EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100441/2020 (V)

Held in Edinburgh by Cloud Video Platform (CVP) on 29, 30, 31 March 2021 and 1 April and 28 May 2021 (Deliberation Days)

Employment Judge J Young
Tribunal Member Ms Lindsay Grime
Tribunal Member Mr Adrian Atkinson

Mr Conor Adamson	**Claimant** **Represented by:** **Mr T Merck, Solicitor**
Student Housing Company (Ops) Ltd	**Respondent** **Represented by:** **Mr L Harris of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the complaint presented to it under section 26 of the Equality Act 2010 is well founded and having considered but taking no action under sections 124(2) (a) and (c) of the Equality Act 2010 orders that the respondent shall pay to the claimant the sum of **Nine thousand five hundred pounds (£9,500)** as compensation.

REASONS

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal on 24 January 2020 making various complaints of unlawful discrimination under sections 13; 15; 20/21; 26 and 27 of the Equality Act 2010. That discrimination was based on his disability having been diagnosed with Adult Attention Deficit Hyperactivity Disorder ("Adult ADHD") on 27 June 2014 and with Autistic Spectrum Disorder ("ASD") on 8 November 2019. Separately he pursued unlawful deduction of wages in respect of sick pay and holiday pay. At the date of the hearing the claimant continued to be an employee of the respondent.

2. In their response the respondent admitted that the claimant was at the relevant time for the purpose of these proceedings, disabled within the meaning of section 6 of the Equality Act 2010 in respect of the diagnoses of Adult ADHD and ASD. All the claims made by the claimant were denied and the lengthy ET3 responded to each of the claims made in detail. That ET3 contained a plea of time bar.

3. Each party completed an Agenda in respect of a preliminary hearing held on 15 May 2020 with a Note of the matters discussed being sent to parties on 26 May 2020. At that time it was envisaged that the final hearing should be "In Person" with appropriate directions being made for the production of documents and the preparation and lodging of witness statements. The Note confirmed that the plea of time bar would be reserved for the final hearing and that acts complained of by the claimant which took place prior to 26 September 2019 would be time barred unless either –

    (a) they formed part of conduct extending over a period, or

    (b) the time limit is extended under section 123(1)(b) of the Equality Act 2010

4. The contention of the claimant was that the acts complained of were a continuing act of discrimination under section 123(3)(a) of the Equality Act 2010.

5. A final hearing was subsequently fixed for 8, 9 and 12 October 2020 but did not proceed due to confusion over the bundles of documentation which had been submitted and the lack of witness statements for the claimant and his witness. Additionally there was concern that albeit there was no notice of the respondent's intention to argue that at the material time they were unaware of the claimant's disabilities, such an argument appeared in witness statements for the respondent. In all the circumstances and after an adjournment for consideration of the outstanding issues it was agreed that the hearing would not proceed and that further dates for a final hearing would be fixed. A Note on the matter was issued 13 October 2020 and as an additional direction beyond those matters contained in the Note issued 26 May 2020 it was directed that the parties liaise to produce a Joint Statement of Agreed Facts. At this time the claimant was not legally represented.

6. By email of 27 January 2021 the Tribunal was advised that the claimant had obtained legal advice in respect of his claim. It was agreed that the final hearing could proceed by means of CVP and an amended Notice of Hearing was issued on 10 February 2021. With that amended Notice of Hearing directions were made by Employment Judge d'Inverno that:-

   (a) The hearing was to proceed subject to the Case Management Orders issued in respect of the hearings on 21 May 2020 and 12 October 2020 and the parties should comply with those Orders

   (b) That parties should liaise regarding the adjustment of, and the claimant's representative lodge with the Tribunal not later than 7 days prior to the commencement of the final hearing, an "agreed List of the Issues, including reserved preliminary issues" which remained in dispute and required determination.

Issues for the Tribunal

7. On the morning of the final hearing the Tribunal received the adjusted List of Issues. A draft List of Issues had been provided by the respondent but only adjusted for the claimant and seen by the respondent the day before the hearing. While the respondent indicated that they were grateful for the clarification made on the Issues to be determined by the Tribunal there was a dispute in respect of certain matters now narrated.

8. The List of Issues advised that the claimant withdrew (1) the claim of direct discrimination under section 13 of the Equality Act 2010; (2) the failure to make reasonable adjustments under section 20/21 of the Equality Act 2010; (3) the claim of victimisation under section 27 of the Equality Act 2010; and (4) the claims of unlawful deduction of wages under section 13 of the Employment Rights Act 1996.

9. Accordingly the remaining issues identified were:-

"**Jurisdiction/time bar:**

(1) Were any acts of discrimination (if proven) that occurred prior to 26 September 2019 part of a continuing act of discrimination after that date?

(2) Would it be just and equitable to extend time in respect of any acts of discrimination (if proven) that occurred prior to 26 September 2019 which did not form part of a continuing act of discrimination after that date?

Harassment (s26 EqA):

(1) Did R engage in unwanted conduct related to C's disability or related to any developmental or intellectual or other disability that C may or may not have, which had the purpose or effect of

violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

(2) C relies on the following acts of "unwanted conduct"

(a) Courtney Riley ("CR") communicating with C by WhatsApp and email and ignoring C when in the office

(b), (c), (d), (e) – withdrawn.

(f) On a Friday between 19 March and early April 2019 CR said to the claimant "Stop being a fucking idiot and let him in!" in an agitated manner.

(g) In mid-June 2019 CR became aggressive throwing his chair back and shouted repeatedly "Do you want beef" to the claimant in an angry and threatening manner.

(h) In June to August 2019 CR deliberately allocated plainly unsuitable tasks to the claimant on numerous occasions.

(i) On approximately 19 July 2019 CR said of the claimant in his presence "He must be a mongo if he can't even understand basic text messages", "pathetic he continues to apply that to administrative job but can't understand messages", and "what a fucking retard".

(j) On or shortly prior to 19 July 2019 CR discussed the claimant's disabilities with his friends he had brought to work.

(k) On 12 September 2019, CR called the claimant "mongo" which is a word that disparages individuals

with intellectual and mental disabilities, for not being able to follow an instruction.

(l) On 4 occasions between July and September 2019 when CR brought a friend into the office and made jokes about C and his mental health.

(m) The respondent dismissing C verbally on 11 October 2019 and in writing on 14 October 2019.

(n) On 13 October 2019, Joe Stoic and/or CR and/or other employees of the respondent magnifying the claimant's handwritten note in relation to his disability on a photocopier/printer and/or leaving this on the machine for a number of days.

Discrimination arising from Disability (s15 EqA) in relation to ADHD:

(1) Do the incidents detailed (a) to (n) above constitute or also constitute unfavourable treatment by the respondent arising because of "something" in consequence of C's ADHD, "something" being conduct or behaviour relating to:

Excitability upon perceived provocation, attention deficit/dysregulation, low emotional resilience, hyperactivity/impulsivity, low ability in certain tasks, low ability in following certain instructions, heightened need for routine/order/structure, and any other consequence of the claimant's ADHD.

(2) If so was R's treatment of C a proportionate means of achieving a legitimate aim?"

10. After discussion on the List of Issues the Tribunal were advised that the claimant would no longer rely on failure to make reasonable adjustments under s20/21 of the Equality Act 2010.

Objection to certain issues

11. Objection was taken by the respondent to the allegations of harassment made at 2(f) and (k) of the List. It was stated that these were allegations seen for the first time within the claimant's witness statement received towards the end of the preceding week and within the List of Issues only now produced by the claimant. It was submitted that this case had been proceeding for some considerable time; there had been a lengthy ET1 followed by specific allegations being made on harassment within the Agenda for the Preliminary Hearing; these allegations were not matters that were raised in a complaint by the claimant to the respondent about the behaviour of Courtney Riley (CR) who had now left the employ of the respondent; there was prejudice to the respondent in not being able to investigate the matter; and on the face of it these allegations were out of time and the inability to investigate would undermine application to extend time.

12. Additionally the issue at 2(h) was also a difficulty for the respondent as there was no notice in this wide ranging allegation of allocation of any particular tasks which were unsuitable. On this issue Mr Merck advised that in terms of the complaint before the Tribunal reference had been made to the claimant being given tasks of "rotas and budgets" (paragraph 22 of the ET1) and those were the tasks complained of.

13. So far as 2(f) and (k) were concerned he referred to paragraph 26 of the ET1 (R8) which indicated certain occasions when the claimant had been called unpleasant names and this was simply "further particulars". Also the claimant would not be relying on a "just and equitable" extension of time but on a continuing course of conduct through to the dismissal of the claimant in October 2019 (which was overturned on appeal).

14. The Tribunal adjourned to consider the position. They considered on a review of the papers that on the face of matters the allegations at 2(f) and 2(k) were not matters which had been apparently raised by the claimant in the various hearings by way of dismissal, appeal against dismissal and complaint to the respondent regarding the behaviour of Courtney Rily. They had not appeared in the ET1; subsequent agenda prior to preliminary hearing; or made out at the hearing in October 2020. The incident at 2(f) referred to a time when there was simply no previous allegation of any harassment of the claimant. The incident referred to at 2(k) contained an allegation which was particularly offensive and memorable. The Tribunal considered there was prejudice in making these allegations at this very late stage. However they were not so confident to be able to exclude the possibility that there had been notice given to the respondent of these allegations in the course of the various hearings and discussions with the claimant through to October 2019. The paperwork was voluminous and accordingly the Tribunal were not prepared to refuse these matters at 2(f) and (k) as issues but to allow them to remain on the basis that it would be necessary for the claimant to be able to point to an occasion or occasions when these allegations had been made known to the respondent prior to the production of his witness statement and List of Issues.

15. So far as 2(h) was concerned there was notice given of tasks on budget and rotas being asked of the claimant. If the evidence strayed beyond those matters and objection raised then such objection could be dealt with at the time.

Documentation

16. The documentation lodged for the parties consisted of productions entitled "Joint Evidence Bundle" made up of productions for the claimant and productions for the respondent. The claimant's productions were paginated C1-250 and the productions for the respondents paginated R1-315. Many of these productions were duplicates. Reference to productions in the Judgment

are to the paginated numbers in respect of either productions for the claimant or respondent.

The Hearing

17. At the hearing the Tribunal heard evidence from:-

(1) The claimant who adopted as true and accurate his witness statement extending to 24 pages (paragraphs 1-118) subject to clarification that (1) reference to the claimant's disability was to the condition of Adult ADHD alone up to 8 November 2019 and thereafter both Adult ADHD and ASD and (2) that where the claimant spoke of victimisation that was a reference to harassment. He also answered supplementary questions and questions in cross examination.

