EMPLOYMENT TRIBUNALS

Claimant: Mr R Jackson

Respondent: The Prisons and Probation Ombudsman

Heard at: **London South Employment Tribunal (by CVP)**

On: **1-4 February, 8-9 February (in chambers) and 10 February 2021**

Before: **Employment Judge Ferguson**

Members: **Mr M Marenda**
Mr P Adkins

Representation
Claimant: In person
Respondent: Ms G Hirsch (counsel)

JUDGMENT having been sent to the parties on 18 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. By a claim form presented on 28 June 2018 (following a period of early conciliation from 2 May to 2 June 2018), the Claimant brought complaints of disability discrimination and unauthorised deduction from wages. At the time of presenting his claim the Claimant was still employed by the Respondent. He subsequently resigned on 18 March 2019 and applied on 26 March 2019 to amend his claim to add various acts of alleged disability discrimination post-dating the ET1 and complaints of victimisation based on alleged detriments because of bringing the Tribunal proceedings. The application to amend was granted.

2. Because of restrictions relating to the Covid-19 pandemic the hearing took place by remote video hearing with the consent of the parties.

3. The issues were agreed between the parties in advance of the final hearing and are set out below.

4. The third condition relied upon as a disability had very limited relevance to the Claimant's complaints. It was relevant only to one of the harassment allegations (paragraph 16 (b) below), but that allegation was effectively abandoned by the time of the hearing. The Claimant gave no evidence about it and did not cross-examine the Respondents' witnesses about it. Given that privacy issues are raised by the publication of these written reasons and it is unnecessary to make any reference to the condition in order to explain our reasons, we have redacted all references to it. The sending of these written reasons has been somewhat delayed by correspondence with the parties about these redactions. The delay was exacerbated by an error in the Tribunal's records that resulted in correspondence to the Respondent's solicitors being sent to the wrong person. The Tribunal apologises for the additional delay caused by that error.

5. The agreed issues are as follows:

Jurisdiction / Time Limits

1. Have the Claimant's claims (with respect to each alleged discriminatory act) been brought within the 3 month time limit (s.123(1)(a) Equality Act ("EqA") 2010)?

2. If not, have the claims been brought within such other period as the employment tribunal thinks is just and equitable (s.123(1)(b) EqA 2010)?

Unlawful Deduction of Wages (s.13 ERA 1996)

3. Did the Respondent make deductions to the Claimant's wages on the following dates:

a. 24 July 2018; and/or

b. 14 September 2018.

4. If so, were any of these deductions unlawful contrary to s.13(1) Employment Rights Act ("ERA") 1996?

Disability (s.6 EqA 2010)

5. The Respondent accepts that the Claimant was disabled within the meaning of s.6 EqA 2010 by reason of the following:

a. Anxiety;

b. Irritable bowel syndrome;

c. [redacted]

6. Did the Claimant have the above disabilities at the material time?

7. If so, did the Respondent know, or could it reasonably be expected to have known, that the Claimant was so disabled at the material time? The Respondent accepts that it knew of the following disabilities at the following times:

a. IBS – 18 May 2017;

b. Anxiety – at or around June 2017;

c. [redacted] – on or around 2 November 2017.

Direct Discrimination (s.13 EqA 2010)

8. The Claimant relies on the following acts and omissions:

a. From 20 October 2017 the Claimant was made to attend the office a minimum of 3 days per week irrespective of annual leave, sick leave, and medical appointments in circumstances whereas other staff were allowed to work from home with no minimum attendance requirement.

b. On 13 April 2018 the Claimant made a flexible working request to Neil Mullane. No formal response was ever received. In so doing, the Respondent was in breach of its own guidance, which states that all applications should be considered and responded to – with reasons – within 3 months.

c. On 13 April 2018 the Claimant applied to Neil Mullane for a disability passport. No formal response was ever received.

d. Between 29 June 2018 and 1 October 2018 the Respondent failed to respond to the Claimant's access to work application.

e. On 24 July 2018 the Claimant was marked sick for not attending the office when he could not travel to work on account of the heat on the tube.

f. On 14 September 2018 the Claimant was marked as sick for taking leave to attend medical appointments (one for counselling and one for a clinic appointment), despite having notified the Respondent of these in advance on 22 August 2018 and 12 September 2018.

g. Between 18 December 2018 and 11 January 2019 the Claimant was subject to disciplinary proceedings (gross misconduct for not attending the office) whilst awaiting the outcome of his access to work application.

9. If this conduct did occur, did the Respondent thereby treat the Claimant less favourably than it would have treated someone not sharing his protected characteristics of disability (s.13(1) EqA 2010)? The Claimant relies on:

a. The actual comparator of Neil Mullane and Nikki Robinson with respect to the 3 days per week detriment.

b. The actual comparators in relation to paragraph 8(e) are:

i. Neil Mullane, who was permitted to work from home when he had a bad foot from new shoes; and/or

ii. Amanda Anglish, who was permitted to work from home when she had a bad back caused by Pilates; and/or

iii. Ruth Jones, who was permitted to work from home when she had a head cold and runny nose.

c. A hypothetical comparator with respect to the other conduct.

10. Put another way, was the Claimant's disability a substantial cause of the alleged treatment?

11. Further or alternatively is the Respondent able to show a coherent non-discriminatory reason for the treatment in question?

Failure to Make Reasonable Adjustments (ss.20-21 EqA 2010)

12. Did the Respondent have a practice of requiring employees to work on-site full-time?

13. If so, did this put the Claimant at a substantial disadvantage in comparison with someone who was not disabled? The Claimant claims that he was forced to go on sick leave when other people were allowed to work from home when they could not attend the office. As a result:

a. He was issued with two warnings for sick absence (one on 15 October 2018 and one on 5 October 2017).

b. He was not paid statutory sick pay between 31 May 2018 and 27 September 2018.

14. If so, did the Respondent fail to make reasonable adjustments contrary to s.20 EqA 2010? The Claimant claims that he should have been allowed to:

a. Work from home on at least 2 or 3 agreed days a week;

b. Work from the hub office in Croydon; and/or

c. Work in a post closer to home. The Claimant says he requested a managed move to Karen Johnson in or around 11 May 2018 but this was denied.

15. Would these adjustments:

a. Have avoided the alleged disadvantage; and

b. Have been reasonable?

Harassment (s.26 EqA 2010)

16. Did the Respondent subject the Claimant to the following conduct:

a. From August 2017 Neil Mullane:

i. Deliberately failed to respond to the Claimant's leave requests (in respect of annual leave and appointments), emails, text message, and phone calls. The Claimant had to text Neil Mullane every morning to request a later start time.

ii. Failed to grant the Claimant's flexible working application.

b. On 22 February 2018 in a meeting with Phil Cosgrove, Neil Mullane said, "I have read up on your illness, most people return to work straight away, why did you tell me you needed an extra month off? I find that strange."

c. On 17 April 2018 Neil Mullane sent the Claimant an email saying, "I believe you are being somewhat disingenuous when you say that I have not given an indication as to why you cannot work from home."

d. Between June and October 2018 Neil Mullane continued to warn the Claimant that he would be reprimanded for any unauthorised absences, despite being aware of the outstanding access to work application.

e. In October 2018 the Respondent singled the Claimant out by not applying the Remote Working Policy to him.

f. In October 2018 the Claimant was singled out and not shown any consideration during the office transfer from London Bridge to Canary Wharf.

g. In or around June 2017 and again between March 2018 and October 2018, Neil Mullane expected the Claimant to attend the office, even though he had no money to travel as his pay had been deducted. The Claimant says he had to apply to the Civil Service Charity to meet his outgoings.

h. On three separate occasions invitations to formal meetings (the invitation to disciplinary meeting on 18 December 2018, the cancelled disciplinary meeting on 20 December 2018, and the attendance management meeting in early 2019) were sent to the Claimant in official marked Prison and Probation Ombudsman envelopes, which should only be used for prisoners in custody.

17. Was this conduct related to the Claimant's disability (s.26(1)(a) EqA 2010)?

18. Did this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (s.26 EqA 2010), having regard to:

a. the perception of the Claimant; and

b. the circumstances of the case;

19. If so, was it reasonable for the conduct to have had that effect?

Victimisation (s.27 EqA 2010)

20. Did the Respondent subject the Claimant to a detriment as a result of him bringing his claim to the employment tribunal on 28 May 2018 (s.27 EqA 2010)? The Claimant claims that he was subject to the following detrimental treatment:

a. He was subjected to disciplinary proceedings on or around 18 December 2018 – and subsequently cancelled on 20 December 2018 as it was said to be a difficult time of year and there was not enough evidence.

b. Ms Susannah Eagle made contact with the Home Office (with whom the Claimant had successfully secured a job) on or around 21 January 2019 and informed them that he was being subjected to disciplinary proceedings. As a result the Claimant's job offer was withdrawn.

c. The cancelled disciplinary proceedings were revived in January 2019.

