EMPLOYMENT TRIBUNALS

Claimant: Mr R Jones

Respondent: British Airways Maintenance Cardiff Limited

Heard at: **Remotely, by video** **On:** **17 – 21 May 2021**
Before: **Employment Judge S Moore**
Tribunal Member Mr B Horne
Tribunal Member Mr A McLean

Representation
Claimant: Mr G Pollitt, Counsel
Respondent: Ms K Hosking, Counsel

JUDGMENT having been sent to the parties on 21 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Introduction

1. The claim was presented on 11 February 2020. The claimant brings claims of disability discrimination namely discrimination arising from disability, failure to make reasonable adjustments and harassment. The respondent disputed disability. By judgment dated 19 April 2021, Judge Fraser determined that the claimant was a disabled person for the purpose of section 6 of the Equality Act 2020. The claimant has PTSD.

2. There was a preliminary hearing on 14 April 2020 which listed the issues in the order. There was a further preliminary hearing on 26 April 2021, listed to ensure the parties were ready to proceed to the final hearing. The claims and issues were recorded as set out in the agreed case management agenda dated 23 April 2021.

3. There was an agreed bundle which ran to 570 pages. The Tribunal heard evidence from the claimant and his partner, Ms S Pendleton. From the respondent the tribunal heard evidence from Mr B Parcell, Ms T Purnell, Mr M Morgan and a witness whose identity is subject to an anonymisation order, who we shall refer to as “A”.

4. Following the hearing counsel for the claimant wrote to the tribunal on 22 May 2021 and raised that the oral judgement did not appear to have communicated the tribunal's finding as to whether the act alleged at paragraph 41 (c) of the particulars of claim amounted to harassment. The respondent's representatives replied on 24th of May 2021 and whilst they agreed this had not been dealt with in the oral judgement they had assumed from its absence that the allegation was found not to have been made out. The respondent initially took the view that written reasons were not required and any dispute over paragraph 41 (c) should be dealt with by a further hearing where reasons could be clarified orally. However on 3 June 2021 there appears to have been a change in position as the respondent's representative made a request for written reasons of the judgment of 21 May 2021.

5. Judge Moore confirmed to both parties that the transcript of the recording of the oral judgement would be checked and confirmed in the written reasons. Judge Moore informed the parties that the notes of the panel confirmed this claim had succeeded.

6. Having checked the recording of the oral judgement, the Tribunal confirms that whilst findings of fact were made regarding this claim they did not inform the parties of their finding in respect of paragraph 41 (c). This was an oversight in a long oral judgment that took over one hour to relay to the parties among multiple findings that had been made. The Tribunal's conclusions are set out below.

7. Lastly it should be recorded that following the claimant's evidence, due to his health and the potential impact of hearing the evidence and oral judgment on the claimant's mental health the claimant chose not to further attend the Tribunal hearing. Mr Pollitt confirmed to the Tribunal that the claimant was content with this arrangement and that he could contact the claimant for instructions as and when necessary despite his absence.

Issues

8. The issues in the claim were clarified in the case management order dated 14 April 2020.

9. At the submissions stage of the hearing, counsel for the respondent submitted that the respondent had not understood paragraph 36 of the particulars of claim to form part of the claimant's claim under section 15 EQA. This was potentially important as the rejection of the grievance was relied upon by the claimant as the last in a continuing series of acts amounting to discrimination.

10. Paragraph 36 had been set out as forming part of the S15 claim in the list of issues contained in the case management order dated 14 April 2020. It was also listed as a S15 claim in the agreed case management agenda. At no time since that order until submissions has the respondent suggested they did not understand that to be part of the S15 claim. They called a witness (Ms Purnell) to deal with the grievance. Further also in the order dated 14 April 2020, under the heading "Time limit/limitation issues" it specifically stated that the claimant relied upon the rejection of his

grievance as unfavourable treatment under his S 15 claim. In my order dated the 26 April 2021 I clarified again at paragraph 9 that the issues were set out in the agreed case management agenda dated the 23 April 2021. In that agreed case management agenda this also referenced the unfavourable treatment as being set out in paragraph 35 and 36 of the ET1. Paragraph 43 of the particulars of claim also makes it clear that the last act of discrimination relied upon was the rejection of the claimant's appeal.

11. For these reasons we reject without hesitation any suggestion that the respondent had not understood paragraph 36 to form part of the claimant's S15 claim.

Findings of fact

12. We made the following findings of fact on the balance of probabilities.

13. The claimant commenced employment with the respondent as an aircraft mechanic on 12 February 2018. The claimant's background is in the military and he served in the RAF for 18 years working mainly in bomb disposal.

14. In August 2018 he was formally diagnosed with PTSD. The claimant was referred to NHS Veterans Wales and in 2018 underwent specialist therapy and counselling. The claimant's PTSD symptoms include short term memory loss and concentration, uncharacteristic outbursts of anger and aggression, confusion, flashbacks and nightmares resulting in sleep deprivation. His symptoms can be worsened if he is under stress at work and at home. Other triggers are loud noises, flashing lights. It was confirmed in an occupational health report that disciplinary investigations and interviews had triggered an episode.

15. The respondent carries out aircraft maintenance and repair. There are approximately 200 mechanics performing the same role as the claimant. The department where the claimant worked was initially managed by a Mr Fairclough.

CAP 716 Guidance

16. The respondent has certain safety obligations under the Civil Aviation Authority ("CAA") rules. We had sight of CAP 716 (Guidance material on the UK CAA Interpretation of Part-145 Human Factors and Error Management Requirements), Appendix N – Personal responsibility of LAEs[1] when medically unfit. This applied to licensed and non licensed personnel engaged in aircraft maintenance. Under the heading "Fitness" it stated as follows:

"In most professions there is a duty of care by the individual to assess their own fitness to carry out professional duties. This has been a legal requirement for some time for doctors, flight crew members and air traffic controllers. Licensed aircraft maintenance engineers are also now required by law to take a similar professional attitude. Cases of subtle physical or mental illness may not always be apparent to the individual but as engineers often work as a member of a team any sub—standard

[1] Licensed maintenance engineer

performance or unusual behaviour should be quickly noticed by colleagues or supervisors who should notify management so that appropriate support and counselling action can be taken. In particular, a decrease in mental fitness in many cases may be related to stress from within the working environment or to the personal circumstances of the individual. Instances of aggressive behaviour, vagueness and slippage of personal standards (cleanliness, appearance etc.) may be indicative of more serious mental issues. Such issues may bring into question the ability of the individual to be trusted or to maintain the necessary levels of concentration to take appropriate decisions on airworthiness matters."

Under the heading "Stress" it stated as follows:

"Everyone is subject to various stresses in their life and work. Stress can often be stimulating and beneficial but prolonged exposure to chronic stress (high levels or differing stress factors) can produce strain and cause performance to suffer allowing mistakes to occur. Stress factors can be varied, physical — e.g. heat, cold, humidity, noise, vibration; they can be due to ill—health or worries about possible ill—health; from problems outside the workplace — e.g. bereavements, domestic upsets, financial or legal difficulties. A stress problem can manifest itself by signs of irritability, forgetfulness, sickness absence, mistakes, or alcohol or drug abuse. Management have a duty to identify individuals who may be suffering from stress and to minimise workplace stresses. Individual cases can be helped by sympathetic and skillful counselling which allows a return to effective work and licensed duties."

Armed Forces Covenant

17. The respondent has signed up to the Armed Forces covenant which is a commitment to honour the Armed Forces Covenant and support the Armed Forces Community. This contained a statement that "special consideration" is appropriate in some cases especially for those who had given the most such as the injured and bereaved.

Respondent's policies

Absence Management

18. This provided that the effective control of absence and implementation of the absence management procedure was the responsibility of managers. The role of occupational health was described as making recommendations to managers and HR regarding a colleague's suitability to perform the duties of their role.

19. The absence notification procedure stated that employees were required to contact the line manager within half an hour of shift starting on the first day of absence. Non notification without good reason would result in disciplinary procedures.

20. Someone of the claimant's level of service qualified for up to 6 weeks company sick pay. Periods of absence where an employee had received salary in the 12 months immediately prior to a new absence counted against a pay entitlement in the case of long-term absence. Employees were supposed to be notified in writing seven days in advance of an impending expiry of sick pay. Failure to do so would mean they would receive sick pay until seven days had elapsed.

21. In a section titled “Pregnancy and disability -related absences” the policy stated that such absences would be “ considered in accordance with current legislation”.

