EMPLOYMENT TRIBUNALS

Claimant: **Mr A Hannan**

Respondent: **Mercedes-Benz Retail Group UK Limited**

Heard at: **East London Hearing Centre**

On: **3, 4, 5, and 9 March 2021**
10 March 2021 (in Chambers)

Before: **Employment Judge Russell**
Members: **Ms M Daniels**
Dr L Ryler

Representation
Claimant: **Ms S Chan (Counsel)**
Respondent: **Mr S Willey (Solicitor)**

JUDGMENT

1. **The claim of harassment related to disability succeeds in respect of a comment by Mr D Jones as set out in paragraph 2.1 of the list of issues.**

2. **The claims of harassment related to disability in allegations 2.2 and 2.3 fail and are dismissed.**

3. **The claim of failure to make reasonable adjustments contrary to Section 20 and Section 21 of the Equality Act 2010 fails and is dismissed.**

4. **The claims of direct disability discrimination and direct race discrimination fail and are dismissed.**

5. **The claim of harassment related to race fails and is dismissed.**

6. **The Claimant did not make a protected disclosure.**

7. **The sole or principal reason for dismissal on 18 July 2018 was not a protected disclosure. The unfair dismissal claim fails and is dismissed.**

8. The Claimant is awarded the sum of £4,000 as compensation for injury to feelings in respect of the single act of harassment which has succeeded.

9. The Claimant is awarded £676.92 by way of interest on the injury to feelings award (110 weeks @ 8%).

REASONS

1 By claim form presented to the Tribunal on 29 January 2019, the Claimant brought complaints of automatic unfair dismissal because of a protected disclosure, disability discrimination (harassment/direct discrimination/failure to make reasonable adjustments) and race discrimination (harassment/direct discrimination). The Respondent has resisted all claims.

2 Following a series of Judgments and Orders at earlier Preliminary Hearings, the Tribunal accepted that it had jurisdiction to hear the complaints and clarified the issues and claims brought. The agreed issues are:

The Claimant (C) was employed by the Respondent from 24.4.19 (should read 29/5/18) *to 18.7.18. He is of Asian ethnicity. His disabilities are depression and anxiety.*

Failure to make reasonable adjustments

1. Did R fail to make reasonable adjustments under section 21 of the Equality Act 2010 for C's disabilities of depression and anxiety in the following respects:

~~i) by failing to ensure that he was not subject to stress in the workplace through its staff adopting the deceitful practices as set out at 2.6 of ET1? The Provision, Criterion or Practice (PCP) was allowing these practices to continue when R knew or should have known that it would cause C more stress than a non-disabled person, because of the need for those with anxiety and depression to keep interactions with customers simple, truthful and straightforward?~~

~~ii) on 12.7.18 (day after Croatia v England World Cup match) giving C 18 jobs to do instead of the average 10-13 jobs. The PCP was expecting and requiring C to do an excessive number of jobs when it knew or should have known that overworking C, especially when he had not been adequately trained on the computer system, would leave C to suffer undue stress, with the effect of exacerbating his mental health conditions (para 18 ET1)~~

iii) failing to give C another display screen to use, when C had expressed his difficulty with reading, concentrating and understanding the display screen (para 19 ET1). The PCP was requiring C to use the particular display screen when due to cognitive impairment arising from his mental health conditions, C was having difficulty using the screen.

iv) failing to accede to C's request for a mental health advocate from the NHS Trust or Mind, to help him at hearings considering his dismissal (para 73 ET1). The PCP was expecting C to be able to present his case at his capability hearing without a mental

health specialist to assist him, when his disabilities of depression and anxiety meant that he could not organise or present his case as effectively as a non-disabled person. The mental health advocate would have understood how this impacted on C and assisted him.

Harassment on the grounds of his disabilities

2. Did R engage in wanted conduct which had the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him on the ground of his disabilities contrary to s. 6 and 26 Equality Act 2010 and taking into account C's perception, the other circumstances of the case, and whether it would be reasonable to make that finding, in the following respects:

   i) David Jones mocking and laughing at C in front of the Advising Team when C made a request to adjust his display screen, then replying that this was a request for R's 'Disabled Employee Adviser' (para 13 ET1)?

   ii) On 10 July 2018 Lauren Murray saying to C *"The way you were looking at Dave, seemed like you were about to go at him"* (implying that C was going to physically attack Dave) (para 33 ET1)?

   iii) Management saying to C on two occasions: *"you look like you 're on drugs"* (para 34 ET1)?

Direct disability discrimination

3. Did R treat C less favourably on the grounds of one or more of his disabilities contrary to sections 6 and 13 Equality Act 2010 by:

   i) on 24.8.18 Tanya Rampling of HR at the appeal hearing, pointed her finger at C in an abrupt manner saying *"You need to calm down, I can end this meeting if I want to"* and unjustifiably accusing C of being aggressive (paras 49-50 ET1);

   ii) Mike Sandle at the adjourned appeal hearing stating that if C was challenging the accuracy of the Respondent's minutes, the entirety of the document would be inadmissible. When C indicated that it was only certain paragraphs which were questioned, Mike Sandle said in a frustrated way *"What are you saying, are they correct or not?"* (para 54 ET1);

   iii) when C looked at his union representative (Norman) in surprise at Mike Sandle's manner, Mr Sandle shouted *"You can't look at Norman, why you looking at Norman?"*

Racial harassment

4. Did R engage in wanted conduct which had the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him on the ground of his Asian ethnicity contrary to section 9 and 26 Equality Act 2010 and taking into account C's perception, the other circumstances of the case, and whether it would be reasonable to make that finding by:

i) Scott making a threatening comment about C in C's earshot on 12.6.18 (should be 12.7.18) *"People like that should be taken outside and be punched up"* (para 17 ET1)?

ii) Lauren Murray expressing her disgust towards an Asian customer in front of the whole team including C saying *"Who does that customer think he is?"* following her recounting a conversation when they had exchanged pleasantries about how each of them were and whether she could help him. C believes this derogatory comment was on the grounds of the customer's Asian ethnicity, who was of the same ethnic background as C (para 22 ET1)?

iii) Jhonny P saying that he couldn't or wouldn't deal with a customer because it raised his blood pressure, when this customer was of Asian ethnicity (para 23 ET1)?

iv) When C approached Scott for assistance, he responded *"what does he fucking want? What's his problem?"* (para 27 ET1)?

v) On 10 July 2018 Lauren Murray saying to C *"The way you were looking at Dave, seemed like you were about to go at him"* (implying that C was going to physically attack Dave) (para 33 ET1)?

vi) Management saying to C "*you look like you' re on drugs*" (para 34 ET1)?

vii) By David Jones performing a Nazi salute whilst saying "Heil Hitler" in the office in front of C and his colleagues (para 78 ETl)?