21. Was the Claimant's claim at the employment tribunal a substantial cause of this treatment?

22. Further or alternatively, has the Respondent shown a coherent non-detrimental reason for the treatment complained of?

Remedies

23. To what compensation, if any, is the Claimant entitled?

24. If the Claimant is found to have been discriminated against, should any award be reduced to reflect contributory fault on his part?

25. Has the Claimant acted reasonably in seeking to mitigate his loss?

26. If any complaints are well founded, should the tribunal make a declaration and/or recommendation?

6. Although the Claimant had raised an issue about recoupment of an overpayment in his schedule of loss, he has not brought a complaint of unauthorised deductions from wages in respect of it.

7. It was agreed that issues of remedy would be dealt with after our decision on liability.

8. We heard evidence from the Claimant. On behalf of the Respondent we heard from Anne Lund, Susannah Eagle, Neil Mullane, Nikki Robinson and Richard Pickering.

9. Before setting out our findings of fact we should record that the fact-finding exercise was not assisted by the way in which the evidence was presented in this case. We had a bundle of over 1,000 pages and a supplementary bundle of more than 200 further pages. The documents and witness statements were presented in a way that was not easy to navigate during the hearing. We found when considering our findings that some key documents were missing, or the Tribunal had not been taken to them during the hearing. Further, some of the evidence was not presented in a helpful way, for example Mr Mullane's witness statement does not explain properly how the "working from home trial" came about or how it was ended, despite this being an important part of the factual background. The uncontroversial facts, such as whether the Claimant was physically present in the office on any given day, should have been established before the hearing and presented to the Tribunal clearly and succinctly. The Tribunal had to piece together much of the uncontentious factual background for itself, which is not a good use of our time, and there were some areas where we simply did not have enough evidence to make factual findings.

THE FACTS

10. The Claimant commenced employment with the Respondent on 2 May 2017 as a "Band C Investigator", based at the Respondent's offices on Southwark Bridge. His role was to investigate complaints from prisoners and to draft correspondence, reports and outcome letters. There was no probationary

period, but it was understood that the Claimant would spend the first few months in on-the-job learning, supervised by a mentor and his line manager. He had worked in a number of different civil service roles prior to joining the Respondent. His most recent job was with the Charities Commission. At the time of leaving the Charities Commission, he had taken 11 days' holiday in excess of his entitlement, and it was agreed between the Charities Commission and the Respondent that these days would be deducted from the Claimant's holiday entitlement in his first leave year with the Respondent.

11. The Claimant had been interviewed by a panel including Neil Mullane, Assistant Ombudsman, who was to become the Claimant's line manager. There is a dispute as to whether the Claimant mentioned during the interview his disability or what he says was a reasonable adjustment relating to home-working at the Charities Commission. It is not in dispute that in the application form the Claimant answered the question as to whether he had a disability for the purposes of the EqA in the affirmative, but the form did not ask for details and he did not provide any. The Claimant said in his witness statement, "During my interview for the position, I explained I would require the same support as my current job if I was successful to which the panel agreed is acceptable". Mr Mullane's evidence to the Tribunal was that he did not see the application form because there were a very large number of applicants and the sift process was done separately to the interviews. At the interview stage all they saw was the applicants' answers to the competency questions. We return to the issue of what was said during the interview below.

12. The Claimant took two days of pre-booked annual leave within a week of starting the job. In his second week he took a further five days of annual leave because of an issue to do with a leak in his flat.

13. On 18 May 2017 the Claimant emailed Mr Mullane as follows:

> "Morning Neil
>
> We can have a chat when you are in the office, but I thought I would let you know that I suffer from IBS which is recognised under the Equality Act which results in severe cramps, abdominal pain and excess use of the bathroom. In addition to that, I worked from home on a continual basis 1-2 days a week as a formal arrangement of set days due to anxiety/stress of being on the train. I know you have commuter hubs as well so that may be an option.
>
> I am still learning etc so I understand the need to be in the office but I thought you should be aware."

14. In the Claimant's fourth week of employment he was off sick for four days.

15. In his fifth week the Claimant took a day off for a hospital appointment and was then off sick for a further two days.

16. On Saturday 3 June 2017 there was a terrorist attack at London Bridge, involving a van being driven into pedestrians and a number of random stabbings in the area.

17. On the following Monday, 5 June 2017, the Claimant asked to work from home because of travel disruptions. Mr Mullane agreed he could complete some training at home. The Claimant was off sick for the following two days due to anxiety related to travelling on the train. He said the terrorist attacks had worsened his anxiety. The Claimant said in a text message to Mr Mullane on 6 June, "I think I need a reasonable adjustment to help me manage".

18. The Claimant attended the office on Thursday 8 June, and on that day told Mr Mullane that his doctor had advised he take it easy. The Claimant asked to work from home the following two days, which was agreed. The working from home was then extended to a third day, the Tuesday, because the Claimant had a parcel delivery. The rest of the week the Claimant took as annual leave.

19. The following week the Claimant asked Mr Mullane if he could work from home due to the heat and his anxiety relating to travel. Mr Mullane was somewhat reluctant on this occasion because he had not yet seen the Claimant's work, but he ultimately agreed on the basis that the Claimant would send the work completed thus far and keep Mr Mullane updated as to what he was doing.

20. On Wednesday 21 June the Claimant attended the office.

21. On Thursday 22 June the Claimant told Mr Mullane he was unwell, but intended to come in. He had not attended the office by 2.30pm. Mr Mullane texted the Claimant to say he was marking him as off sick. He said, "As I previously explained you have wfh for two days this week and therefore at present have reached the max wfh per week we currently allow." The Claimant was off sick the rest of that week and all of the following week.

22. On 23 June Mr Mullane sent the Claimant an appointment for an attendance review meeting. Mr Mullane said he could not make an occupational health referral until he had the Claimant's staff number. This staff number was delayed because of an issue with the Claimant's contract.

23. The Claimant was due to be paid on 30 June. He was not paid on that date due to the delay in getting the Claimant's contract to him.

24. On 3 July the Claimant texted Mr Mullane to say because he had not been paid he had "no funds to get into the office". It was ultimately agreed that the Claimant would work from home or at a "hub" office near the Claimant's home. The "hub" was a government office building in Croydon that the Respondent's employees could use by booking a desk. No other members of the Claimant's team worked at that hub. On the Wednesday of that week Mr Mullane had to remind the Claimant to email him the work he had done. That evening the Claimant emailed Mr Mullane to say that he was expecting to receive an emergency salary payment the following day. He also had a problem with his internet. He proposed working from home on the Thursday and from the hub on the Friday.

25. Mr Mullane responded to the Claimant on 6 July as follows:

> "Hopefully you will receive your pay today.
> If you do, I would expect you to come into Rose Court on Friday.
> If you don't -please email Dan and I to let us know.

> As you know the PPO allows homeworking normally to a maximum of two days per week.
> In exceptional circumstances this can be increased.
> Clearly the current circumstances around pay are exceptional and I therefore agreed an extended period of home/hub working.
>
> If the problem has now been resolved I would anticipate you returning to work in the office.
>
> Working within the team environment, and having access to the knowledge base of experienced officers is an integral part of your training and the development of your skill set.
> As I explained to you previously I would normally expect a new investigator to work exclusively within the office for at least two months. This would enable the new investigator to immerse themselves within the role and to develop their knowledge and understanding of the PPO and the way we work.
>
> CMS is particularly tricky to master and I am sure that you will require some guidance around this.
> (As an example - I note that you do not appear to have acted on the cases I returned to you far amendment last week.)
> (You also need to print out and send letters in relation to these cases).
>
> Don't forget to send me details of today's work before you log off for the day."

26. The Claimant responded on the Friday saying he had been paid so was in the office. He also said "I understand and agree with the reasons to come into the office".

27. The following week, commencing 10 July 2017, the Claimant took two days of annual leave because of issues relating to his internet at home. The attendance review meeting had been due to take place on 11 July, but was then postponed to 20 July. It was made clear in the invitation letter that the outcome of the meeting may include a first written improvement warning.

28. The Claimant took a further day of annual leave on 12 July due to getting blood tests. He also mentioned to Mr Mullane on that day that he was feeling very anxious.

