Case No: 2302962/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

MEMBERS: **Ms A Boyce**
Mr K Murphy

BETWEEN:

Mr F Agyarko
Claimant

and

Asda Stores td
Respondent

ON: **27 – 30 September 2021**
1 October 2021 in chambers

Appearances:
For the Claimant: **Mr D Lamina, McKenzie friend**
For the Respondent: **Mr F Mortin, Counsel**

RESERVED LIABILITY JUDGMENT

The unanimous decision of the Tribunal is that all the claims fail and are dismissed except one claim of discrimination arising from disability as appears at paragraph 1.3 of the list of issues.

A remedy hearing will be listed in due course.

REASONS

1. In this matter the claimant complains of disability discrimination. The specific claims and issues arising therein were agreed between the parties as appears in the appendix to this Judgment. I discussed with the parties the correct date for receipt of the claim form by the Tribunal. There was some discrepancy on the documents but after discussion both parties agreed that the correct date was 3 September 2018.

2. The claimant was accompanied throughout the hearing by Mr Lamina and for the majority of the hearing was represented by him. Mr Lamina is not legally qualified. I attempted to assist him with how to put the claimant's case and in particular how to cross-examine the respondent's witnesses. I had to interject more frequently than I usually would in order to ensure that the cross-examination was relevant and that we were able to complete the Hearing within the listed four days (although in the event we were only able to complete submissions and the Tribunal had to meet separately for deliberation - fortuitously we were able to meet the following day). On the final day of hearing and during the cross-examination of Mr Jeffries, I took the very unusual step of asking the claimant if he wanted to conduct the cross-examination himself as I was not satisfied that he was being given a proper opportunity to put the questions that he wanted (and were potentially more relevant than those being asked on his behalf) to the witness. Both the claimant and Mr Lamina agreed to this approach and Mr Mortin did not object. The claimant also cross-examined Mr Ellis, the respondent's final witness.

Evidence & Submissions

3. Regular breaks were held throughout the claimant's evidence and the Hearing due to his disability. Mr Lamina sat alongside the claimant and was able to assist him in locating documents and statements as required. It was necessary for me to remind Mr Lamina more than once that it was not permissible for him to engage with the claimant whilst he was being cross-examined but we were satisfied that this did not undermine in any way the reliability of the claimant's evidence.

4. For the respondent we heard from:
    a. Mr G Town, now Senior Manager for Transport Operating Model formerly General Manager for Erith CDC;
    b. Ms G Sains, Transport Department Manager;
    c. Mr R Jeffries, Transport Department Manager; and
    d. Mr K Ellis, Stock and Systems Manager.

   The respondent also submitted an unsigned statement from Mr A Gaughan, Transport Shift Manager, which we read but accorded it appropriate weight given that he was not present to be questioned about it. We also had an agreed bundle of 838 pages before us.

5. Both parties provided written submissions and supplemented them orally on the conclusion of the evidence. I restricted both parties to a maximum of 25 pages of written submissions and 45 minutes of oral submissions. Mr Lamina in fact submitted 38 pages and made the oral submissions for the claimant. We took a break during Mr Lamina's submissions as he became very emotional.

Relevant Law

6. Discrimination arising from disability: section 15 of the Equality Act 2010 (the 2010 Act) states:

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

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

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

(2) 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.

7. 'Unfavourable treatment' is not defined in the Act, although the Equality and Human Rights Commission's Code of Practice on Employment 2011 ('the EHRC Code') states that it means that the disabled person must have been put at a disadvantage (para 5.7). The meaning of 'unfavourable' was considered in Trustees of Swansea University Pension & Assurance Scheme & anor v Williams ([2015] IRLR 885) and described as having the sense of placing a hurdle in front of, or creating a particular difficulty for or disadvantaging a person.

8. The core components of a claim under section 15 were considered in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 as follows:

'62. … the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence. (See City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746).'

9. There is no requirement that A be aware that the 'something' has occurred in consequence of B's disability. In Risby v LB of Waltham Forest (UKEAT/0318/15), the EAT confirmed that only a loose connection is required between the 'something' and the unfavourable treatment. And further in Baldeh v Churches Housing Association of Dudley District Limited (UKEAT/0290/18/JOJ) that it is sufficient for the 'something arising in consequence' of the disability to have a 'significant influence' on the unfavourable treatment. The fact that there may have been other causes as well is not an answer to the claim.

10. In the EAT's decision in MacCulloch v ICI [2008] IRLR 846 four legal principles were set out with regard to determining justification of discrimination arising from disability (approved by the Court of Appeal in Lockwood v DWP [2013] EWCA Civ 1195):

'(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end"

(paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it (Hardy & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], per Thomas LJ at [54]–[55], and per Gage LJ at [60]).

(4) It is for the ET to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardy & Hansons plc v Lax [2005] IRLR 726, CA.'

11. Indirect disability discrimination: section 19 of the 2010 Act states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

a. A applies, or would apply, it to persons with whom B does not share the characteristic,

b. it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

c. it puts, or would put, B at that disadvantage, and

d. A cannot show it to be a proportionate means of achieving a legitimate aim.