Direct race discrimination

5. Did R treat C less favourably on the grounds of race contrary to sections 9 and 13 in the following respects?

i) On 24.8.18 Tanya Rampling of HR at the appeal hearing, pointed her finger at C in an abrupt manner saying *"You need to calm down, I can end this meeting if I want to"* and unjustifiably accusing C of being aggressive (paras 49-50 ET1);

ii) Mike Sandle at the adjourned appeal hearing stating that if C was challenging the accuracy of the Respondent's minutes, the entirety of the document would be inadmissible. When C indicated that it was only certain paragraphs which were questioned, Mike Sandle said in a frustrated way *"What are you saying, are they correct or not?"* (para 54 ET1);

iii) When C looked at his union representative (Norman) in surprise at Mike Sandle's manner, Mr Sandie shouted *"You can't look at Norman, why you looking at Norman?"*

Automatically unfair dismissal by reason of making a protected disclosure

6. Did C make qualifying protected public interest disclosures during his employment? The Claimant relies upon the five disclosures identified at pages 37-41 of the bundle, in summary:

i) On or about 29 June 2018, orally to Mr David Jones; the practice of closing down items was wrong; breach of legal obligation and/or criminal offence;

ii) On 27 June 2018; orally to Ms Lauren Murray; the instruction to be creative with the truth about repair to a delay was wrong; breach of legal obligation.

iii) On 25 June 2018; orally to Mr David Jones, the instruction to change customer email addresses in order to avoid negative feedback was wrong; breach of legal obligation;

iv) On 30 June 2018; orally to Scott and Mr David Jones; staff in the repair workshop were not complying with health and safety requirements in various respects;

v) 12 July 2018; orally to Mr David Jones and Ms Lauren Murray; the practice for signing warranty folders was wrong; breach of legal obligation.

7. Was the sole or principal reason for C's dismissal on 18 July 2018 that he had made the disclosure at paragraph 6(v) (s.103A ERA 1996)?

~~**Time limits**~~

~~8. Does the Tribunal have jurisdiction to consider any or all of C's Equality Act claims taking into account of s.123 Eq Act 2010?~~

~~9. Do any of R's acts amount to an act extending over time?~~

~~10. If the Tribunal finds that any of C's claims were not submitted within the appropriate time limit, would it be just and equitable to extend time?~~

3 In closing submissions, the Claimant conceded that only the fifth alleged protected disclosure was relied on as the sole or principal reason for dismissal. Although the other alleged disclosures were not withdrawn the Tribunal did not consider it necessary to make findings of fact on them in order to decide the issues before us. The Claimant withdrew the reasonable adjustments claim in respect of paragraphs 1.1 and 1.2 of the list of issues; the claims at paragraphs 1.3 and 1.4 were maintained. On behalf of the Respondent, Mr Willey confirmed the earlier Judgment of Employment Judge Jones had decided the time limit issues. These issues are accordingly struck through in the list set out above.

4 The Tribunal heard evidence from the Claimant on his own behalf. For the Respondent, we heard evidence from Ms L Murray (After Sales Manager), Mr D Jones (Former Senior Service Team Manager), Mr W Ahmed (Senior Service Team Manager), Mr A Kapetanou (Service Advisor), Ms F Davidson (HR Business Partner), Ms D Burchfield (Warranty Administrator), Mr J Piccou (Service Controller), Mr P Cartmell (Group Warranty Manager) and Mr M Sandle (Group Used Car Sales Manager).

5 We were provided with an agreed bundle of documents and further supplementary documents which became relevant during the course of the evidence. The Tribunal decided to admit some correspondence relating to a safety recall audit in 2016, as it appeared to us to be relevant to the issues in dispute and proportionate to do so. We read those documents to which we were referred during the course of the evidence.

Findings of Fact

6 The Respondent is a member of a group of companies providing sales and

servicing for Mercedes-Benz vehicles within the United Kingdom. It includes a Mercedes-Benz dealership in Stratford, East London which deals exclusively with after sales servicing of passenger cars and light commercial vehicles, including routine servicing, repairs and MOT testing. There were approximately 45 – 50 employees with a further 8 – 10 contractors working at Stratford, managed by Ms Lauren Murray. None had a disability. Mr David Jones, the Senior Service Team Manager, reported to Ms Murray at the material time.

7 In or about April 2018, the Claimant applied for the role of Service Adviser at Stratford. Ms Murray and Mr Jones interviewed him on 17 April 2018. The Claimant provided proof of identity which was signed by the Dealership Administrator, Ms Ainger. An offer of employment was made to the Claimant on 24 April 2018. His starting salary was £30,396 and, as for all employees at Stratford other than the receptionist, he was entitled to a significant percentage of his base salary by way of bonus if certain performance targets were achieved. The bonus was payable monthly in arrears with a quarterly element for the achievement of departmental target. The bonus strongly incentivised employees to maximise profit at Stratford.

8 In preparation for commencement of employment, on 24 April 2018, the Respondent's central HR Department sent the Claimant a number of important documents. These included the contract of employment, a form for bank account details and an equal opportunity monitoring and reasonable adjustment sheet.

- The Claimant's evidence is that he completed the forms, signed them and returned them by post. When chased by HR who said that they had not received the documents, the Claimant says that he scanned them and handed a copy to the Stratford reception. The documents included the equal opportunity and reasonable adjustment sheet in which he stated that he considered that he had a disability, namely cognitive mental health, chronic spinal condition, PTSD and anxiety, was receiving ongoing psychological treatment. He identified reasonable adjustments of a phased return to work, time off for psychology appointments, special care in social/work relationships, phased training and an adapted display screen.

- The Respondent's evidence is that whilst the contract and employment documents such as bank details were received, it has no record of the equal opportunities monitoring form or reasonable adjustments form on its system. It maintains that these documents were not returned by the Claimant.

9 In order to resolve the dispute of evidence, the Tribunal had regard to the limited contemporaneous documents. The emails show that HR chased the Claimant for return of the documents on 26 April 2018. The Claimant responded by email the same day: "**I have accepted the offer and will sign and send copy back ASAP**". The Claimant was chased again by HR on 3 May 2018. He replied the following day, copied to Ms Murray and Ms Ainger, stating that the contract had been signed, would be with them shortly and he would send a scanned copy. The Claimant did not refer to documents other than the contract nor has he provided a copy of the email showing which documents were in fact attached. Ms Murray responded thanking him for returning the documents. The Tribunal does not accept that this is indictive of Ms Murray having read the documents, she was simply acknowledging their return to HR. Moreover, on balance, the Tribunal finds that Ms Ainger would have forwarded any documents received from the Claimant to central HR,

just as she did with the proof of identity obtained at the interview. We find that the equal opportunities and reasonable adjustment documents were not handed to Ms Ainger.

10 The Respondent's screen print of the Claimant's employment record is included in the bundle; it contains no record of disability. The Tribunal accepted the Respondent's evidence of its procedure for processing employee information. The content of paper records is uploaded onto the digital file by a member of the central HR team and is double-checked by another HR administrator. It is a robust system. The purpose of the information about disability is to enable a referral to Occupational Health if appropriate. The Claimant accepted in evidence that there was no reason why the central HR team would deliberately fail to record information which it had requested. On balance, we find that the documents were not received by the Respondent – if they had been, they would have been uploaded on to the system.

11 The Claimant's employment started on 29 May 2018. Although the reasonable adjustments form stated that the Claimant required time off for psychologist appointments, the Claimant stopped his CBT treatment early (and by no later than 31 May 2018) as his work pattern did not fit with the session times. The Claimant did not ask Ms Murray or anybody at Stratford for time off to attend the appointments, nor did he contact central HR to pursue the adjustment contained in the form which he says he submitted. At paragraph 33 of her Judgment dealing with time issues, Employment Judge Jones found that the CBT sessions ended prematurely because the Claimant wanted to focus on his new job.