29. The Claimant attended training on 13 July. He was then off sick from 14 July until the attendance management meeting on 20 July.

30. By 20 July, 11 weeks into his employment with the Respondent, the Claimant had had 13 days of annual leave, 19 days off sick and 10 days working from home or at the hub. He had attended the office on 12 days.

31. At some point before the meeting on 20 July the Claimant had provided to Mr Mullane an occupational health report from his previous employer. The report was dated January 2017. It refers to a particular condition that required hospital treatment. The report continues as follows:

"Mr Jackson has also been suffering from anxiety. He was seen by his GP in September 2016 for this condition. He had been suffering with panic attacks and this had been aggravated by travelling on trains in the rush hour. There are also significant problems with the rail service and the early morning rush hour could be chaotic and very crowded and uncertain. He was started on appropriate medication twice a day to alleviate his anxiety and panic attacks. The disruption with the rail services has continued.

The GP is hopeful that the anxiety and panic attacks will improve in the longer term. Apart from the medication for anxiety, he does not take any other medication.

Mr Jackson also suffers with irritable bowel syndrome. He can suffer with episodes of irritable bowel syndrome with abdominal pain and diarrhoea. He does manage this condition himself, but he can find this disabling.

In answer to the questions in the referral letter.

- Mr Jackson is taking some medication for his anxiety. This may lead to some improvement in his anxiety and have a beneficial impact on his attendance at work and timekeeping. However, he has suffered with anxiety due to the disruption in the rail services and this may continue into the future.

- He does suffer with anxiety and irritable bowel syndrome. Both of these conditions can impact on his attendance at work, especially if he suffers with symptoms when travelling to work or when at work.

…

- The GP has prescribed Mr Jackson some appropriate medication and also given him advice regarding irritable bowel syndrome.

- His condition of irritable bowel syndrome is likely to be covered under the disability provisions of the Equality Act as this condition is long term, having been present for over 12 months and the condition can have a substantial impact on his day-to-day activities.

- It is likely that he will suffer with further periods of sickness absence if he suffers with an exacerbation of this condition in the future. Therefore, you may wish to allow him a slightly greater amount of sickness absence compared with his unaffected peers. However, there may be some improvement in the pattern of sickness absence with the medication and if the irritable bowel syndrome comes under control with the measures and advice that he has been provided with.

- The anxiety may have been exacerbated by the ongoing rail dispute and with the continuation of this this may cause further symptoms of anxiety in the future. There was fairly limited information in the GP's report and I would recommend that a further independent medical! assessment with an occupational health physician is made if there are ongoing difficulties with Mr Jackson's attendance or performance at work.

- At present, he remains medically fit to continue in his post.

- There is no suggestion that his symptoms are related to work, but can be related to difficulties travelling to the workplace."

32. At the meeting on 20 July Mr Mullane said that no decision would be made until after the receipt of an updated occupational health report.

33. The sickness absences were discussed and the Claimant said it had all been related to his IBS and anxiety, which make travel to work very problematic. He said he was on medication. The notes of the meeting continue:

> "NHM asked about previous reasonable adjustments.
>
> RJ confirmed he previously had 3x days where he worked from home a week, including one fixed day. He also confirmed he regularly took ten minute breaks in the day.
>
> NM confirmed that breaks in the day aren't a problem. However the WFH issue was normally reserved for established investigators who proved they could work on own initiative. There would need to be a period of learning where an investigator was in the office, certainly in the short term, to learn the job. NM set out that at interview we clearly stated that there was an expectation investigators work from the office at least 3 days per week and RJ had confirmed he could do this. RJ acknowledged this.
>
> NM set out we might be able to arrange more WFH dates if RJ agrees to complete specific pieces of work."

34. The Claimant mentioned that travel during rush-hour was difficult and Mr Mullane agreed the Claimant could adjust his start times to accommodate this.

35. Under "Next Steps" the notes record that the Claimant would speak to occupational health and ensure the report is completed. Mr Mullane was to seek HR advice in light of the report and consider reasonable adjustments.

36. Returning to the issue of when the Claimant first mentioned his disability and reasonable adjustments, we are satisfied that he did not do so during the interview process. It was not asserted in his original claim form that he had done. The Claimant said for the first time in his witness statement that during the interview he explained "I would require the same support as my current job if I was successful to which the panel agreed is acceptable". He did not put this to Mr Mullane in cross-examination, and in fact during cross-examination he

appeared to accept that the first time he informed Mr Mullane about his disability was in the email of 18 May. There is also no mention in the notes of the meeting of 20 July of the Claimant having said he raised his disability during the interview. Further, the email of 18 May reads as though it was the first time the Claimant was telling Mr Mullane about his IBS and anxiety.

37. There is no dispute that there was discussion of home-working during the interview. It seems clear that the Claimant was made aware of the general policy that home-working was possible, but was limited to a maximum of two days a week. What is less clear is whether there was any variation to this policy for new starters, as Mr Mullane suggested in his email to the Claimant of 6 July, and if so whether the Claimant was told about this in the interview.

38. We find that there was no established policy to the effect that new starters could not work from home at all during an initial learning period, and nor was the Claimant told in the interview that he would need to work exclusively in the office for an initial period. Mr Mullane's unchallenged evidence was that Ruth Jones, another investigator, did not work from home at all until she had been in the team for seven months (as she was part-time this equates to four months full-time), but his evidence suggests it this was a matter of her choice, not because there was a rule that new starters could not work from home. Having said that, working from home was, pursuant the general policy, discretionary, at least until March 2018 when a new attendance policy was published (which we return to below). The two days a week mentioned in the interview was a maximum, not an entitlement. We consider that this was not, however, made as clear to the Claimant as it should have been prior to 6 July. The Claimant certainly appears to have understood that home-working may be more limited during his learning period (see 18 May email and his reply to the 6 July email), but given he was allowed to work from home fairly regularly up until 6 July it appears both the Claimant and Mr Mullane were operating on the basis that the normal working from home policy applied to the Claimant. What caused Mr Mullane to reconsider this was that the Claimant's attendance at the office was very infrequent because of annual leave and sickness, and he started to have concerns about the Claimant not following instructions to send work and generally keep him updated.

39. A further conversation between the Claimant and Mr Mullane took place on 24 July. It appears to have been agreed at that meeting that the Claimant could start at 11am on the days he attended the office in order to avoid rush-hour. There is a dispute about whether Mr Mullane told the Claimant he was required to text each time he wished to do this. The Claimant did text Mr Mullane on each occasion following this meeting until the end of August. Mr Mullane's evidence was that he had not told the Claimant he had to do this, and assumed the Claimant was just being polite by doing so. On 30 August Mr Mullane texted the Claimant saying, "There is no need to always ask. Take it as a given". We find that there had been a misunderstanding about this. We accept the Claimant genuinely believed he had to text each morning if he intended to start at 11am, but there is nothing in the documents or text messages to suggest that Mr Mullane told the Claimant it was a requirement. When Mr Mullane clarified that it was unnecessary on 30 August this was not a change of position; he said "there is no need to always ask", i.e. there was never a need.

40. There seems to have been further discussion about working from home during the meeting on 24 July, but it is not entirely clear what was agreed. Mr Mullane's witness statement says he agreed the Claimant could work from home for a short time until his contract/ pay situation was resolved, but the working from home due to not receiving pay was at the start of July and we have heard no evidence to suggest this was still causing issues for the Claimant at the end of July, or that he was allowed to work from home in late July for this reason. This part of Mr Mullane's evidence was somewhat confused.

41. On 25 July Mr Mullane sent the Claimant an email with the subject "WFH Expectations". It read:

> "Just to confirm our discussion re WFH yesterday evening.
>
> Please send me notification via email when you log on at the start of the day and when you log off at the end of the day.
>
> Prior to logging off each evening -send me copies of the work you have completed during the course of the day (word docs etc)
>
> Please ensure you use the Investigation Record which I sent via a separate email; and that copies of all work/documents/emails is put in your casework folder on the G drive.
> You'll need to create separate case folders in respect of each new case.
>
> On a separate note: Just to confirm the arrangements should you not be able to attend work -You must call me in the first instance.
> If I am not available - a text message is acceptable. However if I don't acknowledge the text within 40 minutes you must send the text again until such time as I do acknowledge receipt."

42. The Respondent's records, which were not disputed, show that the Claimant worked from home or from the hub approximately two days a week from this time until the end of October.

