



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr M Davies

AND

Respondent

Western Consultancy Services
Ltd t/a Home Instead Senior Care

HELD BY VIDEO (CVP)

ON

12 to 15 July 2021
(parties did not attend on the 15th)

EMPLOYMENT JUDGE GRAY

MEMBERS

MS A SINCLAIR

MRS C EARWAKER

Representation

For the Claimant:

in person

For the Respondent:

Mr D Jones (Counsel)

RESERVED JUDGMENT (LIABILITY ONLY)

The unanimous judgment of the tribunal is that:

- **The complaints of direct discrimination, discrimination arising from disability, breach of the duty to make reasonable adjustments and for unauthorised deductions from wages, all fail and are dismissed.**

REASONS

Background to the Claim

1. In this case the Claimant, claims that he was discriminated against because of a protected characteristic, namely disability. The claim is for direct discrimination, discrimination arising from disability and because of the Respondent's failure to make reasonable adjustments. The Claimant also claims unauthorised deductions from wage.
2. The Respondent concedes that the Claimant is disabled for reason of anxiety only, but contends that it did not have knowledge, and that there was no discrimination or unauthorised deductions.
3. There was a case management preliminary hearing in this claim on the 22 December 2020 before Employment Judge Bax (see pages 30 to 46 of the final hearing bundle).
4. At that hearing the complaints being pursued, the issues raised by those to be determined and the listing of this final hearing (to determine liability only) were agreed.

5. Whether the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 remained in dispute at that time. Following further disclosure, the Respondent confirmed by email dated 12 February 2021 (see page 58 of the final hearing bundle) that it accepted that the Claimant was a disabled person by reason of anxiety only at the times material to this claim. It did not accept that the other asserted impairments of panic attacks, obsessive compulsive disorder, and hypochondria amounted to a disability pursuant to section 6 of the Equality Act.

This Hearing

6. This hearing was conducted by video (CVP) with the parties' agreement.
7. For this hearing we were provided with:
 - a. Final hearing bundle (A PDF file of 200 pages including the index).
 - b. Three witness statements for the Claimant, the Claimant, Victoria Lodge ("VL") and Constance White ("CW").
 - c. Two witness statements for the Respondent, Mike Keig ("MK") and Luisa Keig ("LK").
8. At the start of the hearing the issues were discussed (these had been set out by Employment Judge Bax in his case management summary and can be seen at pages 42 to 46 of the bundle).
9. It was identified that in view of when the claim was submitted, 26 April 2020 (see page 1 of the bundle), and when the ACAS early conciliation took place (the Claimant notified ACAS of the dispute on 2 March 2020 and the certificate was issued on 2 April 2020 (see page 39 of the bundle)), this appeared to raise time limit jurisdictional issues. Complaints about matters on or before the 2 December 2019 were potentially out of time.
10. The parties agreed that time limit jurisdictional issues did arise, although Respondent's Counsel confirmed that it was acknowledged the complaints about pay were a series of deductions, so in time and had the potential to be part of conduct extending over a period for the complaints of discrimination that were on or before the 2 December 2019.
11. The liability issues to be determined at this hearing were agreed as follows (following the input of the parties at the commencement of the hearing noted in bold italics):

1. Disability

1.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Whether the Claimant had a mental impairment. He asserts that he has severe anxiety, panic attacks, obsessive compulsive disorder, and hypochondria from the age of about 14.

At the start of this hearing the Claimant confirmed that although there is reference to depression in his disability impact statement (see page 47 of the bundle) he does not claim that as a disability. The Respondent accepts one of the four alleged impairments, anxiety amounts to a disability at times material to this claim (but disputes knowledge). However, the remaining three, being panic attacks, obsessive compulsive disorder, and hypochondria, remain in dispute.

1.1.2 Did it [***being panic attacks, obsessive compulsive disorder, and hypochondria***] have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

1.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment? The Claimant is prescribed sertraline and has been taking it for many years.

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

1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

1.1.5.2 if not, were they likely to recur?

2. Direct disability discrimination (Equality Act 2010 section 13)

2.1 The Claimant describes himself as disabled.

2.2 Did the Respondent do the following things:

2.2.1 Failing to support the Claimant with his mental health issues, namely:

2.2.1.1 In the first half of 2019, the Claimant experienced a number of panic attacks (which he says come in waves and then there can be a gap in time when he does not have them) and the Claimant was not supported in that the Respondent failed to arrange meetings to try and find a way of resolving the problems.

2.2.1.2 Rather than helping the Claimant he was given more work, particularly after the departure of the deputy manager.

The Claimant confirmed that the alleged impairment/disability he relies upon for these complaints is panic attacks.

2.2.2 Declined to appoint the Claimant to the Deputy Manager/Learning and Development Supervisor role.

The Claimant confirmed that he relies upon all four alleged impairments/disabilities for this complaint.

2.2.3 In about August 2019, requiring the Claimant to provide Manual Handling training, supervisions, 1:1's, client assessments and spot checks which were otherwise part of the Learning and Development Supervisor role and in addition to the Claimant's normal tasks.

The Claimant confirmed that he relies upon all four alleged impairments/disabilities for this complaint.

2.2.4 When the new deputy manager was appointed, in about October 2019, the Claimant was required to continue doing the additional tasks and the deputy manager was not required to undertake them.

The Claimant confirmed that he relies upon all four alleged impairments/disabilities for this complaint.

2.2.5 On about 24 October 2019, 4 November 2019 and 20 December 2019 deducted money from the Claimant's wages because he was off sick with anxiety.

The Claimant relies on the accepted disability of anxiety for this complaint.

2.2.6 On termination of the Claimant's employment deducted money from his final pay in respect of level 5 training he had undertaken but had not completed.

The Claimant confirmed that he relies upon all four alleged impairments/disabilities for this complaint.

2.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than Victoria Lodge, Nikki Gower, and Constance White in relation to sick pay. Otherwise the Claimant compares himself to his colleagues generally and/or a hypothetical comparator.

2.4 If so, was it because of disability?

2.5 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.6 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

It was confirmed by Respondent's Counsel that the question of the Respondent's knowledge about the Claimant's anxiety and the other alleged disabilities is also relevant here.

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 Failing to support the Claimant with his mental health issues, namely:

3.1.1.1 In the first half of 2019, the Claimant experienced a number of panic attacks (which he says come in waves and then there can be a gap in time when he does not have them) and the Claimant was not supported in that the Respondent failed to arrange meetings to try and find a way of resolving the problems.

3.1.1.2 Rather than helping the Claimant he was given more work, particularly after the departure of the deputy manager.

3.1.2 Declined to appoint the Claimant to the Deputy Manager/Learning and Development Supervisor role.

3.1.3 In about August 2019, requiring the Claimant to provide Manual Handling training, supervisions, 1:1's, client assessments and spot checks which were otherwise part of the Learning and Development Supervisor role and in addition to the Claimant's normal tasks.

3.1.4 When the new deputy manager was appointed, in about October 2019, the Claimant was required to continue doing the additional tasks and the deputy manager was not required to undertake them.

3.1.5 On about 24 October 2019, 4 November 2019 and 20 December 2019 deducted money from the Claimant's wages because he was off sick with anxiety.