12 In cross-examination, the Claimant accepted that he did not tell the Respondent that he had mental health issues or that his conversation skills were affected by his mental health. He accepted that if he had told Mr Jones, it would have helped but that he was just trying to get on with things at a time when his mental health was deteriorating. On balance, the Tribunal finds that the Claimant was not proactive in disclosing his mental health to the Respondent and did not inform them of any mental health condition or ongoing treatment nor did he provide any information to Ms Murray or Mr Jones from which they might have thought he had problems with his mental health.

13 As shown on his CV, the Claimant had considerable experience working in the motor industry, most recently as a Service Adviser and Administrator for BMW. The Claimant's evidence is that he was "thrown in at the deep end" with too much work and insufficient time or support to settle into his new job. In fact, Mr Jones spent time with the Claimant in the first couple of weeks explaining the Respondent's processes and, on or around 5 or 6 June 2018, allocated two other Service Advisers as mentors to him. The Tribunal finds that the Claimant's mental health was deteriorating, and he was suffering increased confusion, which impacted on his ability to deal with all of the work allocated to him. This in turn led to some frustration on the part of Mr Jones, the supervisors and some Service Adviser colleagues who believed that they had recruited an experienced Service Adviser who would quickly be able to discharge the full range of duties of the role.

14 The working environment at Stratford was robust rather than nurturing. In the probationary review meeting on 17 July 2018, Ms Murray referred to telling the Claimant at interview that Stratford was "**an extremely busy and extremely challenging site and customers, we get a lot of shouting customers and the way we are spoken to SA-SSTM are quite astonishing and I cannot stress enough that I didn't explain this to you and make it clear to all our employers (sic)**". We find that the Service Advisers dealt with this through a mixture of swearing and a sense of "us and them" with regard to customers they perceived as demanding. The

Service Advisers were a close knit and established group of employees, some with assertive and strong personalities, strongly motivated to achieve bonuses through performance. The Claimant struggled in this new environment. The Tribunal found him to be a quiet, reflective person who did not fit comfortably into the team dynamic and perceived himself as an outsider. This developed during his short period of employment to the point where he perceived that his colleagues were excluding him (for example from the WhatsApp group) and ganging up against him. This is consistent with the wide-ranging complaints initially made in the claim, many of which are no longer pursued in these proceedings and were not raised by him contemporaneously.

15 In this context, the Tribunal finds on balance that: (i) Ms Murray said "who does that customer think he is" in front of the team; (ii) Jhonny said that he could not or would not deal with a customer because it raised his blood pressure; and (iii) when the Claimant asked for assistance, Scott replied "what does he fucking want. What's his problem?". Such comments are consistent with the robust working environment, antipathy to customers perceived as demanding, irrespective of race, and frustration that the Claimant had not "hit the ground running".

16 The Tribunal accepted as credible and reliable the Claimant's evidence that he asked Mr Jones for adjustments to his display screen on two occasions in mid-June. However, the Claimant did not refer to it in his appeal letter on 24 July 2018 and in the ET1, the Claimant does not suggest that he told Mr Jones that he required an adjusted display screen because of his mental health disability. On balance, we find that the Claimant did not explain why he needed the adjustment nor would a request for an adjusted display screen logically suggest a mental health disability. Mr Jones' response to the Claimant's request was to laugh and tell him to write down a telephone number, saying that it was for the Respondent's "disabled employee adviser". We find that the comment was not malicious and was intended as a joke, consistent with the nature of the workplace. However, it was ill-judged and the Claimant felt humiliated at being mocked in front of colleagues. The display screen was not adjusted.

17 On 11 July 2018, the Claimant was due to start work at 8am but did not arrive until 8:40am. As recorded in an email the same day, Mr Jones was concerned about his appearance, describing him as looking very confused, lost, blank, "spaced out" and dejected. The Claimant was invited to a meeting with Mr Jones and Ms Murray, in her office. The Tribunal accepted as credible and reliable Ms Murray's evidence that the Claimant's behaviour in the meeting caused her concern. She described him as having blood-shot eyes, staring fixedly at Mr Jones but not responding to any questions from him. On balance the Tribunal finds that neither Mr Jones nor Ms Murray suggested that the Claimant was on drugs. However, the situation was so tense that Ms Murray asked Mr Jones to leave the office. Once Mr Jones left, Ms Murray asked the Claimant if he was ok and said: "**you looked as if you were going to go at him**". We accept that this was said lightly and as a way to break the ice; it was not implying a physical attack by the Claimant as it more plausibly suggested a verbal disagreement. The attempt to defuse the situation worked as the Claimant explained that an issue which had arisen at home had caused him to be late and appear dishevelled. The Claimant was emotional but did not indicate that the comment was unwanted, indeed he thanked Ms Murray for her understanding.

18 Immediately following the meeting on 11 July 2018, Mr Jones sent an email to Ms Murray detailing his concerns about the Claimant's performance during his brief period of employment to date. The Tribunal finds the contents of the email to be contemporaneous

and reliable. The concerns raised were timekeeping, process, customer communication, inability to do more than a very reduced workload, complaints and a failure to engage with mentoring. The process concern arose from the Claimant's refusal to sign the Warranty Folder checklist as he did not understand why his signature was required despite Mr Jones' explanation. Mr Jones concluded the email by stating:

> "**I have real concerns over Abdul's ability as an Adviser and feel that his lack of communication, skill and experience dealing with customers is putting undue stress and pressure on the team. I will forward the notes to Abdul in regard to his one to one chat with me and cc you into them for reference. I will continue to mentor Abdul and try and bring him to the standard the business and customers desire**".

19 Although the notes of the one to one chat were not included in the bundle, the Tribunal accepts on balance that it did occur and that both Mr Jones and Ms Murray had sought informally to address the concerns about the Claimant's performance which were arising during his probationary period. This is consistent with Ms Murray's email to HR on 11 July 2018 asking for a probationary review meeting to be convened. Whilst Ms Murray believed that termination of the Claimant's employment was the likely outcome, it was not at this stage a definite decision and depended on what Claimant said in the probationary review meeting.

20 The process for signing warranty folders was discussed at a team meeting on 12 July 2018. Mr Jones and Ms Murray explained that at the Respondent, it was the job of the Service Adviser to sign the warranty folder to confirm that documents were present. On balance, and for reasons set out below, the Tribunal does not accept that the Claimant said that he was being required to sign to certify that absent documents were in fact present. Instead, the Claimant repeated his belief that the Warranty Administrator should sign – in other words, the information disclosed was about who signed, not what they were signing to confirm or when they were signing.

21 On 12 July 2018, as the Claimant walked into the office, he heard Scott laughingly comment to another Service Adviser that "**people like that should be taken outside and punched up**". The comment was not about the Claimant but about a customer. However, the Claimant believed that this was a threatening comment directed at him, he asked "**what is the joke**" and, when Scott did not respond, said words to the effect of "**if anyone has a problem with me, if it needs to be resolved with punching my face in, take it outside the business**".

22 The Claimant's evidence was that he was not suggesting that he and Scott should fight, rather that Scott should keep any personal dislike of the Claimant out of the workplace. The Respondent's case is that the Claimant's comment was an invitation to Scott to engage in a fight, that the Claimant had thrown a job pack containing customer car keys to the floor and walked out, whereupon Scott attended Ms Murray's office "literally shaking", as she put it.