(2) Craig Burns, Facilities Assistant with the respondents from December 2014 to February 2020 and from early 2019 to approximately October 2019 worked in the same area as the claimant at Brae House. He adopted as true and accurate his witness statement extending to 2 pages (paragraphs 1-12) and answered questions in cross examination.

(3) Helen Crooks, employed from end May 2019 as HR Advisor with the respondent under the brand name Global Student Accommodation covering UK and Ireland and based in Bristol. She adopted as true and accurate her witness statement dated 15 March 2021 extending to 4 pages. She also answered questions in cross examination.

(4) Lindsay Symmons who was employed by the respondent as an Area Manager from 1 February 2019 covering Brae House being the claimant's place of employment. She adopted as true and accurate her witness statement dated 15 March 2021

extending to 7 pages. She also answered supplementary questions and questions in cross examination.

(5) Joe Stoic, Residence Manager with the respondent based in Newcastle under the brand name Uninest. He adopted as true and accurate his witness statement dated 15 March 2021 extending to 4 pages. He also answered supplementary questions and questions in cross examination.

(6) Lynda O'Kelly, Cluster Manager with Uninest Dublin based in Cork. She adopted as true and accurate her witness statement dated 15 March 2021 extending to 2 pages. She also answered supplementary questions and questions in cross examination.

(7) Niamh Banks, Cluster Manager with Uninest based in Dublin. She adopted as true and accurate her witness statement dated 15 March 2021 extending to 6 pages. She also answered questions in cross examination.

18. From the relevant evidence led, documents produced and admissions made the Tribunal were able to make findings. Given the nature of the proceedings it is necessary to rehearse the evidence to some extent for that purpose.

Findings

19. The respondent manages purpose built student accommodation. It is part of a group of companies within a holding company trading as Global Student Accommodation which operates in the UK and beyond. The respondent trades under the brands of Student Housing Accommodation and Uninest Student Residences. The respondent manages three student accommodation residences in Edinburgh including Brae House which comprises about 422 bedrooms of varying sizes and common areas.

The claimant's disability

20. The claimant was diagnosed on 27 June 2014 with Adult ADHD and then ASD on 8 November 2019 (which condition was suspected prior to that date). It was accepted that at the relevant time for these proceedings the claimant was disabled within the meaning of s6 of the Equality Act 2010. He advised that his condition has the potential to "cause difficulties in attention span, impulsive behaviours and irritability" which can be triggered by stressful or confrontational situations. Additionally the condition could affect an understanding of text/email/typing in that material being misinterpreted or in "not getting the correct meaning". The agreed list of issues also specified symptoms associated with the condition of ADHD. A letter from Dr Wheeldon, Consultant Psychiatrist of 5 May 2020 (C105) advises that:-

> "Adult ADHD can have an impact on individuals in terms of effects on their concentration and attention, difficulties with maintaining focus and completing tasks, impulse control and time management. Autistic Spectrum Disorders are typically characterised by difficulties with aspects of language and social interaction, coping with unpredictability and change and understanding non-verbal communication.
>
> Both of these disorders would entitle an individual to "reasonable adjustments in the workplace" and typically individuals can perform well with appropriate adjustments in place. During his contact with the services here Mr Adamson had input from occupational therapy to help him develop appropriate skills particularly around communication within social and work situations. Mr Adamson throughout his contact with us highlighted difficulties with mood, anxiety and self-confidence, some of which appear to be in relation to adverse experiences within his workplace".

Application for employment.

21. The claimant applied for a position as an Administrative Assistant with the respondent within Brae House, Edinburgh in early February 2019. He submitted his CV and was invited to interview. At that time he was interviewed by John McNeil and Courtney Riley of the respondent. There was a general discussion of the role and the claimant's CV and he advised of his disabilities to ensure they were disclosed. He also wished to take the opportunity to discuss how he had come to accept them and how he managed them when employed. He advised that the only additional support he required was to attend therapy appointments from time to time.

22. The claimant's CV (R75/A) advises that he is self-motivated with a range of experience from "customer focussed positions to fast paced and demanding positions" and that he worked well "under pressure".

23. He was unsuccessful in that application for Administrative Assistant but subsequently Courtney Riley contacted him to enquire whether he would consider the position of a Night Facilities Assistant. That had been a position mentioned at the original interview and at that time the claimant had indicated he would not be interested. However when contacted he agreed to attend a further interview. That second interview between Courtney Riley, Lyndsay Simmons and the claimant included a brief conversation around ADHD and how the claimant would "keep my mind occupied during the night hours if I were to be offered the job". As a result of that second interview the claimant was offered the position of Night Facilities Assistant at Brae House reporting to Courtney Riley as the General Manager. (R78). The claimant received at that time a Statement of Particulars of Employment which he accepted on 15 March 2019 (R79/85). Appropriate policies supplied to the claimant and which he acknowledged as having read were listed in the "Policy sign off document" (R86/87). That included Grievance and Disciplinary policies.

24. After initial induction the claimant started night shifts from 18 March 2019. The night shift pattern is 9pm through 7am. The claimant would receive a

"verbal handover" with the Day Facilities Assistant when he arrived for his night shift. Courtney Riley worked day shift and there was little communication between them as the claimant commenced duties. Most communications (unless there was an emergency) were between the claimant and other Facilities Assistants.

25. Toward the end on April 2019 the claimant was again interviewed by Courtney Riley and Lyndsay Symmons for the role of Administrative Assistant which had again become available. He was unsuccessful. It was agreed then that he would get support by way of exposure to administrative and finance tasks and systems to develop his skill set.

26. Towards the end of May 2019 the claimant covered on a temporary basis for a colleague employed as a Day Facilities Assistant but who was absent due to ill health. The claimant was then due to return to Night Facilities Assistant but subsequently covered for another colleague who was absent on extended bereavement leave. His position as Day Facilities Assistant was not made permanent as he always covered on a temporary basis. That continued until the claimant became absent from work from 11 October 2019 in circumstances later described.

27. The claimant requested face to face meetings with his Managers as a preference to communicating by text/WhatsApp and the like. He found that non-verbal communication more difficult given his condition. However he acknowledged that he required to be around the building in his role as a Facilities Assistant which would affect the preference for in person meetings. He also advised that he liked routine and having a structure to his day.

Courtney Riley communicating with claimant by WhatsApp and email and ignoring claimant when in the office (2a of issues)

28. The claimant required to work around the Brae House building. Around 1 July 2019 a "slack group" was put in place to allow staff to communicate in Brae House which had poor mobile phone reception. A phone was provided

to the claimant to enable him to communicate clearly with others within the group which included Courtney Riley, manager and Lindsay Symmons, area manager. It messaged in a way similar to "Whatsapp". There was no complaint from the claimant that he did not regard that as a suitable way of communication given his condition.

29. If the claimant instigated communication with his manager by text (for example (R104/105) then that was because he or his manager would not be on duty and it would not be possible to get in touch by other means. An example of the claimant being in touch with Courtney Riley by email was when he emailed on 11 July 2019 to advise that he had forgotten about an outpatient appointment arranged and that he would be "in straight after" to which Mr Riley responded "No worries about the appointment. See you when you get in" (R98).

30. On 12 July 2019 Lindsay Symmons along with Courtney Riley and the claimant held a "60 day check in" being a meeting to review the claimant's progress. It was noted on the form completed (R99) that the claimant was achieving the required standards. Lindsay Symmon's considered that the claimant had performed well and was quick at completing tasks. In answer to that section which asked "How is the progress on your objectives? Can you share your highlights? Can you share your challenges? (if any challenges: discuss further/coach on how to overcome these challenges)" it was stated:-

> "More communication between team members. Happy with support from team members".

31. Approximately 10 days prior to this meeting Lindsay Symmons had a meeting with the claimant when he raised issues concerning Courtney Riley. At that time the claimant had raised various concerns but not that he had been ignored by Courtney Riley. On her visits to Brae House she had spoken to the claimant on a number of occasions but he had not raised any concern of being ignored. Her evidence was that she could "see him (the claimant) communicating – not see Courtney Riley ignore Conor intentionally". She

also advised that Courtney Riley did not respond to well to queries raised and was slow to answer her on occasion. On issues such as approving or putting through overtime he was “very much last minute”.

32. Some time later on 28 October 2010 the claimant raised a complaint against Courtney Riley and part of his complaint was that “communication attempts by (the claimant) to discuss matters with Courtney were ignored or responded to in a rude and inappropriate manner”. On 5 December 2019 Ms Symmons was interviewed in relation to the complaint raised (R214/215) and in the course of interview in relation to that complaint advised (R215) that “I know they have communication difficulties, I have not witnessed any rude communications, I am aware that both find it difficult to communicate with each other. Courtney at the moment is on an informal PIP re responding on deadlines, he has a problem responding to things timeously” and “he has a problem responding to me”.

33. The outcome of the investigation into that aspect of the complaint raised by the claimant was:-

> “Upheld. It would seem that communication between Courtney and Conor was strained and difficult and that Courtney did not reply to Conor in a timely manner. His tone was also a little short at times and could be construed as inappropriate. It also does not appear Courtney took into consideration Conor’s ADHD, and although no requests for adjustment had been requested, consideration could have been made to ensure easier communication between the two of them”.

34. The evidence on this matter disclosed that while, in line with the investigation into the complaint raised, communication between claimant and Courtney Riley was reasonable initially that deteriorated as time passed into October 2019. In person contact was not put in place by Courtney Riley. There was therefore substance to this issue.

Incident on a Friday between 19 March and early April 2019 (2f of issues)

35. Not long after the claimant had commenced night shift duties the claimant advised that a friend of Courtney Riley arrived around 1.30am asking for entrance to the building. The claimant refused entry. The individual said that he wished to collect "Courtney's bag and a birthday cake that had been left in a fridge in the staff office in the kitchen". The claimant continued to refuse entry and shortly after received a call from Courtney Riley. He could not recall if this was on the facilities phone or his personal number. The claimant advised that Mr Riley had been attending a birthday party for his daughter and was agitated and said words "to the effect of" "stop being a fucking idiot and let him in". The claimant allowed the friend access to the building and upon collection of the items the friend left.

