimant was required to return to an environment in which he had been very stressed and suffered significant increases to his migraines. It was accepted that many of the original team were still present, although there had been changes to the management structure. Those remaining team members had not been asked about their views about the Claimant returning. Although the Claimant could go straight to Mr Kingsbury about any problems there were not any assurances as to how problems would have been prevented from arising in the first place.

There had not been any form of mediation or re-building of relationships between the Claimant and the team in the intervening 6 years. The Claimant was very fearful of being placed back into a similar environment and as such the instruction was significantly adverse and to his disadvantage. It was unfavourable treatment to require the Claimant to return to the environment in which the problems had originally occurred.

Was the unfavourable treatment because of the something arising from the Claimant's disability?

100. The Respondent conceded that if the Claimant had been unfavourably treated that the treatment was because of something arising from his disability. Namely that the Claimant was originally moved from his normal place of work was because of the effect that location/working environment had on his disabilities.

Was the Respondent able to show that it was a proportionate means of achieving a legitimate aim?

The aim or business need

101. The Respondent's aim was to ensure that the Claimant was in a suitable post. We accepted that Mr Kingsbury was trying to find the Claimant a suitable post in the present case. The Claimant accepted that the aim would be a legitimate aim. We concluded that the Respondent's aim in the present case was legitimate.

The reasonable necessity for the treatment

102. The Claimant was not in a permanent position in S&T or in his other temporary roles. This meant that the skills in which he had been trained were not being utilised or he was in a team in which he could not fully participate due to a lack of technical training. It was reasonable for the Respondent to try and find a permanent position for the Claimant so that he could fully participate in the work he undertook that utilised his skills.

Was it proportionate?

103. Mr Kingsbury did not consult with anyone about the step he proposed to take and did not seek guidance from HR, who could have taken a more overarching view and sought a move to a position outside of Mr Kingsbury's delivery unit. We accepted that Mr Kingsbury could only move personnel within his own unit unless there was specific agreement with another unit in his area. The only consideration by Mr Kingsbury was to move the Claimant to Bristol W&G, however he did not ask the Bristol W&G team how they would react to the return of the Claimant. Accordingly, it was difficult to see

how the Claimant could be given assurances that a similar situation would not arise again.

104. Mr Kingsbury did not enquire as to the suitability of Gloucester W&G or how the personnel at that site would react to a transfer of the Claimant. We accepted that the Claimant had said he would be happy to transfer there and had previously made the suggestion. Mr Kingsbury accepted that this was an option which was available to him, but suggested that it was not suitable because the management was the same. We rejected that argument. The direct management structure for the Claimant had changed since 2013, in that Mr Skirton was no longer a member of the team and the Claimant would have had a new manager, Mr Yandell. This was an option which the Claimant would have accepted as it meant he would work with people he got on with. It was significant that the Claimant considered that he would be happy working in Gloucester, even though some of the management would have been the same and he had suggested it before the decision was taken. It was a step which would have removed the difficulty for the Claimant in regaining his competencies and enabling him to transfer to Taunton. A move to Gloucester W&G would not have affected the needs of the Respondent to find the Claimant a suitable post as the Claimant could have regained his competencies in a location in which he would have been happy in the same timescales. In the circumstances the need of the Respondent did not outweigh the discriminatory effect of the decision to send the Claimant to Bristol W&G and therefore it was not proportionate.

105. Mr Kingsbury did not consider that a move to Swindon would assist the Claimant because there was not a W&G team there and therefore the Claimant would not have been able to regain his competencies, however it was a real option for him to regain those competencies in Gloucester.

106. Mr Kingsbury made an assumption that the Claimant's preference was to return to a W&G role. However, Mr Kingsbury did not ask the Claimant whether he would prefer to seek a role in S&T when he said that he could not return to Bristol. This was a further option which was available to the Respondent and was not explored.

107. In terms of a move to Taunton or Westbury, Mr Kingsbury did not have the power to send the Claimant to such locations without authority. Although he tried to seek agreement with Taunton, he did not seek guidance from HR or escalate the idea further up the chain of command. The Respondent therefore failed to fully explore this option.