23 Ms Murray took no contemporaneous note of the comments said to have been made by the Claimant. She did not interview anybody who was present, no notes were taken of any discussions which took place. Mr Kapetanou witnessed the incident. In his evidence to the Tribunal, he said that he was more concerned that the Claimant seemed so upset and did not refer to any threatening or aggressive behaviour by the Claimant, whom he described as generally a quiet person. This is consistent with our finding that the Claimant is by nature quiet and reflective. The Tribunal finds that the Claimant was

upset and emotional, but not aggressive, when he made the comment to Scott.

24 The Claimant was suspended. The letter inviting him to a probationary review on 18 July 2018, listed the following as topics to be discussed: alleged aggressive behaviour to a colleague on 12 July 2018, being late without following proper procedure, refusal to follow the correct process in regard to completing and signing the Warranty Check List Folder, failing to follow proper process regarding customer complaints, concerns about the volume of work being undertaken, leaving a customer unattended, refusing to engage in mentoring training and repeated customer complaints.

25 The probationary meeting took place on 18 July 2018; notes are included in the bundle. The meeting discussed the Claimant's suspension and some of the issues that had arisen during his period of employment using his prior letter as a template for discussion. The Claimant did not challenge Ms Murray's assertion that they had previously spoken about these issues, consistent with our finding that there had been earlier informal discussions. Ms Murray set out the account of the office incident as relayed to her and the Claimant explained that he had reacted as he did because he did not feel included. There was no significant exploration of what was said or why it was said. In his letter, the Claimant had complained that other employees were aggressive to keyboards, smashing them or throwing them around with aggression. Ms Murray rejected this without apparent investigation.

26 In his letter the Claimant had alleged fraud under the previous manager, Frank. At the meeting, Ms Murray acknowledged that there had been fraud but said: "**if we took everyone's bonus back off of them for what we paid for our warranty audit last year, people would not have earned money".** In cross-examination, Ms Murray gave a spontaneous and credible explanation of the financial impropriety. Namely, Frank allowed significant amounts of work in progress which should have been at the expense of the branch to remain unbilled. If such work, for example accidental damage at the fault of the branch, had been billed it would have reduced the profitability and consequently the staff bonus. £30,000 was subsequently written off but there was no attempt to recover the inflated bonus from Stratford staff. This was the fraud and comment about people earning more when managed by Frank to which Ms Murray was referring. Her reference to a warranty audit was a mistake because, as confirmed by the evidence of Mr Cartmell, there was no warranty audit other than the safety recall in either 2016 or 2017. The safety recall audit did not have any financial cost to the Respondent as, despite an intention to debit the branch, Mercedes Benz ultimately did not do so. Overall, we find the parties were at cross purposes on this point and we do not draw any negative inference from Ms Murray's choice of words.

27 Ms Murray sought to confirm that the Claimant's reason for not wanting to sign the back of the Warranty Folder was because he felt that a Warranty Administrator should do it. The Claimant replied that he had not understood the process, confirmed that it had now been explained and said: "**I think I was just being over critical on that procedure but understand not [sic] and will follow it**". The Claimant did not say in this meeting that he had protested to Ms Murray or to Mr Jones about being asked to sign blank warranty folders. The Tribunal considers that if he had raised this issue on 12 July 2018, as he asserted in evidence, then the Claimant would have expressly mentioned it at the probationary review meeting.

28 The meeting discussed the Claimant's time keeping and Ms Murray referred to the earlier meeting on 11 July 2018, suggesting that the Claimant had stared at Mr Jones as if

he were struggling to hold back from saying something and had refused to answer his questions. The Claimant explained that he had not answered because Mr Jones had asked in front of everyone in the office and he did not feel comfortable giving the reason for his lateness on that occasion. This is consistent with our finding that Ms Murray's comment on 11 July 2018 referred to a verbal rather than physical disagreement. Having discussed the issues set out in the invitation letter, at the end of the meeting, Ms Murray told the Claimant that his employment was terminated because of his conduct.

29 The subsequent letter confirming dismissal stated that the reasons for dismissal were aggressive behaviour to a colleague, failure to follow company processes or management instruction, customer service skills and work levels not being at an acceptable standard. The Claimant was paid two weeks in lieu of notice and advised of his right of appeal.

30 Copies of the meeting notes were enclosed. The Claimant made some comments and amendments to the notes. On the section of the notes dealing with the warranty folder check list, the Claimant wrote that he fully understood what it was by reason of his previous experience when working in a warranty role but he did not make any amendment tending to suggest that he had been instructed to sign a blank folder. The Tribunal find that this allegation was first made by the Claimant during his subsequent appeal and that the Claimant had not protested to Ms Murray in June or July 2018 about being asked to sign empty warranty folders.

31 The Claimant's letter of appeal dated 24 July 2018 is 12 pages long and takes issue with the reasons for dismissal. The Claimant alleged offensive and aggressive behaviour by Scott to himself and other colleagues. He gave examples of poor customer service by various colleagues. This was the first time that the Claimant suggested that customers of different ethnic origins were perceived as aggressive, indeed in his 19 July 2018 email to Mr Sandle, the Claimant made a general allegation that his former colleagues slandered customers. The Tribunal consider it significant that even in this appeal letter, the Claimant does not suggest that Ms Murray's comment about a customer was because of race.

32 In his appeal letter, the Claimant referred to the "spaced out" and "on drugs" comments relied upon in these proceedings as being highly offensive, degrading and discriminatory. He stated that "**my mental health disability, its influence on my personality traits should have been acknowledged and considered a bit in the workplace**" and that Ms Murray had not accommodated his condition as requested in forms submitted when his employment started. Later in the letter, the Claimant stated:

> "**The fact that she judged this as an attitude issue is … a confirmation that she failed to understand my personality, mental health condition and characters traits, which is neither abusive, aggressive or violence but perhaps personality condition, which are protected under the disability discrimination and equality act 2010**."

33 Under the heading "management instruction and company process", the Claimant first made the allegation about signing blank warranty folders. He did so in the following terms: "**I raised awareness in the business that it was not correct company process for the Advisers to pre-sign a blank Warranty Folder. I was demonstrated this and instructed to do so by Management before passing the job over to Warranty Department, I was advised that Mercedes Benz Warranty as it was retail group (not franchise) was more relaxed than BMW and not to worry about this (they have blank cheques).**" The Claimant set out his belief that it was for warranty administrators

to close the job, seal the folder, sign that the warranty folder to confirm that all documents are present and correct. He relied upon an amendment to the folder to include a signature box for the warranty team as an acknowledgment that it was incorrect for Service Advisers to sign-off warranty folders. The Respondent denies that there was any amendment to the folder; the process was that the Warranty Administrator would initial the folder when the warranty claim was processed.

34 The appeal hearing took place on 24 August 2018 at 10.30am. It was heard by Mr Mike Sandle with Ms Rampling attending on behalf of HR. The Claimant did not request a mental health advocate but was accompanied by a Trade Union Representative.

35 The hearing did not start well. Mr Sandle told the Claimant that he had not read all of his 12-page letter of appeal sent just after 6am that morning and maintained that by including customer names, the Claimant had breached GDPR rules. In evidence, Mr Sandle accepted that he had not read the appeal letter properly as it had been provided late and as a result had not noted the Claimant's references to his mental health.