3.1.6 On termination of the Claimant's employment deducted money from his final pay in respect of level 5 training he had undertaken but had not completed.

3.2 Did the following things arise in consequence of the Claimant's disability? The Claimant's case is that he becomes very anxious and has panic attacks, as a result he cannot face the world and ceases to function properly, which can also cause him to be absent from work.

The Claimant submits that the four impairments are connected here, being hypochondria, aggravated by his obsessive-compulsive disorder which then leads to anxiety and panic attacks.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent will set out the details in its amended response [***the Respondent has done this as can be seen at page 28 of the bundle***]. The Tribunal will decide in particular:

3.4.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.4.2 Could something less discriminatory have been done instead;

3.4.3 How should the needs of the Claimant and the Respondent be balanced?

3.5 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

4.1 Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion, or practice. Did the Respondent have the following PCPs:

4.2.1 A requirement to undertake a full day's work and additional work from other people.

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it was overwhelming and caused him to become anxious and have panic attacks and cease functioning properly?

4.4 Did the Respondent know, or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1 When the Claimant was anxious and/or having a panic attack allowing him to take 5 minutes to try and recover;

4.5.2 Talking to the Claimant about the situation and being supportive about his condition.

4.6 Was it reasonable for the Respondent to have to take those steps and when?

4.7 Did the Respondent fail to take those steps?

5. Unauthorised deductions (Part II of the Employment Rights Act 1996)

5.1 Were the wages paid to the Claimant on about 24 October 2019, 4 November 2019, 20 December 2019 and in his final pay less than the wages he should have been paid?

5.2 Was any deduction required or authorised by statute?

5.3 Was any deduction required or authorised by a written term of the contract?

5.4 Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?

5.5 Did the Claimant agree in writing to the deduction before it was made?

5.6 How much is the Claimant owed?

A. Time limits

a. Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

b. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

ii. If not, was there conduct extending over a period?

iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1. Why were the complaints not made to the Tribunal in time?

2. In any event, is it just and equitable in all the circumstances to extend time?

12. The proposed hearing timetable was confirmed as:

Day 1	3 ½ hours Tribunal reading and preliminary matters 2 hours Claimant's evidence
Day 2	3 hours Claimant's evidence 2 hours Respondent's evidence
Day 3	3 hours Respondent's evidence ½ hour each Closing submissions Deliberations
Day 4	Tribunal deliberations Judgment Directions for remedy if appropriate

13. We heard evidence from the Claimant, CW, MK and LK.
14. Although VL had submitted a witness statement she did not attend the hearing to confirm her evidence or to be questioned on it, so her evidence is given less weight than those witnesses who did attend and were cross examined.
15. The parties then each made oral submissions.
16. The evidence and submissions concluded at just before 11:30am on day three. Although we were ahead of the anticipated timetable after seeking submissions from the parties and the Claimant saying he would prefer written reasons to assist his understanding in view of his mental health issues, it was confirmed that we would reserve our decision and the parties could be released.

The Facts

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

The disability

18. It is not in dispute that the Claimant is disabled by reason of his anxiety at times material to this claim.
19. The Claimant refers to his other conditions, panic attacks, obsessive compulsive disorder, and hypochondria, in the second and third paragraphs of his witness statement:

“I have suffered with health anxiety, panic attacks and obsessive compulsive disorder from a young age. I have been treated for this over the years through various different methods such as cognitive behavioural therapy, counselling and medication. Throughout my time at Home Instead I have been on and off medication as well as receiving various other treatments. Everybody with which I have worked with within the company mainly the office staff were all aware of my issues. (see medical evidence)”

“During the periods of which I experience high levels of health anxiety, panic attacks and obsessive compulsive behaviour which all tie in together for example I get intrusive thoughts that I am going to die of some illness (which is the obsessions and compulsions) and then as a result it heightens the health anxiety and causes panic attacks. People will typically see my behaviour change and they will notice me seeking reassurance from them or from my doctor. The ways in which people will have noticed my behaviour changing will be that I am very tense, low in mood, jittery, not my usual self, seeking reassurance about whether I am going to die of something or stop breathing (dependant on what my fixation of worry is at the time, typically all health related), pacing to and fro, sometimes I have led on my office floor trying to calm myself down and so on. As well as the periods of mental health, it has caused a secondary effect on my body, high blood pressure consequently meaning I am on high blood pressure tablets for life. This is something that was known throughout the staff in the office as I was tested on numerous occasions for high blood pressure with a 24-hour blood pressure monitoring machine which I had on me in the office on a couple of occasions. (see medical evidence)”

20. About these paragraphs the following was confirmed by the Claimant in his oral evidence in response to supplemental questions and cross examination:
 - a. About the medical evidence he refers to in the second paragraph he confirmed that this was generic evidence showing his conditions and not medical evidence to show that people in the office knew about them.
 - b. About the medical evidence he refers to in the third paragraph he confirmed that this was to page 181 of the bundle which records that he returned the blood pressure monitor on the 26 November 2019. We can see that the blood pressure monitor was issued to the Claimant on the 25 November 2019 (see page 182 as well). The Claimant confirmed in cross examination that he did not recall MK or LK being in the workplace when he wore it.
 - c. The Claimant confirmed that where he refers to “health anxiety” in his witness statement he means hypochondria.
21. The Claimant says that he links the impact on him with his four asserted impairments, because he is hypochondriac, he worries of illness and then the obsessive-compulsive disorder aggravates the obsession about this which heightens anxiety and causes panic attacks.
22. We have considered the Claimant’s disability impact statement which was included in the hearing bundle at page 47. This refers to all four impairments and about those it says:

During the period of employment with Home instead from 2015 to 2019 my mental health has varied, sometimes it has been good other times It has been disabling. I have been on various different medications but at the time In 2019 i was taking Sertraline 150mg.

I am unable to state when these issues will stop as they have been ongoing, I just try to manage them with the help of medications and medical professionals. I have also received cognitive behavioural therapy in the past as well as counselling. I am still suffering severely with mental health issues to this present day. I have received medical treatment on going since employment at Home instead, for example in 2018 I was receiving cognitive behavioural therapy.

23. And....

Due to my mental health varying, some days I would be feeling fine and other days not so fine. On the days that I was not feeling fine it would severely impact my ability to carry out my day to day duties at work, for example I would pace back and forth in my office room, id lay on the floor in the office on my back because I was having a panic attack, I would feel dread and fear, I would seek reassurance from other office members, sometimes I couldn't talk because I felt I couldn't breathe due to having a panic attack, I would shake and tremble, I would sweat and my heart would race. When in this state of mind, it impaired my ability to focus, concentrate and do my job.

I had stated in some 1-2-1's, supervisions, appraisals that I suffer with mental health issues. Everyone I worked with in the office was aware on these issues as quite often I would seek reassurance from them. My manager Vicky informed Mike and Luisa about my anxiety as I remember on occasions her asking me if it was ok when chatting with her if she could disclose these issues to Mike and Luisa. I also remember discussing with Mike and Luisa on occasions that I suffer with anxiety.

The effects of my mental health had I not of had medical treatment/medication would have stopped me from working.