36. The claimant's position was that he took this to be belittling treatment related to his disabilities. As matters were explored before the Tribunal it became clear that the claimant had never raised this incident until it appeared in his witness statement issued to the respondents around 25 March 2021 and the List of Issues under allegations of harassment sent to the respondent on Sunday 28 March 2021, the day before the final hearing commenced. There was no evidence that the claimant had in the course of his complaint against Courtney Riley ever suggested (as he did in his witness statement) the comment made was directed at him on his disabilities and was "treatment of belittling me" which "became a pattern" in time all related to his disabilities.

37. It was claimed by the claimant that he had raised this issue with Lindsay Symmons when he met her in early June to complain about the behaviour of Courtney Rily. She denied there was any reference to this incident.

38. There was no reference to this incident within the very lengthy ET1 which had been lodged for the claimant at which time he had legal advice. His position was that his disability meant that he had to be asked a direct question before he would narrate such an event. He did not set out this matter in the list of

incidents of harassment within the Agenda for the Preliminary Hearing when had some assistance from a Trade Union advisor.

39. On 26 October 2019 the claimant made a written grievance against Courtney Riley making 7 particular allegations. This was not one of them either in the written document or in the interview conducted with him on these complaints (R169 and R195/200).

40. This was an issue to which objection was taken. The Tribunal were satisfied it had never been raised and that it was an issue which was raised too late in the day for it to be properly part of the claimant's case. This was an issue which affected fair disposal of the proceedings given the lack of any notice of this complaint until just before the Hearing commenced.

41. In any event the Tribunal did not consider that this allegation was made out as being an issue of harassment. The claimant's position was that this incident related to his disabilities in being called an "idiot".

42. The Tribunal were not able to assess the evidence of Courtney Riley who did not appear. The claimant indicated in his statement that Courtney Riley had said words "to the effect of" and so was not being definitive about the words spoken. There was then some doubt about the word being used but even if it was the Tribunal did not consider that the claimant took it to be a reference to his disability at the time or thereafter. Given the number of opportunities he had to raise this as an issue and which he never took the Tribunal did not consider that even if the comment was made it was not made with the purpose of violating the claimant's dignity or had that effect from the claimant's point of view. The Tribunal considered that the lack of reference to this incident was confirmation that as at March/April 2019 and thereafter the claimant never considered this was an issue that had any effect of violating his dignity or creating an offensive atmosphere. If he had considered it set the scene for belittling treatment of him the Tribunal considered it would have been raised earlier than 2 years from the incident

Incident in mid-June 2019 when Courtney Riley became aggressive and shouted "do you want beef" at the claimant.

43. In this matter the claimant advised that he and a colleague Craig Burns were "summoned to Courtney Riley's office". He wanted them to carry out additional work around administrative tasks. In his witness statement the claimant stated that "both Craig and I objected as this was not work that was included in our role". The work in question appeared to be that Mr Riley wanted them to take on responsibility for preparing a rota and some work around budgets. In his witness statement the claimant states that he was "disappointed at being asked to do work that I had been turned down for twice in the past" being a reference to him seeking an administrative post but not being selected. He states that "Craig and I giggled a bit followed by my insistence that I could not be involved in budgeting or the rota as we were coming up to the summer turnaround and I would be busy in my role". He then stated that Mr Riley became aggressive, threw his chair back and became confrontational saying "Do you want beef" in an angry way. He stated that he left the room at that point.

44. The claimant made reference to this matter in his written complaint in October 2019 by indicating that it occurred "during a minor workplace disagreement with a decision made by Courtney Riley …." (R169) In his interview of 18 November 2019 (R195) he indicated " I can't remember 100% , either to do with the rota or budgets …" and indicating that he was trying to say to Courtney Riley that he did not have time for this matter as it was "turnaround", being a reference to the need to reorganise, clean and effect any repairs to the rooms once the students had left for their summer break and "Destiny Students" arrived to use the accommodation. In that account he stated that Craig Burns was in the office and Courtney Riley asked "me to do desk, can't remember the task, I said no I don't have the time and he started saying do you want beef"

45. Craig Burns in his interview following the written complaint made by the claimant (R180/181) did recall Courtney Riley saying to the claimant "Do you

want beef". His recollection was that it was "something to do with Conor's overtime". His view was it was a disagreement over the issue of overtime which escalated into an argument and at one point Mr Burns had indicated that he didn't want to be there.

46. Mr Burns had also given a statement to Mr John Law in his capacity as Trade Union representative for the claimant in the complaint which had been raised against Courtney Riley. In that statement (C84/91) Mr Burns indicated that the incident arose out of "something to do with Conor's wages or his overtime or something that hadn't been, it was in the process of being processed. It hadn't been figured out. Conor was having to reiterate to Courtney to quantify his overtime correctly. To put it into context this was a situation that had happened before in terms of Conor having to repeatedly clarify his overtime with Courtney and several times he had overtime missed from the payroll and had to chase it up afterwards. He was already a little bit frustrated I imagine and with good reason". The discussion escalated into an argument with Courtney Rily stating to the claimant "Do you want beef". At this point Mr Burns spoke up loudly to indicate he didn't want to be involved in this matter and immediately after that the claimant left the room.

47. In his witness statement Craig Burns referred to 2 occasions when he and the claimant were called in by Courtney Riley to discuss the "claimant's payroll situation and administrative matters". On one of these occasions he recalled Courtney Riley challenging "Conor on the points that Conor made about overtime" resulting in an argument and that Courtney Riley "thrust his chest out and then leaned forward across most of the width of the desk pushing his face towards Conor's face then shouted to Conor "Do you want beef" in a highly aggressive and threatening tone, manner and body language. This was very memorable to me". Mr Burns then raised his voice "demanding to be excused" and both he and the claimant left.

48. The claimant's position was that he had been asked to do the "rotas and budgets" as "part of a course of conduct by Courtney Rily to get a reaction out of him" and to "bully him" in relation to his ADHD. The balance of the

evidence was that this argument arose out of the treatment of overtime and the processes involved. It was accepted that in the course of this matter Courtney Riley had stood up and in a loud angry way said to the claimant "Do you want beef" The genesis of the argument was more difficult to establish as there were conflicting recollections. On consideration the Tribunal favoured the account given by Mr Burns. They did so because he had on three occasions given an account of the genesis being overtime. Also the evidence from Lyndsay Symmons was that overtime and payment could lead to friction. She confirmed that Courtney Riley was very much "last minute" and that she could understand there being issues on overtime. She also indicated that there were certain differences between the way in which that operated between night shift/day shift and that could well have led to arguments ensuing. It was always frustrating for individuals not to have been included in a payroll run and albeit not always the case that might have been caused by late returns from Mr Riley. Additionally the evidence of the claimant in the complaint raised in October 2019 and interview on that complaint was that he was not sure of the tasks he was being asked to do when this incident occurred.

49. The behaviour of Courtney Riley was not in keeping with that of a manager. However the Tribunal did not consider it could be an incident where, as the claimant claimed, he was being deliberately picked on by Courtney Riley to get a reaction out of him and bully him in relation to his ADHD. The Tribunal's view was that this was an incident on overtime payments which escalated and became heated between the claimant and Courtney Riley but was not related to his ADHD. The Tribunal did not consider it an incident where the claimant was being picked on by Courtney Riley to get a reaction out of him. There was an argument and both became angry.

In June/August 2019 Courtney Riley deliberately allocated plainly unsuitable tasks to the claimant on numerous occasions (2g of issues)

50. While the Tribunal considered that the incident above did not arise as a result of the claimant being asked to do "rotas and budgets" it accepted that the

claimant was at some point in the period June/August 2019 asked to do "rotas and budgets" by Courtney Riley. Craig Burns in his evidence referred to 2 occasions when he and the claimant had attended with Courtney Riley on "overtime and administrative tasks". The Tribunal considered that one of those occasions involved the heated argument on overtime but there was a separate occasion when request was made of the claimant to prepare rotas and budgets as was claimed by the claimant.

51. The evidence was that the claimant wished to be involved in more administrative tasks as he saw that as a way of developing his skills. However he indicated he was not able to do so because of "turnaround" and so the matter never went further.

52. There was no evidence of any written request from Courtney Riley to the claimant asking for rotas to be prepared or for any other administrative tasks. There was no reference to the claimant being asked on numerous occasions to perform tasks outwith his role in the written complaint raised on 26 October 2019 (R169).

53. The complaint by the claimant was that Courtney Riley asked him to complete such tasks to "get a reaction". The claimant agreed that he had asked if he could be more involved in administrative tasks to develop his skills. His complaint in this instance was that of the timing of the request because he didn't have time to get involved on these matters given the work he had to do in "turnaround". Accordingly the complaint was not that he was being asked to do the tasks but he was too busy to do them at that time. Therefore the suggestion was that Courtney Riley knowing that the claimant would not have the time asked him to get involved in these tasks to goad him and get a reaction. The Tribunal were not able to make that finding. In any event the Tribunal did not consider that there was evidence to support the allegation that in "June/August 2019 Courtney Riley deliberately allocated plainly unsuitable tasks to the claimant on numerous occasions". On one occasion the claimant had been asked to get involved in rotas and budgets and had said he could not because he did not have enough time and the

matter was not pursued. There was no evidence he was asked again to complete "plainly unsuitable tasks".

Incident on 19 July 2019 (2(i) of Issues); Incident shortly prior to 19 July 2019 (2(j) of Issues); Incident of 12 September 2019 (2(k) of Issues);
Incidents on 4 occasions between July and September 2019 (2(l) of Issues)

54. These issues concerned alleged comments made by Courtney Riley to the claimant that "he must be a mongo if he can't even understand basic text messages"; "pathetic he continues to apply for that administrative job but can't understand messages" and "what a fucking retard". It was stated this took place on 19 July 2019. On this occasion he stated that when entering the office area Courtney Riley was there with "two of his personal friends" and a conversation struck up upon his arrival. It was alleged that one of Courtney Riley's friend said "Is that the mongo one there" at which all three laughed and Courtney Riley responded "You must be a mongo if you can't even understand basic text messages".

55. In the lengthy ET1 lodged by the claimant (paragraph 26 – C19) it is stated:-

> "On at least 4 occasions between July and September 2019 Courtney invited a friend into the office area and together they attempted to antagonise me by whispering to each other, pointing and laughing at me and making jokes about my mental health. On one occasion, in September 19, Courtney's friend called me a "fucking retard" and both he and Courtney laughed at me. I find this treatment to be intimidating, humiliating and incredibly offensive and I believe that this constitutes harassment relating to my disabilities".

