Case No: 1804865/2019

EMPLOYMENT TRIBUNALS

Between:
Mr S Dixon **and** Superior Machines Limited
Claimant **Respondent**

Heard at: Leeds **on:** 5 to 9, 12 and 13 July 2021

Before: **Employment Judge Cox**
Members: **Ms H Brown**
Mr K Lannaman

Representation:
Claimant: Mrs Dixon, lay representative
Respondent: Mr Robinson-Young, counsel

REASONS

1. On 12 September 2019 the Claimant made a claim to the Tribunal alleging that his employer, the Respondent, had committed various acts of unlawful disability discrimination against him, contrary to the Equality Act 2010 (EqA).

2. Over the course of two Preliminary Hearings, the Tribunal clarified with the Claimant what his claims were.

3. At the beginning of the main Hearing, the Tribunal provided the parties with a list of the allegations that it understood the Claimant to be making, drawn from the list of issues in the Orders made after the Preliminary Hearings. The Claimant confirmed that the list was accurate. Some of the allegations were not mentioned in the original claim form or had changed in their detail from those given in the claim form. The Tribunal gave the Claimant leave to amend his claim to the extent necessary to reflect the list of allegations as they now stood. The Tribunal considered it to be in the interests of justice to allow the application to amend for the following reasons. The Tribunal had reflected the allegations in their amended form when recording the issues raised by the claim in the Orders it made after the Preliminary Hearings. As a result, the Claimant had assumed they were accepted

as part of his claim and had had no reason to think he needed to make an application to amend to include them. The Respondent had already provided an amended response to the amended allegations. The Respondent was ready to defend the amended allegations at the Hearing and consented to the Claimant's application to amend his claim to include them. Although some of the allegations the Claimant sought to include or amend might have been presented out of time, it was not possible to reach any concluded view about that until the Tribunal had made findings of fact on the evidence to establish whether they amounted to conduct extending over a period, in which case the time limit for presenting a claim would not start to run until the end of that period (Section 123(3)(a) EqA).

The law

4. The Claimant is profoundly deaf and has been so since birth. His primary language is British Sign Language (BSL). The Respondent accepted that he is a disabled person within the definition in the EqA as a result of his deafness and that it had knowledge of his disability at all relevant times.

5. The Claimant alleged that the Respondent had discriminated against him in the following ways:

   5.1 Direct discrimination, in that, because of his deafness, it had treated him less favourably than it treated or would treat others (Section 13 EqA).

   5.2 Harassment, in that it had engaged in unwanted conduct related to his deafness that had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (Section 26 EqA).

   5.3 Discrimination arising from disability, in that it had treated him unfavourably because of something arising in consequence of his deafness (Section 15 EqA)

   5.4 Failure to meet the duty to make adjustments, in that it had a practice that put him at a substantial disadvantage in comparison with people who are not deaf, it knew or could reasonably have been expected to know that he was at that disadvantage, and it failed to take the steps it was reasonable for it to have to take to avoid that disadvantage (Section 20 EqA).

   5.5 Victimisation, in that it had subjected him to a detriment because he had done a protected act, namely, presented this claim to the Tribunal (Section 27 EqA).

6. It is unlawful for an employer to discriminate against or victimise a disabled person by subjecting him to a detriment (Section 39(2)(d) and (4)(d) EqA) or by subjecting him to harassment (Section 40(1)(a) EqA). For these purposes, failure

to meet the duty to make reasonable adjustments is viewed as discrimination (Section 21(2) EqA). An employer subjects an employee to a detriment if it does something that the employee could reasonably view as putting him at a disadvantage in his employment (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285).

The evidence

7. The Respondent is a company that manufactures agricultural milling and mixing machinery at premises based at a rural location near Driffield in Yorkshire. It is a small company with only around nine employees, including the Claimant, involved in manufacturing jobs, and three or four others working in management and administrative roles. It is one of several companies that have been owned and run by the Theakston family.

8. At the Hearing, the Tribunal heard oral evidence from the Claimant and from various individuals working for the Respondent. Mr Robert Theakston is the sole director of the company but also works in one of the workshops. Mr Martin Lovel is the General Manager who deals with staffing and administrative matters. Mr Phil Lovel, his son, is a senior welder and fabricator and the Claimant's supervisor; the Claimant worked mainly with him. Mr Scott Renshaw is a fabricator and welder who works in the same workshop as the Claimant. The Tribunal also heard oral evidence from Mr Edward Flanagan, the Respondent's solicitor, in relation to the allegation of victimisation. The Respondent submitted a witness statement from Mr Remis Jablonkis, who works for the Company as a paint sprayer. He is Lithuanian and is also profoundly deaf. The Claimant confirmed that he had no questions for Mr Jablonkis on the contents of his statement and it was therefore taken as agreed.

9. The Tribunal was referred to various documents in a file produced for the Hearing and viewed CCTV footage of the incident in Allegation 2.