24. We note from this that the effects on his activities as asserted by the Claimant in his written evidence, with and without reference to his anxiety, are the same. The substantial adverse effect arises from the cumulative impact of all, hence why the impact described is the same with or without the impairment of anxiety in the evidential mix.

25. In cross examination the Claimant explained that absence was a consequence of his alleged disabilities as well as the need to attend Doctor's appointments. He also explained that his sleeping was impacted. Also, his eating when, because of his hypochondria, he developed a fear of having throat cancer and couldn't swallow. He also explained that he would have panic attacks 15 to 20 times a day. He also referred to difficulty socialising. As to the difficulty socialising it was put to the Claimant that this was not an issue for him at the time of a health questionnaire he completed on the 23 December 2019 for his GP, as in response to a question about socialising the Claimant said yes, he was able to socialise regularly with others (see page 50).

26. The evidence of the Claimant, as confirmed orally, is he had absence related to his disability on the 4 November and 2 December 2019. This is consistent with the reasons for sickness absence as recorded in the fit notes, Respondent's documents and as summarised in MK's witness statement (at paragraph 19). The fit notes at pages 166 (4 November 2019) and 167 (2 December 2019) do refer to "Anxiety states".

27. In cross examination the Claimant said that this absence was also due to his obsessive-compulsive disorder as well as anxiety but agreed that the fit notes do not state this. Our attention was drawn to the Claimant's medical notes at page 177 of the bundle that appear to record that his obsessive-compulsive disorder ended on the 16 August 2018. The Claimant was asked about this in cross examination and he confirmed that he didn't know why it says date ended but he accepted that there was probably not anything that says he is suffering from obsessive compulsive disorder in 2019.
28. The Claimant confirmed in cross examination that he had no days off due to hypochondria.
29. We were referred to the letter from the Claimant's GP dated 4 January 2021 (see page 56) which says ... "I can confirm that our medical records date back to the 2nd June 2010 when it was first reported that Matthew was suffering with anxiety and panic attacks.". There is no reference to hypochondria or obsessive-compulsive disorder in the GP letter, but the Claimant said this may be because his notes were incomplete him having changed GP when he relocated after his employment ended. Clearly though there are references in the medical notes to obsessive-compulsive disorder (see page 177).
30. We have also noted that in answer to the question in the health questionnaire completed by the Claimant on the 23 December 2019 (at page 50) ... "Do you have a history of any other mental health condition not previously mentioned?", the Claimant's answer is recorded as ... "Yes... You said: "Anxiety, panic attacks and OCD". The GP records also refer to "Anxiety states" (see page 180, the entry for 2 December 2019) in the same way as the fit notes as referred to above do, and not just anxiety. The Claimant is also recorded as saying "I am not coping at all with the anxiety and panic attacks."
31. Clearly anxiety and panic attacks are linked in the medical assessment of the Claimant. Reference is also made by him to obsessive compulsive disorder at the time. The Claimant also explains that his hypochondria was active as well at that time and he refers to the GP entry about his blood pressure dated 6 November 2019 (see pages 182 and 183). The Claimant is recorded as saying "As you can see from my records I am a very anxious person and worry about my health a lot. I am now back on sertraline to help this ... I don't know if I have been obsessive over constantly checking it but more than likely..."
32. It is the Claimant's case (as set out in the agreed list of issues) that he becomes very anxious and has panic attacks, as a result he cannot face the world and ceases to function properly, which can also cause him to be absent from work, and that this arises in consequence of his disability.
33. In cross examination the Claimant confirmed that the consequence of his disability is being off sick, absence. He was asked if beside absence was there anything else as a consequence of his disability. The Claimant

confirmed an increase in Drs appointments, which he was asked to confirm was absence and he said that he was not sure. He was asked what unfavourable treatment was because he needed more Drs appointments and he was not able to say. The Claimant also maintained in his oral evidence that needing re-assurance arises as a consequence of his disability.

The employment relationship

34. MK explains about the Respondent in his witness statement that ... "1. I am the joint owner and Managing Director of the Respondent Company Western Consultancy Services Limited, which operates under a franchise of Home Instead." And ... "2. I manage the franchise with my wife, Luisa Keig who is a director of the business. We have been operating this business since 1 April 2017 which is based in Weston super Mare employing 49 members of staff who provide adult care to Weston super Mare, Clevedon, Burnham on Sea, and the surrounding communities."
35. The Claimant in his claim form says he was employed from 1 October 2015 to 27 December 2019 as a Care Co-ordinator (see page 4 of the bundle).
36. The Respondent says the Claimant was employed from the 26 November 2018 to the 27 December 2019 due to a break in service (see page 14 of the bundle).
37. This issue though is no longer in dispute between the parties having been resolved at the case management preliminary hearing before Employment judge Bax (see paragraph 63 at page 40 of the bundle) ... "The Claimant accepted that he had 2 periods of employment with the Respondent and explained that the reason for the break was that he did not think there would be sufficient opportunities for him to develop and therefore left and worked for TSB for about 5 months. There was no agreement that the Claimant would remain an employee and he accepted that there had been a break in the continuity of his employment and that he did not have 2 years continuous service."
38. The Claimant in the first paragraph of his statement for this hearing says that his current employment was from November 2018.
39. The Claimant's main terms and conditions are at pages 68-73 of the Bundle. These were signed by the Claimant on the 5 November 2018 (see page 73).
40. Those confirm that the Claimant's employment commenced on the 26 November 2018. They also note that the Claimants job title is Scheduler / Care Co-ordinator (see page 68 of the bundle).
41. We also note with reference to the employment contract as being relevant to the matters in this claim that (as at page 70) it says:

Sickness Absence and Payment

In the event of your absence from work due to personal sickness or injury, the Company is responsible for paying you statutory sick pay (SSP) providing that you are eligible and comply with the provisions and rules set out in the Employee Handbook.

42. We have also been presented with a copy of a Training Agreement signed by the Claimant on the 28 November 2018 which deals with the recoument of training costs.
43. It is accepted that the Claimant wanted to develop and progress in his role, and this is supported by the notes from a supervision meeting, confirmed as being in December 2018 (page 63) and the Claimant's appraisal document in the early part of 2019 (see page 79).
44. As is noted in another appraisal document completed with the Claimant in the early part of 2019, he has no concerns to raise (see page 81).
45. The document also records (at page 84) that the Claimant says his manager supports him on a day to day basis "if I need help I know that she will make time to help me".
46. There is a further appraisal document with the Claimant which says the appraisers are MK and VL (page 87) and it is dated 29 March 2019. It records that MK endorsed what VL said and that it was lovely to have the Claimant back and he thanked him for his work. The Claimant himself records "I am very happy in my role and enjoy what I do, I am also very grateful to have the opportunity to continually be able to develop professionally." (page 90).
47. There is then a meeting on the 13 June 2019 between the Claimant and VL, see pages 99 and 100, and this shows the Claimant being offered reassurance and support. In oral evidence the Claimant praised VL for her support of him.
48. There is then a meeting on the 10 July 2019 between the Claimant and VL, see pages 101 and 102, that records the Claimant expressing that ... "another reason I don't want to do the manual handling on a permanent basis is that I don't feel confident training people. I am not a born trainer" ...and then later in the note... "I don't like training that's not how I want to progress. Connie likes this and that is what she is good at. I would tell you if I am doing too much."
49. The Claimant accepted that he was awarded Office Team member of the quarter in July 2019, which was awarded to him by MK and LK for great achievement (this is referenced at page 136 of the bundle).
50. Chronologically it is then of note from MK's witness statement (as per paragraph 9) that the ... "The Learning and Development Supervisor, Connie White tendered her resignation on 22 August 2019."