43. The Claimant accepts that he did not always email Mr Mullane to tell him when he was logging off at the end of the day. As to sending work, the Claimant disputed that he had failed to comply with Mr Mullane's instructions. He said in his oral evidence that he would upload his work to the case management system (CMS), so Mr Mullane would have been able to access it there. We consider that Claimant's evidence on this issue was disingenuous. He knew that Mr Mullane would not know whether work had been uploaded to CMS unless the Claimant told him. Further, the email expressly says that the Claimant should send "copies of the work" to Mr Mullane. There were numerous occasions when the Claimant did not do this.

44. The bundle contained a document produced by Mr Mullane reviewing the working from home "trial period" from 4 September 2017 to 27 October 2017. The document states that the agreement was for the Claimant to work from home two days and attend the office three days a week. It says that in fact during the period the Claimant only made it into the office five times. He did not always notify start and end times via email. He only sent evidence of his work on the same evening on four of the thirteen days worked from home. The

Claimant did not take issue with this document and we accept it accurately reflects the Claimant's failure to comply with the instructions in the email of 25 July.

45. As already noted, Mr Mullane's evidence about the trial period was not very clear, but it would appear there was an agreement in late July that the Claimant could work from home or the hub two days a week, in spite of the reservations in Mr Mullane's email of 6 July, but that the official "trial period" did not start until 4 September.

46. On or shortly before 22 August the Claimant had emailed Mr Mullane saying he had still not heard back from occupational health and he requested authorisation to work from the hub three days a week because of anxiety and panic attacks related to travelling on the train, and to start late (up to 11am) when in the London office.

47. Based on an email exchange between Mr Mullane and HR around this time it is clear Mr Mullane was reluctant to authorise the request to work from the hub, which was treated as a working from home request. Mr Mullane said:

> "I do not want him working from home at all until such time as he has been in the office for a sustained period (3 months). He is new to the job - he needs to be around the team in order to pick up how the work is conducted, to discuss cases to pickup information, to learn from and interact with his peers etc.
>
> The general feedback I am getting from most managers is that they do not authorise wfh until about the third or fourth month, and then only if a competent level of work can be evidenced."

48. In fact, as already noted, the Claimant did continue to work from home or the hub around two days a week. Mr Mullane also asked HR for advice on chasing up the occupational health report.

49. An occupational health appointment for the Claimant was arranged for 24 August, but he did not attend because he went to hospital due to a swollen eye. It seems that the Claimant had some difficulty arranging another date for the appointment.

50. On 5 October Mr Mullane wrote to the Claimant with the outcome of the formal attendance meeting on 20 July. The letter noted that the Claimant had cancelled an appointment with occupational health and there appeared to be difficulties rearranging. The letter said that, as a small organisation, the Respondent would find any adjustment to sick leave triggers difficult to accommodate, and in any event the Claimant's current absence figure would probably be in excess of any adjusted trigger. The Claimant was issued with a first written improvement warning, effective for three months from 31 August 2017. The letter said the Claimant must not exceed 25% of the standard trigger point during that period. If the Claimant had a further two days or four spells of sickness absence he would be subject to the next stage of the process. The Claimant was informed of his right to appeal. He did not do so.

51. On 20 October there was a dispute about the Claimant working from home. Mr Mullane was expecting the Claimant in the office, but the Claimant said he was working from home due to an ongoing situation with his mother. Mr Mullane responded saying that they would need to have a discussion the following week. He continued:

> "In the interim I am withdrawing the facility to work from the Hub from today. This agreement was always twofold and dependent on you attending the office on days you were not at the Hub. This has not happened. I shall expect you in the office on Monday and we can discuss this on Friday as arranged."

52. The Claimant responded saying, among other things, that he used to be a model employee and that he was going through a rough patch. He said he felt a lot of his issues "including sick leave etc" started when he moved to central London which, together with his mother's health, had made things "more of a struggle". He asked if there was any way he could get a transfer or secondment to a department based in Croydon.

53. Mr Mullane responded saying the Claimant would need to research a transfer himself, and that the fact the Claimant was subject to an attendance review could be a problem. The Claimant agreed with that.

54. The Claimant and Mr Mullane were due to have a meeting on 27 October, but it did not take place because the Claimant was unwell. Mr Mullane made notes of a number of matters to discuss with the Claimant, and the meeting ultimately took place on 30 October. The notes record that there was a discussion about annual leave and retrospective applications for special leave. The Claimant had exceeded his annual entitlement by several days, and both the Claimant and Mr Mullane were operating on the assumption the Claimant had a full year's annual leave entitlement. The Claimant's evidence was that he had forgotten about the 11 days that were deducted by agreement with Charities Commission.

55. There was also a discussion about performance. Mr Mullane said he was not seeing what he considered an adequate daily work output. Mr Mullane said he would have to give the Claimant a "must improve" rating, and said the Claimant would be put on a performance improvement plan.

56. Under the heading "Going Forward", the notes state:

> "As per our previous email correspondence you are aware that the facility to work from home has now been withdrawn.
>
> I believe that your performance can only improve following a sustained period of working in the office, interacting with colleagues, becoming immersed in the ethos of the organisation and learning the intricacies of the job.
>
> I shall expect you to work from the office with effect from next Monday 30th October. Please remember to bring your laptop in with you on that day.

> Following a sustained period of improvement in both attendance and performance we can review this working arrangement and hopefully move back to regular working away from the office. We can set a review date for three months from Monday i.e. 31/01/18.
>
> The reasonable adjustment of attending work after the rush hour will remain in place. Please note however, that I expect you to be in the office by 11:00."

57. The Claimant was off sick from 3 November until 5 March 2018 because of the third condition relied upon as a disability.

58. An occupational health report was eventually produced on 1 February 2018. It describes the Claimant's current health issues as follows:

> "[The Claimant] has an underlying condition of anxiety that he has required treatment for in the past and is under the care of the GP; he has associated conditions that impact his gastro intestinal system too. He has recently received a diagnosis of [redacted] that will require ongoing treatment and specialist support for the foreseeable future, currently monthly attendance required. This has exacerbated the feelings of anxiety, and our tool shows that this is at a significant level, with lots of aspects impacting daily activities, particularly sleep pattern."

59. As for capacity for work, the occupational health advisor supported the Claimant's plan to return to work in the coming weeks. She recommended a phased return and flexible start times. As for home working, the report states:

> "Home working is going to be very helpful and I would support that due to the recent diagnosis of new illness with coordination of medical appointments and other support appointments. This is likely to require several days per week for now, until the medical appointments settle, and will enhance productivity. I believe that disorder of anxiety will be aided by not having to commute as frequently."

60. An absence review meeting took place on 22 February 2018. There were no minutes of that meeting before us, but a letter from Mr Mullane to the Claimant dated 5 March 2018 confirms that the phased return and late start time were agreed. The letter does not expressly say working from home was not agreed, but it is not in dispute that that recommendation was not agreed or implemented.

61. Mr Mullane's witness statement states:

> "I was not comfortable with this option, following the failed trial. I felt that Richard's work would benefit from him being around colleagues to learn from and answer his queries, and because I did not feel that he was producing work that was of the quality and quantity that we would have expected, and he didn't know the job very well, that he would benefit from additional supervision."

62. In March 2018 the Respondent introduced a new office attendance policy. This states that the basic expectation was that all full-time staff will spend a minimum of three days of every working week in the office. It also said,

> "In line with the MoJ's Smarter Working initiative, it is recommended you spend the remainder of your working week (approximately 40% of your time) working remotely, either at home or at an MoJ hub."

63. The Claimant returned to work on 5 March 2018 on a phased basis. After the end of the phased return period, from 12 April 2018, the Claimant commenced a period of sick leave.

64. Shortly before this, on 10 April, the Claimant had contacted the Civil Service Workplace Adjustment Team "CSWAT" saying that he wanted to explore working from home as a reasonable adjustment. An adviser from CSWAT suggested that mediation with the Claimant's line manager could be helpful. The Claimant emailed Mr Mullane about this on 13 April. He sent Mr Mullane a completed "workplace adjustment passport", which is meant to assist civil servants in dealing with reasonable adjustment issues if they move between departments. This set out the adjustments he required, including working from home 2/3 days a week. The form has a section to record that the adjustments are agreed, with the signature of the line manager. The Claimant said in the covering email that he would like mediation, and asked Mr Mullane to agree to it. The Claimant said if Mr Mullane agreed he would complete the form. Mr Mullane replied saying he had no objections to mediation. He said, however, that the Claimant would be expected to attend work in the meantime and asserted that they had made sufficient reasonable adjustments to accommodate his return to work.