The findings

10. Based on the evidence it heard, the Tribunal made the following findings on the allegations.

Allegation 1: Over the period from 14 June to 5 July 2018 Scott Renshaw verbally abused the Claimant by saying he was "thick as fuck", a "mongrel", a "spastic" and by saying "you are only here to sweep the floor" and "you shouldn't be here". This was alleged to be direct discrimination or harassment.

11. The Claimant's evidence was that Mr Renshaw used these words; Mr Renshaw denied it. The Tribunal preferred Mr Renshaw's evidence, for the following reasons.

12. The Tribunal accepts as credible Mr Renshaw's evidence that he would not have called the Claimant a mongrel or a spastic because his father has multiple sclerosis and it would feel like being abusive towards his own father. The Tribunal also finds his evidence credible that he would not have called the Claimant "thick as fuck" because, as he put it, "I'm a bit slow myself" and dyslexic. The Claimant's evidence was that he was able to lip read but not with a high degree of accuracy. He said that he knew that Mr Renshaw had called him a spastic because he had used the sign he himself uses for "spastic", namely, slapping the backs of his hands together. The Tribunal does not find it credible that Mr Renshaw would know and use the sign the Claimant uses for the word "spastic" when this is not the BSL sign for the word and Mr Renshaw could only have known it if the Claimant had taught him it.

13. As the Tribunal has doubts about the credibility of the Claimant's evidence, it prefers Mr Renshaw's evidence to the Claimant's and concludes that Mr Renshaw did not make the comments alleged. From the evidence the Tribunal heard, the Tribunal accepts that Mr Renshaw and the Claimant did not get on. Mr Renshaw considered the Claimant to be lazy and a show-off, because he took frequent cigarette breaks and coffee breaks that others did not take and bragged about the money he had. As Mr Renshaw himself admitted, he did tell the Claimant he was lazy and a show-off on occasions. But these were not comments that were made because of the Claimant's deafness nor did they relate to the Claimant's deafness.

14. Because the Tribunal is not satisfied that any comments Mr Renshaw made to the Claimant were because of his disability or related to it, this allegation fails.

Allegation 2: On 25 July 2018 Scott Renshaw assaulted the Claimant with a hammer. This is alleged to be direct discrimination, harassment or discrimination arising from disability

15. This allegation relates to an altercation between the Claimant and Mr Renshaw on the factory floor. The Tribunal viewed the CCTV footage of the incident several times and with the confrontation between the two men magnified.

16. At the time in question, the Claimant was working with Mr Phil Lovel on a machine. He had left the machine to fetch a piece of metal. Mr Renshaw was standing talking to Mr Lovel in the place where the Claimant had been working. Mr Renshaw had been panel-beating at his own workbench and come around to get Mr Lovel's advice on a problem he had with the job he was working on. He still had the hammers he had been using in his hands. The Claimant returned to the machine and touched Mr Renshaw on his right shoulder to communicate that he wanted him to move. Mr Renshaw continued talking to Mr Lovel and did not move. The Claimant touched Mr Renshaw again on his right shoulder, this time pushing

him to emphasise that he wanted him to move. Again, Mr Renshaw did not move and continued talking to Mr Lovel. The Claimant touched Mr Renshaw on the shoulder for a third time and Mr Renshaw responded by pushing the Claimant's hand off his shoulder using the flat of the hammer he was holding.

17. The Claimant then took Mr Lovel by both wrists and pushed him away, causing Mr Renshaw to walk backwards away from the machine. The Claimant kicked out at Mr Renshaw and, because Mr Renshaw's legs were apart, made contact with his thigh. The Claimant continued to push Mr Renshaw away holding his wrists and Mr Renshaw dipped his head forward sharply in what appeared to be an attempt to headbutt him. This was ineffectual as the Claimant was holding himself too far away from Mr Renshaw to allow contact. When the Claimant released his wrists, Mr Renshaw swung one arm and hammer in front of him and raised the other arm and hammer above his head. He did not move any significant distance towards the Claimant and appeared to be fending the Claimant off rather than advancing towards him.

18. There was no evidence before the Tribunal from which it could conclude that Mr Renshaw acted as he did because of the Claimant's deafness or that his actions related to the Claimant's deafness. The claims of direct discrimination and harassment therefore fail.

19. The Claimant alleged that Mr Renshaw's contact with him with the hammer amounted to discrimination because of something arising in consequence of his disability, namely his practice of touching people in order to communicate with them. The Tribunal is satisfied that Mr Renshaw pushed the Claimant's hand away not because the Claimant had touched him but because he had touched him repeatedly and that had caused Mr Renshaw to become very irritated with him. The Claimant did not repeatedly touch him to communicate to him that he wanted him to move: Mr Renshaw knew from the Claimant's first touch on his shoulder that he wanted him to move. Because of the antagonism he felt towards the Claimant, Mr Renshaw had decided not to move. The Claimant sensed that and so his second contact with him became more assertive and, prompted by the third contact, led to Mr Renshaw's reaction. The subsequent actions of the Claimant in taking hold of Mr Renshaw and kicking out at him and Mr Renshaw in attempting to headbutt the Claimant, swinging one arm holding a hammer in front of the Claimant and raising the other arm holding a hammer were all part of a tussle in which both men were equally involved.