51. The Claimant is asked to meet with MK about his interest in CW's role on the 28 August 2019 and we can see from pages 114 and 115 of the bundle, a set of interview questions and then a meeting note of the Claimant's responses. It is not in dispute that VL was on holiday at this time.
52. MK describes this meeting at paragraph 9 of his statement and as the notes record (page 115) MK commented that he had no concerns about the Claimant's ability to provide training, rather around his desire to train and that it was too big a part of the role to "grin and bear it.". MK says that the Claimant agreed to think about whether he felt he could "enjoy" training and to provide feedback to him and VL the following week.
53. There is then a meeting on the 2 September 2019 between the Claimant and VL, see page 103, which records VL saying to the Claimant that she thinks that MK may have reservations about the Claimant taking on CW's job because the Claimant had previously commented he did not want to do the training.
54. Then as per paragraph 12 of MK's witness statement ... "I met with Mr Davies on or around 3rd September 2019 to communicate the decision.", which was to not offer the Claimant the role, which he says was ... "because of his lack of desire to deliver training" (see paragraph 11). MK confirmed in cross examination that he had expected to offer the Claimant the role if he could convince him of his desire to do the training aspects of the job. He confirmed that as an internal candidate he did not need the Claimant to complete an application form. As the Claimant did not give him that reassurance, he did not consider he could offer the role, and he opened the application process up to external candidates. MK confirmed that he did still want the Claimant to progress and develop with the Respondent.
55. The Claimant in his oral evidence appeared to accept this as the reason for him not getting the role and instead his focus was what he thought to be an unfair process. About this though it was confirmed by MK that the same interview questions were used for the external candidates and we accept this to be the position. We also accept that the application form was an extra step that the Claimant did not need to complete as he was an internal candidate.
56. We have been referred to an email dated 4 September 2019 from VL to MK (pages 170 to 171) about the handover of CW's tasks and it says ... "I have looked at this with Connie today and I propose the following...". It then records the tasks being shared amongst 7 employees, including the Claimant. There is nothing to suggest from the evidence that we have been presented that this was therefore not the proposal of VL.
57. There is then a meeting on the 10 September 2019 between the Claimant and VL, see page 104 to 105. It records VL saying:

Vicky: As I understand it Mike was not confident in your ability with the training. As I said to you before you need to be pushed out of your comfort zone to progress. I have seen you lacking in confidence when you were first asked to do assessments. You shadowed me, you learnt and now you are confident.

As you already know I would like you to carry out all manual handling training going forwards as no one else is trained to train the trainer level. I have tried to get you a cancellation on North Somerset

58. And...

Vicky: The additional; tasks that you are picking up will be excellent to use as evidence. Is there anything else that you would like to discuss?

Mat: No.

59. There is an email from VL to LK and cc to MK about the Claimant dated 23 October 2019 (page 119) that records VL telling them that the Claimant is off sick today and has flu like symptoms.
60. At a return to work meeting between the Claimant and VL on the 24 October 2019 (page 111), it records under the heading of "Outline of return to work plan (if required) ... Mat may need to take a few moments to clam down and breath when feeling anxious – Vicky advised Mat to take time away from his desk, quiet area if he feels he needs to.". This is then signed by the Claimant and VL.
61. There is an email from LK to the Claimant dated 25 October 2019 (page 107) that records the Claimant receiving a congratulation about receiving compliments about his work.
62. There is then a meeting note dated the 13 November 2019 (page 121) that records an informal meeting between the Claimant and MK and notes MK recording he asked the Claimant if he was okay and the Claimant said yes, he is much better now. The note records that MK invites the Claimant to say what support he needs in his job role. The note does not say that the Claimant asked for any.
63. The Claimant in cross examination accepted that it was the absences in November and December 2019 that relate to his disability. The fit notes show the periods the Claimant is signed off as being from the 4 November 2019 to the 11 November 2019 (page 166) and then from the 2 December 2019 to the 16 December 2019 (page 167).
64. By emails dated 29 November 2019 from the Claimant to LK (pages 123 to 124) he queries the amount of his wages. By email dated 1 December 2019, LK replies explaining about SSP. The Claimant accepted in cross examination that he accepted the explanation LK had provided.
65. The Claimant's complaint about this is that in the November and December 2019 pay cycles he is deducted money by only being paid SSP when he is off with anxiety, instead of full pay. He says that he was treated worse than

Victoria Lodge, Nikki Gower, and Constance White in relation to sick pay. The totality of the Claimant's evidence about this, as confirmed orally, is that he was told by these individuals in the middle of 2019 that they got full pay. He confirmed that he formed the view this was a matter he wanted to take to the Employment Tribunal when he left (on the 27 December 2019), although he didn't act until after. He accepted that his grievance dated 1 February 2020 (pages 130 to 133) did not raise the sick pay issue and he confirmed that he did not have an explanation for that. The Claimant acknowledged in his submissions on this issue that all he had was hearsay evidence.

66. The Claimant when asked in cross examination if his comparators had any of the four conditions he relies upon as disability he confirmed that he was not aware that they did, he could only say that CW had mild anxiety because of "woman's things". The Claimant also accepted in cross examination that the comparators were not doing the same job as him.
67. This is in contrast to the evidence of the Respondent on this matter presented by LK (paragraphs 20 to 24 of her witness statement) which confirms that during periods of sickness absence, the Claimant was paid SSP in accordance with his contract of employment (pages 70). This is not in dispute. Further, that there is payslip evidence of other employees only being paid SSP, and LK confirmed who the redacted payslips related to in her oral evidence by reference to pages 146 to 150. This included VL (page 147) and Nikki (page 148) and CW (page 149). LK states that employees were offered flexibility for medical appointments and that any other paid time off was agreed directly with VL for time off in lieu of working out of normal office hours. LK's evidence is that this applied to the office team and she was aware of occasions where the Claimant, Nikki Lawton and CW had all agreed paid time off in lieu with VL (see pages 64-65 & pages 94-96). Although VL says she received full pay in her witness statement she did not attend to be challenged on this. We have no evidence proven before us to support that the individuals who the Claimant says told him were paid full pay in fact were.
68. The Claimant then resigns from his employment on the 4 December 2019 by email (page 125) giving 4 weeks' notice. We note that the Claimant does not raise any issues in his resignation email. The Claimant's leaving date is then agreed as the 27 December 2019 (see page 128). Although the Claimant says in his witness statement (the fifth paragraph on the second page) that he thought his treatment by the Respondent was a way of getting him out, this does not appear to be supported by the documentary evidence he creates at that time nor by what the Respondent's witnesses say about the Claimant's departure which came as a shock to MK (see paragraph 32 of his statement).
69. There is then an email dated 14 December 2019 from the Claimant to LK (page 128) where the Claimant refers to the repayment of training fees saying "I also understand I need to pay a certain percentage off on the level 5? Please confirm how much this is...". In cross examination The Claimant accepted he owed something under the training agreement suggesting he thought it would be around £50.