56. In the Agenda completed for the Preliminary Hearing the claimant states in the allegations of harassment that he had been "subjected to jokes from Courtney Riley and his friends who he would allow in the office" and "When I did sit in the office though I felt intimidated on several occasions from being directly threatened by Courtney, him using offensive and racist language and

his friends humiliating and degrading me by pointing and laughing at myself. On one occasion while in the office my Line Manager's friend called me a "fucking retard" in front of my Manager, they both laughed (C54). In that part of the claim dealing with "direct discrimination" (but relating to these incidents) it was stated:-

> "On at least 4 other occasions between July and September 2019 Courtney Riley invited a friend into the office area and together they attempted to antagonise me by whispering to each other pointing and laughing at me and making jokes about my mental health. On one occasion in September 2019 Courtney's friend called me a "fucking retard" and both he and Courtney laughed at me".

57. The claimant completed the Agenda for the Preliminary Hearing himself with the assistance of a Trade Union representative. On being asked why he had not made the allegation then that Courtney Riley had made the comments in the issues he stated that unless "he was asked a direct question he wouldn't give the information" as that was the way his "brain works".

58. In the written complaint made against Courtney Riley on 26 October 2019 (R169) the claimant made 7 allegations one of which (allegation 3) was:-

> "On a number of occasions while I was working "backshift" (12pm to 9pm) on weekdays, at approximately 4pm when Courtney Rily would be preparing to leave the office Courtney Riley would invite his friend/acquaintance into the office area. If I stayed within the office area I was subjected to jokes comments and general derogatory treatment pertaining to my mental health".

59. There were no references within these allegations of Courtney Riley making the comments stated. In particular there is no reference to him being called a "mongo" by Courtney Rily or a "fucking retard" or "pathetic he continues to apply for that administrative job but can't understand basic text messages".

60. In the hearing on the complaint made by the claimant of 18 November 2019 (R195/200) which hearing lasted between 12.28pm and 3.39pm the claimant was asked about the various allegations and in relation to allegation 3 stated that Courtney Riley's friend would come round around 4/4.30pm and that his friend "called me a fucking retard". On being asked why he stated "I have never met the man, I do not know him, I do not know of him he is not my friend" and that the only knowledge he would have of the claimant's ADHD would be "maybe from Courtney, I would like to think Courtney as he is the only person who knows I was. I also told Lindsay". He returned to this matter when he was asked:-

> "This friend of Courtney you feel is making jokes relating to your diagnosis?" and responded:-
> "They would point at me, snigger and whisper to one another to me that is antagonising me and trying to get a reaction. I have been called a retard".

61. He was asked if he had made any comment in return and stated:-

> "No not my place to say anything I know he should not be in the office. I told Lindsay and towards the end of my time then it stopped".

62. In the interview with Courtney Riley on this complaint he was asked if a friend came into the office after 4pm and he stated that "has happened" and over the summer "probably about twice". He stated that the claimant was never "laughed at and the butt of jokes. That never happens".(R211)

63. There was of course no direct rebuttal evidence from Courtney Riley of these matters. He did not appear having left the respondent's employ in December 2019. There did not appear to have been any particular effort made by the respondent to trace him (if he had moved from his known address) and obtain a witness order if he was unwilling to appear.

64. However on these issues at 2(i)-(l) the Tribunal were concerned that prior to the witness statement being produced there had never been any allegation in that on 19 July 2019 Courtney Riley had said that the claimant was "a mongo if he can't even understand basic text messages"; or stated he was "pathetic he continues to apply for that administrative job but can't understand basic text messages" and "what a fucking retard" or on 12 September 2019 Courtney Rily called him a "mongo". In the face of that background the Tribunal were not able to find that these incidents had occurred. They had not been raised by the claimant until production of his witness statement very late in the day. The Tribunal did consider that these were such memorable incidents that the claimant would have narrated them when he had the opportunity either on the complaint being raised in writing; at the interview to discuss these complaints; within the ET1 form or within the particulars specified in the Agenda for the Preliminary Hearing.

65. However there was a consistent complaint made by the claimant that he had been abused by a friend or friends of Courtney Riley in calling him a "fucking retard" and on occasion sniggering and laughing and mocking him on account of his disability. There was specific comment made by the claimant that he was called a "fucking retard" by a friend at an incident of 12 September 2019. The Tribunal considered there was sufficient to find that had occurred. Also the Tribunal believed the claimant in stating that Courtney Riley had joined in the laughter of his friend(s) mocking the claimant. While it was not language used directly by Courtney Riley it was stated in his presence and he made no attempt to intervene with his friend(s) to desist from making that comment. Indeed the evidence was that his reaction was encouraging of such comment. The Tribunal accepted that the "laughing and sniggering" occurred between July and September 2019.

66. The Tribunal also considered that the only way the friends of Courtney Riley would be aware of the claimant's disability and adopt the abusive language and mock the claimant would be at the instance of Courtney Riley.

67. The Tribunal found that the issues at 2j and 2l were made out but not 2i .On issue 2(k) to which objection was taken the Tribunal could as indicated find no prior reference to the claimant being called a “mongo” by Courtney Riley and as indicated did not consider that this was an issue that could have fair disposal being raised at such a late stage. However even if it was allowed as an issue the Tribunal did not consider on the available evidence it had taken place

The Claimant being verbally dismissed on 11 October 2019 and in writing on 14 October 2019 (2m of issues)

68. Incidents took place between the claimant and Courtney Riley on 12 and 24 September 2019 which resulted in the claimant being asked to attend a meeting to investigate allegations of potential gross misconduct. The allegations were set out in a letter to him of 27 September 2019 sent to him by Courtney Riley (R118). The letter advised that there were 2 allegations being:-

- Allegations of gross misconduct – intimidating conduct behaviour and abusive behaviour to Line Manager in the presence of a customer (September 24th 2019)

- Allegations of general misconduct – failure to follow reasonable management instructions (September 12th and 24th)

69. The claimant was invited to an investigation meeting on 30 September 2019 to offer an explanation or comment on the allegations that had been made. The meeting was to be chaired by John McNeil (General Manager, Canal Point) with Martha Cluness (General Manager, Arran House) there to take notes.

70. The letter was intended to be delivered by hand to the claimant by Courtney Riley but they did not appear to be on shift at the same time and the claimant was advised that there was a letter in his locker for him. He had an exchange

of messages with a colleague Andy McDonnell on that issue and the claimant asked Mr McDonnell to read the letter to him (R119/120). The claimant was aware it was likely to be "discipline" in that exchange of messages.

71. For the investigatory meeting he wished a fellow Facilities Assistant to be present. He was advised that the meeting on 30 September 2019 was not a disciplinary meeting but investigation and so in terms of the policy no representation was appropriate at that stage (R122/124).

72. Courtney Riley and a witness to the incident of 24 September 2019 supplied statements to Mr McNeil (R125/126). The claimant was interviewed by Mr McNeil on 30 September 2019 conform to notes of that meeting (R127/132) and typed version (R133/134).

73. The interview with Dalia Koleva who witnessed the incident on 24 September 2019 was noted (R135) as was the meeting with Courtney Riley (R136).

Incident of 12 September 2019

74. On this incident the claimant was engaged in a "painting job" and received messages from Courtney Riley which began around 17.40pm saying "Get man – come down and man the post at reception please" as he was leaving. The claimant believed that Courtney Riley was scheduled to work until 18.30pm (to the best of his recollection). The claimant suggested that he "close the shutter" as he was mid painting and it would take him time to tidy up but Courtney Rily indicated that someone required to be on hand at the desk. The claimant indicated that he would be "over once I finish painting" and also that he would "send an email tonight regarding my flights and hotel in Bristol on the 24th of this month".

75. Around 7.45 Mr Riley messaged the claimant saying "I'm leaving in 5 minutes. You've got to be in the front desk man. Can't have the shutter down at this time of day PS … flights/hotel?"

76. The claimant responded to say:-

> "I'll be over as soon as I'm finished. The more you message the longer it will take. Literally finishing up just go. I have a meeting in Bristol on the 24th of this month with the Student Housing Company". (R107)

77. Within the witness statement of the claimant he advised that he arrived at the office and explained to Courtney Riley that "I did not understand his message". That seemed to be on the use of the words "Get man". He then states:-

> "I was not given the opportunity to explain further when he called me a "mongo" for not being able to follow a simple instruction. Again Courtney had a personal friend with him at this time. This friend called me a "fucking retard". I had been assembling and building a new IKEA cube table and then painting this with gloss paint in another part of Brae House when the first request had been made to return to reception…….. This had the impact of ruining my day and my thoughts and causing anguish which on occasion could lead into the following day".

78. The essence of this complaint was that Courtney Riley had requested the claimant to man the front desk and the claimant's response was that he would do that once he had finished his painting job and the circumstances were taken to be a refusal to follow a reasonable instruction.

Incident of 24 September 2019

79. In respect of this incident the description of the matter given by Courtney Riley was read to the claimant which stated that:-

> "Conor approached me in the office to speak about his trip to Bristol and the current FA vacancy. There was a customer at reception,

where I was sat, so I said we will speak about it later. He insisted that we have the conversation here and now (in front of the customer – Ellie Buckley) and I stated again that we will do it later. He insisted again that we have the conversation here and now because he won't have it "anywhere else but here". He asked about Bristol, I told him that the flights and accommodation is cancelled because of the dates being muddled (by him). He said that there was no point cancelling all his appointments in that case. He then stormed off calling me a "fucking arsehole" then slammed the door behind him. That left a stiff awkward air about the place. The student then proceeded to ease the tension in the room when she half joked to me that "You are having a bad day at work, it seems". Dalia our admin was witness to the whole exchange from the parcel room". (R125)

80. The statement from Dalia Koleva confirmed the essence of this allegation including in particular that the claimant had sworn at Courtney Riley after pressing him to speak to him on the "Bristol meeting" (R126).

81. In the investigatory meeting the claimant admitted to calling him a name but "I called him a dick not an arsehole". He stated that "he had gone to reception to discuss the day FA role and Bristol. I went in to discuss that and why he had not responded to my email. I was sitting at the front desk and Dalia was there. I asked him about Bristol first of all. I was told I had cost the company too much money for Bristol and it would not be getting rebooked. I then went to try and argue the point by apologising for my mistake but it was his responsibility to book it. At that point that was when the atmosphere changed. I then went on to ask would he rebook and that I sent an email on this stating I was sorry and that I would still like to go. He responded with a swift no you are not going, it's too late. That's when I went into the day FA role after that. I proceeded to start talking about it then and that I want to discuss the day FA job now. I started the conversation by leading that the job has been live by HR for 3 weeks and it has been on intranet at the time for 12 days. On 3 occasions I was interrupted including on that one occasion

and was told we would speak about it later. On the last occasion I was told that he was "fucking telling me that we would speak about it later – he also pointed at me".(R127/128)

82. The Investigation Manager John McNeil recommended that there be a disciplinary hearing on the allegations and by letter of 2 October 2019 the claimant was invited to a disciplinary meeting to be held on 4 October 2019. The claimant intimated a "Statement of Fitness for Work" indicating he was not fit for work until 11 October 2019 (R143) and so the hearing was rearranged to 11 October 2019 (R140 and 144). The 2 allegations were repeated. Joe Stoic was to chair the disciplinary hearing.