20. In summary, the Tribunal concludes that there was no form of disability discrimination involved in this altercation and this allegation fails.

Allegation 3: Robert Theakston ignored the Claimant's complaint about Mr Renshaw's assault on him. This is alleged to be unfavourable treatment

because of something arising from the Claimant's disability, namely, the difficulty in communicating with him because of his deafness.

21. The Claimant did not complain about Mr Theakston's assault on him in writing, either in the notebooks on workbenches that he and others used to make notes or in a grievance letter. The Tribunal therefore considered whether Mr Theakston had ignored any complaint the Claimant had made at the time of the incident.

22. Mr Theakston was working in a neighbouring workshop when he heard the altercation going on next door. He had to interrupt the operation he was carrying out in order to find out what was going on. The CCTV footage is entirely consistent with Mr Theakston's evidence that when he arrived on the scene, he addressed himself to Mr Renshaw alone, remonstrated with him and told him to go back to his own workbench. The Claimant was standing beside Mr Theakston while he did this and gesturing to indicate that Mr Renshaw had hit him with a hammer, but Mr Theakston was not looking at the Claimant at this point. Mr Theakston was not ignoring the Claimant's complaint because of his difficulty in communicating with the Claimant. Rather, he had chosen to deal with the conflict between the two men by directing his irritation at Mr Renshaw, who was the combatant who was not at his workstation and needed to return to it to defuse the situation.

23. As the Tribunal is not satisfied that Mr Theakston ignored the Claimant's complaint about Mr Theakston's conduct, this allegation fails.

Allegation 4: The Respondent ignored the Claimant's grievance of 5 July 2018. This is alleged to be direct discrimination, harassment or discrimination arising from disability, namely the difficulty of communicating with the Claimant because of his deafness.

24. On 5 July 2018, the Claimant wrote to Mr Theakston to formally complain about Mr Renshaw's conduct towards him. He said that Mr Renshaw was verbally abusing him and unfairly criticising the quality of his work.

25. The Company did not ignore this grievance. On the contrary, it accepted that all that the Claimant said in it was true without even discussing it with Mr Renshaw. Mr Lovel wrote to Mr Renshaw on the same day that the grievance was received giving him a final written warning. The Respondent itself did not inform the Claimant of the outcome of his grievance, but that was not because it had ignored it. The Claimant was aware that the Respondent had acted on the grievance in any event, because Mr Renshaw told him that he had received a written warning and no longer wished to talk to him except about work: he had a mortgage and family to provide for and could not afford to lose his job. He asked the Claimant to keep away from him.

26. As the Tribunal finds that the Respondent did not in fact ignore the Claimant's grievance of 5 July 2018, this allegation fails.

Allegation 5: On 23 October 2018 Martin Lovel did not take the Claimant's application for a job as an experienced mechanical fitter seriously, said "you must be joking", laughed at him and did not offer him the job. This is alleged to be direct discrimination, harassment or discrimination arising from disability, namely the difficulty the Respondent had in communicating with the Claimant and its resulting misunderstanding of his abilities.

27. In October 2018 the Respondent advertised for an experienced mechanical fitter. The Claimant applied for the job. Mr Lovel accepted in evidence that his response to the Claimant's application was to laugh and ask the Claimant whether he was joking. The Respondent did not formally respond to the Claimant's application and he was not offered the job. The Tribunal accepts Mr Lovel's evidence that his response was because of his genuinely held belief that the Claimant was so significantly underqualified for the post that he must have been aware that there was no real prospect of him obtaining it and he could only have been joking in saying he wanted to apply.

28. The Tribunal finds that Mr Lovel did not handle this matter professionally or as sensitively as he should have done, but there was no evidence before the Tribunal to indicate that his actions were because of or related to the Claimant's deafness. Nor does the Tribunal accept that the Respondent's response to the Claimant's application was because it did not understand the Claimant's abilities because of his difficulty in communicating. Mr Phil Lovel, who was the person with whom the Claimant worked most closely, and Mr Theakston, who visited the workshop where the Claimant worked several times a day, both confirmed in their evidence that the Claimant's performance was good for the first couple of years after he joined the Respondent in 2016. His enthusiasm for the job had then appeared to wane and his performance had deteriorated. He had made mistakes in assembling machinery that had cost the Respondent money and put its reputation with its customers at risk. He had fitted several components wrongly and fitted guards to a machine with bolts that were too short. A new guard and longer bolts had to be dispatched to the customer.

29. Further, the job the Respondent was wanting to fill involved a much higher level of skill than the Claimant had. There was a dispute between the parties as to whether the Claimant's job title was general machinery fitter or general labourer, but the Tribunal accepts that he was recruited to carry out duties allocated to him by fabricators, welders and fitters to assist them in their work. His mechanical fitting experience was limited to assembling a machine, the SM3000, that was the most basic machine that the Company manufactures. Whilst it involved some basic manufacturing of chains it did not require any significant skills in fitting.