108. There were other less discriminatory measures which could have been taken, most notably sending the Claimant to Gloucester W&G, where the Claimant said that he could have worked without stress likely to cause a migraine. Such a move would have had no adverse impact on the legitimate

aim of the Respondent. In the circumstances the discriminatory effect of the decision was not outweighed by the need of the Respondent and it was not proportionate or reasonable for the Claimant to be required to work at Bristol W&G. The Respondent failed to show that it was availed of the defence of justification.

109. The Claimant was discriminated against due to something arising from his disability.

Reasonable Adjustments

Did the Respondents generally apply a provision, criteria and/or practice namely a requirement to undertake duties at an employee's normal place of work"?

110. The Respondent accepted that it had such a requirement.

Did the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

111. The Respondent disputed that the Claimant was put to a substantial disadvantage on the basis that the difficulty was not working at Queen Ann Road, but with the people who worked there. It was submitted that the disadvantage only arose because of who he had to work with. We rejected that submission. As a welder the Claimant's normal place of work was Bristol W&G at Queen Ann Road and he had been placed in temporary roles in order to keep him away from that place of work. When he was required to return to Bristol W&G, in order to regain his competencies, there was a requirement for him to carry out his duties at his normal place of work. The location in which the Claimant was required to carry out his duties had within it many of the same people who had been involved in the situation before he left in 2013. The requirement for him to work in that location required the Claimant to work with those people. The Claimant was concerned that working with those people would cause his migraines to become worse again. Mr Kingsbury accepted that he was aware that there was a risk of this, but he had not made any enquiries with the Bristol W&G team about their views or how the situation would be managed. The Claimant had sought a demotion and pay decrease in order to avoid returning to Bristol W&G which demonstrates the level fear by the Claimant and the extent of the relationship breakdown. The place of work and the personnel within it are intertwined. Bristol W&G is the location where the Team with which the Claimant had problems worked. The Claimant by being required to undertake duties at Bristol W&G was being exposed to the people who had been involved in the cause of his stress and exacerbation of his migraines. The Claimant was fearful about returning and that fear would add to his stress and therefore risk an increase in migraines with their consequent

debilitating effects, which would not be suffered by people who were not disabled. The Claimant was put at a substantial disadvantage in comparison to non-disabled people, by being required to undertake his duties at the normal place of work.

Did the Respondents not know, or could they not be reasonably expected to know that the Claimant was likely to be placed at such a disadvantage?

112. The Respondent accepted that it had the requisite knowledge of the Claimant's disability and the substantial disadvantage.

Did the Respondents take such steps as were reasonable to avoid the disadvantage?

113. An adjustment not only has to be reasonable, but it must operate so to avoid the disadvantage of the PCP. As set out in relation to the justification defence to the discrimination arising from disability claim a move to Gloucester W&G was a viable option. It was discounted on the basis that it had the same management structure as Bristol. However, the Claimant had said that he had got on with the personnel at Gloucester and that he would have been happy to work there. It was also significant that although some of the management was the same as in 2013, the Claimant's direct line manager no longer worked in the team and that there had been changes. Requiring the Claimant to work at Gloucester instead would have removed or ameliorated the effects of the PCP, was something that the Claimant was agreeable to and it would have been a reasonable adjustment.

114. Mr Kingsbury could also have sought advice from HR and sought authority for the Claimant to be transferred out the delivery unit, but did not make such enquiries.

115. Accordingly, the Respondent failed to make reasonable adjustments.

Harassment

On 5 September 2019, did Paul Kingsbury, Infrastructure, Maintenance and Delivery Manager, tell the Claimant that he would be moved back to his original place of work at Bristol Welding. Despite knowing that the Claimant would return to work with managers who had bullied him in 2013 and was it unwanted?

116. The Claimant was required to move back to Bristol W&G. The Claimant made clear to Mr Kingsbury that he did not want to return to that team and that he considered that working with the same people would cause stress and trigger migraines. The instruction to return to Bristol W&G was unwanted.