83. The notes of the disciplinary hearing (R152/R157) disclosed that in the course of the hearing the claimant handed a note to Mr Stoic indicating:-

> "Before we start I would like this noted.
>
> I have been diagnosed with Adult ADHD for some years now. I also have a form of Autism. I suffer from anxiety. All of this affects my mental health and the way I process things.
>
> Courtney and Lindsay are well aware of this as I have attended appointments with my occupational therapist whilst employed in this job".

84. In the disciplinary hearing the claimant advised that he wanted to speak to Mr Courtney Riley on 24 September 2019 on the trip to Bristol and the FA role that he had been "promised to by Courtney and also his Line Manager" but "he does not get back to me" and "so on that day I wanted to talk to him there and then about it". He was asked if he had found the behaviour acceptable and indicated "looking back I am very honest but I feel that I said to him that what I think but in the way I said it could have been done differently, as I would not like to say it in a way it would hurt someone's feelings. If I am being honest, yes I would have dealt with it differently".

85. On the incident of 12 September the claimant advised he had no problem going to the desk but his problem was the "get man" in the first message from Courtney Riley who he understood was on until 6.30pm and the text was sent at 17.10pm and so he did not think that Mr Courtney Riley could "steal time from the company".

86. The claimant advised that he would want to make more complaints regarding Courtney Riley but he would want to do that "in my own time as that's how my brain works".

87. The meeting was adjourned and on resumption the claimant was advised that he was dismissed on the grounds that it is "unacceptable behaviour to speak with a work colleague the way you did. So on the grounds of gross misconduct and that the behaviour may bring the company into disrepute. We can't have these behaviours shown in front of our customers". The claimant asked if he was being dismissed on both issues and was told that it was in relation to the swearing at the Manager in front of a customer as this was likely to bring the company into disrepute. He was advised it would be put in writing.

88. A letter was then sent to the claimant on 14 October 2019 (R161) advising of the outcome of the disciplinary hearing namely that he was dismissed on the allegation of his behaviour to a Line Manager in the presence of a customer on 24 September 2019. It was stated:-

> "While I understand that you claim there have been bad management practices at Brae House and that you plan to raise a grievance about Courtney Riley, swearing at a colleague at the reception desk where anyone could have heard and a student did hear is something that cannot be tolerated. You agreed during our meeting that it is not acceptable. I believe this could be classed as violent, abusive, indecent or intimidating conduct which could damage the reputation of the company and could bring it into disrepute. You have

suggested there are bad management practices at Brae House. I would ask that you do raise your concerns so that they can be investigated fully".

89. In respect of the allegation on the incident of 12 September 2019 it was indicated that had he not been dismissed for gross misconduct he would have been issued with a written warning effective for a period of 12 months.

90. The background to this incident was that the claimant was to attend a respondent seminar on Health and Safety in Bristol (his colleagues had appointed him as their representative earlier in the year) but in supplying the information on travel bookings he had got the dates wrong. He had wanted to see if the bookings could be rearranged so he could attend. There had been an email exchange with Courtney Riley on 23 September 2019 on the issue (R111/112) and the "FA post" which interested the claimant and he was asked by Courtney Riley " why don't you pop in tomorrow and we can talk about it?" When he went to the office on 24 September 2019 he was told by Courtney Riley "I'm busy" which in his witness statement the claimant said "progressed until the tone from Courtney Rily became "pointed and aggressive" and he said "I told you I do not have the fucking time". I responded with words to the effect of "fucking arsehole" or "fucking dick". It was accepted that there was a student in the area on this exchange.

91. Mr Stoic confirmed that the dismissal of the claimant was in relation to "allegation 1" namely swearing at his superior in front of a customer. He was asked if he thought the claimant may have been acting on impulse at the time and advised that it could be "a reaction" and "I could not see how a normal could result in that so could be impulsive or reaction" He was also asked whether he thought that the claimant was "uncontrolled at the time" and suggested that this might be to do with the claimant's ADHD. Mr Stoic's response was that the claimant may have been "uncontrolled" but this was not acceptable behaviour. He was not sure he "completely understood the question" but from what he heard thought that the claimant was in control of what he said and "not think was as a result of ADHD". His purpose in the

disciplinary hearing was to find out the claimant's position and give him an opportunity to say what he wanted to say about the matter. However he indicated he "could have asked more" about the claimant's disability and was not clear how that affected him and "could have investigated further". His call to HR had not suggested further enquiry. At the time the claimant did confirm that he wished to raise a grievance against Courtney Riley.

On 13 October Joe Stoic and/or CR and/or other employees of the respondent magnifying the claimant's handwritten note in relation to his disability and leaving that lying for a number of days (2m of issues)

92. On 13 October 2019 the claimant was sent a message by his colleague Andrew McDonnell to say that the handwritten note given to Mr Stoic at the disciplinary hearing had been found at the communal office printer. It had been left there from approximately 1pm on Friday 11 October 2019.

93. The claimant states that he was "distraught that my disabilities had been made public knowledge to anyone happening to walk by. I was not secretive about them but I felt it wholly inappropriate that a private and confidential message meant for the decision maker in a disciplinary process had felt it acceptable to leave this in such a public space". He stated that students of the service used the printer and other administrative staff. He advised the note had been "magnified" onto A3 paper. A photograph of the top of the photocopier machine was produced (R159/160). The copy left was of the note handed to the disciplinary hearing (R158). In his witness statement the claimant advised "this was retaliation from Courtney Rily and I felt violated". In his oral evidence he confirmed it was not wrong to copy the note but why should it be magnified and "think Courtney did this" and that "probably Courtney Rily did this" as he would pass the copier and use the copier during the day.

94. The evidence from Joe Stoic was that he did make a copy of the note that the claimant had passed to him at the disciplinary hearing. He went to the office to do this. He was unfamiliar with the copier as it was not his normal

workplace. The copier did not work straight away. He was made aware that he had left a copy of the note and was extremely disappointed that a copy had been left. He had tried to copy the document manually and nothing had come out of the machine. He was "genuinely sorry and it was genuinely a mistake". He confirmed that the copy that he took away had come out on A3 which he had folded in half. He presumed that was the standard setting and it had unintentionally made the document larger.

95. The leaving of the note regarding the claimant's disability was treated as a data breach and the appropriate form raised by the respondent (R238/239).

Appeal against dismissal

96. On 20 October 2019 the claimant intimated an appeal against dismissal (R164/165). The appeal covered a number of matters. It alleged that Mr Stoic had failed to deal with the allegations in a considered or reasonable manner and that the outcome letter had provided "no information in support of the decision reached or any detail whatsoever on the evidence which has been considered as part of the process". He was criticised for taking little time to reach a decision and that there was insufficient investigation into the circumstances and it was more likely that the witness Dalia Koleva had not heard Courtney Riley using the words "I am accused of and mistakenly attributing them to me, if those words were heard at all".

97. The appeal was taken by Lynda O'Kelly, Cluster Manager based in Cork who had no knowledge of the claimant.

98. In the first instance she met with the claimant on or around 14 November 2019 when he was accompanied by Mr Law. Notes were taken of that meeting (R186/192). It was explained that the claimant would argue that the "decision arising from disability - as alleged actions that led to dismissal are due to or could be due to the disability that Conor suffers from". On the second allegation that led to a written warning this was "not a reasonable managerial request as Courtney not due to finish his shifts till later that day,

also H&S issue that was present in the room where Conor was working at the time. He was working with gloss paint". As regards the note handed to the disciplinary meeting it was claimed that there was a "major breach of confidentiality" as "I provided a note stating that I suffer from ADHD and on the spectrum for autism, I provided this to Joe. Joe went into the office and photocopied it onto A3 paper and then left on their printer for 4 days. This was in Brae House. My colleagues know I suffer, but this has been left on printer where Managers, FAs, anyone dropping off post can see in plain sight".

99. The claimant indicated that he had called Courtney Riley a "fucking dick but the way I have seen the statement is that I swore a lot more, but I swore twice and then walked away". He referred to Courtney Riley using bad language on many occasions. He advised that he would not be able to go back to work because of "trust" in that he could not go back to work for someone who "threatens me and gets his friends in to intimidate me". He was not sure if he could return if Courtney was not there. He would have to consider matters on whatever outcome was reached.

100. The meeting notes were sent to the claimant on 15 November 2019 for him to review and return with any comments and certain adjustments were made.

101. Ms O'Kelly also met with Courtney Riley on 21 November 2019 (R210/212). He confirmed that at the incident involving the first allegation the claimant had "stormed out and looked back and said you fucking arsehole" and that the student had said "you are having a bad day". Statements were also taken from Joe Stoic (R217/218); John McNeil (R205); Craig Burns (R202/203) and Dalia Koleva (R204) whose position was that the claimant had sworn at Courtney Riley in front of the student customer.

102. By letter of 6 December 2019 (R228/229) the claimant was advised that the outcome of the appeal hearing was that the dismissal was overturned and in its place a formal written warning issued effective for a period of 12 months from 11 October 2019. The reasons given were that the claimant had no

previous disciplinary record; the relationship between the claimant and Courtney Riley seemed to have broken down some time ago but no formal complaint made by either party, only informal verbal complaints; foul language seemed to be commonplace within the workplace at Brae House; the claimant had admitted to using foul language in the reception in front of a student but had shown some remorse at the disciplinary hearing in indicating that it "could have been done differently".

103. On allegation 2 the finding was a belief that the claimant had not taken reasonable instruction from Courtney Riley "perhaps due to the breakdown in your relationship, but this is not enough of a reason not to follow instruction from your Manager".

104. In her witness statement Ms O'Kelly stated that she had taken into consideration the disability of the claimant in her assessment. However in oral evidence she advised she did not consider that impacted on the outcome "in her experience of the disability". She was asked what experience she had in the matter and advised that an adult family member had been diagnosed with ADHD approximately 4 year and while recognising the symptoms described in the letter from the Consultant Psychiatrist (C105) did not consider the condition meant that an individual could not recognise right from wrong. The disability did not, in the view of Ms O'Kelly, excuse the claimant's behaviour but there were other factors at play sufficient to mitigate the sanction.