22. The policy contained a series of triggers which were used to identify which action will be taken regarding absence. Under the heading “Triggers” the policy stated:

“**Triggers are used to identify points at which the Manager will take action in respect of a Colleague's absence record and/or finding ways to work with Colleagues to improve attendance. For clarity, the trigger points for the purposes of this policy are defined as 3 occasions of absence in the past 12 months or extended periods of absence, which may be defined as periods of more than 4 weeks. In the event that a Colleague reaches a trigger point, the Manager will conduct an investigation into the Colleague’s absence record. It is important that the Colleague cooperates fully in any investigation in order that the Colleague's absence record is fully understood by the Manager. As a result of the investigation the Manager may take further action in accordance with the Company's Disciplinary Procedure.”**

23. At the relevant time the respondent managed sickness absence via their disciplinary procedure and used language such as disciplinary hearings. Mr Morgan later, as part of the grievance appeal, agreed the use of this language was confusing and advised he had started to update letters to remove references to the term ‘disciplinary’.

Disciplinary procedure

24. The disciplinary procedure provided examples of misconduct and gross misconduct.

25. The procedure specified that a failure to reach standards of performance, absenteeism and poor timekeeping were examples of misconduct (not gross misconduct).

Performance management policy

26. The performance management policy provided that the formal procedure should not be used before all informal discussions, remedies and procedures had been tried and exhausted. The formal procedure should only be considered as a last resort and used only after all coaching, support and training interventions had not resulted in the required improvement in performance. The policy provided specifically for an informal approach to be taken “wherever possible”. The first step of which was the manager was required to set up an informal meeting to identify and discuss concerns and develop an action plan along with training needs. The action plan needed to be reviewed and monitored within an agreed timescale. This was anticipated to take no longer than three months.

27. It was only if the informal procedure had not resolved concerns or performance issues were so serious it caused concern in respect of overall safety should formal action be taken.

Dignity work training

28. The Tribunal did not have sight of the respondent's equality policy or dignity at work policy. Band 2 managers have to complete an e-learning course called "managing an inclusive workforce" every three years. We did not have sight of the content of this course or who in particular had undertaken the training. We also did not know or had no evidence on what if any training is given to shopfloor operatives.

29. We saw reference in the bundle to a set of behaviours said to form part of colleague's job descriptions but we did not see the job description or behaviours. The first behaviour is to treat everyone as an individual respect differences and "add a personal touch to make the difference".

30. This was the only evidence before the tribunal concerning any steps taken by the respondent under section 109 of the Equality Act 2010.

The claimant's employment

31. The claimant passed his probation period in June 2018. There were three ratings: develop, "ok" and strong. The claimant was marked "ok on all requirements save business awareness where he was marked as needing to develop. There were generally positive comments on the probation form.

First appraisal

32. This covered the period from 1 April 2018 to 31 March 2019 and it was conducted by Mr Hollands. The claimant was recorded as partially meeting expectations. In the reviewers' comments, Mr Hollands stated that the claimant had had " a rocky PTSD period" during which time he had witnessed the claimant suffer anger issues and a very prickly and difficult attitude with those around him. Mr Hollands recorded a long chat with the claimant to discuss the issues and seen a notable change when working on his team describing the claimant to have been constructive and been able to be tasked with evolving jobs in which he demonstrated good skills and healthy latent knowledge. He described enjoying having the claimant on the team and that he worked best when empowered and trusted. He described how the claimant was aware of how he could be perceived when his PTSD issues flare and urged him to build rapport with people around him to ensure he has a safety net. The claimant accepted that he had felt supported by Mr Hollands at that time.

Diagnosis and absence due to PTSD

33. In August 2018 the claimant was formally diagnosed with PTSD and was off sick between 22 August 2018 and 24 November 2018. During this time he was referred to occupational health on three occasions. In the third report dated 13 November 2018, the respondent was advised as follows:

- There had been ongoing improvement with his symptoms and recovery,
- He would only require one further counselling session;
- He had been following a daily routine and reports being more organised;
- There were very encouraging positive signs of recovery and that the condition is well managed.

34. The claimant was fit to return with adjustments of phased hours and regular meetings with a line manager. There were no long term adjustments recommended and no suggestion that the PTSD would cause recurring absences. A review in 4 weeks was suggested.

35. After his return to work on 26 November 2018, the claimant was sent a letter inviting him to a disciplinary hearing. The hearing was conducted by Mr Fairclough and the claimant was accompanied by a trade union representative who informed Mr Fairclough in his opinion the claimant was ”covered under the Equalities Act” given his recent PTSD diagnosis.

36. We did not hear evidence from Mr Fairclough but it was common ground that he decided to issue the claimant with a verbal warning on 4 December 2018 as he had reached the trigger point in the absent management policy. The absence that triggered the warning was the PTSD absence. The warning would remain live for 12 months.

37. Mr Fairclough later told Ms Purnell as part of the grievance investigation that he decided not to apply discretion at that time (he could have chosen not to take into account the third absence which was related to the claimant’s PTSD). The reason given was that if the claimant had a further PTSD episode he could apply discretion at that point. This was done on the assumption that Mr Fairclough would continue to be his line manager. The claimant did not appeal the verbal warning despite being advised he could do so.

38. At the end of March 2019 Witness A took over management of the bay from Mr Fairclough. Witness A’s partner also has PTSD and as a result Witness A has had dealings with this condition in his private life and believed he had a good understanding and awareness of the condition.

39. On 24 March 2019 the claimant was hit by a car and as a result had a further period of absence of 8 days.

40. On 12 April 2019 the claimant had a hospital appointment but realised on the way to the hospital he should have been at work . One of the symptoms of the claimant’s PTSD is memory loss, which can be exacerbated by stress. The claimant tried to contact Witness A to explain what happened but was unable to do so as he was on leave. The claimant eventually spoke to someone in HR who told him to raise it with Witness A on his return. The claimant’s evidence was that on his return he went explain the situation to Witness A who told him unauthorised absence could amount to gross misconduct. Witness A did not accept this version of events but accepted that he may have had a conversation of a similar nature later in the year albeit Witness A did not accept that he used the words gross misconduct. We find that the claimant was informed that unauthorised absence could be classed as gross misconduct. The claimant referenced this in his grievance 5 months later and also Witness A did subsequently treat unauthorised absence as gross misconduct.

41. On 17 April 2019 the claimant was handed a letter requiring him to attend a disciplinary hearing due to absence. It did not specify what particular absence were due to be discussed and therefore the claimant

understandably at that time believed he was being disciplined for the absence taken on 12 April 2019 due to what we call “the hospital mix up”. The respondent disputed that that the claimant had been disciplined for the hospital mix up and pointed to the absence records which did not record 12 April 2019 as an absence and also the annual leave records which recorded that Witness A granted annual leave this day. We find that the disciplinary action taken in due to be taken in April 2019 (which was eventually taken in May 2019) was not in respect of the hospital mix up but for the absence that followed after the claimant was hit by a car.

42. At each disciplinary hearing we heard evidence about, the claimant was provided with less than 24 hours notice. This was the case on 18 April 2019. Witness A stopped this particular hearing due to concerns about the claimant’s welfare as he became extremely distressed and was sent home. The claimant was subsequently referred to occupational health on 23 April 2019 who advised he was unfit for work.

April 2019 Occupational Health Reports

43. In the 23 April 2019 report, the occupational health advisor advised that the claimant was experiencing several significant life events that was causing him severe stress and anxiety which may have been exacerbating some of the symptoms of PTSD including short-term memory loss. The report informed the respondent the specific triggers of the most recent episode included ongoing medical appointments, investigations, disciplinary investigations and interviews regarding the hospital mix-up incident.

44. The respondent asked the occupational health advisor whether the claimant was capable working in safety critical environment. They were informed at that stage he was not given he was experiencing short-term memory loss. The report went on to say that given the critical nature of the work the reasons for the memory loss may need further investigation.

45. One week later the claimant was seen by different occupational health advisor. Despite what had been said above just a week earlier (that the claimant was not safe to work in the critical state environment) the advice stated he was fit to return to work from 7 May 2019. The advisor felt this would be sufficient time to completely regain his focus and short term memory. The recommendation was he should be continuing to elect to take mini breaks and that being at work was good for mental health. The advisor also recommended training for staff dealing in mental health problems and PTSD as this could improve understanding and enable increased support for sufferers. It was explained that the claimant may continue to get episodes where his PTSD symptoms worsened especially if he was under stress at work or home. Lastly it stressed that the implementations of the suggestions in the report were ultimately a management decision.