36 From the notes, it is evident that the nature and tone of the appeal hearing became increasingly confrontational and the Claimant was frustrated as he felt that his issues were not being properly considered. When discussing the incident with Scott, the Claimant said that he felt that Mr Sandle and Ms Rampling were not seeing his side of the events, that they had not read the whole appeal and suggested that they might need to adjourn to do so. Ms Rampling replied: "**you will need to calm down and listen or otherwise I will have no other option other than to end this meeting due to your behaviour now. (Interruption – aggressive stance).**" Mr Sandle intervened to ask everyone to stop talking over each other and described the Claimant as being clearly emotional. The Tribunal accepts that the words in brackets were included to record the demeanour of the Claimant at that stage in the meeting. This is not unusual as the words alone may be insufficient to convey the way in which they are spoken. On balance, the Tribunal finds that the Claimant was emotional and frustrated which was perceived as an aggressive stance although we accept that he was not being physically aggressive in the hearing.

37 The tone of the hearing became more hostile when the Claimant challenged the accuracy of the notes of the probationary meeting in respect of the warranty folder. Mr Sandle and Ms Rampling's response was that this was not in the letter of appeal and the Claimant could not challenge only part of the notes - essentially, he either accepted the entirety of the notes or they should be entirely disregarded. The Tribunal accepts that Mr Sandle spoke to the Claimant in a frustrated manner when he asked the Claimant whether he was saying that the notes were correct or not. This is consistent with the sense of irritation shown in cross-examination about the late provision of the comments and his belief that the Claimant was selectively challenging only those points which showed him in a bad light. When the Claimant turned to his Trade Union representative for advice on whether to maintain his accuracy challenge, Mr Sandle told him that Norman, his representative, could not make the decision for him. The Claimant did not understand what they were asking him and, it is this context, that Ms Rampling again told him to calm down. On balance, we find that both Mr Sandle and the Claimant were speaking with raised voices by this point.

38 The Tribunal finds that the approach of Mr Sandle and Ms Rampling was unnecessarily confrontational and was not constructive. It is not unusual for the accuracy of notes of a hearing, whether it be disciplinary, grievance or otherwise, to be challenged

in part and there is no logical reason why there should be such an "all or nothing" approach. The Claimant was not being aggressive but was aggrieved by what the Tribunal finds to be the hostile manner of Mr Sandle and Ms Rampling. The Claimant did not return after the short break taken at 12.30pm and the hearing was adjourned.

39 Attempts were made to reconvene the appeal hearing. In his correspondence, the Claimant expressed his profound unhappiness and belief that he had not had a fair appeal hearing. In his email sent on 10 September 2018, the Claimant said that the unfair and biased procedure had aggravated his mental health condition and that he now needed "**advocacy intervention with the matter at hand**". This was the first time that the Claimant had informed the Respondent that he required assistance from a mental health advocate.

40 In a letter dated 11 September 2018, the Claimant set out his concerns with the accuracy of the notes of the previous hearing. The Claimant also made further allegations about the conduct of his former colleagues and, for the first time, alleged that Mr Jones had performed a Nazi salute whilst saying "Heil Hitler" in the office in front of the Claimant and his colleagues. In evidence the Claimant maintained that the comment and gesture were made; the allegation was not put to Mr Jones in cross-examination, but the Respondent's case is that no such conduct occurred. The Tribunal considers it material that the allegation was first made at such a late stage in the process. The alleged conduct is so offensive that we find that, if it had happened, it would have been raised in the 24 July 2018 when the Claimant clearly felt comfortable alleging inappropriate behaviour by former colleagues. On balance, we find that Mr Jones did not act in the manner alleged.

41 In that letter, sent to the Directors of Mercedes Benz Retail Group and copied to Ms Davidson, the Claimant said that it had been unreasonable and practically impossible to require his comments on the appeal hearing notes within two working days due to his current mental health, capacity and dyslexia. The Claimant wrote that: **"I have clarified I am due to request any further help with advocacy support by Mind/NHS Working Well Trust. I [sic] caseworker will be present in future to assist in dealing with this matter**". The Tribunal finds that despite the obvious typographical error, this was a clear statement that the Claimant required a mental health advocate to be present at the reconvened appeal hearing.

42 Ms Davidson replied to the Claimant on 12 September 2018, addressing many of the points raised in his letter but not the request for a mental health advocate at any reconvened hearing. The Tribunal finds that there was no refusal, rather the request was overlooked due to the very many issues raised in a letter which was at times confusing. On 17 September 2018, Ms Davidson confirmed that the Sandle appeal hearing would be set aside and a fresh appeal hearing would be conducted by a different manager and HR representative.

43 The same day, Mr Watson in his capacity as newly appointed appeal manager wrote to the Claimant inviting him to a hearing on 27 September 2018. He advised the Claimant that he could be accompanied by a former colleague or trade union representative, he did not mention a mental health advocate. Mr Watson invited the Claimant to contact him directly if he had any queries.

44 The Claimant commenced ACAS early conciliation on 20 September 2018 and informed the Respondent that he would not attend the appeal hearing. On 27 September 2018, the Claimant made his views very clear that he did not want there to be any further correspondence with the Respondent whether by way of appeal outcome or otherwise.

Process for Warranty Claims

45 The Tribunal heard a large amount of evidence about the process for making a claim for repair work done under warranty. When a customer brings a car into Stratford, they provide a brief description of the complaint which is recorded on a job card and signed by the customer. A workshop technician looks at the vehicle and decides whether the repair is covered by warranty due to manufacturers defect (for example the bumper has come loose because a fixing has failed) or is to be paid by the customer (for example, the bumper has come loose due to a parking error). If the repair is not covered by warranty, the Service Adviser calls the customer to seek their authority to proceed on a privately paying basis. If the workshop technician has any doubt as to whether or not the work falls within warranty, they can seek assistance from the Warranty Managers or Administrators or provide photographs of the questionable part to the Warranty Operators.

46 When the work is complete, the technician completes the job pack. The Service Adviser then puts the job pack and other relevant repair documentation into the warranty folder. At Stratford, the Service Advisor was expected to sign the checklist on the warranty folder. The Tribunal accepts as reliable the evidence of Mr Cartmell that the signature was to confirm only that the required documents were included; it was not an authorisation of a valid warranty claim. The warranty folder was then passed to the Warranty Administrator who would double check that the required documents were present, initial the warranty folder and submit the claim. The warranty folder was securely stored separately from customer paid jobs in the event of any future audit or need to obtain information about previous work done.

47 The Claimant's case as to the alleged impropriety with the warranty folder was confusing and changed in material respects. In his claim form, he alleged that the fraud was signature by a non-claims administrator and at paragraph 46 that it was the Warranty Administrator who had the authority to make the claim and should therefore sign. This is consistent with his position during employment and in the probationary review meeting that he was unhappy at being required to sign the warranty folder at all as he considered that it was the job of the Warranty Administrator, based upon his experience in that role at BMW. His refusal to sign the warranty folder caused confusion and irritation to his colleagues and, despite numerous explanations that at the Respondent it was the job of the Service Adviser, the Claimant continued to refuse to sign. This is consistent with the 11 July 2018 memo, the inclusion of refusal to follow the correct process for completing and signing the warranty checklist folder in the list of topics to be discussed in the probationary review meeting and the Claimant's position in the meeting where his stated concern was who should sign, not what he was signing for.

48 In the further particulars of the protected disclosures submitted as part of these proceedings, disclosure 5 related to the warranty folders. The particulars stated that a repair should not be carried out if the requisite paperwork has not been completed, that on 1 June 2018 Anthony (Kapetanou) was required to sign a blank warranty folder to falsify the required paper work, that on 10 July 2018 the Claimant was told by Mr Jones to sign the folder even if documents were missing as Mercedes had an open cheque book and that on 12 July 2018 the issue of signing warranty folders after the repair had been done arose again. Paragraph 15 states that the Claimant made a protected disclosure indicating that the practice of signing warranty folders after the event was wrong but does not include a reference to signing blank warranty folders.