65. The Claimant responded saying "I will proceed on the mediation application". The Claimant asserted that the late start was not sufficient. He pointed out the others are able to work from home two days a week without it being a reasonable adjustment.

66. Later that day the Claimant submitted to Mr Mullane a formal flexible working application, in which he requested working from home 2/3 days a week, with one set day in the office. He acknowledged in the application the failed trial in 2017, but said that this was because his [redacted] was at that stage not diagnosed and he was without medication.

67. We note at this juncture that the Claimant suggested on a number of occasions during his evidence that confusion and other cognitive problems were a symptom of [redacted]. the Claimant did not adduce any medical evidence to support this.

68. At the end of the flexible working application, the Claimant said he had also discussed a shorter working week, four days a week, but wanted to "see how things go with this arrangement first".

69. There was a further email exchange between the Claimant and Mr Mullane on 17 April, in which the Claimant asked to work from home on two days. Mr Mullane did not agree to it. The Claimant simply reiterated that it was a problem for him to come into the office. Mr Mullane replied

> "I believe you are being somewhat disingenuous when you say that I have not given an indication as to why you cannot work from home.
> I have repeatedly told you that this is because you quite simply are not up to speed with the job.
> You need to attend the office and actually learn the job.
>
> Hopefully the mediation will resolve this issue.
>
> You may recall that at our meeting on 30/10/17 prior to your sick leave the following week, I told you about the issues I had with your performance.
> I told you at the time that I intended to put you on an informal performance improvement plan.
> Now that the phased return is complete, I will discuss this further with you at a 121/PMR that I will arrange for next week."

70. During the following week it seems that an advisor from CSWAT spoke to Mr Mullane. Mr Mullane then emailed the Claimant on 23 April as follows:

> "I have spoken to CSWAT.
> I am going to have to review whether or not we can reasonably implement the Working from Home you require.
> As I have explained to you I have no problem with you working from home once you are in a position to do so.
> The problem is that in the short term you need to be in the office learning the job.
> It is almost like a catch-22 situation - in order to effectively work from home you need to evidence your ability in the office in the first instance.
> And, unfortunately you are unable to come into the office.
>
> I feel that the most we could reasonably manage would be to facilitate one day a week, with targets and review whether that is working on a weekly basis.
> They also said I should get a further OH report.
> I asked you about this before and you were somewhat reluctant.
> Please reconsider and let me know your decision.
> This might be especially important if you cannot work without the required support and we cannot reasonably provide the level of support you require."

71. On 23-24 May there was an exchange of emails between the Claimant and HR regarding the Claimant's suggestion of a possible "managed move". HR advised the Claimant there was no such process any more.

72. On 4 June 2018 the Claimant submitted a grievance complaining about Mr Mullane's handing of his disability issues and the failure to allow home working. It also referred to Mr Mullane's failure to respond to the flexible working application or disability passport.

73. There were several attempts to convene a further formal attendance meeting during this period, from 17 April 2018 onwards.

74. The evidence as to the Claimant's attendance at work after this is somewhat unclear, but it appears the Claimant agreed to return to work from 20 June. A further occupational health report dated 13 June 2018 states that the Claimant was fit to return to work on 20 June as planned. It recommended keeping the later start time and said "It would be very helpful if as an adjustment to enable him to manage the anxiety and IBS that he is either allowed to work from home on one day per week or at a local office in Croydon. I note the comments made about not allowing him to work from home until his performance has improved."

75. In fact the Claimant did not return to work on 20 June. He said this was because he had not been warned of his pay being reduced to half and then nil pay, in accordance with the sickness absence policy, so he did not have the funds to travel. As it happens, the Respondent says that the Claimant had received more sick pay than he was entitled to by this stage. As already noted, however, this is not an issue before us. It is not in dispute that the Claimant was mistakenly not warned of the reduction to half pay and nil pay.

76. On 28 June Mr Mullane emailed the Claimant suggesting that Access to Work may be able to help and providing a link. The Claimant made an Access to Work application around this time.

77. On 2 July 2018 Mr Mullane told the Claimant that he was still expected to attend work. He said,

> "You were aware of this financial problem at the end of May. I do not think it unreasonable for you to have made arrangements to ensure you had funding means to enable your return to work."

78. Again, it is not entirely clear what the position was as regards the Claimant's attendance at work after this. Mr Mullane's witness statement says that the Claimant was absent from 26 June to 27 September, giving his reasons as lack of funds to commute. But it is not in dispute that the Claimant did attend work on some occasions during that period, including for example on 30 July 2018. The Claimant was clearly also intending to attend the office on 24 July because there is a dispute about his reasons for not attending that day. It appears from the Respondent's records that the Claimant may have taken it upon himself to work from the hub on a number of occasions during this period, but this was not agreed with Mr Mullane so was treated as unauthorised absence.

79. On 13 July 2018 Mr Mullane emailed the Claimant to confirm that the Respondent would allow a reduction in his hours to four days a week.

80. On 24 July 2018 it appears the Claimant was intending to travel to the office in London Bridge. He did not attend, however, and told Anne Lund who was acting up in Mr Mullane's absence, that he could not travel because of the excessive heat on the train. He asked to work from home instead. Ms Lund emailed the Claimant the following day saying that she could not authorise working from home for reasons already explained, and that he would therefore be recorded as off sick.

81. It was clear from the Respondents' witnesses that there was no clear policy on whether employees were allowed to work from home if they were sick or could not travel due to sickness. It is not in dispute that employees were often allowed

to do so, and there are examples in the bundle of employees with bad backs or colds being allowed to work from home. Mr Mullane said it depended on the circumstances.

82. On 30 July the Respondent's offices moved to Canary Wharf. The Claimant attended the new office on that day.

83. In August 2018 the Claimant commenced counselling sessions, weekly at 1.00pm on a Friday. Towards the end of August the Claimant informed Mr Mullane that on Friday 14 September he also had a hospital appointment at 11am. Unhelpfully, the Claimant did not address this issue at all in his witness statement. The Claimant claimed during the hearing that Mr Mullane had agreed by email that the two appointments justified the Claimant taking the whole day off, but we were not taken to any such email.

84. On 12 September Mr Mullane emailed the Claimant as follows:

> "Richard
> I have advised you of the need to attend the office.
> I have not received any notification in relation to your non-attendance in the office for a number of days nor have I received any evidence relating to your appointments.
> In addition I have tried unsuccessfully to arrange a meeting with you to discuss attendance and other matters.
> Advising you of work circumstances and decisions via email is not my preferred method of communication.
> However in the light of your continued absence from the office this is clearly the only method of communication available.
> HR have advised me that your Friday counselling sessions should not count as Disability Leave.
> I do not intend to apply this retrospectively as given your circumstances I do not feel this would be the correct thing to do.
> I will of course support your continued attendance at the sessions.
> However, what it does mean is that your counselling sessions must now be covered along the lines of medical appointments.
> If you cannot change your appointment times then we will be expecting you to attend the office pre and post the interview.
> If you do not attend the office then, unfortunately, you will be recorded as either Sick or Unauthorised Absence (depending on what notification you provide)"

85. The Claimant replied saying that he would be back in the office tomorrow and that Friday was his last counselling session. He reminded Mr Mullane he also had a hospital appt at 11am that day.

86. The Claimant did not attend work at all on 14 September and was marked as off sick.

87. It is not in dispute that that policy on medical appointments was as set out in an email from HR to the Claimant on 22 October:

> "Employees are permitted paid time off for less than one day to attend medical appointments, such as hospital outpatient clinics. However, they

should make an effort to arrange medical appointments for the beginning or the end of the day to minimise the time off. Requests for a full day's absence need to be supported by a hospital appointment card or letter."

88. The Claimant said in response to cross-examination that he did not attend work because he would not have arrived until 3.00pm, so it "would have been the end of the day". It was apparent from the Claimant's evidence that he understood the policy to mean that two appointments would always equate to a day of paid absence, as long as it was supported by an appointment card.

89. The Claimant's Access to Work application was granted on or around 27 September. Funding was provided for him to travel to and from Canary Wharf by taxi every day.

90. The Claimant was then on annual leave for a week. He returned to work on 8 October 2018.

91. On 15 October the Claimant attended a formal attendance meeting, chaired by Susannah Eagle, Assistant Ombudsman. During the meeting the Claimant told Ms Eagle he had been offered a job at the Home Office in Croydon.

92. On 22 October Ms Eagle wrote to the Claimant issuing him with a final written improvement warning. She upheld the decisions to treat the Claimant's absences on 24 July and 14 September as sickness absence. The Claimant was informed of his right to appeal and did not do so.