Telephone call from Witness A to claimant reference absence

46. The exact date of the following incident is not clear only that it was some point in May 2019.

47. There was a dispute of evidence about what happened between the parties. The claimant's evidence was he was at Ms Pendleton's home getting ready to go away on holiday when Witness A rang him on his mobile. Witness A asked, "*why are you not working today",* or words to that effect. The claimant started to panic and feel sick and trying to stay calm explained he had booked leave. The claimant described Witness A as "his usual abrupt and unforgiving self" towards him on the call.

48. Witness A did not accept that description of the call. He accepted he had been told by one of the team leaders that the claimant not attended work and admitted he had not checked whether the claimant had booked leave before calling the claimant. As soon as the claimant informed Witness A he had booked leave Witness A said he felt "a bit embarrassed" and asked if the claimant had anything nice planned, to which the claimant replied, "spending time with my good lady" and the conversation ended amicably. Ms Purnell interviewed Witness A about this later as part of a grievance investigation His account was the same to Ms Purnell as given in his evidence to this Tribunal.

49. We also heard evidence from Ms Pendleton about this call. She told the Tribunal that the claimant had put the Witness A on speakerphone and she heard the conversation. Ms Pendleton described the call as not a friendly one and that Witness A came across aggressive, abrupt and accusatory. By the end of the call he had stated he wanted to see the claimant immediately on his return. Counsel for the respondent challenged Ms Pendleton regarding consistency. In her statement to Ms Purnell as part of the grievance appeal, Ms Pendleton said the conversation ended by Witness A saying he would see the claimant when he got back which differs both in respect of words and meaning as to how the call ended in her witness statement to the Tribunal.

50. Witness A believed (wrongly) that the claimant was absent without leave and therefore we think it is credible that there would have been a degree of frustration expressed by Witness A which is likely to come across such perceived as described by the claimant and Ms Pendleton. Witness A also acknowledged that he was embarrassed during the call and it did not say he apologised to the claimant for the error. The claimant was in a heightened state of anxiety about absence is having just experienced the hospital mix- up. His evidence was corroborated by Ms Pendleton and we do not find that the inconsistency in her statement as to how the conversation ended sufficient to doubt her or find that she was not telling the truth. Although Ms Pendleton is the claimant's partner and may have had grounds to exaggerate the call to bolsters the claimant's case we found her to be a credible witness and we accepted evidence. The call was not a friendly call and left the claimant feeling anxious even though he had done nothing wrong.

<u>Verbal warning 21 May 2019</u>

51. The claimant returned to work on 19 May 2019 and attended a work return to work interview with Witness A. They read through the occupational health report that had been received (see above). The claimant was subsequently sent the letter inviting him to attend a disciplinary hearing, which related to

his time off from having been hit by a car. The hearing was arranged for 21 May 2019. At that hearing he was reissued with a verbal warning.

52. On the second day of the hearing Witness A changed his evidence about which absences had counted towards the decision and the decision-making process at that stage. We find nothing turned on this because Witness A accepted that when reissuing the verbal warning he took into account for a second time the PTSD absence from August to November 2018, as it was counted in the rolling preceding 12 months. This meant the claimant was set a new 12 month rolling period until May 2020.

Alleged deductions from wages

53. One the acts of unfavourable treatment relied upon by the claimant[2] were alleged deductions in his pay the end of April and May 2019. We did not have any evidence as to what the actual deductions were apart from a summary chart in the bundle that appears to have been compiled by the payroll teams part of the grievance investigation by Ms Purnell. The claimant says he raised the issue of the deductions in June 2019 and some monies were repaid, we do not know how much.

June 2019 absence

54. In June 2019 also the claimant had further absences due to PTSD nightmares and Witness A informed the claimant that he would normally receive a warning but they had applied discretion and did not issue a further warning at that time.

Appraisal

55. On 17 July 2019 the claimant had a mid-term appraisal with Witness A. Witness A had received reports from team leaders about areas of concern and he had also asked for a report from a Mr P Morgan concerning the claimant's behaviour at recent company events. The appraisal covered the period March 2019 to July 2019 and had been written by the team leaders. It contained the following comments (we only set out those that are relevant and relied upon in the ET1 as unfavourable treatment and harassment):

"We have observed, as his team leaders, that Steve (due to his PTSD) has two differing personalities: one in which he demonstrates a professional attitude and the other, anger disruptiveness and indecisiveness. The issue that we face is never knowing which personality is dominant at that particular moment in time or day which makes it difficult for us to allocate tasks to him. There are times when he will demonstrate that he can work with minimal supervision and, as the day progresses, he will be indecisive and distracts other team members who will have to assist/carry out that particular task for him. And when he stressed, Steve has a profound negative impact on the teams morale as he tends to 'offload' his problems to them, e.g. after he's had a disciplinary hearing with [witness A]. This makes administration of the team difficult for Snelson and I.

Also, in my professional opinion (as a LAE and not a psychiatrist) that when he is under the influence of PTSD, I noticed his work suffers.

….

[2] Pleaded at paragraph 35 (d)

As a summary, it is in both Snelson's and my professional opinion that Steve Jones is unsuitable for working on a life aircraft. He may be better suited for office work but this is beyond my expertise to make such a decision.

56. Ms Purnell later accepted that the wording used by the team leaders "may or may not be the most articulate".

57. We accepted the claimant's evidence that first time he was aware of the comments and strength of feeling was when he read the appraisal and this had debilitating effect on him. The appraisal was discussed with the claimant at a meeting on 20 July 2019. We had sight of the transcript of that meeting. From that transcript we find the meeting was conducted in a supportive manner by Witness A apart from one particular comment from the HR adviser. The claimant had commented that he never asked to have PTSD and the HR adviser commented in reply that they [the respondent] "hadn't asked for it either". The claimant found this comment very upsetting.

58. Following this meeting the claimant was placed on a formal improvement plan under the performance management procedure. Witness A was asked under cross-examination why he had bypassed the informal approach recommended in the respondent's policy. Witness A told the tribunal he felt the certifiers (team leaders) had already been offering guidance and got to the point when the claimant was not listening anymore. He considered when in conversation with the claimant, that the claimant steers the meeting and even if he's been given advice he doesn't want to listen. Therefore the conclusion was reached that the way to go was more formal so the claimant would "take heed." Witness A accepted that there were no notes of any meetings with the team leaders where they had informally discussed concerns about the claimant's ability with the claimant.

59. The formal plan identified two areas that required immediate attention. These were behaviour and attitude and performance.

60. In relation to the development area of behaviour and attitude, the action required of the claimant was to make sure his attitude and behaviours were professional at all times. The desired outcome/progress of this development area was that the claimant was to have no more anger issues or unprofessional behaviours and attitude.

61. Witness A wrote to the claimant on 31 July 2019 with a copy of the plan and set the next meeting to take place on 2 September 2019.

<u>Annotation of claimant's job card with the letters PTSD</u>

62. Around this time the claimant discovered someone had written the letters "PTSD" in front of his name job card which was stored on the shopfloor for everyone to see. The claimant was upset, humiliated and tore the card up and put it in the bin. He told a colleague, Mr Coles about what had been written on the card but did not tell anyone else or tell Witness A. Mr Coles later corroborated he had been told about this by the claimant but that he had not actually seen the card. It was further corroborated by an entry in the GP records of the 27th August 2019.

63. Witness A also accepted that the claimant had told him about it several months later. When he was made aware he discussed this with Mr Coles but as the claimant had torn up the card Witness A concluded that as there was no evidence he could not follow it up and he took no action

64. Ms Purnell address this in her grievance outcome. The claimant had asserted that a communication should have been sent out to the bay reinforcing that behaviour of this type was not tolerated within the company. Ms Purnell, after discussing this issue with Witness A, accepted Witness A's explanation for not taking any action. The reasons given were that it would have been difficult as there was no evidence and that further highlighting the situation to a wider audience would have put an unnecessary spotlight on the claimant which Witness A felt was not the right thing to do.

Events regarding the health of the claimant's father and daughter

65. In early August 2019 the claimant's father suffered a heart attack. The claimant failed to attend work on 2 August 2019 and did not call in accordance with the absence notification procedure. Witness A telephoned the claimant and left a message on his answerphone to which the claimant called him back shortly after. He informed Witness A that his father had had a heart attack and he was at the hospital with him. There were a number of further days on 7, 8 and 9 August 2019 when the claimant also failed to attend work and failed to report his absence. At this time the claimant's father continued to be a serious condition hospital undergoing emergency surgery.