49 The Claimant first alleged that he was required to sign the checklist to confirm documents in what was actually an empty warranty folder or to sign before the work was completed in his letter of appeal, dated 24 July 2018. The Tribunal consider it significant that the Claimant's corrections to the probationary review meeting notes during the appeal process made no mention of a requirement to sign empty folders. In evidence, the Claimant said that Mr Jones had told him that if a document was not in the folder, he should not tick it on the checklist but to sign the folder and pass it to the Warranty Administrator. This is plausible and we accept Mr Jones' evidence that not all documents on the checklist were always required and the Service Adviser is signing only to show what is present. It is entirely inconsistent with the Claimant's case that he was required to sign an empty folder. Moreover, a requirement to sign as complete a warranty folder which was in fact empty would not make any sense as it would not authorise a warranty claim and the Warranty Administrator would have to chase to obtain the necessary documents anyway.

50 The Claimant's case as it developed after his dismissal was that the signing of incomplete or empty folders was part of a fraud upon the warranty provider. He relied upon the safety recall audit in support of this allegation. The Tribunal considered the evidence of Mr Cartmell to be impressive and reliable. The recall audit raised entirely different issues about the job pack and qualification of technicians being used on certain types of work; if an incorrectly qualified technician was used, all of the vehicles worked on would fail the audit which explains the apparently high level of failures on the recall audit. The job pack is not the same as the warranty folder and there was nothing in the recall audit which concerned the adequacy of documents submitted for a warranty claim.

51 The Tribunal accepts Ms Murray's evidence, consistent with the contemporaneous documents to which we have referred, that the Claimant never told her that his concern was about signing an incomplete folder. She understood, as we have found, that his concern was that it should be the job of the Warranty Administrator and not the Service Adviser. The Tribunal found Mr Ahmed to be an impressive, reliable witness who also confirmed that there was no contemporaneous concern expressed by the Claimant about signing an incomplete folder, the folder was only signed after the work had been done and he had never been asked to sign an incomplete folder. Mr Kapetanou's evidence was measured and supportive of the Claimant about the Scott incident, yet he denied being asked to sign blank folders and made clear that the folder was only signed after the work was done and ready to be passed to the Warranty Administrator.

52 The Respondent's Warranty Manual requires that a warranty repair be recorded on the job card and validated before the repairs commence. The Tribunal accepts the consistent evidence of the Respondent's witnesses that this means confirmation that there is a valid warranty in force and the customer has signed the job card to authorise a warranty claim. Under the heading "Warranty Envelope", the Manual states that: "**all warranty job packs must contain an accurately completed Warranty Check List**", with the confirmation box signed, dated and timed by an authorised signatory to confirm the repair documentation is complete and correct. All supporting documents required to substantiate a warranty claim must be retained in the job pack. In the section dealing with warranty administration, the manual states that:

> "**the confirmation box on the Warranty Envelope must be signed, dated and timed by an authorised signatory to confirm the repair documentation is complete and correct. This is an EWMR requirement for all claims**".

After specifying some of the documents which must be included it deals with claims not complying with warranty guidelines and states:

> **"If the issue cannot be resolved to the Administrator's satisfaction, then the claim must be referred to the Market Area Warranty Manager".**

53 The Tribunal does not accept the Claimant's case that read holistically, the manual requires the Warranty Administrator rather than the Service Adviser to sign the warranty folder (envelope). The warranty envelope section does not specify who the authorised signatory should be. The only reference to an Administrator is in connection with issues arising when a claim is submitted and there is no dispute that it is the Warranty Administrator who submits the claim, not the Service Adviser. Read sensibly and objectively, the manual does not require that the Warranty Administrator be the person who signs the checklist. This is consistent with the evidence of Ms Burchfield, that if there were a query on a warranty claim it would be for the Warranty Administrator to clarify or approach the Warranty Manager if necessary. Finally, the Tribunal accepted as reliable the evidence of Mr Cartmell who was adamant that this part of the manual did not refer to the warranty folder but to issues arising once a warranty claim had been submitted.

Law

Discrimination

54 Section 13 of the Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Disability and race are each a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

55 Section 20 of the Equality Act 2010 provides that:

> **"20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

56 Part 3 of Schedule 8 provides that the employer is not subject to the duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the employee has a disability and is likely to be placed at substantial disadvantage.

57 Where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the Tribunal should identify (1) the PCP(s) applied, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee, **Environment Agency v Rowan** [2008] IRLR 20 at paragraphs 26-27 (Judge Serota QC).

58 Having done so, the Tribunal must consider and identify what (if any) step it is objectively reasonable for the employer to have to take to avoid the disadvantage. The aim of the duty is to remove or at least ameliorate the substantial disadvantage so that the disabled person may remain in the workplace. The potential adjustment need only have *a* prospect of alleviating disadvantage; there is no need to show that it would have been completely effective or even that there was a good or real prospect of it being so.

59 The Equality and Human Rights Commission's Employment Statutory Code of Practice, at paragraph 6.28, suggests that the following factors might be taken into account when deciding what is a reasonable step for the employer to have to take:

- **whether taking any particular steps would be effective in preventing the substantial disadvantage;**
- **the practicability of the step;**
- **the financial and other costs of making the adjustment and the extent of any disruption caused;**
- **the extent of the employer's financial or other resources;**
- **the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
- **the type and size of the employer.**

60 Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect."**

61 In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness,

having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

62 In **Pemberton v Inwood** [2018] EWCA Civ 564, Underhill LJ revisited **Dhaliwal** in light of the introduction of s.26 and the difference in language to the predecessor harassment legislative provisions. Underhill LJ made clear that in considering whether conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for that conduct to be regarded as having that effect taking into account all other circumstances.

63 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

64 Unfair or unreasonable treatment of itself is not sufficient, but where there is a comparator who is treated more favourably the absence of an explanation for the unreasonable treatment may amount to the 'something more', **Anya v University of Oxford** [2001] ICR 847, CA.

65 In considering whether the burden of proof has shifted, the Tribunal should not adopt an overly mechanistic approach but rather consider whether discrimination can properly and fairly be inferred from the evidence, **Laing v Manchester City Council** [2006] IRLR 748. A Tribunal will be setting an impermissibly high hurdle, however, if it asks if discrimination is the only inference which could be drawn from the facts, **Pnaiser v NHS England and Coventry City Council** [2016] IRLR 170, EAT.

Protected Disclosure

66 A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, a criminal offence has been, is being or is likely to be committed or that a person has failed, is failing or is likely to fail to comply with a legal obligation, sections 43B(1)(a) and 43B(1)(b) Employment Rights Act 1996.

67 There is no rigid dichotomy between "information" and "allegation", the issue is whether there is sufficient factual content and specificity such as is capable of tending to show a relevant failure, **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436. This is an issue to be decided having regard to all the facts of the case and is likely to be closely aligned with the issue of whether there is a reasonable belief that the information tends to show a relevant failure.

68 For disclosures made after 25 June 2013, there is no good faith requirement when considering liability but the employee must have had a reasonable belief that the disclosure was made in the public interest.