93. According to the Respondent's records the Claimant was absent from work again from 19 November until 21 December. This appears to have been initially related to the death of his grandmother, and then subsequently to do with a problem with the Access to Work taxi service. The Claimant attended work on a few days over the Christmas period/ early January, and was subsequently off sick from 14 January 2019 until he resigned on 18 March 2019.

94. Ms Eagle's evidence to the Tribunal was that in November 2018 she was promoted and took on the position of Acting Deputy Ombudsman. She had become Mr Mullane's line manager, and as such they had regular discussions about the Claimant and his attendance. In December 2018 she instructed Lee Quinn, another Assistant Ombudsman, to begin a disciplinary investigation to investigate the Claimant's absences from work over the preceding months. She said there was some confusion in that Mr Quinn thought he was to invite the Claimant to a disciplinary hearing. An invitation was sent on 18 December 2018 alleging that the Claimant had failed to attend work on various dates between 17 October and 15 December without authorisation. Mr Quinn then realised that the invitation was premature because the Respondent needed to conduct an investigation first, including interviewing the Claimant. The invitation was retracted on 20 December 2018. Ms Eagle re-commenced the disciplinary investigation by reappointing Mr Quinn on 9 January 2019.

95. It is not in dispute that the correspondence relating to the disciplinary proceedings, and another letter about an attendance management meeting in early January 2019, were sent to the Claimant at home in envelopes bearing the Respondent's logo (i.e. with the words "Prisons and Probation Ombudsman"). Ms Eagle's evidence was that she did not know whether it was

normal to use such envelopes when sending correspondence to employees at home. It is not in dispute that the Respondent uses plain envelopes when writing to ex-prisoners at home.

96. In the meantime the Claimant's application for a job in the Home Office was being progressed and the Home Office requested information about the Claimant from the Respondent. On or around 21 January 2019 Ms Eagle informed the Home Office, in response to a request for further information about his final warning for sickness absence, that the Respondent had commenced a disciplinary investigation into the Claimant's conduct. Ms Eagle informed the Claimant about this. The Claimant put to Ms Eagle in cross-examination that it was Home Office policy that managers would not have conversations with recruiting managers from another department. No such policy was adduced in evidence by the Claimant. Ms Eagle said she was not aware of that, only that she knew it was their policy not to provide a reference. Her evidence was that the Home Office had asked for information about the attendance management proceedings and having discussed the position with her line manager, the Prisons and Probation Ombudsman, they decided that they would not be answering honestly if they did not mention the disciplinary investigation.

97. On 31 January 2019 the offer from the Home Office was withdrawn on the basis that the Claimant had not disclosed the attendance warnings and he had had further absences since the final written warning. There is no evidence of the disclosure of the disciplinary investigation having contributed to this decision. It appears that the problem with the attendance warnings was resolved because the Claimant had applied for the post as an external candidate, so the same considerations did not apply. The Claimant resigned from the Respondent on 18 March 2019 and started the new role at the Home Office on 10 June 2019.

THE LAW

Deductions from wages

98. Section 13 of the Employment Rights Act 1996 ("ERA") provides:

> **13 Right not to suffer unauthorised deductions**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

…

Direct discrimination, harassment and victimisation

99. The EqA provides, so far as relevant:

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.

…

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

…

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

100. Disability is a protected characteristic under the EqA.

Failure to make reasonable adjustments

101. Pursuant to section 20 EqA, where an employer has a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not apply if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to (paragraph 20 of Schedule 8 EqA).

102. Section 21 provides that an employer discriminates against a disabled person if it fails to comply with a section 20 duty in relation to that person.

Jurisdiction

103. Section 123 EqA provides, so far as relevant:

123 Time limits

(1) Subject to sections 140A and section 140B, proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

…

CONCLUSIONS

Jurisdiction

104. We address any time limit issues as they arise in relation to the particular complaints.

Unlawful deduction from wages

105. The Claimant claims in his schedule of loss that he was marked as sick on the two days identified in the list of issues and he claims two days' pay, which he calculates as £288.

106. The burden is on the Claimant to show that the sums claimed were deducted from his wages.

24 July 2018

107. We heard no evidence from the Claimant or any of the Respondent's witnesses as to any deduction from wages on this date, but the Respondent does not dispute, based on an email from HR relating to the Claimant's pay that was added to the bundle during the hearing, that £83.24 was withheld in respect of that date. The position as regards the Claimant's pay was, it seems, extremely complicated by July 2018, in part because of the apparent overpayment of sick pay. The email suggests that the sum of £83.24 was deducted from the Claimant's August pay because of his sickness absence on 24 July, which was recorded as "Nil pay". He presumably received nil pay because he had already exhausted his entitlement to sick pay.

108. It is not in dispute that if the day was properly recorded as sickness absence the Respondent was entitled to make the deduction. The question is whether the sum deducted was "properly payable" to the Claimant; if the Respondent was entitled to treat it as sickness absence then the sum was not properly payable.

109. We are satisfied that the Respondent was entitled to treat this day as sickness absence and therefore the sum was not properly payable. The Claimant had no contractual right to work from home. The Claimant's contract gives the Southwark Bridge office as his place of work. We have found that there was a general policy that permitted working from home up to two days a week, but this was not a contractual entitlement and by July 2018 Mr Mullane

had made it clear that the Claimant was not entitled to work from home. Mr Mullane had indicated in April 2018 that he might be prepared to agree one day working from home or the hub, but this arrangement was not put in place. The Claimant's arguments mostly relate to the fact that other people were allowed to work from home when they could not travel or were unwell. This is not relevant to the Claimant's contractual position.

14 September 2018

110. The Claimant has not established that any deduction occurred relating to his absence on 14 September 2018. As already noted, he did not address this issue at all in his witness statement. The email added late to the bundle does not suggest that any deduction occurred because of his absence on that day. The evidence from both sides was somewhat unsatisfactory because the Respondent said the Claimant was absent for the whole month up to 27 September due to lack of funds to travel to the office, but that does not accord with the emails of 12 September. In any event, the Claimant has not established that a deduction occurred so this complaint cannot succeed.

111. Even if there were a deduction on this date, we consider it very doubtful that the Claimant was entitled to payment of his salary on that day. The email from Mr Mullane on 12 September said that the counselling session would be treated "along the lines of medical appointments" and at least implied that the Claimant should change the appointment time. The policy made it clear that appointments should if possible be arranged at the start or end of the day to minimise absence. Mr Mullane also expressly said that if the Claimant could not change the appointment time "then we will be expecting you to attend the office pre and post the interview… If you to not attend the office then, unfortunately, you will be recorded as either sick or unauthorised absence". Even accounting for the additional appointment in the morning, it was clear that the Claimant was expected in the office after his counselling session. There is nothing to support the Claimant's belief that two appointments would always justify a whole day's absence. The Respondent was therefore entitled to treat the day as sickness or unauthorised absence.

<u>Knowledge of disability</u>

112. Insofar as it is relevant, we conclude in light of our findings above that the date on which the Respondent knew or could reasonably be expected to have known about the Claimant's IBS and anxiety was 18 May 2017.

<u>Direct discrimination</u>

a. From 20 October 2017 the Claimant was made to attend the office a minimum of 3 days per week irrespective of annual leave, sick leave, and medical appointments in circumstances whereas other staff were allowed to work from home with no minimum attendance requirement.

113. The Claimant has not made out that this conduct occurred. The allegation is that from 20 October 2017 the Claimant was made to attend the office a minimum of three days a week irrespective of annual leave, sick leave and medical appointments. Neither Mr Mullane's email of 20 October nor the notes of the meeting on 30 October state that any such requirement was

imposed. It is true that the Claimant's poor attendance level at the office was a factor in ending the working from home trial, but that does not mean that any new requirement was imposed precluding the Claimant from taking annual leave, sick leave or attending medical appointments.

114. It seems to us that the Claimant's real complaint is about the withdrawal of the right to work from home. That is not how the complaint is put, and in any event we consider it is not well-founded.

115. Insofar as the Claimant has proved a difference in treatment with the actual or hypothetical comparators, Mr Mullane has established a non-discriminatory reason for it. He had implemented a trial period of working from home, despite his concerns expressed in July 2017 that the Claimant was not attending the office enough to learn the job, and the trial had been unsuccessful. We have found that the Claimant did not comply with Mr Mullane's instructions, particularly as regards sending copies of his work. Mr Mullane's concerns about the Claimant's ability to learn the job were expressed at the time and we accept that they were the reason for the withdrawal of working from home. It is also relevant to note that Mr Mullane had known about the Claimant's disability since May 2017 and had allowed home-working until 20 October. That is also very strong evidence that he was not motivated by the Claimant's disability in withdrawing working from home.

b. On 13 April 2018 the Claimant made a flexible working request to Neil Mullane. No formal response was ever received. In so doing, the Respondent was in breach of its own guidance, which states that all applications should be considered and responded to – with reasons – within 3 months.