70. By an email dated 24 December 2019 (see page 126), LK confirms that the full amount of £240 will be deducted as the Course has not been completed. It says:

- The full cost of the level 5 course. The Employers contribution was £240 and is unfortunately fully paid therefore non-refundable. The fact that you haven't fully completed the Level 5 training is the reason it's not covered in the percentage scale. Non completed courses are referred to in the paragraph in the training agreement as follows:
"If I agree to attend a training session and then fail to attend that training session I agree that my employer has the right to deduct the full amount of the training cost from my salary".
Although your Level 5 course has been removed from support by Western Consultancy Services (as you will no longer be employed by the company), I understand that your progress through the course is still there, and you can pick this up and proceed with it yourself at any point.
Deduction £240

71. The Claimant does not reply to this email and accepted in cross examination when asked if there was anything wrong with the explanation being made, no because I accepted some would be due.

72. That deduction is then made as can be seen on the payslip dated 31 December 2019 at page 145.

73. As to a difference in treatment between the Claimant when compared to VL and CW, who the Respondent accepts did not repay the costs of certain courses when they left, the Claimant has not presented evidence to show that they are the right comparators, and we accept the explanation provided by LK under oath as to the reason for any difference in the repayment of training costs being that the courses CW and VL undertook were essential for their jobs, if not mandatory, whereas the Claimant's was a vocational course and transferrable, funded by the apprentice scheme.

74. The Claimant submits a grievance to the Respondent dated 1 February 2020 (pages 130 to 133) and we note that although it raises discrimination as being an issue it does not say what the Claimant's disability is, nor that the Respondent knew about it, nor does it raise a concern about the payment of SSP.

Just and equitable considerations (time limits)

75. Matters concerning the just and equitable question relating to time limits were confirmed by the Claimant in oral evidence as his written statement did not address them.

76. The Claimant commenced the ACAS early conciliation process on the 2 March 2020, and it was open until the 2 April 2020. He submitted his claim on the 26 April 2020.

77. When asked if there is anything he wants to tell us as to why he could not start the process before that, he said there were two things. They are firstly he had trust and confidence in his employer and felt at the time things were normal. It was not until he was made aware by different sources that it was not normal to be treated the way he was that he then took action. Secondly,

he felt scared and anxious and didn't know how to handle it, he didn't know what was right.

78. He confirmed that he realised this towards the end of 2019 when he discussed matters with friends and family. He then did a bit of research spoke to the CAB, went on the ACAS website and read through different things. His research through ACAS confirmed what he needed to do, and he was aware of the three months mentioned. When this was done, he confirmed it was after he left (27 December 2019) so was the end of 2019 beginning of 2020.
79. The Claimant further confirmed that the ACAS officer he spoke to had told him about time limits saying he was made aware he needed to make a claim within 3 months after it happened. He confirmed that he thought that meant he had to claim in about 3 months and he didn't realise the claims had to be in the three months, so he felt he needed to do it by April 2020, so as to be within 3 months. He knows now this wasn't right and he had misunderstood it.
80. He confirmed that the reason he had not contacted ACAS to start the early conciliation process before the 2 March 2020 was, he wanted to make sure he was right, and the evidence was all legitimate. We note that the Claimant did raise a grievance with the Respondent on 1 February 2020 (pages 130 to 133). This was formally responded to by the Respondent on the 6 February 2020 (see paragraph 19 of LK's witness statement) and a copy of the response is at pages 134 to 138 of the bundle.
81. The Respondent submitted that it was at greater prejudice than the Claimant if discretion were exercised to extend time, because VL is no longer an employee of the Respondent (MK having confirmed in his oral evidence that she left at the end of March 2020) and if the claim had been presented in time she would have still been an employee. It was submitted that it is clear from the evidence we have been presented that VL has a role in matters the Claimant complains about. VL also did not attend this hearing so that her evidence could be challenged, and it was submitted it may have assisted the Respondent's case because of her involvement in matters and the Claimant having no complaint against her. Further, it was submitted that the Claimant's case is not in the clearest of terms, the witness statement is not helpful with factual details as it is based on his recollection of events 2 years previously, which we observe the Claimant has confirmed he did not have a problem with at the time, he only formed this view after he had left the Respondent's employment and spoke to family and friends. The grievance is also incomplete in advancing the allegations the Claimant now makes, as it does not refer to what his disability is or that the Respondent knew about it, or make reference to the complaints he has about only receiving SSP when on sick leave.

The Respondent's knowledge of disability

82. We have noted that the Claimant says he is not disabled in response to question 12.1 of the Claim Form (see page 9). We observe that this is

consistent with his oral evidence where he acknowledged that at the time of the complaints he makes, he did not consider himself to be disabled. He formed this view after speaking to people and conducting his research after his employment had come to an end. The Claimant also does not say in evidence that he told the Respondent at any time during his employment that he had a disability. Our factual focus is therefore on the constructive knowledge of the Respondent.

83. The Claimant refers to what he says the Respondent knew in his impact statement (see page 47):

Everyone I worked with in the office was aware on these issues as quite often I would seek reassurance from them. My manager Vicky informed Mike and Luisa about my anxiety as I remember on occasions her asking me if it was ok when chatting with her if she could disclose these issues to Mike and Luisa. I also remember discussing with Mike and Luisa on occasions that I suffer with anxiety.

84. He also makes reference in the fourth paragraph of his witness statement to text messages between MK and VL dated 4 November 2019 (see page 120) that refer to the Claimant being off sick with anxiety and VL thinking “he may be off for a while.”.

85. We referred to the written witness statement of VL about what she says she told MK and LK about the Claimant’s asserted disabilities. She says:

“As Mats manager I was responsible for ensuring his health and safety at work, as was Mike as his employer. I carried out a medical condition risk assessment in line with the Home Instead medical conditions policy relating to Mat’s anxiety. Not only was this discussed with Mike it was, with Mat’s consent discussed with the wider team I had recommended that Mat took time away from his desk and the office environment if he felt anxious during his working day m. This was fully documented and placed within Mat’s personnel file If a member of staff was absent from work at anytime I reported this to Mike along with the reason for their absence. I have provided Mat with a message that I sent to Mike relating to Mat’s absence from work along with Mike’s response for your records. The message clearly states that Mat is experiencing anxiety”.