69 As made clear in **Babula v Waltham Forest College** [2007] EWCA Civ 174, the worker must subjectively believe that the information tends to show a relevant failure and objectively that belief must be reasonable. A belief may be reasonable even if it is wrong.

70 The same subjective and objective tests apply to whether or not the worker reasonably believed the disclosure to be in the public interest, **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ 979. There may be more than one reasonable view of what is in the public interest and the Tribunal must not substitute its view for that of the worker. The particular reasons why the worker believes a disclosure is in the public interest are not of the essence nor is public interest required to be the predominant motive for the disclosure. There is no definition of "in the public interest" and it is a matter of fact for the Tribunal in all of the circumstances, indeed there may still be public interest where the disclosure is self-serving, however the following factors will normally be relevant:

(a) The numbers in the group whose interests the disclosure served.

(b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.

(c) The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than disclosure of inadvertent wrongdoing affecting the same number of people.

(d) The identity of the alleged wrongdoer, including the size and prominence of the relevant community.

71 In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled up approach but to consider each disclosure by date and content, identify the relevant breach or criminal offence in each case and the detriment (if any) which is caused thereby.

Conclusions

Reasonable Adjustments

72 The focus of the submissions of both representatives was whether or not the Respondent had knowledge, actual or constructive, that the Claimant was disabled and was likely to be placed at a substantial disadvantage in respect of both the display screen and the mental health advocate.

73 Dealing first with the display screen, the Tribunal has found as a fact that the equal opportunities and reasonable adjustment documents were not handed to Ms Ainger or received by central HR. Nor, we have found, did the Claimant provide any information to Ms Murray or Mr Jones from which they might have thought that he had problems with his mental health. He was not proactive in disclosing his mental health difficulties. The Claimant did not explain why he needed the adjustment nor would a request for an adjusted display screen logically suggest a mental health disability. We conclude that Mr Jones neither knew nor could reasonably be expected to know that the Claimant was disabled and that his mental health caused cognitive impairment with problems reading, concentrating and understanding the display screen.

74 The Claimant did not request a mental health advocate at the probationary review meeting and, as set out above, Ms Murray had no knowledge of the Claimant's mental health disability. Whilst the PCP as set out in the list of issues refers to the probationary review meeting at which his employment was terminated, the Respondent neither knew nor could reasonably be expected to know that the Claimant would be put at a substantial disadvantage by reason of his disability in attending without a mental health advocate.

75 The Claimant's appeal letter dated 24 July 2018 made an express reference to his mental health disability, protected under the Equality Act 2010, and its effect upon his personality. The Tribunal were unimpressed by Mr Sandle's evidence that he had not realised that the Claimant was disabled because he had not fully read the appeal letter as it had been submitted on the morning of the appeal hearing. The letter is 12 pages long but would not require significant time to read properly. The appeal hearing was important, the Claimant had lost his job and raised material reasons why that may have been unfair. It was unreasonable for a manager to proceed to hear an appeal without reading the letter in full to understand the Claimant's case. At most, it would have taken only a short delay to the start time of the appeal. Even if Mr Sandle did not expressly know that the Claimant was disabled, he could reasonably be expected to know from the content of the letter. The Tribunal rejects Ms Davidson's evidence that the content of the letter and the emails which she subsequently received were insufficient to put them on notice of disability. The Claimant was not simply referring to a fluctuating state of health but clearly to a mental health impairment which he regarded as a disability.

76 The Claimant did not request the support of a mental health advocate at the appeal hearing with Mr Sandle. He was accompanied at that hearing by his trade union representative who could, and did, assist him to organise and present his case. Even though the Respondent knew that the Claimant was disabled, it could not reasonably be expected to know that he would be put at a disadvantage without a mental health advocate at the appeal hearing in the circumstances.

77 The request for a mental health advocate was first made on 10 September 2018 in the context of attempts to arrange a reconvened appeal hearing. The Tribunal heard no evidence or submissions to suggest that there was a PCP generally applied of failing to accede to requests for such a companion at an internal meeting. Even if it were a PCP, there was no refusal to make the adjustment and the Tribunal has found that it was simply overlooked. The Claimant did not raise the matter again in response to Mr Watson's letter only one week later as, we conclude, by that date he had decided not to attend the hearing in any event. For all of these reasons, we find that the Claimant was not put at a substantial disadvantage and there was no failure to make a reasonable adjustment.

78 The reasonable adjustment claim fails and is dismissed.

Harassment - Disability

79 The Tribunal has found that the comment alleged at paragraph 2(i) of the issues was made by Mr Jones in respect of the display screen. The Respondent's case was that the incident simply did not happen but made no submissions as to whether it would have been unwanted, had the proscribed effect or related to disability. The Tribunal accepts the Claimant's case that the comment was unwanted and that he felt that he was being mocked in front of his colleagues. Subjectively and objectively it was reasonable for the comment to create a humiliating environment. The Respondent did not know that the

Claimant was disabled and had problems with mental health or that this was the reason why an adjusted display screen was required. However, the Equality Act does not require the unwanted conduct to relate to the Claimant's particular disability but to disability generally. The comment by Mr Jones was overtly related to disability.

80 The Tribunal has not found that either Ms Murray or Mr Jones suggested that the Claimant was "on drugs" as alleged or at all. On 11 July 2018, Ms Murray did say that it looked as if the Claimant was going to go at Mr Jones. The Tribunal has found that this was said to defuse a difficult situation in what was evidently a tense meeting. It did not imply a physical attack by the Claimant rather a possible verbal disagreement. We reject Ms Chan's submissions that the comment implied that the Claimant was going to criminally assault Mr Jones. The Claimant did not give any indication at the time that the comment was unwelcome, indeed at the end of the meeting, he thanked Ms Murray for her understanding. Applying **Dhaliwal,** even if the comment were unwanted, the Tribunal does not consider that it is objectively reasonable for such a transitory comment to have the proscribed effect when looked at in context.

81 In any event, the Claimant has not established the link to disability. Ms Chan submits that the comment was obviously detrimental as it was rude and humiliating to imply a criminal assault and that the burden then shifts to the Respondent to show that it had nothing to do with his Asian ethnicity or disability. Even if we had found that the comment was rude and humiliating in context, which we have not, the Tribunal does not accept that that alone is sufficient to shift the burden of proof. It is for the Claimant to prove primary facts from which the Tribunal could find discrimination. The mere fact of an inappropriate comment alone would be insufficient.

82 In any event, the Tribunal concludes that Ms Murray's comment was entirely caused by the Claimant's behaviour and demeanour in the meeting. The Claimant's case is that his demeanour was caused by the cessation of CBT and his deteriorating mental health which caused Ms Murray to perceive him as aggressive. However, the comment was made at a time when Ms Murray did not know and could not reasonably be expected to know that the Claimant was disabled. The Claimant's employment was short and there was no obvious change in his behaviour which she might have remarked upon had Ms Murray worked with him longer. The Tribunal does not agree that Ms Murray perceived the Claimant as aggressive whether because of his disability or his race. She was concerned that he was going to engage in a verbal disagreement with Mr Jones in the context of the Claimant arriving late for work, dishevelled, with blood shot eyes, not speaking to Mr Jones but staring at him instead. The comment was neither consciously nor subconsciously related to disability.

83 With the exception of the issue about the display screen, the claim of harassment related to disability fails and is dismissed.