66. On 11 August 2019 the claimant was not due to be in work but he contacted Witness A by text message to inform him that his daughter had been taken seriously ill with the same condition that had led to his wife's death some years previously. He advised that he and his partner had had to perform CPR to keep her alive and was on the way to the hospital with her.

67. The claimant was not due back in work until 15 August 2019. He duly returned on that day and spoke to Witness A in his office and spent time telling him what had happened. The claimant had also had to look after his grandchildren whilst his daughter was in hospital and he told Witness A that his PTSD was "going into overdrive" due to the stresses he was under.

68. On 16 August 2019 the claimant did not report for work nor did he communicate within half an hour of his shift starting to report his absence. At 8:15 AM he sent Witness A a text message advising him he was at hospital again with his daughter. We accepted the claimant's evidence that he found it very difficult to adhere to the respondent's absence reporting procedures during this period due to the effect of his PTSD exacerbated by stress and his memory as well as the general very difficult circumstances the claimant found himself in with the illness of his daughter and his father. There were further absences on the 17th and 23rd of August 2019 and again the claimant failed to adhere to the reporting procedures. He returned to work on 24 August 2019 and met with Witness A in his office.

Events on 24 August 2019

69. Witness A's office was an office within an office and a number of employees were in the vicinity immediately outside. There was a different account between the parties about what happened next. The claimant's evidence was that the meeting commenced with Witness A showing no sensitivity to his situation and immediately raised his voice and accused him of having been absent from without authority.

70. The claimant felt his PTSD "coming to the fore" and could not cope with the situation and told Witness A he had to leave immediately. At that point the claimant says Witness A waived a piece of paper in the air and said "we've got further business ", but the claimant got up to leave. He alleges having left the office and walking away he felt Witness A's arm sharply on his shoulder to spin him around and felt he was being attacked from behind. His PTSD went into overdrive, he became extremely emotional and recalls saying to Witness A "get your hands off me" or words to that effect. The claimant says Witness A replied "we still have things to talk about" but the claimant that he had to remove himself from the situation urgently. The claimant told the tribunal that he was in Witness A's office of about 5 to 10 minutes before the altercation.

71. Witness A's evidence was as follows. Witness A maintained that the meeting opened the discussion about his welfare and the claimant telling him about what happened to his father and daughter in recent days. This concurs with the timing given by the claimant as to how long he was in the office before the altercation took place. Witness A told the tribunal the claimant was very calm up to the point of which Witness A informed him he needed to give a pack containing a disciplinary letter and supporting evidence which we will return to below. At this point the claimant became very upset and walked out of the office. Witness A accepted he followed the claimant and put out his hand in a gesture to try and get him to return as it was causing a scene outside. Witness A was adamant that he did not touch the claimant at any point. Witness A subsequently instructed staff present to write statements about what they had seen. None of these corroborated the claimant's version of events that Witness A touched all the claimant or put his hand on the claimant's shoulder. Two witnesses confirmed that Witness A had put out his arm in a gesture trying to encourage the claimant's return to the office.

72. In relation to this incident we prefer the account of Witness A and we find that Witness A did not physically touch the claimant or grab his shoulder or arm. The reason we have made this finding is that Witness A's account was corroborated by a number of witnesses. There was no evidence of collusion. We also take into account the medical evidence that the claimant's PTSD means he has an enhanced startle reaction which may have led to him perceiving he had been touched whereas he had not.

Disciplinary invite pack

73. We now turn to what prompted the preparation of disciplinary pack that Witness A wanted to give the claimant on 24 August 2019. On 15 August 2019, the first day the claimant returned to work after his father and

daughter had been seriously unwell, Witness A prepared a disciplinary letter inviting the claimant to attend a disciplinary hearing on 16 August. Witness A told the Tribunal he had physically given the claimant this letter on the afternoon of 15 August 2019. The letter inviting the claimant to attend a disciplinary hearing stated as follows:

"Unfortunately, it has become apparent that you are not conducting yourself in the manner
to which the Company expects and therefore I am writing to inform you that you are required to attend a disciplinary hearing which will take place on Friday 16 August 2019 at 14:00 in the HR Office at BAMC. This disciplinary hearing will be held in accordance with the Company's Disciplinary Procedure.

I shall be conducting the disciplinary hearing and the allegations that l shall be considering are:

Disobedience of unlawful (sic) and reasonable orders (Poor Time Keeping)
Failure to reach expected standard of performance or behaviour

These allegations, if found, are considered by the Company to amount to Misconduct and Gross Misconduct.

Two copies of your Sateon[3] attendance record and the BAMC Disciplinary Procedure are enclosed. One copy Is for your use and the other is for the person you may wish to accompany you at the hearing.

74. The claimant did not attend the hearing on 16 August 2019 as noted above he did not attend work. The next day back was 24 August 2019 and the events in Witness A's office transpired.

75. At some point therefore between the 16th and 23rd of August 2019 a further letter was drafted to the claimant and in which he was invited to a further disciplinary hearing on 24 August 2019. The letter stated as follows:

Dear Steven

Re: Final rearranged disciplinary hearing

We had arranged a disciplinary hearing to take place on Friday 16 August 2019. You failed to attend work on this day; you did not follow the process for absence as l have previously reminded you several times, that you must call me at the start of every shift if you are unable to attend. This is in line with the Absence Management Procedure Guidelines. Instead you sent me a text at 08:15 am, stating that you were not attending work. Due to your non-attendance at this meeting we then re-scheduled this hearing to take place today, 23 August 2019. However, again you failed to attend work and consequently failed to attend this rescheduled hearing, informing me of your non—attendance via a brief text message this morning.

This behaviour appears to be a continuation of the conduct that led us to invite you to a disciplinary hearing in the first place. We view this very seriously and are extremely concerned by your current attitude towards work.

We will rearrange the disciplinary hearing one more time (and no more), to take place on Monday 2 September 2019 at 02:45 pm. This rearranged hearing will be held in accordance with the Company's disciplinary policy. I would also like to make clear that, should you fail to attend this hearing (as with the last two hearings), we reserve the right to make a decision in your absence, based on the evidence before us at the time. '
As with the two previous hearings which did not go ahead, the allegations l will be

[3] This was the respondent's clocking on system

considering are:

- **Disobedience of lawful and reasonable orders**
- **Failure to reach expected standard of behaviour.**

It is possible that, should these allegations be found, they would amount to misconduct and/or gross misconduct. One possible sanction arising from this hearing could be the termination of your employment with the Company.

If you wish, you are entitled to be accompanied at the disciplinary hearing by a work colleague or a trade union representative. Gayle Callaghan, HR Coordinator, shall accompany me at the hearing. Two copies of your Sateon attendance record, the BAMC disciplinary procedure, the BAMC Absence Management Procedure Guidelines and two copies of your attendance/absence since 2nd August 2019, which have been transcribed from your text messages and telephone conversations, are enclosed. One copy is for your use and the other is for the person you may wish to accompany you at the hearing.

76. Since 2 August 2019 Witness A had been keeping a running note of the claimant's unauthorised absences. This was included in the disciplinary pack.

77. As events transpired in Witness A's office on 24 August 2019, the claimant did not take the disciplinary invite letter and pack from Witness A. The claimant subsequently went off sick from 24 August 2019 and has not returned to work to date. The claimant says he learned of the intention to call him to a final rearranged disciplinary hearing when he received the above letter through the post. He did not attend the hearing on 2 September 2019 as he was signed off by his GP as unfit for work. He decided to seek professional advice. The claimant was experiencing PTSD symptoms at that time and needed professional advice to write a grievance letter dated 3 September 2019. He asked for the grievance to be dealt with in writing.

78. In summary the grievance complained about the following:

- The decision to discipline the claimants and issue him with a verbal warning for PTSD related absence in December 18;
- That when the claimant returned to work on 12 April 2019 after the hospital mix up Witness A told him what he had done was gross misconduct;
- The incident when Witness A telephoned the claimant whilst he was on pre-booked annual leave and asked why he was not at work;
- deductions from salary April and May 2019;
- comments in the July performance review;
- the placement of the claimant on the formal performance management procedure;
- someone had written PTSD on his job card;
- the incidents on 24 August 2019 in Witness A's office and that Witness A allegedly pulled the claimant sharply on the shoulder and;
- the disciplinary procedures instigated in August.