86. The message referred to appears to be the one at page 120 on the 4 November 2019, that the Claimant refers to in his evidence. We also note that what VL says she told MK appears to be wholly consistent with what MK and LK say about what they knew and when.
87. MK refers in paragraph 19 of his witness statement about the Claimant’s absence that only the last two appear to relate to anxiety, which is consistent with the Claimant’s evidence, that he says those absences relate to his disability. The fit notes show the periods the Claimant is signed off as being from the 4 November 2019 to the 11 November 2019 (page 166) and then from the 2 December 2019 to the 16 December 2019 (page 167).
88. Further, at paragraphs 23 to 25 and 26.1, MK says:

“23. Mr Davies asserts as part of his claim that he has suffered from severe anxiety, panic attacks, obsessive compulsive disorder and hypochondria from the age of 14. Luisa Keig and I recall Mr Davies stating he suffered from OCD and hypochondria but did not consider that any of these amounted to a disability nor did Mr Davies assert this. Although stress had been cited in some discussions from June 2019 (pages 99-100)] and feeling anxious from October 2019 (pages 110-111), these proceedings are the first occasion that panic attacks due to feeling anxious has been shared with us. Again, at the time of his employment I was unaware of the effect he now says the anxiety and panic attacks have on his ability to carry out day to day activities.

24. Furthermore, within his Impact Statement he says on difficult days he would pace back and forth in the office and lay on the floor on his back to alleviate his panic attacks. He also maintains that on occasions he was unable to talk, would tremble and start to sweat. I have never witnessed any of this. I spend at least 50% of my time working in the office and had I witnessed such issues I would have talked to Mr Davies immediately to see how we could help, whether it be taking time out, going home, going for a walk, seeking professional help or providing more support with his job role.

25. He claims that he experienced these panic attacks in the first half of 2019. During this time, the Claimant met with Ms Lodge to carry out his appraisal, business development plan and supervision yet no mention is made whatsoever in these correspondences to panic attacks.

26.1 During a supervision discussion with Ms Lodge on 13 June 2019, Mr Davies mentioned that he had found the last couple of months stressful, so Ms Lodge worked through the reasons and challenges with him (pages 99-100). At a further supervision on 10 July 2019 (one month later) there was no mention of stress. Workload was mentioned and Ms Lodge discussed strategies that Mr Davies might adopt to help him (pages 101-102).”

89. LK says at paragraphs 7 and 8 of her witness statement:

“7. Mr Davies states as part of his claim that he has suffered from severe anxiety, panic attacks, obsessive compulsive disorder and hypochondria from the age of 14. Mike and I only recall Mr Davies stating he suffered from OCD and hypochondria but we did not consider that any of these amounted to a disability and neither did Mr Davies assert this. Whilst stress had been cited in some discussions from June 2019 (pages 99-100) and feeling anxious from October 2019 (110-111), these proceedings are the first occasion that panic attacks due to feeling anxious has been shared with us. Again, at the time of his employment I was unaware of the effect he now says the anxiety and panic attacks had on his ability to carry out day to day activities.

8. Furthermore, within his Impact Statement he says on difficult days he would pace back and forth in the office and lay on the floor on his back to alleviate his panic attacks. He also maintains that on occasions he was unable to talk, would tremble and start to sweat. I have never witnessed any of this. The only time I have been aware of anything close to this is following

Mr Davies's return to work on 24th October 2019 when Ms Lodge made Mike and I aware that Mr Davies may need some time away from his desk if he was feeling anxious (page 114[111]). Mike and I were both fine with this return to work strategy and endorsed the action and put no stumbling blocks in the way of it happening if Mr Davies required this."

90. LK gave an example in cross examination of a discussion she recalls with the Claimant about non-work-related matters where the Claimant made a comment along the lines of, that's a bit OCD of me. LK confirmed that such discussions were general conversations.
91. The Claimant resigns from his employment on the 4 December 2019 by email (page 125) giving 4 weeks' notice. We have already noted that the Claimant does not raise any issues in his resignation email.
92. We have also noted with reference to the grievance the Claimant submits to the Respondent on the 1 February 2020 (see pages 130 to 133) he does not in that state what his disability is, nor that the Respondent knew about it.
93. The Respondent's evidence on what they knew about the Claimant's disability is consistent with the contemporaneous documents they were aware of and what the Claimant's supporting witness says. Also, it is consistent with much of what the Claimant himself says and accepted in cross examination when referred to the relevant meeting notes as being communicated at that time. We therefore accept the Respondent's evidence on the balance of probabilities about what they knew and when about the Claimant's circumstances.

The Law

94. This is a claim alleging discrimination because of the Claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct disability discrimination, discrimination arising from a disability and failure by the Respondent to comply with its duty to make reasonable adjustments.
95. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA.
96. For a complaint of direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. For direct discrimination because of disability the Respondent has to have had actual or constructive knowledge of the Claimant's disability before a claim under section 13 can succeed.
97. As for the complaint for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of

achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

98. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA, provides that a person is not subject to the duty to make reasonable adjustments if they do not know, and could not reasonably be expected to know that the relevant person is disabled but also that his disability is likely to put him at a substantial disadvantage in comparison with non-disabled persons.
99. Knowledge of disability, whether actual or constructive, must be knowledge of the following matters: the physical or mental impairment; that it is of sufficient long-standing or likely to last 12 months at least; and that it sufficiently interfered with the individual's normal day-to-day activities to amount to a disability.
100. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
101. We remind ourselves of the guidance set out in **Igen v Wong [2005] ICR 9311** (approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**) which sets out the correct approach to interpreting the burden of proof provisions. The correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal). Only if such facts have been made out to the tribunal's satisfaction (which is on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the Respondent to prove (on the balance of probabilities), that the treatment in question was 'in no sense whatsoever' on the protected ground.
102. We also remind ourselves that in **Madarassy v Nomura International PLC [2007] ICR 867** Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of

discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination’.

103. Disability

104. As set out in section 6 and schedule 1 of the Equality Act 2010 a person has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on his ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.
105. We have considered the principles from the cases of *Goodwin v Patent Office [1999] IRLR 4(EAT)*; *Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL* and *Tesco Stores Ltd v Tennant UKEAT/0167/19/00*, which appear relevant to the matters to be determined in this claim.
106. We also refer to the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (“the Guidance”).
107. The following key points are noted:
108. The burden of proving disability lies squarely on the Claimant.
109. From the definition from the Equality Act 2010, as referred to above, four essential questions need to be answered: (1) does a person have a physical or mental impairment? (2) does that have an adverse effect on their ability to carry out normal day to day activities? (3) is that effect substantial? (4) is that effect long-term? These questions may overlap to a certain degree; however, a tribunal considering the issue of disability should ensure that each step is considered separately and sequentially: *Goodwin*.
110. An impairment will only amount to a disability if it has a substantial adverse effect on the individual’s ability to carry out day-to-day activities which are normal. Whether an effect is substantial requires a consideration whether it is more than minor or trivial: section 212 Equality Act 2010.
111. In relation to “normal day to day activities”, the focus of the Act is on the things that the Claimant cannot do or can only do with difficulty, rather than on things they can do (*Goodwin*).
112. Paragraph. 2(1), Schedule. 1, Equality Act 2010 states that an impairment will have a long-term effect only if: (1) it has lasted at least 12 months; (2) the period for which it lasts is likely to be 12 months; or (3) it is likely to last for the rest of the life of the person affected.

113. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if it is likely to recur: paragraph 2(2), Schedule.1, Equality Act 2010.
114. In respect of the meaning of the word 'likely' as used in the above context, this means whether something "could well do" or "could well happen". This is referred to in paragraphs B12 and C3 of the Guidance and the case of Boyle.
115. Also, the Guidance states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (see para C6). This is to ensure that the total period during which a person has an impairment with recurring effects is at least 12 months. The example is given of a young man with bipolar affective disorder, a recurring form of depression. His first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This will satisfy the requirements of the definition of disability in respect of the meaning of 'long-term' because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period — in this case a period of 13 months.
116. Pursuant to Schedule 1(5) Equality Act 2010, the effect of medical treatment (including medication and corrective measures) needs to be discounted when considering substantial adverse effect on the ability to do day to day activities. This is re-enforced in the Guidance at paragraphs B12 to B14.
117. The Guidance states that where a person has more than one impairment but none of the impairments considered in isolation has a substantial adverse effect on normal day-to-day activities, account should be taken of whether the impairments together have such a substantial adverse effect (see para B6). The Guidance gives the example of a minor impairment that affects physical coordination and an irreversible but minor injury to a leg that affects mobility. Taken together, these two impairments might have a substantial adverse effect on the person's ability to carry out certain normal day-to-day activities.
118. The EAT in Tesco confirmed that likelihood of something being "long term" must be judged as at the date of the alleged discriminatory behaviour.

119. Time Limits

120. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
121. From the 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment

tribunal proceedings. The Claimant obtained a valid ACAS certificate for these proceedings.

122. We have considered the principles from the cases of **British Coal v Keeble [1997] IRLR 336 EAT**; **Robertson v Bexley Community Service [2003] IRLR 434 CA**; and **London Borough of Southwark v Afolabi [2003] IRLR 220 CA**.
123. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the **Keeble** decision:
- a. The length of and the reasons for the delay.
 - b. The extent to which the cogency of the evidence is likely to be affected by the delay.
 - c. The extent to which the parties co-operated with any request for information.
 - d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
 - e. The steps taken by the claimant to obtain appropriate professional advice.
124. We note that the Court of Appeal in the **Afolabi** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
125. It is also clear from the comments of Auld LJ in **Robertson** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard ... "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

126. Wages

127. The Claimant claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.

128. Section 13 reads:

“13 Right not to suffer unauthorised deductions

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

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

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

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker’s contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting “wages” within the meaning of this Part is not to be subject to a deduction at the instance of the employer.”.

The Decision

129. The Claimant’s disability

130. It is accepted that the Claimant is a disabled person by reason of his anxiety. In respect of his asserted impairments of hypochondria, obsessive-compulsive disorder and panic attacks, factually the effects on his activities as asserted by the Claimant in his written evidence, with and without reference to his anxiety, are the same. The substantial adverse effect arises from the cumulative impact of all, hence why the impact described is the same with or without the impairment of anxiety in the evidential mix.
131. The Claimant says that he links all four of his asserted impairments as being the cause of the substantial adverse effects on him. The medical evidence we have been referred to supports this. On the basis that these conditions have been with the Claimant since, as he says, a young age, and the Respondent accepts that the anxiety condition satisfies the definition of a disability we do not see a factual basis as to why the same conclusion does not also apply to the other three impairments. All four impairments appear to generate the substantial adverse effects on him, that would prevent him from working if he did not take the medication when needed. We therefore find that the Claimant is a disabled person by reason of a mental impairment consisting of anxiety, panic attacks, hypochondria and obsessive-compulsive disorder.
132. However, even if we are wrong in that conclusion we are conscious of the guidance at paragraph B6 which supports that even if the other three alleged impairments are not a disability in their own rights the combination of multiple impairments could result in a person being disabled.

133. Knowledge of disability

134. For us the issue of importance in this claim is not so much the question of whether the Claimant satisfies the definition of being a disabled person but, particularly in view of the combination effect and the Claimant relying on different impairments for different parts of his claim, what the Respondent knew about them at the points it is alleged it acted in a discriminatory way.
135. Knowledge of disability, whether actual or constructive, must be knowledge of the following matters: the physical or mental impairment; that it is of sufficient long-standing or likely to last 12 months at least; and that it sufficiently interfered with the individual's normal day-to-day activities to amount to a disability.
136. As found, the Respondent's evidence on this matter is consistent with the contemporaneous documents they were aware of and what the Claimant's supporting witness says. Also, it is consistent with much of what the Claimant himself says and accepted in cross examination when referred to the relevant meeting notes as being communicated at that time. We therefore accept the Respondent's evidence on the balance of probabilities about what they knew and when about the Claimant's circumstances.
137. From that we do not find primary facts that support the Respondent had actual or constructive knowledge of the Claimant's disability.

138. The Respondent decision makers accused of the discrimination (MK and LK) had no knowledge of the Claimant's panic attacks.
139. Although MK and LK accept the Claimant stating to them, he suffered from OCD and hypochondria, there are no facts to support that they were aware that they had a substantial adverse effect on his day to day activities and was doing so at that time.
140. As to anxiety this can be seen to be an impairment the Respondent is aware of from the end of October 2019. But there are no facts proven on the balance of probability that show it was aware that it had a substantial adverse effect on the Claimant that was at that point long term, or likely to be, or was a recurrence of something before. We note that the Claimant's last sick note before his employment ends on the 27 December 2019 expires on the 16 December 2019.
141. We therefore do not find that the Respondent had actual or constructive knowledge that the Claimant was a disabled person.
142. Knowledge of disability is a necessary ingredient to make the Respondent liable for all of the discrimination complaints that the Claimant makes against the Respondent. This not being proven on the balance of probability the Claimant's complaints of discrimination therefore all fail and are dismissed.
143. However, for completeness we can observe as follows based on the facts we have been asked to determine:
144. The allegations of discrimination relate to not being given support in the first half of 2019, not getting appointed to the role of the Deputy Manager/Learning and Development Supervisor (September 2019), increases in workload – first half of 2019 to October 2019, and complaints about pay (sick pay and recoupment of training fees). About these we observe from the primary facts we have found:
145. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been subjected to the alleged less favourable treatment.
146. The Claimant's first allegation of less favourable treatment is that in the first half of 2019, he experienced a number of panic attacks and that he was not supported in that the Respondent failed to arrange meetings to try and find a way of resolving the problems. There is evidence of meetings happening with the Claimant in the first half of 2019 and him being given support. The Claimant did not ask for more. Therefore, we do not find that the Claimant has proven on the balance of probability that this was less favourable treatment for him. We note that VL was his line manger during this time, and

the Claimant has no complaints about her or that she acted in any way towards him less favourably because of disability. He praised her for her support of him.