Harassment - Race

84 As set out in our findings of fact, we have accepted that Scott made the threating comment on 12 July 2018 but that it was about a customer and not the Claimant. The Tribunal has also found that the other comments about customers set out in the list of issues were made. They are consistent with the robust working environment at Stratford and disparaging comments made about all customers perceived as demanding. The Claimant now alleges that the disparaging comments were specific to Asian customers.

He did not suggest this in his letter prior to the probationary review meeting, during the meeting itself, or in his amendments to the notes of that meeting or his initial email to Mr Sandle. The Tribunal does not doubt that similar things was said about all customers believed to be demanding irrespective of race. The Claimant has not shifted the burden of proof as this was not an act of harassment related to race.

85 As for the "go at him" comment made by Ms Murray on 10 July 2018, we rely on our earlier findings of fact and conclusions as set out in connection with the disability related harassment claim. Ms Chan submits that it is based upon an assumption displayed by Ms Murray of the Claimant being an "aggressive Asian". The Tribunal disagrees. The Claimant's behaviour and demeanour was unusual and this alone prompted the comment, it would have been said to any employee acting in the same way irrespective of their race. The Tribunal rejects the submission that Ms Murray made any stereotypical assumption as alleged or at all.

86 The Tribunal has found that the "on drugs" comment and the alleged conduct of Mr Jones in the office (paragraph 78 of the ET1) did not happen.

87 The claim of harassment related to race fails and is dismissed.

Direct Discrimination – Disability and/or Race

88 The same three detriments are relied upon as acts of both direct race discrimination and direct disability discrimination. All three arise from the appeal hearing before Mr Sandle and Ms Rampling. For the reasons set out in our findings of fact, the Tribunal accepts that comments in the same gist as those quoted in the list of issues were said by Ms Rampling and Mr Sandle at the appeal hearing on 24 August 2018. Ms Rampling did tell the Claimant to calm down and referred to ending the meeting, Mr Sandle did question the Claimant in a frustrated manner about whether the notes were accurate and did tell the Claimant that he could not look to his trade union representative to tell him what to do about the notes.

89 As set out above, the appeal hearing was conducted by Mr Sandle and Ms Rampling in a manner which was unnecessarily confrontational and was not constructive. The tone was set from the outset when the Claimant was accused of a GDPR breach and Mr Sandle made clear he had not fully read the appeal letter. It deteriorated further over relatively common place issues such as challenges to the accuracy of the notes of a previous meeting. Mr Sandle and Ms Rampling were hostile and irritated by the Claimant. The Claimant felt frustrated and aggrieved that his appeal was not being properly considered. Both the Claimant and Mr Sandle raised their voices at times.

90 The claim is one of direct discrimination and not of harassment. The Tribunal must therefore consider whether or not the Claimant has proved primary facts from which we could conclude that the comments were because of his race or his disability. Direct discrimination requires us to consider how a comparator, actual or hypothetical, would have been treated in the same or not materially different circumstances. In the absence of an actual comparator, as here, it is often more helpful for the Tribunal to consider the reason why certain conduct occurred rather than construct an arid hypothetical comparator, see **Shamoon.**

91 The Claimant struggled to articulate the facts from which the Tribunal could and should infer that his race or disability was a material cause for the comments. Essentially, his case was that because the behaviour of Mr Sandle and Ms Rampling was unreasonable, we should infer that it was because of his race or disability. We disagree. Unfair or unreasonable treatment alone is not sufficient without something more, see **Anya.** The comments which are relied upon as direct discrimination must be seen in context. They were made because of the Claimant's behaviour, although not aggressive he did become emotional and demonstrated his frustration in the appeal hearing. Although there was good reason for the Claimant to be emotional and frustrated and the comments of Mr Sandle and Ms Rampling were not reasonable, a view apparently shared by HR who decided that a new appeal panel should be convened, we conclude that any employee behaving in the same way would have been subjected to the same comments, irrespective of their race or disability. The Tribunal declines to draw the adverse inference urged upon us by Ms Chan for these reasons.

92 The claim of direct discrimination fails and is dismissed.

Unfair Dismissal

93 In deciding whether the Claimant made a protected disclosure, the Tribunal relies upon our findings of fact as to the information disclosed by the Claimant prior to his dismissal. His complaint prior to dismissal was about being required to sign the warranty folder at all, stating that it was the job of the warranty administrator. This is consistent with Ms Murray's understanding in the probationary review meeting and the Claimant's initial position that he had not understood the process before. We accepted Ms Murray's evidence that the Claimant never told her that his concern was about signing an incomplete folder, consistent with the evidence of Mr Ahmed and Mr Kapetanou.

94 It was only in the grounds of appeal submitted after dismissal that the Claimant first disclosed information which purported to show that he was required to sign blank warranty folders. Whilst the Claimant genuinely believes that he raised the issue during employment, the Tribunal disagrees and concludes that he has conflated the information disclosed as his complaint and dissatisfaction developed over the course of a difficult appeal process. Prior to dismissal, there was no disclosure of information in the way the Claimant asserts in the particulars of protected disclosure (signing after the repair had been done/after the event, see paragraphs 12 and 15 of the particulars) or in his evidence (signing blank folders).

95 Even if there had been a protected disclosure prior to dismissal, there were significant concerns about the Claimant's conduct and performance generally which had caused Ms Murray to call the probationary review meeting. The final incident with Scott was a further example of tension in the working relationship between a newly employed member of staff and his colleagues in which the Claimant made an inappropriate comment and threw a job pack including customer car keys to the ground, potentially causing damage for which the Respondent would be financially responsible. The Tribunal concludes that this last incident made up Ms Murray's mind that the Claimant's employment would be terminated and removed any lingering chance of the Claimant retaining his employment.

96 If the Claimant had had over two years' service, this would have been an unfair dismissal as no disciplinary process was followed and he was given no prior warnings. However, the Claimant was employed for just over 7 weeks, was still in his probationary period and was not performing to the anticipated standard. The Tribunal accepts that the concerns expressed by Mr Jones in his email on 11 July 2018 and by Ms Murray in her letter inviting the Claimant to the probationary review meeting were the reason for dismissal. Whilst the issue of signing warranty folders was included, this was the Claimant's total refusal to sign at all and insistence that it should be the warranty administrator who did so. It had nothing to do with blank or incomplete warranty folders or the timing of the signature.

97 The unfair dismissal claim fails and is dismissed.

Remedy

98 For the reasons set out above, only the disability related harassment due to the comment made in connection with the request for a display screen adjustment has succeeded. The Tribunal took into account the Claimant's evidence in his witness statement about the remedy claimed. The termination of the Claimant's employment is entirely unconnected with this act of harassment and therefore the Claimant is not entitled to compensation for past or future loss of earnings.

99 The Tribunal accepts that the Claimant has experienced an exacerbation of his existing mental health impairment and injury to feelings in the manner described in his witness statement. He attributes this to "all of the issues and discrimination" he encountered. However, only one of the very many acts of discrimination and harassment alleged has succeeded. On the basis of our findings and conclusions, we have treated this as a single act of harassment falling within the lower band of **Vento,** which at the time provided a range of £900 - £8,600. Taking into account the Claimant's already vulnerable mental state, distress at being mocked and the overtly insensitive and discriminatory nature of the comment, the Tribunal is satisfied that the appropriate award is **£4,000**.

100 The Claimant is entitled to interest at 8% from the date of the harassment, which the Claimant puts at roughly mid-June 2018. This is a period of two years and six weeks (110 weeks), giving a sum of **£676.92.**

Employment Judge Russell
Date: 28 July 2021