30. As the Tribunal does not accept that the Respondent's reaction to the Claimant's application for the experienced mechanical fitter post was because of or related to the Claimant's deafness or anything arising from it, this allegation fails.

Allegation 6: The Respondent discouraged the Claimant from taking up the offer of counselling after an accident in the workshop involving a serious injury to another employee. This is alleged to be discrimination arising from disability, namely the need to provide a BSL for the Claimant to enable him to receive the counselling.

31. In January 2019 there was an accident in the machine shop which resulted in serious injury to an employee. A few days later, the Respondent offered all employees counselling, to be arranged through its insurer, the NFU. The Claimant did not initially take up the offer of counselling, but he later decided to ask Mr Martin Lovel whether counselling was still available. Mr Lovel said it might be difficult to get an interpreter. The Tribunal accepts Mr Lovel's evidence that he then went on to say that he would take the Claimant's request forward if he decided he wanted counselling and he should let him know. The Claimant said he would think about it but never came back to him.

32. The Tribunal does not accept that this amounted to Mr Lovel discouraging the Claimant from taking up the offer of counselling. He was mentioning a practical difficulty that might arise but was still making clear that he would act on the Claimant's request if he wanted to pursue it. As the Claimant was aware, the Respondent already had access to the services of Mrs Searson, a BSL interpreter who visited the company twice a year for meetings between Mr Jablonkis, the Claimant and management. The Tribunal does not accept that Mr Lovel's acknowledgment of the practical difficulties could reasonably be viewed by the Claimant as putting him at a disadvantage in his employment, because Mr Lovel at the same time indicated that he would progress the matter if the Claimant wanted him to. In the event, the Claimant never came back to Mr Lovel to ask for counselling. In his later grievance letter of 15 July 2019, the Claimant complained that the Respondent had given "very little support" after the accident. He said that he was sent a letter offering counselling "but it was not actively encouraged. Felt very much like a box ticking exercise by the company". He did not say that Mr Lovel had discouraged him from taking up the offer.

33. As the Tribunal does not accept that Mr Lovel discouraged the Claimant from taking up counselling nor that the comments he made amounted to subjecting the Claimant to a detriment, this allegation fails.

Allegation 7: On 21 June 2019 Phil Lovel, Andy Hutton, James Richardson, David Jackson and Christopher Tate hid a £20 note belonging to the Claimant. Phil Lovel and James Richardson then told the Claimant that he did not need

the £20 because he received disability benefits. This is alleged to be direct discrimination or harassment.

34. The Respondent receives £4 a day/£20 a week from Access to Work on behalf of Mr Jablonkis towards the cost of his transport to and from work. The Claimant lives near Mr Jablonkis and knows him through a club to which they both belong. The Claimant drives to work and when he joined the Respondent he started bringing Mr Jablonkis to work with him. In recognition of this, the Respondent paid the money it received for Mr Jablonkis's travel costs to the Claimant.

35. On 21 June 2019, the Claimant received a £20 note. He realised that the Respondent also owed him £12 from the previous week, when he had driven Mr Jablonkis in to work on three days. He put the £20 note down on the workbench so that he could write a note asking for the other £12. On returning to the bench he found the banknote was missing. His work colleagues had hidden the note to play a joke on him. Mr Phil Lovel later told him where it was.

36. There was no evidence before the Tribunal to indicate that the Claimants' colleagues played this joke on him because he is deaf or that their conduct related to his deafness. The Tribunal accepts Mr Phil Lovel's evidence that they played the joke on the Claimant because he used to brag about not needing the £20 because he already had plenty of money.

37. The Claimant's evidence was that Mr Lovel and Mr Richardson then said to him that he did not need the £20 because he received disability benefits. In his evidence, Mr Phil Lovel unequivocally denied that they said this. The Tribunal prefers Mr Lovel's evidence to the Claimant's because his evidence about the prank was more credible than the Claimant's overall. In particular, the Tribunal rejects as not credible the Claimant's evidence that he spent three hours looking for the £20 note. It is inconceivable that Mr Phil Lovel, the Claimant's supervisor and the person with whom he worked most closely, would have allowed the Claimant to spend almost half a working day looking for the note before telling him where he could find it.

38. Because the Tribunal finds that the joke was played on the Claimant because of his deafness and did not relate to it, and that the comments about his disability benefits were not in fact made, this allegation fails.

Allegation 8: On 26 June 2019 Andy Hutton followed the Claimant into the toilets at lunchtime and shouted at him to stop washing his hands and that washing his hands wasn't his job. This is alleged to be direct discrimination or harassment.