116. It is not in dispute that Mr Mullane did not provide a formal response to the Claimant in accordance with the flexible working policy. The circumstances were not typical. There had been much discussion about working from home and, having received occupational health advice, Mr Mullane concluded that it was still not practicable until the Claimant had had a period of office attendance to learn the job. The Claimant returned to work on that basis on 5 March 2018, but after the end of the phased return period he decided to pursue the matter again, this time via a flexible working application. In doing so, however, he recognised that it was part of the existing dispute and suggested mediation as the only way forward. Mr Mullane agreed to this and the Claimant said he would complete the forms. It was not entirely clear whether the discussions with CSWAT were in fact the "mediation" that was envisaged. What is clear, however, is that discussions continued, and as a result Mr Mullane suggested he might consider one day working from home. He later confirmed the Claimant could reduce his hours to four days a week. We are satisfied that the continuation of those discussions was the reason Mr Mullane failed to provide a formal response. He was not motivated by the Claimant's disability.

c. On 13 April 2018 the Claimant applied to Neil Mullane for a disability passport. No formal response was ever received.

117. Similarly, when the Claimant sent Mr Mullane the disability passport, he recognised that it was not simply a question of Mr Mullane signing the form. It was a highly controversial issue whether the Claimant should be allowed to work from home. Discussions continued and since there was no agreement, it

is unsurprising that Mr Mullane did not sign the form. The reason for the conduct was the continuing dispute, not the Claimant's disability.

d. Between 29 June 2018 and 1 October 2018 the Respondent failed to respond to the Claimant's access to work application.

118. The Claimant confirmed during his oral evidence that he was not pursuing any complaint that the Respondent failed to do anything relating to his Access to Work application. His complaint was about being required to attend work while he waited for the outcome, which is covered under the harassment complaints. This complaint therefore falls away.

e. On 24 July 2018 the Claimant was marked sick for not attending the office when he could not travel to work on account of the heat on the tube.

119. We have already found that the Respondent was entitled to mark the Claimant off sick for not attending the office because he had no contractual entitlement to work from home. The question is whether this decision was taken because of the Claimant's disability. The Claimant relies on the comparators set out in paragraph 9(b) of the list of issues, but none of them was in relevantly similar circumstances. They were all experienced investigators who were entitled to work from home. By this stage Mr Mullane had decided that the Claimant should not be allowed to work from home for the reasons already covered. That was the reason he was marked sick, not his disability.

f. On 14 September 2018 the Claimant was marked as sick for taking leave to attend medical appointments (one for counselling and one for a clinic appointment), despite having notified the Respondent of these in advance on 22 August 2018 and 12 September 2018.

120. We are doubtful whether there was any detriment here because, as already noted, the Claimant has not established any deduction from wages related to his non-attendance on this date. Nevertheless, we have considered the reason for the treatment and for the reasons already given we are satisfied that Mr Mullane treated the Claimant as off sick on this date because he had warned him on 12 September that he would do so if he did not attend the office, and that is what happened. It had nothing to do with the Claimant's disability.

g. Between 18 December 2018 and 11 January 2019 the Claimant was subject to disciplinary proceedings (gross misconduct for not attending the office) whilst awaiting the outcome of his access to work application.

121. This allegation is confused. This was not the period when the Claimant was awaiting the outcome of his Access to Work application; it had already been approved by this time. It is not in dispute that it was Ms Eagle's decision to commence disciplinary proceedings, so we must consider whether she did so because of the Claimant's disability. She has explained her reasons in her evidence to the Tribunal. She said she had become Mr Mullane's line manager and was therefore overseeing his management of the Claimant. She had also dealt with the Claimant's formal attendance meeting and issued him with a final written warning. She was aware that there had been further absences in December 2018, not all of which were authorised by Mr Mullane. In those circumstances it is unsurprising that she would consider disciplinary action as

a next step. By that stage it was not only a question of the Claimant's sickness levels; it had become a potential conduct issue. There is nothing to suggest that she acted other than in good faith or that she was motivated to any extent by the Claimant's disability. This complaint therefore fails.

Failure to make reasonable adjustments

122. The PCP relied upon is a "practice of requiring employees to work on-site full-time". As we have already found, the Respondent's general policy throughout the Claimant's employment was that staff could work up to two days a week from home on a discretionary basis. It is arguable that that changed in March 2018 when the new policy was introduced, but the policy is phrased in terms of expectation and recommendation; there was nothing mandatory about it. We have also not accepted that there was a general policy that new starters must work on-site full-time. The Respondent's approach to the Claimant, frequently permitting him to work from home in the first six months of his employment, shows that even if there were such a policy or practice, it was not applied to the Claimant. The Claimant has not made out the existence of the PCP claimed.

123. It seems to us that what the Claimant really complains about is the withdrawal of working from home in October 2017 and the refusal to allow it once he returned to work in March 2018. This is not, in reality, a reasonable adjustment complaint. It could perhaps have been pursued as a s.15 EqA complaint on the basis that it was unfavourable treatment because of something arising in consequence of the Claimant's disability, namely his levels of sickness absence. But that is not the claim the Claimant brought, nor is it what the Claimant agreed in the list of issues.

124. Even if there were a policy or practice of requiring employees, or new entrants, to work on-site full-time, and even if this put the Claimant at a substantial disadvantage because it resulted in his high levels of sickness absence and formal attendance management warnings, we would not have found that the Respondent had a duty to make adjustments claimed.

125. As for working from home on "at least 2 or 3 agreed days a week", we consider the following factors are relevant:

125.1. The Claimant has not said at any stage that his disability/ies made it impossible for him to travel to work. He mentioned the anxiety/stress of being on the train, but never suggested that this effectively prevented him using public transport. He said it was difficult for him to travel during rush-hour and he preferred not to travel to the office every day of the week.

125.2. The medical evidence did not show that the Claimant's disability/ies impacted his ability to use public transport in general. The occupational health report from the Charities Commission said that he had been suffering from panic attacks and this had been aggravated by travelling on trains in the rush-hour. It also referred to disruption in rail services and the early morning rush-hour being chaotic and crowded. The February 2018 occupational health report said that the Claimant's anxiety impacted daily activities, but only mentioned sleep pattern. The only reference to travel was, "I believe that disorder of anxiety will be aided by not having to

commute as frequently", but the report does not explain in what way the Claimant's anxiety impacts his ability to commute.

125.3. The Claimant accepted the job on the basis that he would need to be in the office at least three days a week and did not say during the application or interview process that he required any adjustment to the normal attendance requirements.

125.4. The Claimant acknowledged on more than one occasion the need to be in the office in order to learn the role by working with colleagues.

125.5. The Respondent agreed to adjust the Claimant's start time to avoid rush-hour and kept that adjustment in place throughout the Claimant's employment.

125.6. The Respondent allowed the Claimant to work from home regularly during the first six months of his employment, but Mr Mullane reasonably formed the opinion that it was not suitable for the Claimant, at least until he had become an established investigator. There was much discussion during the hearing of the Claimant's performance, but we do not consider it necessary to make findings about the quality or quantity of his work. Working from home necessarily involves a high degree of trust on the part of the manager because supervision of the employee is much more difficult than if they are physically present in the office. Mr Mullane's concerns really came down to issues of trust and the Claimant's ability or willingness to follow management instructions. The fact that the Claimant failed to follow the "expectations" document during the working from home trial period was a sufficient reason for Mr Mullane to conclude that working from home was not appropriate for the Claimant.

126. For those reasons, it was not reasonable for the Respondent to have to make the adjustment claimed.

127. We do consider that there are aspects of the Respondent's management of the Claimant that could have been better, and possibly contributed to the Claimant's sense of injustice when working from home was withdrawn. It seems to us that Mr Mullane adopted a laissez-faire approach to his management of the Claimant in the first few months of his employment, allowing him to take annual leave at will and allowing working from home or the hub initially with no firm parameters or expectations set. He also does not seem to have followed a formal appraisal system in respect of the Claimant, which could have provided a better forum for raising the performance concerns. The delay in obtaining the occupational health report was unfortunate to say the least. The initial delay may have been unavoidable because of the issues with the Claimant's contract, and the Claimant must bear some responsibility for the delay because he cancelled the initial appointment, but that does not explain the delay of some nine months from the Claimant mentioning his disability. There seems to have been a collective failure to chase the matter up. As it happens, it probably would have made no difference if the report had been obtained sooner because Mr Mullane's concerns about the Claimant working from home arose early in the Claimant's employment and it can be assumed he would have rejected a working from home recommendation on the same basis if it was made before October 2017. Finally, as noted above, the policy on working from home was

not clear and the discretionary nature of it was liable to lead to feelings of injustice where it was refused. If the Respondent believed that a period of two or three months of exclusive office-working was required for new investigators, that should have been made clear at the recruitment stage.