79. The Respondent appointed Ms Purnell to investigate the grievance. Ms Purnell was a witness at the hearing. We were taken to a number of documents concerning the investigation she undertook. Ms Purnell interviewed Witness A and Mr Jones (the claimant's union representative), the team leaders and Mr Fairclough. During the meeting with Witness A, he

told Ms Purnell that he felt "forced" to have the claimant on the aircraft due to reports (the occupational health reports) and felt powerless. Ms Purnell clarified that the reference to Witness A feeling powerless was that the reports from OH never came to the point where they suggested it may not be correct for him to continue to work on aircraft, leaving the decision as to whether it was safe to continue with the manager and team leaders. We observe that this is exactly in line with the respondent's policies but for reasons unknown to us the respondent considered they could not take the decision to remove the claimant from working on the aircraft.

80. The team leaders told Ms Purnell that there had been incidents of angry outbursts where the claimant had kicked items across cabins and threw tools after he had been unable to drop an arm rest into a track as well as swearing.

81. Witness A told Ms Purnell he was struggling with the well being of the claimant and the safety of the aircraft and passengers and was at that time looking for help from someone more qualified to make that decision. It was apparent to this Tribunal that nobody from the respondent felt able to make this decision and took the view they could not make this decision unless occupational health specifically stated the claimant was not fit.

82. Witness A told the tribunal that the discretion to not issue a trigger under the absence management policy was only generally applied at the written warning stage. Ms Purnell agreed with this. The verbal written warning was variously described as a "stake in the ground" or "line in the sand" that would be always issued regardless as to whether the reason for the absence was a disability or a hospital appointment or something of that nature. Ms Purnell told the tribunal that had she found the verbal warning should not been issued or the performance management should not have been implemented she would not have had the authority to actually overturn the decisions but she could have taken it back for consideration to a more senior manager to review.

83. Ms Purnell informed the claimant she was not upholding his grievance on 8 November 2019. Her reasons were set out in the letter of the same date. Ms Purnell concluded that although Mr Fairclough had not applied discretion when issuing the first verbal warning, the claimant's treatment was felt to be fair and reasonable, as the guidelines had been applied consistently and at the later point the claimant should have received a written warning, discretion was applied. Therefore Ms Purnell upheld the decision by Mr Fairclough to issue a verbal warning for the claimant's first PTSD absence and not apply the discretion at that stage as well as Witness A's decision to take that PTSD absence into account a second time, when he re-issued the verbal warning in May 2019.

84. In relation to the performance review, Ms Purnell was clearly influenced by the requirement of the supervisors moreover a duty to observe the claimant's performance and evaluate it to safeguard the airworthiness of the aircraft. Ms Purnell goes on to say as follows

"I do not believe you have been penalised for your PTSD. Performance within the safety critical industry has to be evaluated, the fact that some of your

performance issues are, as you state related to your PTSD does not relieve you of British Airways maintenance Cardiff and the duty to protect the airworthiness of the aircraft. What BA should do is take into account your PTSD when seeking to manage any issues that arise (be they performance or absence related) and I believe that has been done on all counts.

…

"In conclusion, due to the fact that you make repeated reference to your PTSD being the cause of your poor performance and behaviour in both meetings as well as in day to day dealings with your colleagues, it is difficult for others around you to make no reference to it".

85. There was no reference to the bypassing of the informal stage of the policy.

86. In relation to the disciplinary procedures instigated in August 2019 Ms Purnell concluded that even though the claimant had not followed the Notification Process Witness A had booked both Annual Leave and Time Off for Dependents in order to cover his absence and had grounds to issue disciplinary action in relation to his failure to notify in line with company process. Ms Purnell added that Witness A had applied leniency however we heard no evidence from the respondent's witnesses that the disciplinary action taken in August 2019 had been withdrawn.

87. The claimant at that time remained under a verbal warning which was due to stay in place until May 2020. This potentially could have been escalated upon further absences and we find it likely it would have been given the respondent's previous close attention to previous absences and that he was absent again within the 12 month rolling period.

88. The claimant appealed the grievance in an appeal letter dated 14 November 2019. He subsequently initiated the Acas early conciliation procedure on 19 November 2019.

89. The respondent asked the claimant to attend an occupational health appointment but regrettably the advisor was off sick which resulted in the claimant receiving late notification of the cancellation. The respondent sought to rearrange the appointment. Ms Pendleton wrote to the respondent on 5 December 2019 to advise that he would not be able to attend any OH appointments for the foreseeable future describing him as sick, distressed and unable to attend the premises.

90. The appeal was rejected by Mr Morgan who notified the claimant of that decision on 2 January 2020. The length of the letter caused the claimant confusion and he described himself as completely lost by the language of the letter. The claimant's unchallenged evidence was at this point he assumed the internal procedures had ended and that he felt completely helpless and as if the respondent was never going to accept what they had done how they could help and put things right. He therefore decided to "go externally" and submit the claim on 11 February 2021.

91. The outcome letter referred to a further right of appeal but this was not immediately understood by the claimant as can be seen from the correspondence between the claimant and the HR manager. On or around 31 January 2020 the claimant realised he may have a further right of appeal

and queried this with HR, lodging a further appeal on 31 January 2020. This was dealt with by Mr Parcell who was head of operations for the respondent. It was during this process that Ms Pendleton provided the statement about the events concerning the phone call she heard between the claimant and Witness A.

92. The claimant lodged his ET1 on 11 February 2020. We did not hear any evidence as to why the claimant waited until this date after receiving Mr Morgan's letter other than the claimant was unwell with his PTSD to the extent he could not attend OH appointments or the grievance meeting or face going to his place of work.

93. In a letter dated 2 July 2020 Mr Parcell rejected the appeal apart from partially upholding the claimant's complaint that Mr Morgan's letter had been overly long and complex.

The Law

S15 EQA 2010– Disability Arising from Discrimination

94. Section 15 provides:

15 Discrimination arising from disability

A person (A) discriminates against a disabled person (B) if—

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

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

Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

95. **Basildon & Thurrock NHS Foundation Trust v Weerassinghe UKEAT/0397/14** provides the Tribunal should identify two separate causative steps in Section 15 claims (per Langstaff J, then the President of the EAT):

"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

96. **Pnaiser v NHS England & anor [2016] IRLR 170** sets out the approach to be followed in Section 15 claims (paragraph 31):

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links.

(e) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(f) The statutory language of section-on 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

B. It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

97. In respect of S15 (1) (b), the Tribunal must objectively balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. In **Birtenshaw v Oldfield [2019] IRLR 946,** the EAT held that the Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly.

<u>S20/21 – Failure to make reasonable adjustments</u>

98. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. In this case, it is the duty arising under S20 (3) EQA 2010. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. **(Environment Agency v Rowan**

2008 ICR 218, EAT). The question whether the proposed steps were reasonable is a matter for the ET and has to be determined objectively.

99. In **Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265**, the Court of Appeal considered the application of adjustments to absence management policies. On the particular facts of that case the Court of Appeal held that the tribunal had been entitled to find that there was no obviously appropriate extension period and a relatively short extension would be of limited value where the absence was lengthy; and that, accordingly, the tribunal had been entitled to conclude that the proposed adjustments were not steps that the employer could reasonably be expected to take.

S 26 EQA 2010 – Harassment

100. This provides:

Section 26 Harassment

(1) A person (A) harasses another (B) if—
- **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
- **(b) the conduct has the purpose or effect of—**
- **(c) violating B's dignity, or**

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

(3) A also harasses B if—
- **(a) A engages in unwanted conduct of a sexual nature, and**
- **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**

(4) A also harasses B if—
- **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
- **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
- **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**

(5) 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.**

101. Part 7 of the EHRC Code provides that unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.

102. It is a question of fact for the Tribunal as to whether the conduct complained of occurred. If so, the Tribunal must determine if it had the purpose or effect as set out in S26 (1) (b). The test has subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser has on the Claimant. The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

103. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495** the EAT held that the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the only necessary or possible route to the conclusion that the conduct in question is related to the particular characteristic. Nevertheless there must still be some feature or features of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct is related to the protected characteristic. The Tribunal must articulate what these features are.

104. **UNITE the Union v Nailard [2018] IRLR 730** is a case about third party liability for harassment however the EAT's reasoning at paragraphs 100 – 103 (as to how a Tribunal should approach the issue of "related to" under S26) was upheld (per Lord Justice Underhill at paragraph 98). The ET should focus upon the conduct of the individual or individuals concerned and ask whether their conduct is associated with the protected characteristic. The first task is to identify the conduct; the next is to ask whether that conduct is related to the protected characteristic. The focus must be on the person against whom the allegation of harassment is made and his conduct or inaction, it will only be if his conduct is related to the protected characteristic that he will be liable under S26. It will be a matter of fact whether the conduct is related to the protected characteristic.