39. The Tribunal accepts that on 26 June 2019 Mr Hutton came into the toilets when the Claimant was there and told him to stop washing his hands because washing his hands wasn't his job. The Tribunal also accepts the Claimant's evidence that

Mr Hutton's actions caused him to think that there had been another accident in the workplace and this caused him considerable distress because the serious accident that had occurred in January had had a big impact on his mental health. As the Claimant himself accepted in his evidence, however, Mr Hutton's actions were not because of the Claimant's deafness nor did they relate to it. From the evidence it heard from Mr Phil Lovel and Mr Theakston, the Tribunal finds it more likely than not that Mr Hutton said what he did because it was widely known amongst the workshop employees that the Claimant would often refuse to do tasks he was asked to carry out, saying "that's not my job". Mr Hutton was making fun of his use of that phrase.

40. As the Tribunal does not accept that Mr Hutton's actions were because of or related to the Claimant's deafness, this allegation fails.

Allegation 9: On 28 August 2019 Mr Martin Lovel bullied the Claimant by sending him a text message saying: "we are more than a little bit concerned that after being with us for 3 years you don't know what drills etc are or whether you can safely use them". This is alleged to be direct discrimination; harassment; discrimination because of something arising in consequence of the Claimant's disability, namely Mr Lovel's failure to understand the consequence of the Claimant's primary language being BSL; and failure to make adjustments to the Respondent's practice of requiring employees to complete a competency declaration in English.

41. After the incident involving Mr Hutton on 26 June, the Claimant went home and remained on sick leave after that.

42. On 28 August Mr Martin Lovel wrote to the Claimant as follows:

> *Hi Simon.*
>
> *Our new H & S consultant from NFU requires us to produce signed competency declarations from all the staff.*
>
> *We need you to let us know which operations you believe you are competent at carrying out without supervision, so we can make an assessment prior to his next visit in two weeks.*
>
> *Please reply as soon as possible.*

The Claimant replied by text as follows:

> *Hello. This is simon using wifes phone. I got your letter. Can you send me a list of all machines cos I don't know what they are called so I will tick off which I can use and sign and send back to you. Thanks.*

Mr Lovel replied with the text at issue in this allegation:

> *We're more than a little concerned that after being with us for three years you don't know what drills, saws, welders etc are or wether you can safely use them.*

Mrs Dixon, the Claimant's wife, texted on his behalf:

> *He knows what they are and can describe them using sign language. He just doesn't know the proper names for them. He can use all of them,. You know that Simon's English isn't that good and he wanted to make sure that he names them all correctly. Thank you*
>
> *Simply saying saw or drill isn't enough as that is too generic I am sure you can appreciate the differences between a hand held saw and a large machine driven saw whatever it is called I am concerned about your implication that simon is an idiot. He is not. And you should know better that simon is competent and uses them safely.*

Mr Lovel texted back:

> *We are having a Health & Safety inspection very soon, it is required that everyone must acknowledge their skills. Simon has chosen not to be here. As he knows, we have hand saws and band saws, pillar drills and small drills. Please do not imply that I am in any way less than fair, as Simon knows deafness is not an issue here, so please don't make it one.*

Mrs Dixon replied:

> *Thank you for the specific names of the equipment. I shall support simon in writing a declaration and sending it to you by post….*

43. The Claimant then researched on the internet to find the names of the machines he used. With his wife's help, he sent the Respondent a letter on 1 September confirming that he could use several machines, which he listed, safely and competently. The list included machines, such as jigsaws and a grinder, that Mr Lovel had not included in his text and gave more detail of the drills, saws and other machines that the Claimant used.

44. The Tribunal finds that Mr Lovel sent the text because he was irritated by the Claimant's request for a list of the machines he used. The tone of the text was critical and hostile. He appears not to have understood what underlay the Claimant's request, which was the Claimant's difficulty in giving the names of the

machinery he used in English because BSL, rather than English, was his primary language.

45. There was no evidence before the Tribunal to indicate that Mr Lovel sent the text because the Claimant is deaf or that the text related to the Claimant's disability. The Tribunal finds that Mr Lovel would also have sent the text to an employee who was not deaf but had been working for the Respondent for three years and said they needed a list of the machines they used because they did not know what they were called. The allegations that the text amounted to direct discrimination or harassment therefore fail.

46. The Tribunal does accept, however, that, because of its critical and hostile tone, the text amounted to unfavourable treatment of the Claimant. The Tribunal also accepts that Mr Lovel sent the text because of something arising in consequence of the Claimant's disability, namely his request that he be supplied with the machines' names, which he made because, as a result of his deafness, he did not know the names in English.

47. Discriminating against a disabled person because of something arising from disability is not unlawful if the employer can show that the act in question was a proportionate means of achieving a legitimate aim (Section 15(1)(b) EqA). The Tribunal does not accept that Mr Lovel had any legitimate aim in sending the text. He merely wanted to express his irritation to the Claimant. The text was therefore an unlawful act of discrimination arising from disability

48. The Respondent's practice was to require its employees to provide a declaration of competency in the use of machinery in English. That put the Claimant at a particular disadvantage in comparison with employees who were not deaf because he did not know the names of the machines in English whereas they did. Mr Lovel could reasonably have been expected to know the Claimant was at that disadvantage. Even though the Claimant had been working for the Respondent for three years, his own text to Mr Lovel identified that he did not know the names of the machines he used. Although Mr Lovel did not appear to understand that this was because English was not the Claimant's primary language, he ought reasonably to have known that. He knew that the Claimant used BSL to communicate and ought reasonably to have known that this would make it difficult for the Claimant to give the names of machinery in English.