147. The Claimant's allegation that the Respondent declined to appoint him to the Deputy Manager/Learning and Development Supervisor role. We have found primary facts that confirm the Respondent's reason for declining to appoint the Claimant at that time is his lack of desire to undertake training work. The issues the Claimant has sought to challenge in evidence relate not to the reasons for the decision (which was also communicated to him at the time by VL) but the process. He thought he should have been asked to complete an application form, should have been interviewed by two people and given the same questions as the external candidates. The primary facts do not infer that these actions were because of the Claimant's disability (if the Respondent did know about it). The application form was a portal to interview for external candidates, the Claimant was an internal candidate. VL was on holiday when MK met with the Claimant about the role. We accept what MK confirmed in oral evidence that he expected to be able to offer the Claimant the role if his concerns about the Claimant's desire to train were put to rest. We accept that the same interview questions were used for all the candidates.
148. The Claimant's allegations of increases in workload in the first half of 2019 to October 2019. We have found primary facts that confirm the Respondent's reasons for this are, to cover for CW leaving and this was VL's decision. That after CW's departure the Claimant was the person at the Respondent qualified in respect of manual handling, and again this relates to VL's decision making (as detailed in the meeting with the Claimant on the 10 September 2019, pages 104 to 105). The Respondent wanted to help the Claimant with his professional development which is in line with what the Claimant wanted.
149. The Claimant's allegations that he was not paid full pay when off sick with anxiety and that he should not have had £240 deducted for the cost of the level 5 training he had undertaken but not completed.
150. The primary facts support that the sick pay issue can only relate to the disability absences as confirmed by the Claimant being in November and December 2019. The Claimant submits he was treated worse than Victoria Lodge, Nikki Gower, and Constance White in relation to sick pay. The Claimant's evidence as confirmed orally about this is that he was told by those individuals in the middle of 2019 that they got full pay when off sick. He confirmed that he formed the view this was a matter he wanted to take to the Employment Tribunal when he left (27 December 2019), although he didn't act until after. He accepted that his grievance dated 1 February 2020 (pages 130 to 133) did not raise the sick pay issue and he confirmed that he did not have an explanation for that.
151. The Claimant when asked in cross examination if his comparators had any of the four conditions he relies upon as disability he confirmed that he was not aware that they did, he could only say that CW had mild anxiety because

of “woman’s things”. The Claimant also accepted in cross examination that the comparators were not doing the same job as him.

152. The Claimant’s contract of employment states that he will only receive SSP when on sick leave. The Claimant accepted in his submissions that his claim was reliant on hearsay only, i.e. what he was told, and VL did not attend to confirm the position. We therefore accept the Respondent’s reasons for why the Claimant was paid the way he was and that SSP was the norm for the Respondent’s employees.
153. As to the deducted money from his final pay in respect of the level 5 training he had undertaken but had not completed, it is accepted that the training was not completed. The Claimant accepted that he owed something (see page 128) and the Claimant’s confirmation in cross examination he thought it would be around £50. The Respondent confirms the position by email before the deduction is made and the Claimant does not challenge it at that time. We accept that there is a difference as articulated by LK between the Claimant’s vocational course and the training that was undertaken by CW and VL. We also note that the Claimant accepts that as comparators their circumstances were not the same.
154. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude that the Respondents have committed an act of discrimination (because of the Claimant’s disability), in the absence of an adequate explanation. The first stage of the burden of proof exercise will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. From these primary facts we are satisfied that the Respondent has acted for particular reasons that do not infer discrimination.
155. In respect of the Claimant’s something arising complaint (section 15 EqA) it is for the Claimant to show that ‘something’ arose as a consequence of his disability and that there are facts from which it could be inferred that this ‘something’ was the reason for the unfavourable treatment. The agreed issues confirm that the Claimant is asserting that he becomes very anxious and has panic attacks, as a result he cannot face the world and ceases to function properly, which can also cause him to be absent from work. In cross examination the Claimant confirmed that the consequence of his disability was being off sick, absence. He was asked if beside absence was there anything else as a consequence of his disability. The Claimant said an increase in Drs appointments, which he was asked to confirm was absence and he said that he was not sure. Asked what unfavourable treatment was because he needed more Drs appointments, the Claimant was not able to say. Although not set out in the agreed list of issues the Claimant also asserted in his evidence that him needing reassurance was something that arose as a consequence of his disability.
156. So are there facts from which it could be inferred that these ‘somethings’ were the reason for any proven unfavourable treatment?
157. Applying the primary facts, we have found to this question and the allegations the Claimant makes:

- a. not being given support in the first half of 2019, we have not found this to have been proven on the balance of probability;
 - b. not getting appointed to the role of the Deputy Manager/Learning and Development Supervisor (September 2019), this cannot be inferred to be for reason of absence or need for reassurance;
 - c. increases in workload, from the first half of 2019 to October 2019, this cannot be inferred to be for reason of absence or need for reassurance;
 - d. about only being paid sick pay, this would appear to relate to absence; and
 - e. recoupment of training fees, this cannot be inferred to be for reason of absence or need for reassurance.
158. The Claimant's absence arising in consequence of his disability leads to the Claimant getting SSP as opposed to full pay. It is not the application of the contractual term to pay SSP to the Claimant that is unfavourable but the contractual terms specific effect on the Claimant.
159. We therefore do not find primary facts to infer the something was the reason for the unfavourable treatment, save that absence leads to the Claimant getting SSP under the terms of his contract. However, we accept that this is a proportionate means of achieving a legitimate aim being business efficacy and for the purpose of performing the employment contract as asserted by the Respondent in its grounds of response. We accept that it is proportionate because the deduction of money (i.e. paying the Claimant SSP instead of full pay when he is on sick leave) is an agreed contractual term that applies equally to everyone. Unless agreed otherwise an employer is only required to meet the SSP threshold when paying employees for sick leave.
160. Finally to address the complaint of a breach of the duty to make reasonable adjustments we have not found that the Claimant has proven on the balance of probability that the Respondent had the alleged PCP of ... "A requirement to undertake a full day's work and additional work from other people". Further, the reasonable adjustments the Claimant suggests ... "When the Claimant was anxious and/or having a panic attack allowing him to take 5 minutes to try and recover;" and ... "Talking to the Claimant about the situation and being supportive about his condition." Are evidenced as being offered and done by the Respondent.
161. Although not relevant based on the findings we have made in respect of the question of time limits we do not find that the Claimant has proven on the balance of probability conduct extending over a period because the complaints in time, which are those relating to the SSP deductions and the training fee deduction, do not appear to be evidentially connected to the other allegations made which include actions of VL.
162. We are also not persuaded that it would be just and equitable to exercise our discretion to extend time for those complaints out of time. We accept the prejudice to the Respondent would outweigh that to the Claimant. This is based on the reasons for him not issuing the claim sooner, VL having left the Respondent's employment before the claim was submitted and her

evidentially being involved in matters. Also, there being no contemporaneous documents about the complaints to support what the Claimant says, so we are reliant on what he can recall now, about matters he did not think were an issue until after his employment had ended which was formed on his discussing matters with friends and family.

163. Deductions from wages

164. As to the unauthorised deductions from wage based on the facts we have found, these complaints also fail and are dismissed. The Respondent had authority to make the deductions it made pursuant to the terms of the employment contract, the training agreement and the written explanation from the Respondent about what was to happen before the training costs were deducted.
165. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 11; the findings of fact made in relation to those issues are at paragraphs 18 to 93; a concise identification of the relevant law is at paragraphs 94 to 128; how that law has been applied to those findings in order to decide the issues is at paragraphs 129 to 164.

Employment Judge Gray

Date: 19 July 2021

Sent to the Parties: 22 July 2021

FOR THE TRIBUNAL OFFICE