128. The claimed adjustment, "work from the hub office in Croydon" is not clear. We assume this is intended as an alternative to working from home, i.e. the Claimant should have been allowed to work from the hub two or three days a week. For the same reasons as above, we do not consider this would have been a reasonable adjustment.

129. The Claimant also argues he should have been moved into a post closer to his home. The Respondent's position at the time the Claimant raised this was that managed moves were no longer being considered. The Claimant has not produced any evidence to suggest that that was incorrect, or that the Respondent had the power to move him to another department, even if within the umbrella of the Ministry of Justice. In the absence of any evidence as to the availability of posts closer to the Claimant's home, the suitability of those posts and whether the Respondent had the power to effect such a move, we could not find that such an adjustment would have been reasonable.

130. For all those reasons the reasonable adjustment complaint fails.

Harassment

131. The Respondent did not take issue with the Claimant's perception of the impact of the alleged acts of harassment on him. Its arguments were that these matters were not related to the Claimant's disability and/or it was not reasonable for them to have the proscribed effect, so should not be treated as having done so.

a. From August 2017 Neil Mullane:

i. Deliberately failed to respond to the Claimant's leave requests (in respect of annual leave and appointments), emails, text message, and phone calls. The Claimant had to text Neil Mullane every morning to request a later start time.

ii. Failed to grant the Claimant's flexible working application.

132. The Claimant has not specified the leave requests, emails, texts and phone calls he claims Mr Mullane deliberately failed to respond to. Nor did he put to Mr Mullane in cross-examination that he deliberately failed to respond to any such messages or requests. This aspect of the complaint cannot therefore succeed. As for texting Mr Mullane to request a later start time, this happened for one month in August 2017. The complaint is substantially out of time and we do not consider it would be just and equitable to extend time in respect of it. Further, we have already found that Mr Mullane did not actually impose a requirement on the Claimant to text him. It was a misunderstanding. The Claimant has not therefore established the claimed "unwanted conduct".

133. We have already made findings as to the reason why Mr Mullane did not formally respond to the flexible working application. Given those circumstances, we do not consider this comes close to the threshold for

harassment. Mr Mullane was in constant discussion with the Claimant about adjustments to his working pattern, so the failure to provide a formal response under the flexible working policy could not on its own be conduct that created an intimidating, hostile, etc. environment for the Claimant.

b. On 22 February 2018 in a meeting with Phil Cosgrove, Neil Mullane said, "I have read up on your illness, most people return to work straight away, why did you tell me you needed an extra month off? I find that strange."

134. The Claimant has not given any evidence to the Tribunal about such a comment being made in the meeting, so we treat this complaint as not being pursued. Mr Mullane did not deal with this in his witness statement and the Claimant did not put it to Mr Mullane in cross-examination. There is no basis on which we could make a factual finding that it happened.

c. On 17 April 2018 Neil Mullane sent the Claimant an email saying, "I believe you are being somewhat disingenuous when you say that I have not given an indication as to why you cannot work from home."

135. It is not clear on what basis the Claimant says this comment constituted harassment related to disability. Mr Mullane was taking issue with the Claimant's suggestion that he was failing to address the Claimant's request to work from home. He was not unreasonably pointing out that he had already explained why he considered working from home was not suitable for the Claimant at that time. Even if the Claimant was offended by the comment, we do not consider it was reasonable for it to have had the proscribed effect. It did not reach the threshold for harassment.

d. Between June and October 2018 Neil Mullane continued to warn the Claimant that he would be reprimanded for any unauthorised absences, despite being aware of the outstanding access to work application.

136. We have seen no evidence of Mr Mullane warning the Claimant he would be reprimanded for unauthorised absences. He did tell the Claimant during this period that he was still expected to attend work, notwithstanding his Access to Work application. He made it clear, reasonably in our view, that the Claimant had known about the pay issue since May and his claimed lack of funds to travel was not a sufficient reason not to attend the office. This conduct did not reach the threshold for harassment. Further, since the Claimant's absences during this period were due to the expiry of his sick pay, not his claimed inability to travel due to disability, reminding the Claimant of the need to attend the office was not "related to his disability".

e. In October 2018 the Respondent singled the Claimant out by not applying the Remote Working Policy to him.

137. It is not clear what the Claimant claims happened "in October 2018". This is perhaps a mistake and should say 2017. To the extent that the Respondent singled the Claimant out by withdrawing the working from home facility, we have already dealt with the reasons for this and found that it was not unreasonable for Mr Mullane to conclude that working from home was not suitable for the Claimant at that time. The conduct does not therefore reach the threshold for harassment.

f. In October 2018 the Claimant was singled out and not shown any consideration during the office transfer from London Bridge to Canary Wharf.

138. There is nowhere near enough evidence for us to make a factual finding that the Claimant was singled out and not shown any consideration during the office move to Canary Wharf. The Claimant claimed that a notice was given to other employees inviting them to raise any personal issues connected to the move and that he did not receive this because he was off sick. The notice was not in the bundle and nor did we hear any evidence about how the Respondent handled any issues raised by other employees. The Claimant was in regular dialogue with Mr Mullane and could easily have raised any concerns related to the move. Further, Mr Mullane was the one who suggested the Claimant contact Access to Work, and that resulted in the Claimant being given funding to travel by taxi to Canary Wharf every day.

g. In or around June 2017 and again between March 2018 and October 2018, Neil Mullane expected the Claimant to attend the office, even though he had no money to travel as his pay had been deducted. The Claimant says he had to apply to the Civil Service Charity to meet his outgoings.

139. This does not add anything to (d) above. The Claimant was told he was expected to attend the office. This did not constitute harassment.

h. On three separate occasions invitations to formal meetings (the invitation to disciplinary meeting on 18 December 2018, the cancelled disciplinary meeting on 20 December 2018, and the attendance management meeting in early 2019) were sent to the Claimant in official marked Prison and Probation Ombudsman envelopes, which should only be used for prisoners in custody.

140. We do appreciate the Claimant's concerns about receiving post with the Respondent's logo and name on the envelope, because incorrect assumptions could be made by anyone who saw the envelope. The Respondent should perhaps consider whether it would be better to send any correspondence to employees in plain envelopes. However, there is no basis on which we could find that this conduct had the purpose of creating the proscribed effect. We had no evidence to suggest this was not the Respondent's usual practice. As to the effect of the conduct, the Claimant's witness statement says it caused him embarrassment. That does not reach the threshold for harassment. The comparison with prisoners' correspondence is not apt; writing to a prisoner who has been released in an envelope with the Respondent's logo raises privacy issues because it discloses the fact that they are an ex-prisoner. There is no such privacy breach in writing to employees in this way; it is a different issue that it might lead to incorrect assumptions. That may be true, but unless it was done deliberately (which we do not find) it could not reach the threshold for harassment.

141. The harassment complaints therefore fail and are dismissed.

<u>Victimisation</u>

142. There is no dispute that the conduct relied upon as detriments took place. We have already accepted Ms Eagle's evidence about the reasons for

commencing the disciplinary investigation. There is no basis on which we could find that this was done in bad faith, and certainly nothing to suggest it was linked to the fact the Claimant had commenced Tribunal proceedings some six months earlier. There was a sufficient basis to commence an investigation, given the final written warning for attendance and the Claimant's further absences from November to December 2018. We are satisfied that her genuine concerns about the Claimant taking unauthorised absences was the reason for commencing the investigation.

143. As already noted, the Claimant has not established that the job offer was withdrawn as a result of Ms Eagle disclosing the conduct investigation. It is therefore doubtful that this constituted a detriment. Further, there is no basis on which we could find that she was motivated by the Claimant having brought Tribunal proceedings. Her evidence, which we accept, was that she felt it would be misleading not to mention it when the Home Office made enquiries about the attendance management process. That was the reason for the conduct.

144. For those reasons, the victimisation complaints fail and are dismissed.

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Employment Judge Ferguson

Date: 27 May 2021