Did the conduct have the purpose or effect of violating the Claimant's dignity, or created an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant?

117. We accepted that Mr Kingsbury was looking for a solution which would benefit the Claimant and that his intention was to find a permanent welding and grinding role away from Bristol W&G. We did not accept that the purpose of the instruction was to violate the Claimant's dignity or to create the prohibited environment.

118. It was agreed that there had been an environment at Bristol W&G in which the Claimant perceived that he was being bullied and the team refused to work with him, which led to a complete breakdown in the relationship. Many of the same people still worked at Bristol W&G and they had not been spoken to as to how they would react to the Claimant returning. There had not been any form of mediation or attempts to rebuild the relationships. The Claimant had taken a downgrade and pay decrease to avoid returning to Bristol W&G. He was fearful that if he returned that he would be in a very similar situation and that his stress levels would rise, and his migraines would increase. Taking into account the historical background, the effect on him was more than minor or trivial. The instruction had the effect of putting the Claimant in an intimidating and hostile environment and it was, in the circumstances, reasonable for it to have had that effect on the Claimant.

Was the conduct related to the Claimant's disability?

119. Mr Kingsbury accepted that the Claimant had told him about his migraines and the effect of working in Bristol W&G on them. Mr Kingsbury accepted that there was a risk of an increase in the Claimant's migraines if he returned to Bristol W&G, but had his sights on the permanent move to Taunton. The Claimant clearly told Mr Kingsbury that he did not want to return to Bristol W&G. The Claimant had proved primary facts that in the absence of an explanation tended to show that the decision was associated or connected with the Claimant's disability. The Respondent submitted that the purpose of the move was not related to the migraines, however the Claimant had explained why he did not want to return to Bristol, and this was in the mind of Mr Kingsbury when making his decision. Mr Kingsbury took a calculated risk when making his decision and as such the Claimant's disability was inherently involved in making it. Accordingly, we were satisfied that the action was related to the Claimant's disability. However, we add that we accepted that Mr Kingsbury did not act deliberately and was trying to seek an overall good outcome for the Claimant and that it was done with good intentions.

120. Accordingly, the Claimant succeeded in his claim of harassment.

Remedy

121. The Claimant was subjected to a single act of discrimination, however it occurred against a background of a distressing series of events when the Claimant worked in Bristol W&G. The historical context had an impact on the Claimant, and it resulted in an increase in his stress levels which prevented him from working. The Respondent disputed the extent of the injury to feelings by reference to the Occupational Health reports. We accepted that the Claimant's thoughts were dominated by the situation at work and his concern about returning to Bristol W&G. The Occupational health report in October 2020 identified that the blockage to his return to work was a return to Bristol W&G and the same blockage was implicit in the report from February 2020.

122. We took into account that the actions of Mr Kingsbury were not deliberate and that the impact on the Claimant lasted for a long time. The lengthy history of issues was relevant. It was also significant the Claimant had been working before the incident in September 2020.

123. Counsel for the Claimant agreed that the case fell into the lower band because it was not a deliberate act and it was a one off incident of discrimination. It was submitted that it was more serious because Mr Kingsbury was aware of the risk and the length of time the Claimant was affected by the incident, with which we agreed.

124. Although the incident was isolated, the historical background is relevant, because it explains why the Claimant reacted as he did. Although he was physically able to return to work he was mentally prevented from doing so by reason of his concern of returning to Bristol W&G. He was still suffering from mild symptoms of anxiety and depression in October 2020.

125. Counsel for the Respondent submitted that an award should be in the middle of the lower band. Counsel for the Claimant submitted it should be in the region of £8000 to £8,500. Taking into account the above matters the appropriate award for injury to feelings was £8,500 plus interest of £1,155.07.

126. The Claimant also suffered a consequential loss of earnings, as accepted by the Respondent, and there was a further award in that respect in the agreed sum of £5,620.06 plus interest of £381.30.

Employment Judge Bax
Date: 24 May 2021

Judgment sent to Parties: 03 June 2021

FOR THE TRIBUNAL OFFICE