Time limits

105. S123 EQA 2010 provides:

123 Time limits

(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3) For the purposes of this section—

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

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

106. The key date as to when time starts to run is the date of the act. In **Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24, EAT** Elias P held that the question is when the act is done, in the sense completed and that cannot be equated with the date of communication. He goes on to say as follows:

"As desirable as it might be that time should not run until the employee knows of the detriment, it is difficult to see why, at least in a case where the grievance relates to the refusal to grant a benefit, the detriment is not suffered with the rejection of a grievance, whenever that is communicated and whether the employee knows of it or not. "

107. In **Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686**, Mummery LJ held that the Claimant was entitled to pursue her claim beyond the preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period."

108. In **South Western Ambulance Service NHS Foundation Trust (appellant) v King (respondent) [2020] IRLR 168**, the EAT held that in order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, a claimant will usually rely upon a series of acts over time (the 'constituent acts') each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. If any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act.

Burden of proof

109. S136 EQA 2010 sets out the burden of proof provisions. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. This does not apply if A shows that A did not contravene the provision.

Conclusions

Claims of Discrimination arising from disability

110. The unfavourable treatment relied upon was set out in paragraphs 35 and 36 of the particulars of claim. We set out our conclusions in respect of each alleged act as follows.

111. We firstly deal with 35 (a) and 35 (c) together as they all relate to disciplinary action taken by the respondent in relation to PTSD and therefore disability related absences.

112. Our relevant findings of fact are at paragraphs 33-37 and 51-52 above. The claimant received a verbal warning on 4 December 2018 which was reissued on 21 May 2019 and would remain live for a further period of 12 months. The net effect was that by not applying discretion, one disability related absence meant any further absence between December 2018 – May 2020 could mean further action. We agreed with Mr Pollitt that this meant the disability related absence was taken into account twice.

113. The respondent accepted the warnings amounted to unfavourable treatment and that it had arisen in consequence of disability. We have therefore considered whether the respondent had shown the issuing of the warning was a proportionate means of achieving a legitimate aim.

114. The legitimate aims relied on were as follows:

a) Managing sickness absence, ensuring consistent attendance at work and seeking to facilitate a return to work causing least disruption through poor attendance to the business operations and;
b) The respondent operates a safety critical environment and is entitled to entitled to manage staff performance to ensure that all employees are able to undertake their role to an acceptable standard otherwise the result could be catastrophic.

115. We find that both of these are legitimate aims. In relation to the second legitimate aim this Tribunal fully acknowledges the respondent's responsibilities in respect of the safety critical environment in which they operate.

116. We have gone on to consider whether they have achieved this aim by proportionate means. Our conclusion is they have not for the following reasons.

117. But for the PTSD absence the claimant would not have hit the third trigger and would not have been subjected to disciplinary procedures in December 2018 and May 2019.

118. In relation to the first warning, the respondent failed to follow their own procedure and consider whether discretion should be exercised. There was an unwritten rule or practice which provided that discretion would only ever be applied at the written warning level. The problem with not exercising the discretion at verbal warning stage is that the claimant was then placed on a rolling twelve month period where any further absence would trigger further disciplinary action and potential warnings. He was, in the absence of any discretion whatsoever, placed into that 12 month period where any further absence could have consequences.

119. An employer is not as a general principle obliged to discount disability related absences however in this case, in refusing to apply discretion on the very first time the claimant reported for disability -related absence was not

proportionate. This decision had a very significant effect on the relationship between the respondent and the claimant moving forward. Not only did it sour the relationship between the parties and it also significantly affected the claimant's ability to ever be able to adhere to an acceptable attendance record.

120. This can be seen in May 2019 with the reissuing of the verbal warning. This second warning led to more unfavourable treatment, because the claimant was on a new 12 month rolling record. We conclude that it would have been very difficult if not impossible for the claimant, due to his disability, to have ever sustained a 12 month period with no absences whatsoever and not find himself on the path towards escalating levels of triggers.

121. We had no evidence from the respondent about the impact of the claimant's absence on the business operations or the safety critical environment. The Tribunal must balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. The only evidence we heard was that there were 200 people in the same role the claimant. In Witness A's cross examination on the impact of the claimant's absence (as this was not addressed in any of the respondent's witness statements), he explained that absence generally might result in a need to backfill or use agency staff but this was the extent of the evidence on the operational impact of the claimant's absence.

122. We therefore find in favour of the claimant and that the respondent has subjected the claimant to discrimination arising from disability in respect of paragraphs 35 (a) and (c).

Paragraph 35 (b) -The claimant's disability is such that he suffers episodes of memory loss and bouts of confusion. In April 2019, this resulted in the claimant mixing up his work days and phoning in to apologise that he had got his days mixed up, for which the claimant was subjected to disciplinary action.

35 (d) - the claimants absence related to his PTSD resulted in the respondent deducting sums from the claimant salary, without explanation, at the end of April and May 2019.

123. See findings of fact at paragraph 40-41 and 53. We find that this unfavourable treatment did not take place and therefore these claims fail.

35 (e) the claimant disability is such that he suffers mood swings and becomes aggravated easily and this is often perceived as the claimant acting negatively, when in fact it is a symptom of his disability. In July 2019, the claimant was subject to an annual performance review which was highly critical of many of his behavioural traits (most if not all of which were symptoms of his PTSD). The claimant was then handed a copy of these critical comments in relation to him and also subjected to a formal performance management process during which his behavioural traits came under further scrutiny and criticism.

124. This contains a number of acts of alleged unfavourable treatment which we break down as follows;

- the criticism of the claimant's behavioural traits in the appraisal document and;
- the placement of the claimant on formal performance improvement procedure.

125. The criticisms referenced were the comments by the supervisors as set out at paragraph 55 above.

126. The respondent accepted the comments amounted to unfavourable treatment and that the claimant's performance was something arising in consequence of his disability. The respondent submits the unfavourable treatment was a proportionate means of achieving the legitimate aims as the LAE's were obliged to raise concerns if they believed he was not competent and setting out the criticisms was justified. The language used was purely descriptive and the claimant accepted it was accurate. Further it was appropriate and necessary to refer to his PTSD.

127. We entirely accept that the respondent was entitled to raise issues of safety concerns. However we do not find it was done so in a proportionate way. The first time the claimant knew about the strength of feeling and the concerns was when he read the comments in the appraisal document. They had not discussed them with him previously. These comments had a significant and debilitating effect on the claimant and were unnecessary. We find that the comments were insensitive and showed poor awareness and lack of training on how to address shortcomings in an employee's performance due to a disability. They suggested the claimant was at fault and also referenced how the claimant's disability impacted on his work colleagues. There was no up to date medical advice sought from occupational health as to how best to manage performance shortcomings. We fail to understand why the respondent did not consider themselves empowered to remove the claimant from working on the aircraft given their obligations and concerns of the team leaders and Witness A. The respondent did not get a proper handle on the situation and it was handled badly. They had all the responsibility and obligation to make the safety decisions but seemed to defer always to occupational health even though this was not their role. There was no challenge to the occupational health advice even though it dramatically changed from one week to the next, advising that he was not safe and needed further investigation to becoming safe only one week later even though the advisor was aware of the memory loss and concentration issues. The referrals did not properly address the team leaders concerns which we have no doubt to be genuine and did not inform occupational health of the critical incidents that had taken place that led to those concerns, for example when the claimant became angry and had thrown his tools inside an aircraft.

128. This claim therefore succeeds.

129. It was unclear whether the respondent accepted that placing the claimant on a performance improvement plan was unfavourable treatment.

We have concluded that it was. Whilst it could be argued that the purpose of the plan is to help an employee sustain improvement, there are detrimental consequences if the employee is unable to make those improvements which ultimately can lead to dismissal.

130. We find that placing the claimant on the formal improvement plan was not a proportionate means of achieving the legitimate aims. For a second time in dealing with the claimant, the respondent did not follow their own procedures. The respondents own performance management policy provided that in most cases informal actions such as coaching, support and/or training would allow performance issues to be resolved without the need to resort to using the formal procedure. The respondent in this case completely bypassed their own informal approach set out in the policy. There was no reasonable explanation before the tribunal for their reasons for doing so. We did not accept Witness A's explanation as plausible.