49. The Tribunal finds that the Respondent was under a duty to make adjustments to the practice of requiring employees to provide their competency declaration in English, which could easily have been met by providing the names of the machines the Claimant used in English, as the Claimant requested, so that C could identify which ones he worked on. That was not done. Mr Lovel gave some of the names but not the full list of machines that the Claimant used. The C had to do his own research to find these out.

50. The Tribunal therefore concludes that Mr Lovel's text involved discrimination arising from disability and a failure to meet the duty to make adjustments.

Allegation 10: On 15 January 2020 the Respondent pressured the Claimant to return to work and/or threated him with disciplinary proceedings in relation to the incident with Mr Renshaw on 25 July 2018. This is alleged to be victimisation because of his protected act of presenting this claim to the Tribunal on 12 September 2019.

51. The altercation involving the Claimant and Mr Renshaw on 25 July 2018 had been captured by a CCTV camera that the Respondent had relatively recently had fitted in the workshop for the purposes of guarding against theft. The Respondent's premises are in a relatively isolated rural location, making them vulnerable to being broken into. At the time, it did not occur to anyone to look at the CCTV footage. Mr Theakston had intervened at the time to defuse the situation and did not think it necessary to pursue the matter as a disciplinary issue with either man. It later transpired that Mr Richardson, who had been involved in working with the CCTV installer to set up the system, had kept a copy of the footage on his mobile phone. At some time before Mr Richardson left the Respondent's employment in December 2019 he shared the footage with the Respondent. The company then passed it on to the solicitor dealing with this claim on its behalf, Mr Flanagan.

52. On 15 January 2020, Mr Flanagan sent the Tribunal and the Claimant a completed agenda in preparation for the first Preliminary Hearing in the claim, which was due to be held on 20 January 2020. The agenda is a standard form that the Tribunal sends to the parties and asks them to complete and return in advance of the Preliminary Hearing. In sending in the agenda, Mr Flanagan was acting as the Respondent's agent and the Respondent was liable for any unlawful act of discrimination involved in that act (Section 109(2) EqA). He had the Respondent's authority to act as its legal representative in the claim and it is irrelevant that the wording he used in the agenda was included without the Respondent's knowledge or approval. (Section 109(3) EqA).

53. In the final section of the agenda headed "Any other matters" Mr Flanagan inserted this text:

> *Upon investigating the matter for the purposes of these proceedings the Respondents have discovered CCTV footage of the Claimant assaulting the colleague Scott Renshaw.* ***Were the Claimant not on sickness absence he would be given the opportunity to respond to the inevitable suggestion of misconduct.*** *However the Respondent will wish to have facilities to play the footage to the Tribunal as it is relevant to the complaints brought and to credibility.*

54. The sentence in the text that the Claimant considered to be an act of victimisation is that highlighted by the Tribunal by using bold font.

55. The Tribunal accepts Mr Flanagan's evidence that when he viewed the CCTV footage he genuinely believed that it showed that the Claimant had assaulted Mr Renshaw.

56. The Tribunal does not accept that including this text in the agenda could reasonably be viewed by the Claimant as putting him at a disadvantage in his employment. He was being given information that it was important he should know, namely that the Respondent now had CCTV footage that it believed indicated he might need to face disciplinary proceedings for his part in the altercation with Mr Renshaw.

57. The Tribunal also finds that the sentence was not included in the agenda because the Claimant had brought a claim of discrimination. It was made in the context of a discrimination claim and would not have been made if there had been no litigation in existence, but it was not made because the Claimant had alleged that the Respondent had discriminated against him. The sentence was included because Mr Flanagan believed that the fact that the Claimant appeared to have been guilty of misconduct was relevant to the issues in the claim.

58. Because the Tribunal has concluded that the sentence at issue did not amount to a detriment and was not done because the Claimant had brought a claim of discrimination, this allegation fails.

59. If the Tribunal had concluded that Mr Flanagan's action amounted to victimisation, it would have needed to consider whether it was covered by judicial proceedings immunity. If it was, it could not be the subject of a claim to the Tribunal. The Tribunal has reached no concluded view on this point. Although the Tribunal raised the possible application of the immunity at the Hearing, the Respondent made no submissions on the circumstances in which the immunity applies to the actions of an advocate.

60. For the sake of completeness, the Tribunal does not consider that the sentence at issue amounted to pressurising the Claimant to return to work. If anything, it was a disincentive for him to return, given that he might then be facing a disciplinary process. The Claimant confirmed at the Hearing that he did not make any claim in relation to anything that happened at his return to work interview on 26 July 2019.

Allegation 11: The Claimant's rate of pay is alleged to be direct discrimination or discrimination arising from disability, namely, the Claimant's receipt of disability benefits and/or the Respondent's difficulty in communicating with him because of his deafness and consequential misunderstanding of his skills.