105. The effect was that the claimant was reinstated with immediate effect and would receive back pay for any period during which he was not paid or did not receive company sick, payment to be made into his bank account later that month.

106. There then followed some correspondence from the claimant as to whether or not Courtney Riley would be at work when he was there. The Tribunal was advised that Courtney Rily left the employment of the respondent on or around 12 December 2019 on performance management issues.

Complaint against Courtney Rily

107. Prior to the appeal hearing the claimant intimated a grievance against Courtney Riley by letter of 26 October 2019 (R169/170). It was treated as a complaint. There were 7 allegations being (in summary):-

Allegation 1 – incident where Courtney Riley said “Do you want beef” to the claimant

Allegation 2 – an incident involving a destiny student staff member and a package received containing a Stanley knife

Allegation 3 – Courtney Riley inviting friends into the office area when he was subjected to jokes and comments pertaining to his mental health

Allegation 4 – Courtney Riley using unacceptable language within the office area

Allegation 5 – Courtney Riley rarely being in the office and routinely arriving late and leaving early and being absent for extended periods in the day

Allegation 6 – communication attempts with Courtney Riley were routinely ignored and his manner of response rude and inappropriate

Allegation 7 – on several occasions Courtney Rily had contacted the claimant excessively and inappropriately during non-work hours and when absent from work due to illness. In particular an attempt at contact was made on 25 October 2019 after employment ended

108. Niamh Banks, Area Manager, Dublin South was appointed to investigate the complaints raised and invited the claimant to a meeting on 12 November

2019 (R174) subsequently amended to 18 November 2019. The notes of that meeting with the claimant (R195/200) covered the 7 allegations and the claimant was given time to add any further information.

109. On 12 November 2019 Niamh Banks met with Craig Burns (R180/181); Courtney Riley (R182/185) and on 28 November 2019 Lindsay Symmons (R214/215); and Charis Rothwell (R216). Niamh Banks concluded her investigation and submitted a report on the complaint on 5 December 2019. (R225/226). The outcome was subsequently intimated to the claimant on 9 December 2019. The complaint was partially upheld:-

> Allegation (a) was upheld. Although it was stated that the "specifics of date and time" were not completely recalled there were "corroborating statements to show that there was on at least one occasion a situation where Courtney used intimidating body language and aggressive language towards Conor".
>
> Allegation (b). This was not upheld.
>
> Allegation (c). This was partly upheld in that although there was on occasion a non-member of staff in the office there was not sufficient evidence to show that derogatory comments or jokes were made specifically at any one member of staff. However having non-staff on site regularly could be construed as unprofessional and not conducive to a good working environment.
>
> Allegation (d). This was partly upheld. While there was a general culture of casual language on site that extended to all members of staff there was a concern over how Courtney Riley conducted himself in relation to language and comments towards staff.
>
> Allegation (e). This was not upheld as there was flexibility around child care and business needs in relation to working hours agreed

between Courtney Riley and his Area Manager. There was no evidence to prove there was excessive absenteeism.

Allegation (f). This was upheld in that it seemed communication between "Courtney Riley and Conor Adamson was strained and difficult and that Courtney did not reply to Conor in a timely manner" and "It also does not appear that Courtney took into consideration Conor's ADHD and although no request for adjustments had been requested, consideration could have been made to ensure easier communication between the two of them".

Allegation (g). This was not upheld as there was no evidence of excessive or inappropriate contact out of hours.

110. It was recommended that there be a disciplinary investigation into how "Courtney Rily conducts himself with other members of staff" as his behaviour could be seen as "not setting a good example for staff" and that there also be some retraining of staff.

Injury to Feelings

111. The claimant advised that he continued to be unfit for work as at the date of hearing. He stated that his disabilities meant that he "continued to suffer work related stress and anxiety".

112. He states that it was only at the appeal hearing against dismissal that he felt he was being "listened to and that was also his perception within the complaint raised regarding the actings of Courtney Riley.

113. So far as the outcome of the complaints raised was concerned he felt "relieved" that it was becoming clear that Courtney Riley had treated him poorly but there was no apology for the bullying and harassment that he considered he had faced. He continued to feel "victimised" as it appeared to

him that whilst he had been dismissed for gross misconduct for swearing Courtney Riley remained in the job having been found to do the same thing.

114. On hearing that his dismissal had been overturned he felt "elated that I had in some ways been vindicated" but still thereafter struggled to envisage returning to work "not knowing how many people knew of my handwritten note that had been left on the copier or about the series of events that led to my wrongful dismissal". He had not returned to work on the date of the hearing and had submitted the appropriate statements of fitness to work.

Submissions

For the Claimant

115. It was submitted that reliance was placed on the amended List of Issues both in respect of section 15 of the Equality Act 2010 (unfavourable treatment arising in consequence of disability) and section 26 of the Equality Act 2010 (harassment). It was submitted that the issues could be categorised either as breaches of section 15 or as breaches of section 26.

116. In relation to issue 2(l) which related to 4 occasions between July and September 2019 when Courtney Riley brought a friend into the office and made jokes about the claimant and his mental health reference was made to those matters being dated 19 July 2019 (reference within paragraph 26 of ET1 and paragraph 25 of claimant witness statement) (12 September 2019) (witness statement paragraph 32); August 2019 (evidence at hearing) and last week June/early July 2019 friends of CR in office whispering and making jokes referred to in evidence at hearing).

117. It was submitted that no knowledge was needed for the complaint of harassment to succeed and that there was a 3 stage test outlined in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 (1) identifying the unwanted conduct, (2) whether the purpose or effect led to a hostile or

adverse environment and (3) whether this was related to the relevant protected characteristic.

118. In the case of **English v Thomas Sanderson Blinds** [2008] EWCA Civ 1421 held that there was no need for knowledge of the protected characteristic.

119. So far as section 15 of the Equality Act was concerned reference was made to **City of York v Grossett** [2018] EWCA Civ 1105. There it was stressed that the issues that required to be investigated was whether (a) the unfavourable treatment was because of an identified "something" and (b) that "something" arose in consequence of the disability.

120. It was not necessary to say that the respondent was aware of any causal link if there was a causal link between the disability and that "something".

121. Insofar as 2(m) of the issues was concerned where the claimant swore at Courtney Riley the submission was that happened as a consequence of the claimant being prone to impulsive behaviour as a result of his disability of ADHD.

122. It was sufficient for the "something" to have a material influence on the decision and in this case that was made out (**Baldeh v Churches Housing Association of Dudley and District** [2019] 3WLUK710).

123. In this case it was impossible to ignore that Courtney Riley was not present as a witness in relation to issues 2(a) – (l). The respondents had not apparently made any effort to contact him. The best evidence to rebut the claims by the claimant had not been led. The "second best evidence" from the respondent would have been to lead evidence of what Courtney Riley said of these matters but none of that had been led by the respondent. The inferences had to be drawn in the absence of either of those lines of evidence that these complaints made by the claimant were true. While there may be issues on lack of notice for certain of these matters that was not true of them all.

124. It was submitted that there was a continuous course of conduct because the dismissal relied on at 2(m) of the issues could be part of that continuous course of conduct involving Courtney Riley. The dismissal was the culmination of that course of conduct. That took place in October 2019 and so no time bar arose.

125. In that respect reliance was placed on **Aziz v FDA** [2010] EWCA Civ 304 which indicated that regard should be had as to whether the same individuals or different individuals were involved as a factor in determining whether there was a continuous course of conduct and in this case Courtney Riley was the common factor.

126. So far as it might be claimed that dismissal was a proportionate act to achieve a legitimate aim the respondent had of course overturned the dismissal on appeal as being too severe and so there was evidence it was not proportionate.

127. So far as remedy was concerned it was stated this should be at the "bottom of the high band" of the Vento scale or the top of the middle band. It had been continuing conduct and the claimant had given evidence on the severe effects on him. While the appeal had sought to reinstate the claimant the harm had been done by the dismissal.

For the Respondent

128. It was submitted for the respondent that the 2 types of claim under section 26 and section 15 of the Equality Act 2010 were very different. Albeit the allegations referred to a foundation for both those sections allegations would require to be categorised under one or other. It was very unusual to find that there could be overlap.

Jurisdiction

129. It was submitted that the Tribunal had no jurisdiction to hear the claims 2(a) – (l) as they were all out of time. There had been no application made to the Tribunal to extend time or adjust an equitable basis and these issues could only qualify for consideration if they were part of a continuous course of conduct linked to issues 2(m) and (n).

130. The 2 hurdles were (1) the necessity to prove that either 2(m) or (n) were acts of discrimination. If not there was no continuing act and (2) even if 2(m) or (n) were discriminatory acts it could not be shown that there was a connection to the previous incidents. If they were unable to be linked then all previous acts were out of time.

131. So far as the particular acts were concerned 2(a) was not a claim of harassment or under section 15. The unwanted conduct did not relate to the protected characteristic. The evidence presented showed that the claimant was happy to communicate by Whatsapp or email. On some of these matters he was shown to have emailed Courtney Riley at his initiation. There was a free flow of communication. At no stage did the claimant ever say that he should not be contacted in this way. The claimant when asked how he communicated indicated he did so by slack the type of Whatsapp used in the building.

132. At 2(f) the claimant was told to “stop being an idiot”. This could only be an allegation of harassment. There was no previous reference to this claim and it was now far too late for it to be advanced. No application had been made for amendment.

133. Even if the claim was allowed the fact that it had never been raised before meant the Tribunal had to decide if it ever occurred. When the claimant made a complaint to Ms Symmons he talked of management style delay, slow on his overtime but did not say that he had been spoken to in this way.

Even if it had happened it was not related to his disability. Courtney Riley simply wanted his friend to be allowed in.

134. Again on the issue 2(g) this could only be a section 26 claim. It was always accepted that there had been an altercation between Courtney Riley and the claimant. Mr Burns said that this had nothing to do with his condition but to do with overtime or possibly administrative tasks. The matter was investigated. It may have been unprofessional but it wasn't to do with the claimant's disability.

135. Insofar as 2(h) was concerned the claimant was asked to do a rota. The evidence was that the claimant had wanted to acquire different skills. He indicated to Mr Riley he was too busy to do that and that was the end of the matter. There was no unwanted conduct related to the disability.