131. We also find that the action plan that was put in place was unachievable. In reality, the action required of the claimant to ensure his attitude and behaviour was professional at all times was not realistic for someone with a disability of PTSD. Further the same can be said of the "desired outcome" which was for the claimant to have "no more anger issues or unprofessional behaviour and attitude". In our judgment the respondent was requiring the claimant to achieve the unachievable - to stop having PTSD symptoms. There was no recognition or support outlined in the plan as to how the claimant could achieve these outcomes. It did not incorporate or revisit advice that had been given by occupational health. We saw from the failure to deliver the training recommended, that this recommendation was not followed by the respondent in any event.

132. We think there must have been different ways of achieving the legitimate aim that would balance the needs of the claimant with the need to maintain critical safety. We had no evidence of any thought process or exploration as to whether or not the claimant could have been temporarily transferred to a different role for example. In our conclusion it simply was not proportionate to effectively require the claimant to stop having symptoms of PTSD as a measure of improving his performance. For these reasons we find in favour of the claimant in respect of this claim.

Paragraph 35 (f)- claimant's disability is such that he struggles to deal with stress and stressful situations. In August 2019, the claimant experienced significant stress linked to the ill-health of both his father and daughter. This resulted in him being absent from work for a period, for which he was subjected to hostility by Witness A and also subjected to disciplinary action.

133. This claim contains two elements; firstly that the claimant was subjected to hostility by Witness A (the incident in Witness A's office), and secondly the disciplinary action in August 2019.

134. In relation to the alleged hostility by Witness A, as we have found paragraph 72 above, this allegation of unfavourable treatment was not made out as such we dismiss this element of the claim.

135. In relation to the disciplinary action in August 2019 conclusions are as follows.

136. The relevant findings of fact concerning the disciplinary action are at paragraphs 73-77. It is evident that the respondent decided to discipline the claimant for his sporadic and unauthorised absences in August 2019 which occurred at the time of the serious ill-health of his father and his daughter and having to care for his grandchildren.

137. The respondent's action of seeking to discipline the claimant (in particular having regard to the possible outcome of such disciplinary proceedings being dismissal for gross misconduct) amounted to unfavourable treatment. We also conclude that the allegations themselves were unfavourable treatment, describing the poor timekeeping as "disobedience" denoting an element of wilful behaviour, which given the circumstances the claimant was in we found to be a surprising choice of allegation.

138. We have gone on to consider whether or not that unfavourable treatment arose in consequence of the claimant's disability. We have had regard to the medical evidence that demonstrated that the claimant's memory could be severely impacted by his PTSD. During the month of August 2019 on numerous occasions the claimant failed to adhere to the respondent's absence reporting policy. We find that the failure to adhere to the absence reporting procedures arose from symptoms of PTSD namely short term memory loss which at that stage must have been significantly worse due the stress of the poor health of his father and daughter. We are satisfied there was a sufficient connection between the claimant failing to comply with the absence notification procedure and PTSD to say that conduct was arising from disability.

139. On 15 August 2021 the claimant returned to work and informed Witness A that his daughter had nearly died only a few days earlier. This Tribunal understand the impact and disruption that unauthorised absence can cause employers and as stated above we accept it is a legitimate aim to manage attendance. However we find that the respondent did not use proportionate means. Firstly, their own disciplinary procedure provides that unauthorised absence is misconduct. This would suggest that the respondent had set their own means of managing unauthorised absence at a bar designating such behaviour is misconduct and therefore to escalate the first instance of unauthorised absence by the claimant albeit there were a number of absences, to the level of gross misconduct cannot be said to be proportionate. Secondly, for the same reasons as set out above we did not hear any evidence as to how this unauthorised absence impacted on the respondent's business operations. For these reasons we find in favour of the claimant in respect of this claim.

140. *Paragraph 36 - the examples at paragraphs 35 above had a significant and detrimental effect on the claimant. He raised a grievance about them on 4 September, which was in the main rejected, and he appealed against that decision on 14 November, which was again in the main rejected on 6 January 2020. He submitted a further appeal on 31 January 2020.*

Conclusions – paragraph 36

141. We find that failure to uphold a grievance amounts to unfavourable treatment.

142. Counsel for the respondent submitted that the rejection of the grievance could not amount to "something arising" in consequence of the claimant's disability. Ms Hosking cited **Unite v Nailard** as authority that just because the subject matter of the grievance is disability this does not carry over to the reason why the grievance is rejected. We agree with this contention. However applying **Pnaiser** we have considered what caused the unfavourable treatment with a focus on the reason in the mind of Ms Purnell, who rejected the grievance. In doing so, she upheld the decisions we have found to have been discriminatory. This had the effect of maintaining and perpetuating a discriminatory state of affairs.

143. The 'something' that caused the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it. We agree with Mr Pollitt's submissions that failing to overturn certain decisions arose from the claimant's disability because he had asked for the verbal warnings and performance management process to be classed as unfair due to his PTSD and he wanted them overturned.

144. We also conclude that the respondent has not shown upholding the grievance that contains a reiteration of discriminatory conduct to be a proportionate means of achieving the legitimate aim.

Failure to make reasonable adjustments

145. The failure to make reasonable adjustments claimant is set out from paragraph 37 through to paragraph 40 in the particulars of claim.

146. There were two PCPs relied upon namely the absence management procedure (the trigger system) and the performance management procedure. Both were applied to the claimant.

147. The first element of the claim was in respect of the absence trigger system. The substantial disadvantage was that people with a disability more likely to have sickness absence and thus more likely to receive disciplinary sanctions namely the triggers. The respondent accepted this was a substantial disadvantage.

148. It was the claimant's case that would have been reasonable for the respondent to make adjustments to the triggers. There was only one disability related absence that had been taken into account which was the claimant's first PTSD absence in 2018 that led to the first warning.

149. The respondent submitted this was not a reasonable step for the respondent to take as it would have failed to put "a stake in the ground" making it clear to the claimant how important consistent attendance is for

the respondent. Further, the respondent later applied discretion by not giving the claimant a written warning after his car accident absence.

150. We were not referred to any relevant authorities but have had regard to the guidance in **Griffiths.**

151. We have concluded that it would have been a reasonable step for the respondent to have adjusted the procedure so as to disapply the claimant's absence for PTSD in 2018. This was the claimant's very first absence for his disability. He had only been recently diagnosed. When Mr Fairclough issued the warning, the medical advice was that the condition was stable, with only one further counselling session being required. The OH advisor referenced "very encouraging positive signs of recovery" and did not suggest there would be ongoing or recurrent absences. It was not reasonable to issue a warning to apply a "stake in the ground" in these circumstances. The respondent's own policy suggested that triggers could be adjusted yet we heard that the respondent would never apply discretion at the third absence and would always issue a verbal warning. The consequences of failing to adjust the trigger for a person with a disability were considerable. They were set on a path that was very difficult for a disabled person to get off. This claim succeeds.

152. The substantial disadvantage in respect of the application of the performance management procedure was that that the claimant's PTSD impacted on his demeanor, made him appear negative and also could make him forgetful which were found to be performance issues under the process. It was agreed that the claimant's performance was significantly affected by his PTSD and he was more likely to be managed under the procedure.

153. The claimant submitted that that he should not have been set on a formal performance improvement plan due to his attitude/demeanor, the targets set were unrealistic and the respondent should have taken an informal approach first and/or given the team leaders PTSD related training as had been recommended by OH.

154. The respondent submitted that it would not have been a reasonable step to manage the claimant informally as it would not have been an effective way to manage his performance. The reason for adopting a formal process was to provide a structured and unambiguous approach to moving the claimant forward. They pointed to Witness A's evidence at paragraph 58 above as reasons why the formal approach needed to be adopted.

155. We find that it would have been a reasonable step to have adopted an informal approach first for the following reasons. Firstly, this is what the respondent's own procedure says. Secondly, we reject any suggestion that some informal measures were attempted. There was no evidence of this. Thirdly, the respondent's informal approach does prescribe an action plan following a meeting so the respondent's explanation that the claimant needed a structured an unambiguous approach does not stand up as their own procedure would have required that in any event. Fourthly the respondent was on notice that investigations and hearings triggered episodes of the claimant's PTSD. It cannot be said to have been in the claimant's interest to embark on these formal procedures when they knew

it was likely to trigger a PTSD episode at the time he was being required to not engage in PTSD behaviour under the performance plan.