61. The Claimant alleged that his pay rate, and that of Mr Jablonkis, were lower than they would otherwise have been because they are deaf. He said that he should have been paid the same rate of pay as Mr Richardson, who worked as a fitter.

62. The Respondent's accountant did not hold pay information for these three individuals before 2017 but it was apparent from the Claimant's contract of employment that when he joined the Respondent in 2016 he was paid at the rate of £7.80 an hour. This rose to £8.50 an hour in April 2018. Mr Richardson, who worked as a fitter, was paid £9 an hour in 2017, rising to £10 an hour in November 2018. There was always therefore a differential of over £1 an hour between the Claimant's pay rate and that of Mr Richardson. Mr Jablonkis was paid £8.25 an hour in 2017, rising to £9.25 an hour in April 2020.

63. Mr Theakston is the person who decides on employees' rates of pay. He considered that the Claimant was paid the appropriate rate of pay for the work he was doing, his skill level and length of experience and the market rate for the job. The Claimant's deafness and any difficulties he had in communicating did not prevent Mr Theakston having an accurate picture of the Claimant's level of skill and ability. His knowledge was based on his own observations of the Claimant's work and conversations he had had with Mr Phil Lovel about it. Mr Theakston admitted that he did not generally give employees a pay increase unless they asked for one. As he put it, he took note of what his father told him when he worked with him in the family business, which was that, if an employee thinks they are being undervalued they will come knocking at your door.

64. The Claimant compared his pay rate with that of Mr Richardson; he said he was being paid less than Mr Richardson because he is deaf. The Tribunal considers that there were material differences between the Claimant's case and that of Mr Richardson, making it impermissible to compare them (Section 23 EqA). Mr Richardson had more experience than the Claimant and was doing the full range of the work of a fitter whereas the Claimant was not. The Claimant was mainly assisting others in their work. He assembled the most basic of the Respondent's machines, but, as already noted above, this did not involve the same demands or level of skill as the work that others, including Mr Richardson, were doing.

65. Because the Tribunal does not accept that Mr Theakston's decision-making when setting the Claimant's pay rate was because of the Claimant's deafness or anything arising in consequence of it, this allegation fails.

Allegation 12: The Respondent failed to meet its duty to make adjustments to its practice of requiring employees to communicate in English.

66. From the evidence it heard from the Respondent's witnesses and the notebooks that the Tribunal saw, it is satisfied that for most practical purposes the Claimant was able to communicate effectively with Mr Phil Lovel, who he worked most

closely with, and with his other colleagues. Although his written English was not completely fluent, he was able to communicate in writing about the jobs he was asked to do and chat with colleagues about non-work matters by making notes in the notebooks kept on workbenches. He was able to lip read, even if not to a high degree of accuracy. He was able to write letters to management about significant issues he wanted to raise, as evidenced by two written grievances he raised in July 2018 and July 2019. Twice a year Mr Jablonkis met with Mr Martin Lovel or another person representing the Respondent's management to discuss any issues he had with his employment. Mrs Jill Searson, a BSL interpreter who was well-known to the Claimant, attended those meetings. Although her fees for doing so were covered by funding from Access to Work for Mr Jablonkis, the Claimant also attended those meetings and was able to raise matters with Mrs Searson's help. The Respondent was also willing to arrange for Mrs Searson to attend other significant meetings it had with the Claimant to provide interpretation, as evidenced by the fact that it arranged for her to be present at his return to work interview on 26 July 2019.

67. Nevertheless, the Tribunal bears in mind that the duty to make adjustments arises if the Claimant is at a substantial disadvantage in comparison with employees who are not disabled, and that a disadvantage is substantial if it is more than minor or trivial (Section 212(1) EqA). The Tribunal accepts that the Claimant was at a substantial disadvantage because he could not communicate exactly what he wanted to say and when he wanted to say it as matters arose during the course of his working day, and the Respondent could reasonably have been expected to have been aware of that.

68. The Tribunal is therefore satisfied that the Respondent was under a duty to make adjustments in relation to its practice of requiring employees to communicate in English.

69. The Tribunal considered what adjustments it would have been reasonable for the Respondent to make to avoid that disadvantage.

70. In his evidence to Tribunal, the Claimant mentioned Sign Live, an online service that can give sign language interpretation as and when needed. He said that he had mentioned this service at his return to work interview on 26 July 2019 but the Tribunal did not accept that evidence. It was not in the Claimant's witness statement and the Tribunal accepts Mr Theakston's evidence that he had not heard of it before it was mentioned at the Hearing. Subscription to the service might have been identified as a possible adjustment had Access to Work assessed the Claimant's needs when employed by the Respondent. Even if an assessment had taken place, however, it would not have been a reasonable for the Respondent to subscribe because, as a result of its isolate location, its internet connection at that time was very weak and would not have supported the service.