136. So far as the comments were alleged under 2(i) these could only be section 26 claims. The issue was whether on balance these things happened. They were not on the ET1; not in the PH Agenda when the claimant had assistance of a Trade Union representative. It was astounding if they had not been referred to if they had occurred and even more inexplicable as in the investigation meeting, disciplinary meeting, appeal meeting and complaint specific to Courtney Riley no mention had been made of being called a "Mongol" or a "retard" or "pathetic" as he "can't understand messages".

137. While the claimant records Courtney Riley using bad language there is no mention made of these matters and it was not at all credible that they took place.

138. Insofar as the absence of Mr Riley was concerned he had left the respondent in 2019 and no-one knew where. There was no need to call Mr Riley before the claimant had produced his witness statement populated with new issues. Prior to that time it was possible to look at documents in relation to matters which had been raised and investigated. It was very prejudicial to have new issues raised on the Sunday before the Tribunal for the first time. These

matters had not been raised with Ms Symmons at the 60 day review and they should be rejected.

139. Insofar as 2(j) was concerned and Mr Riley discussing the claimant's disabilities with friends there was no evidence of these matters.

140. Insofar as allegation 2(k) was concerned again this was entirely new and the same point was made regarding notice and the lack of any reference to this allegation previously.

141. The allegation at 2(l) referred to 2(i) and again should be rejected. Again this allegation of jokes being made was a new matter and was not in the claimant's witness statement or elsewhere.

142. In any event all these issues were out of time and should be rejected.

143. It was stated that the dismissal should be considered under section 15 and not on matters related to the claimant's disability but as something arising as a consequence of disability.

144. The only evidence put forward as to the disability in respect of this incident was ADHD and there was no evidence to say that that condition caused a person to be abusive or unable to know right from wrong. The evidence only showed that there was impulsivity on someone with that condition. That did not mean that impulsivity led to an individual shouting and swearing. The evidence of Ms O'Kelly was to the effect that her experience of the condition was that knowledge of right and wrong was not overcome. If the claimant's position was that in his case that impulsivity did lead to that abuse then there was no medical evidence to support that proposition.

145. If the incident of 24 September 2019 was truly spur of the moment then there was plenty of time for the claimant to have apologised after the event. But he did not do so. There was a great deal of evidence to show that he regarded the conduct as unacceptable but he did nothing to apologise or explain. The

outburst was only to do with the fact that he did not like Mr Riley and that he got angry. He states that in any event this was language used by Mr Riley. It is inconsistent to say that justified the language and to say that it was caused by disability. The crucial link had not been shown to exist.

146. Even if the conduct was caused by something arising from disability it was a legitimate aim to protect the respondent's reputation for dismissal. The exchange had taken place in front of a customer and they had a reputation to uphold.

147. The fact that there was a more lenient view taken on appeal should not be held against the employer. It was simply a different view of the matter. There was justification to appeal.

148. So far as 2(n) was concerned Mr Stoic had clarified the whole issue of the note being left on the copier. The allegation was that Mr Riley must have come along and made a copy or magnified it and left it on the copier but there was no evidence to support that position.

149. Insofar as it was claimed to be an act of harassment the note did not refer to the claimant; the claimant confirmed that some in the office knew of his condition; the note was anonymous and there was no basis to say it had been done with any intent.

150. On the issue of jurisdiction it could only be if the dismissal and the leaving of the note could be considered to be somehow connected to the earlier allegations could the Tribunal have jurisdiction on these matters.

151. All the matters at 2(a) – (l) concern Mr Riley and as was made clear in **Aziz** a factor in the assessment was whether or not the same person was involved. It was clear that the only person involved in the dismissal and the leaving of the note on the copier was Mr Stoic.

152. In relation to remedy it was significant that matters had not been raised at the relevant time and the question arose as to whether there was in fact any injury.

153. So far as dismissal was concerned he was reinstated and so there was no loss of earnings.

154. There was no deliberate intent as regards the leaving of the note and that was a significant factor.

Conclusions

The Relevant Law

Harassment

155. The general definition of harassment is set out in section 26(1) of the Equality Act 2010 and applies to all protected characteristics except marriage and civil partnership and pregnancy and maternity. It states that a person (A) harasses another (B) if:-

- A engages in unwanted conduct related to a relevant protected characteristic – s.26(1)(a); and

- 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 – s.26(1)(b)

156. The 3 essential elements of harassment are (a) unwanted conduct (b) which has the proscribed purpose or effect and (c) which relates to a relevant protected characteristic.

157. In this case the relevant protected characteristic is disability.

158. A standalone claim of harassment under section 26 does not require a comparative approach. It is not necessary for the worker to show that

another person was, or would have been, treated more favourably. Instead he or she simply needs to establish a link between the harassment and the protected characteristic. In **Pemberton v Inwood** [2018] IRLR 542 Lord Underhill took the opportunity to revisit guidance he had given in **Dhaliwal** to address what he identified as a subtle change in the wording of section 26 as compared to earlier formulations. He stated that in order to decide whether any conduct has either of the proscribed effects (purpose or effect) a Tribunal must consider both whether the victim perceives themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). He went on to observe that the relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated or an adverse environment created then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them then it should not be found to have done so.

159. It is also the case that Tribunals should be sensitive to the hurt that can be caused by offensive comments or conduct but it is important not to encourage a "culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase". The context of a remark remains important.

160. As indicated harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. A claim based on purpose would plainly require an analysis of the alleged harasser's motive or intention. That may require an Employment Tribunal to draw inferences as to what the true motive or intent actually was.

161. Where the claim simply relies on the "effect of the conduct in question" the perpetrator's motive or intention (which could be entirely innocent) is irrelevant. The test in that regard has the subjective and objective elements to it.

162. The conduct must be "related to" a relevant protected characteristic.

163. Whilst the view of a complainant that the conduct in question is related to the protected characteristic is relevant it is not determinative. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495 it was stated that a Tribunal needs to "articulate distinctly and with sufficient clarity what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged". It is necessary to find some identifiable reason for the conduct to have been related to the characteristic relied upon.

Discrimination arising from Disability

164. By virtue of section 15(1) of the Equality Act 2010 "a person (A) discriminates against a disabled person (B) if:-

- A treats B unfavourably because of something arising in consequence of B's disability and

- A cannot show that the treatment is a proportionate means of achieving a legitimate aim"

165. If an employer can establish that it was unaware that the claimant was disabled it cannot be held liable for discrimination arising from disability. There was no issue here that the employer was unaware of the claimant's disability.

166. To succeed a claimant must establish:-

(a) that he or she has suffered unfavourable treatment

(b) that that treatment is because of something arising in consequence of his or her disability

167. As it was put in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC65 section 15 "raises 2 simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?"

168. There is no requirement that the disabled person has to establish less favourable treatment than that experienced by a comparator.

169. The "something" that causes the unfavourable treatment need not be the main or sole reason but must at least have a significant (more than trivial) influence on the unfavourable treatment and so amount to an effective reason or cause for it (**Pnaiser v NHS England** [2016] IRLR 170).

170. In relation to the defence of proportionate means then there is a need to attempt to balance the prejudice to the employee of losing his job for something arising out of disability against the need to show a legitimate aim. An employer would require to engage with the legitimate aim.

171. In **Urso v Department of Work and Pensions** [2017] IRLR 304 it was held that an actual dismissal can also be an act of harassment. A dismissal can be an affront to the claimant's dignity and so come within section 26. As distinct from a "constructive dismissal" an actual dismissal could be treated as either a breach of section 26 or section 15 or both.

Conclusions

172. The Tribunal have sought to explain within the findings why it is that certain of the acts of "unwanted conduct" could not on the evidence be relied upon as a basis of claim.

173. As regards 2(f) the view of the Tribunal is that this allegation was an allegation of harassment under section 26 of the Equality Act 2010 but was an allegation raised too late in the day to be capable of fair disposal. In any

event the Tribunal did not consider that even if it had been made out the claimant considered it as being an act that had the effect of violating his dignity or creating an adverse environment for him. There were numerous opportunities for the claimant to have raised this matter. The lack of any complaint over a period of 2 years was sufficient indication for the Tribunal to consider that the conduct did not have that effect on the claimant. The Tribunal were satisfied that even if the comment was made it was not one which the claimant took to be related to his disability such that his dignity was violated or an adverse environment created.

174. On issue 2(g) the Tribunal considered that the incident should be considered under s26 of the Equality Act 2010. However the Tribunal considered that this incident came about as a result of a heated argument between the claimant and Courtney Riley and was not related to his disability or (even if considered under s15) unfavourable treatment because of something arising in consequence of his disability. The Tribunal did not consider that the context of the matter signified that the claimant was being "picked on" on account of his disability by Courtney Riley. There was no particular articulation given to the Tribunal of how it was that this outburst related to the claimant's disability. The Tribunal were unable to articulate with sufficient clarity what features of the facts would lead to the conclusion that the conduct did relate to his disability.

175. On issue 2(h) the Tribunal again have sought to explain in the findings why it is that they did not consider the request to perform "rotas and budgets" was related to the claimant's disability or was unfavourable treatment because of something arising out of his disability. The claimant accepted that he had asked to be given different tasks to develop his skills. The Tribunal did not consider that the context of matters meant that Courtney Riley was deliberately goading the claimant by asking him to perform these tasks in the "turnaround" period. A request was made and the claimant explained he was too busy at that particular time to be engaged in "rotas and budgets" and so the matter was dropped. The Tribunal were unable to make a finding that the claimant was deliberately goaded in this way so that there was unwanted

conduct related to his disability or there was unfavourable treatment because of something arising out of his disability.

176. On issues 2(i)/(l) the Tribunal have again sought to explain why they consider that they could not take into account the issues raised at 2(i) and 2(k). However they were satisfied that the claimant had been called a "fucking retard" by a friend(s) of Courtney Riley and that the claimant had been laughed at by Courtney Riley's friend(s) and Courtney Riley himself. They accepted that he had been laughed at and mocked as being a "fucking retard".

177. The unwanted conduct relied upon in the agreed issues which remained for consideration were the issues at 2(a); 2(j) and (l); 2(m) and 2(n).

178. On issue 2(a) the Tribunal did consider that despite requests from the claimant that he have "in person" contact with Courtney Riley and communication "face to face" rather than by text or messages there was no attempt by Courtney Riley to respond to that request and there were communication difficulties as a result. The claimant also complained of any emails he sent being ignored for example in the notes of the disciplinary hearing (R152). In his witness statement he referred to holiday requests being ignored.