156. We further find that the respondent failed to take steps that had been recommended to them by their OH advisors to implement training for the supervisors. It was also not reasonable to set the claimant targets which were unachievable

157. This claim therefore succeeds.

158. There was a dispute between the parties as to whether the reasonable adjustments claim set out in paragraph 39 was also not been pursued. The claim was that the occupational health report dated 30 April 2019 had identified that the claimant should be allowed to take extra mini breaks at work. It was contended these adjustments were not adequately put in place in relation to the claimant. The issue over mini breaks had been omitted from the list of issues in the case management orders and the respondent submitted that they had understood this was not the pursued.

159. As we heard evidence on the issue of mini breaks we set out our conclusions. We find this claim does not succeed and therefore the issue of whether it had been withdrawn falls away. There was no evidence that the claimant had either requested or been denied many breaks. We agree with Miss Hoskins that the onus would have been on the claimant to request the mini break and it could not have been on the team leaders to identify when the claimant needed a mini break.

160. We also take into account the supervisor told Ms Purnell in the grievance investigation that they had told the claimant he could take breaks when he needed to.

Harassment

161. The harassment claim was set out in paragraph 41 of the particulars of claim. There were six acts of harassment relied upon. We set our conclusions in respect of each of these as follows.

Paragraph 41 (a) - around May 2019, when the claimant was on annual leave, he received a call from Mr York asking him why he was not at work.

162. Our findings of fact in respect of this incident are set out above paragraphs 46-50.

163. We find that the telephone call was unwanted conduct that related to the Claimant's disability. Witness A made an unjustified assumption that the claimant was absent without permission and he did so based on previous conduct related to the claimant's disability namely forgetfulness. The claimant had previously failed to attend work due to the mix up over his hospital appointment.

164. We also find that this telephone call had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We accepted the claimant's evidence as to how the call made

him feel at the time. We do not find that the telephone call had the purpose of creating such an environment. We further have reached the conclusion in accordance with S26 (4) that it was not reasonable for the conduct to have had that effect. The call had a particular effect on the claimant because he was already very concerned about being absent from work given the previous warning. Objectively, a call from an annoyed manager whilst you are on leave may be irksome and cause annoyance but it did not amount to harassment even accepting that Witness A came across in the way he did to the claimant and Ms Pendleton. For these reasons we dismiss this harassment claim.

Paragraph 41 (b) - in mid-July 2019, the claimant had an annual end of year performance review meeting, and following the meeting, the claimant was given a report containing comments about him which he found offensive and degrading.

165. These were the comments in the claimant's appraisal which we have set out paragraph 55 above.

166. The comments amounted to unwanted conduct relating to the claimant's disability. We also find that the comments had the effect of both violating the claimant's dignity and creating the environment set out at section 26 (1) (b) (ii) and that the conduct did have the said effect taking into account the perception of the claimant, the other circumstances and that it was reasonable for it to have had the effect.

167. The respondent submitted it was not reasonable to have the proscribed effect as the claimant had brought up the PTSD and it was impossible to be accurate in any other way.

168. We are unable to agree with this submission. These comments should be contrasted with the way in which the same concerns were raised by Mr Hollands in the previous appraisal in a more sensitive way (see paragraph 32). Mr Hollands had on that occasion managed to communicate concerns about his performance in a much less personal and hurtful way. It was untenable to suggest there was no other way the concerns could have been raised.

169. The respondent raised the reasonable steps defence however we had no evidence that the team leaders had ever received any training on dealing with mental health issues. There was no evidence to support the reasonable steps defence.

170. We find for the claimant in respect of this claim.

Paragraph 41(c) - around the end of July, someone had written the letters PTSD in front of the claimant's name on his name card on the shop floor

171. This was the claim that having checked the recording of the oral judgement, was omitted from the oral judgement. We had, during deliberations made findings in favour of the claimant in respect of this claim and also set out findings of fact in the oral judgement which are reproduced

at paragraph 62-64 above. The omission of the finding from the oral judgement was an error. Our findings are as follows.

172. The act of annotating the claimant's job card with the letters PTSD was clearly unwanted conduct relating to his disability which had the effect of violating his dignity and creating the environment set out at section 26 (1) (b) (ii).

173. Nobody knows who wrote the words on the card or what their reasons worth of doing so but there can be no doubt it had the effect described by the claimant at paragraph 62.

174. The respondent accepted that such an incident would have been upsetting. The respondent submitted that they are taken all reasonable steps to ensure that such events should not happen. The burden of proof is on the respondent to show they had taken all reasonable steps under section 109 EQA. We have concluded that the evidence before the tribunal which is set out in paragraphs 28-29 does not satisfy section 109 and show that the respondent had taken all reasonable steps. This claim therefore succeeds.

Paragraph 41 (d) - despite knowing full well about the claimants' difficult personal circumstances from 2 August onwards (and the effect that this would have on his already fragile health) the respondent had tried to invite the claimant to attend disciplinary hearing for poor performance to take place on 16 August.

And

Paragraph 41(f) - on 28th of August the claimant opened a letter that he had received through the post from the respondent, dated 23 August, inviting him to attend a final arranged disciplinary hearing and warning him that one possible outcome of the proposed disciplinary hearing was dismissal.

175. The respondent submitted that as the claimant had not received the invitation to attend a disciplinary hearing on 16 August there cannot have been harassment. The problem with this submission is that Witness A told the Tribunal that he had personally handed that letter to the claimant (see paragraph 73). We find nothing turns on this as the claimant did subsequently receive a version of 16 August letter when he was sent the letter of 23 August 2019 by post.

176. The instigation of disciplinary procedures, which could have led to the claimant's dismissal for gross misconduct does in our judgment amount to unwanted conduct and it related to his disability. The reason the claimant was being invited to a disciplinary hearing for unauthorised absences and poor performance related to failures to report his absence which we found above to be related to his disability. Also, poor performance was accepted as related to his disability.

177. We do not find that the purpose of the disciplinary process was to harass the claimant. We do find it was the effect and it was reasonable for it to have had that effect for the following reasons.

178. We have acknowledged above that the unauthorised absence would have potentially been disruptive to the respondent and they were entitled to manage it. However we do not consider the respondent did this in a reasonable way.

179. The respondent was on notice that formal procedures triggered the claimant's PTSD. The claimant was alleged to be disobeying lawful orders to notify his absence. We found the respondent's actions in alleging he had committed gross misconduct – and that this was deliberate – to be unreasonable. The claimant had no previous episodes of unauthorised absence except for the hospital mix up. The respondent's own disciplinary policy denoted this conduct to be misconduct yet the claimant was informed it was potentially gross misconduct for which he could face summary dismissal. The Tribunal was struck by a lack of empathy for the very difficult and upsetting situation the claimant was in during that period of almost losing both his father and daughter. The claimant had made efforts to keep Witness A informed, he had even sent him a text message whilst on the way to hospital with his daughter having just performed CPR. On his first day back on 24 August 2019, within a short period of time Witness A told the claimant he would be disciplined. We also were unable to understand why the claimant was being disciplined for a failure to reach an expected standard of behaviour and whether this was related to the performance management procedure. If so, there had been no follow up meeting since the action plan was set at the end of July 2019 and we would find that also to be unreasonable to escalate matters outside the policy to the point of dismissal for gross misconduct.

180. In these circumstances we find it is reasonable for the claimant to have perceived the respondent was subjecting him to harassment relating to his disability.

Time limits

181. Lastly, having made our findings in respect of each head of claim we are able to determine whether the claimant's claim was presented in time.

182. We find that there was conduct extending over a period as provided in S123 (3) EQA 2010. We find that there were a series of acts over time each of which is connected with the other. Firstly, due to the ongoing application of the absence management and performance management policies and secondly there was a general discriminatory state of affairs culminating in the upholding of the grievance which maintained the said state of affairs. We have found that the failure to uphold the claimant's grievance to be a discriminatory act and as such the claim was presented in time. Had the claimant not gone off sick he would have faced the discriminatory disciplinary proceedings, performance action plan and been potentially subject to further triggers due to absences as Ms Purnell upheld all of those actions..

183. If we had not found the claim to have been in time we would have extended time as it would be just and equitable to do so because of the

poor state of the claimant's mental health after August 2019. See our findings at paragraph 92.

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Employment Judge S Moore

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Date: 20 August 2021

REASONS SENT TO THE PARTIES ON 26 August 2021

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FOR THE TRIBUNAL OFFICE Mr N Roche