71. The Tribunal considered whether it would have been reasonable for the Respondent to arrange for a BSL interpreter to be available to assist the Claimant during his working day, for which it might have received some funding from Access to Work. The Tribunal concluded that that it would not have been reasonable for the Respondent to have taken that step. The Claimant was working in a small team with Mr Lovel and had only occasional difficulties in relation to the timing and content of communication with him or with others with which he would have wanted an interpreter's assistance. It would not have been practicable or reasonable to have an interpreter standing by in the workshop in case they were needed.

72. The Tribunal considered whether it would have been reasonable for the Respondent to provide all its employees with deaf awareness training. From the evidence it heard, the Tribunal is satisfied that this is a workplace where, for the most part, employees who are deaf and employees who are not deaf communicate effectively with each other about practical, work-related matters through writing things down, lip reading or gestures. Nevertheless, the Tribunal accepts that such training could have raised the other employees' awareness of how the Claimant communicated. Such training would not, however, have been effective to avoid the disadvantage that he had, which related to his ability to communicate instantaneously and accurately. That could only have been achieved by training each one of the Respondent's employees to be fluent in BSL. The Tribunal does not consider that it would have been reasonable for the Respondent to have had to take that step, given the significant amount of time and cost involved in such training and the impact those would have had on a business the size of the Respondent's.

73. In summary, the Tribunal finds that there were no steps that it would have been reasonable for the Respondent to have to take to avoid the disadvantage caused to the Claimant by the Respondent's practice of requiring employees to communicate in English. The Respondent has not, therefore, breached its duty to make adjustments.

Time limits

74. A significant number of the Claimant's allegations related to acts alleged to have been done many months before he presented his claim to the Tribunal. Had any of those acts been found to amount to unlawful discrimination, the Tribunal would have needed to decide whether they had been presented outside the statutory time limit and, if they had, whether they had been presented within a further period the Tribunal thought just and equitable (Section 123 EqA). That might have involved the Tribunal deciding whether any or all of the acts amounted to conduct extending over a period, so that time for bringing a claim would have started to run only at the end of that period (Section 123(3)(a) EqA).

75. In the event, the Tribunal has not needed to consider the issue of time limits. The only act it has found to be unlawful discrimination was Mr Lovel's text of 30 August 2019, which was included in the Claimant's original claim form. The claim form was presented on 12 September 2019. The claim in relation to that act had therefore been presented within the three-month time limit.

Compensation

76. The Claimant sought compensation only. The Tribunal has considered what compensation it should award the Claimant for the unlawful discrimination involved in Mr Lovel's text.

77. In his Schedule of Loss, the Claimant claimed for his loss of earnings due to his absence on sick leave since 26 June 2019. The Tribunal does not consider that this loss of earnings was caused by the text. By the time he received it, the Claimant had already been on sick leave for over two months. On his own evidence, he had already decided that his mental health had not recovered sufficiently for him to be able to return to work. His mental ill-health was caused by the effect the workplace accident in January 2019 had had upon him and the many ways in which he believed he had been treated unfairly at work. The Tribunal is not satisfied that the text he received from Mr Lovel had any material effect on his ability to return to work.

78. The Claimant also claimed damages for psychiatric injury. The Tribunal accepts that the Claimant has had an extended period of significant mental ill-health and that his symptoms are consistent with him having Post Traumatic Stress Disorder, caused by the accident at work in January 2019. There was no evidence before the Tribunal to support a conclusion that Mr Lovel's text exacerbated the Claimant's mental ill-health. The Tribunal does not, therefore, consider it appropriate to award the Claimant damages for psychiatric injury.

79. The Tribunal does, however, consider it appropriate to award the Claimant compensation for the injury to his feelings. Applying the guidance given by the Court of Appeal in Vento v Chief Constable of West Yorkshire Police (No. 2) EWCA Civ 1871, the Tribunal notes that this was a one-off act of discrimination and that the Claimant was upset by many things that happened at work that the Tribunal has found did not involve unlawful discrimination. Nevertheless, the Tribunal accepts the Claimant's evidence that he was hurt by Mr Lovel's hostile response to his reasonable request for a list of the machinery he used and felt undervalued as a person as a result.

80. The Tribunal considers that this is a case where an award in the lower band in Vento is appropriate. As a result of the Second Addendum to the Presidential Guidance on Tribunal awards for injury to feelings issued on 25 March 2019, that band runs from £900 to £8,800 in cases presented after 5 April 2019. The

Respondent submits that an award of £4,000 would be appropriate in this case. The Tribunal is satisfied that that sum would adequately compensate the Claimant for the injury to his feelings. It therefore awards £4,000 in compensation.

81. In addition, the Tribunal considers it appropriate to award interest on that sum under the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 at the rate of 8% per annum for the period from 20 August 2019 (the date of the text) to 13 July 2021 (the date of the award). That amounts to a period of one year and 327 days. Annual interest at 8% on £4,000 amounts to £320. The Tribunal therefore awards interest of

    £320 + £(327/365 x 320) = £320 + £286.68 = £606.68

82. The Tribunal makes a total award £4,606.68.

Employment Judge Cox

Date: 29 July 2021