179. The Tribunal considered that there was a deterioration over time in communication in this way and that was reflected in the findings by the respondent on the complaint raised by the claimant about communication difficulties between him and Courtney Riley. There was then support from those findings of the complaint on this issue. The Tribunal did consider that there was substance in the claimant being ignored.

180. The Tribunal was satisfied that this was unwanted conduct related to the claimant's disability. The claimant had explained to the respondent that "in person" or "face to face" receipt of instruction or explanation was his preference to prevent any misunderstandings. His condition meant that there

could be difficulty understanding text and Whatsapp messages in that he could sometimes take them the wrong way and not properly interpret their meaning. An example of this in the evidence was the offence that the claimant took in the text on 12 September 2019 commencing "Get man" which might have seemed innocent but to which the claimant clearly took exception as he gave evidence and as recorded in the notes of the investigative hearing (R155) . The Tribunal were satisfied that he did prefer face to face communication because it did enable him to gain a better understanding of any messages received so that they were not misinterpreted. In addition there was the evidence that given the lack of in person contact and the need for the claimant to message his manager he got no response. The Tribunal could not ascribe any motive to Courtney Riley to find any "purpose" in this respect but were satisfied that the "effect" was to violate the claimant's dignity and create an offensive environment for him. The lack of in person communication despite that request and being ignored would violate dignity and lead to increased anxiety and stress in the claimant on account of his condition. The letter from the consultant psychiatrist of 5 May 2020 indicated that a feature of the condition was "low resilience" and so the more likely that the claimant would consider an offensive environment created..

181. In those circumstances therefore the Tribunal did consider that the complaint of harassment under section 26 was made out in respect of this issue. This continued until 11 October 2019 when the claimant was dismissed.

182. On issues 2(j) and (l) the Tribunal were satisfied that the claimant had been mocked as a "fucking retard" perhaps by way of joke by friend(s) of Courtney Riley but self-evidently unwanted conduct related to his disability and which would violate the claimant's dignity and create an offensive or humiliating environment. The comment was made in the presence of Courtney Riley. He took no action to prevent such comment being made. The Tribunal were satisfied that the comment related to the claimant's disability as the friends had been advised about the claimant's disability by Courtney Riley. The Tribunal was also satisfied from the evidence of the claimant that such

comment was accompanied by "laughing and sniggering" not only by the friends but also Courtney Riley. It was also satisfied from the evidence of the claimant that the general mocking occurred over July/September 2019. The Tribunal found that this was an act of harassment under section 26.

183. Issue 2(m) relates to the dismissal of the claimant on 11 October 2019. As indicated in **Urso** (above) dismissal can be an act of harassment under section 26. on the basis that (as distinct from constructive dismissal) an actual dismissal can clearly be seen to have the effect of violating a person's dignity.

184. The unwanted conduct was the dismissal. The issue then is whether or not the dismissal related to the claimant's disability and the Tribunal considered that was the case.

185. The evidence was that the claimant's ADHD led to impulsive behaviour and impetuosity or acting without thinking. The complaint against the claimant was that he swore at his manager, Courtney Riley, when a student customer was in the area.

186. There is no doubt that took place and that the claimant on 24 September 2019 did call Courtney Riley a "fucking arsehole" or "fucking dick". The context of course was that he was seeking a conversation with Courtney Riley who was not willing to engage. That came in the context of the claimant being ignored and there being communication difficulties.

187. It was also the case that bad language was commonplace in the workplace. That was a finding made by the Appeal Officer and it was evident that Courtney Riley also used bad language as common currency.

188. The previous day Courtney Riley had asked the claimant to "pop round tomorrow" to discuss matters. When he did so he was met with an individual who was not prepared to discuss matters at that time. There was no

evidence that Courtney Riley was dealing with anything else at the time which would have prevented him from discussing matters with the claimant. The evidence suggested that the assistant was dealing with the student customer in seeking to find a parcel and that there was no particular ongoing activity by Courtney Riley which would mean he could not speak to the claimant at that time.

189. In the circumstances there was likely to be frustration and irritation by anyone with this particular condition all leading to impetuosity and impulsive behaviour. the Tribunal did consider that the outburst by the claimant in language of common currency within this workplace was related to his disability of ADHD.

190. The dismissal was based on this incident. It was clear that the incident of 12 September 2019 did not affect the decision to dismiss which was based on the outburst. Mr Stoic with hindsight accepted that being made aware of the claimant's disability he could have sought to find out more and make more enquiry as to how the disability might have affected the claimant in the context of this incident.

191. The Tribunal of course respected the experience of Ms O'Kelly. Her position was that she certainly recognised the symptoms of ADHD including impetuosity and impulsive behaviour but that she considered her family member still was aware of the difference between right and wrong. That of course relates to her experience of the condition but the issue here was swearing at the Manager in the context of bad language being common currency within this particular workplace. The Tribunal considered that feature required to be taken into account in an assessment of whether the outburst could be related to the claimant's disability and they found that it was. If that had not been a feature of communication amongst individuals in this workplace then it may be that a line could be drawn between impulsive behaviour and abuse which was not related to disability. However given the irritation and frustration which the Tribunal considered would be apparent in the context of the discussion or refusal to discuss in the meeting with his

manager then the Tribunal did consider that the outburst of swear words was related to the disability.

192. Accordingly they considered that the claimant's dignity was violated by the dismissal and the issue at 2(m) was made out as harassment under s26. The Tribunal did not consider it necessary to further consider if it was also discriminatory under s15 which requires a different analysis.

193. On issue 2(n) it was accepted that Mr Stoic had inadvertently left on the photocopier the note which had been handed in by the claimant at the disciplinary hearing giving information on his disability. There was no evidence that this had been copied or magnified by Courtney Riley as was suggested by the claimant. The magnification of the note seemed to come about as a result of Mr Stoic copying the note onto A3 paper and in that process becoming enlarged.

194. It was submitted that as the note contained no name then the claimant would not be identified. We think that unlikely in the dynamics of an office environment. It was the case that certain individuals were aware of the claimant's condition. In the office environment the Tribunal were of the view that anyone seeing the note which was publicly displayed would have quickly come to a realisation that it concerned the claimant. Office personnel would be aware of Mr Stoic being in the office to meet the claimant. Whether inadvertent or not the Tribunal did consider that the effect of leaving a note on display containing sensitive information on an individual's mental condition to be seen by all was unwanted conduct which would violate a person's dignity and lead to a humiliating environment.

195. It is also of some significance for the Tribunal that the respondent did record the leaving of a note as a data breach emphasising that albeit inadvertent this should not have happened.

Jurisdiction.

196. The general rule is that a complaint of work related discrimination must be presented within the period of 3 months beginning with the date of the act complained of (s.123(1)(a)). However conduct extending over a period is to be treated as done at the end of that period (s.123(3)(a)).

197. Much of the case law on time limits in discrimination cases centres on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts the time limit begins to run when each act is completed whereas if there is continuing discrimination time only begins to run when the last act is completed. This can sometimes be a difficult distinction to make in practice.

198. In this case the date as to whether an act complained of is in time or not is 26 September 2019. If any acts complained of were prior to that date then it would be necessary to rely on either a continuing act of discrimination taking place beyond that date or that it was just and equitable to extend time. It was made clear here that reliance was placed on there being conduct extending over a period and no submission was made in relation to "just and equitable" extension.

199. It is clear that a Tribunal should consider whether the substance of a claimant's allegations is an ongoing situation or a continuing state of affairs as distinct from a succession of unconnected or isolated specific acts. A Tribunal should look at the substance of the complaints in question as opposed to an existence of a policy or regime and determine whether they can be said to be part of a continuing act for which an employer is responsible.

200. In **Aziz v FDA** [2010] EWCA Civ 304 the Court noted that in considering whether separate incidents form part of an act extending over a period "one

relevant but not conclusive factor is whether the same or different individuals were involved in those incidents".

201. The Tribunal have found that the claim of the claimant being ignored was a continuing matter through to his dismissal on 11 October 2019. That claim is in time as are the claims arising from dismissal and the note being left on the copier. From the evidence the acts of the claimant being referred to as a "fucking retard" and being mocked by friends of Courtney Riley (in his presence and being condoned by him) took place prior to 26 September 2019. The last occasion narrated by the claimant in respect of such incident was 12 September 2019. The issue is then whether that claim is part of a continuing act for which the employer is responsible.

202. The complaints found were all harassment complaints and so there is a common and continuing substance in that sense. A common factor in relation to the acts of ignoring the claimant and him being mocked on account of his disability was Courtney Riley. The Tribunal have made the finding that Courtney Riley must have told his friends of the disability of the claimant that led to him being mocked and abused. In the view of the Tribunal those were linked continuing acts which took the position beyond 26 September 2019. Additionally while the dismissal hearing was not taken by Courtney Riley he was the one who reported the claimant for disciplinary purposes and that led to his dismissal. While he did not make the decision to dismiss the Tribunal considered that there were continuing acts to 11 October 2019 under section 26, all arising from the same source.

203. In those circumstances, therefore, the Tribunal did not consider that the mocking and abuse the claimant received from friends of Courtney Riley was time barred.

Remedy

204. The remedy sought in this case was an award in relation to injury to feelings alone. This claim was presented on 24 January 2020 and an assessment requires to be made on the Vento levels in place at that time.

205. The leaving of the note was inadvertent and as was indicated the claimant had not made his condition secret. The dismissal was an affront and can easily be seen to violate dignity. It was overturned on appeal and the claimant would be able to resume working. His manager left around December 2019 which would discontinue the issues on communication and being ignored albeit would affect the claimant over some months and an increase stress and anxiety and create a degrading environment. Clearly the comment by friends of Courtney Riley and being laughed at on account of his disability would be very hurtful for the claimant.

206. The claimant said he had lost trust with his employer. The letter of 5 May 2020 from his consultant psychiatrist indicated that during the claimant's contact with the service he had "highlighted difficulties with mood, anxiety and self-confidence some of which appeared to be in relation to adverse experiences within his workplace". The Statement of Fitness to Work (R257) indicated absence was due to "stress at work" as at 21 April 2020. The Tribunal can see how hurtful the treatment would be but there did not appear to be any lasting psychological damage to the claimant as a consequence of these matters. In the circumstances they considered that cumulative effect should be dealt at mid-level Vento and that an award of £9,500 was appropriate and that is the award made.

207. Finally the Tribunal are conscious that intimation of this Judgment has taken longer than it should due to a combination of circumstances including pressure of other work and apologies are given to parties.

Employment Judge: Jim Young
Date of Judgment: 20 June 2021
Entered in register: 22 June 2021
and copied to parties