12. 'Provision, criterion or practice' (PCP) is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions. It has been confirmed however in Ishola v TFL ([2020] EWCA Civ 112) that PCP carries the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again and although a one-off decision or act can be a practice, it is not necessarily one.

13. Indirect discrimination involves the comparison of the effect of the PCP on different groups which have no material difference between their circumstances. The claimant needs to show that the group with the characteristic suffer disadvantage as compared with those without the characteristic but there is no requirement to reduce statistical evidence to that effect (Games v University of Kent [2015] IR LR202). It is not necessary, however, for every member of the group to suffer the disadvantage (Essop v Home Office [2017] UK SC 27).

14. The same or similar principles apply in considering the employer's defence of justification at section 19(2)(d) as appears above in relation to discrimination arising from disability.

15. Breach of the duty to make reasonable adjustments**:** section 20 and schedule 8(20) of the 2010 Act set out the duty to make adjustments. If an employer applies a PCP – as above - which puts a disabled person at a substantial (i.e. more than minor or trivial) disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was likely to be placed at that disadvantage (Wilcox v Birmingham CAB Services Ltd UKEAT/0293/10).

16. Interpreting the duty does not contain a strict causation test but requires a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability. If so, the test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT).

17. In the case of Environment Agency v Rowan ([2008] IRLR 20), the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify the PCP applied; the identity of the non-disabled comparators where appropriate; and the nature and extent of the substantial disadvantage suffered by the claimant.

18. In assessing what adjustments are reasonable we refer to the EHCR Code's list of factors to take into account (para 6.28) and the House of Lords decision in Archibald v Fife Council ([2004] UKHL 32) which made it clear that the duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability and can therefore entail a measure of positive discrimination.

19. Harassment: section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

20. In Land Registry v Grant (2011 IRLR 748) Elias LJ said:

> "Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one – it must reasonably be considered to have that effect – although the victim's perception of the effect is a relevant factor for the tribunal to consider. In that regard, when assessing the effect of a remark, the context in which it is given is always highly material.
>
> Moreover, tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent

trivial acts causing minor upsets being caught by the concept of harassment."

21. In Hartley v Foreign and Commonwealth Office Services ([2016] ICR 17), the EAT stated that a Tribunal considering the question posed by s26(1)(a) must evaluate the evidence in the round, and that the alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'. The Tribunal should look at the overall picture, including its own findings on the adverse effects of the claimant's disability.

22. Victimisation: section 27 of the 2010 Act provides that A victimises B if A subjects B to a detriment because B does a protected act or A believes B has done or may do a protected act.

23. Protected acts include bringing proceedings under this Act, giving evidence or information in connection with proceedings under this Act and making an allegation that A or another has contravened this Act.

24. It is for the claimant to prove the detriment. A detriment exists if a reasonable worker would take the view that the treatment was to his detriment (MOD v Jeremiah [1979] IRLR 436) but it must still be capable of being objectively viewed as such (St Helens Metropolitan Borough Council v Derbyshire [2007] UKHL 16).

25. Burden of proof**:** the provisions regarding burden of proof for all of these claims are at section 136 of the 2010 Act which provide, in summary, that if there are facts from which the Court could decide in the absence of any other explanation that the claimant has been discriminated against, then the Court must find that that discrimination has happened unless the respondent shows the contrary.

26. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). A simple difference in status and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed.

27. At the first stage the Tribunal has to make findings of primary fact. It is for the claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. At this stage the outcome will usually depend on what inferences it is proper to draw from those primary facts. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test. At this stage the Tribunal does not have to reach a definitive determination. The Tribunal must assume that there is no adequate explanation for those facts. It is

appropriate to make findings based on the evidence from both the claimant and the respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

28. If the Tribunal is satisfied that there is evidence to suggest that there was an act of unlawful discrimination, the burden of proof shifts to the respondent. To discharge that burden the respondent must prove, on the balance of probabilities, that they did not commit such an act. The Tribunal is entitled to expect cogent evidence to discharge that burden because the facts necessary to prove an explanation will normally be in the possession of the respondent.

Findings of Fact

29. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find on the balance of probabilities the following to be the relevant facts.

30. The respondent is a very large employer operating over many sites and with a variety of roles within its workforce. It has a number of policies with particularly relevant parts as follows:

31. Absence & Sickness:

    a. Under 'Purpose' it states:

    > 'This policy is intended to be supportive, fair and encourage good attendance. Managing colleagues with genuine health issues must be handled in a compassionate and supportive manner. The policy is also designed to help find either temporary or permanent solutions.
    >
    > Equally, it is important that conduct-related sickness absence matters are promptly managed to encourage good attendance consistently, in particular for cases where colleagues exhibit patterns and sickness absence repetition.'

    b. Provision of company sick pay entitlement after 3 years' service of 26 weeks and 13 weeks unpaid retention thereafter.

    c. In the section headed Managing Sickness Absence – Long Term Ill Health and Capability it provides that periods of sickness exceeding 3 weeks will be treated as long term sick and the colleague will be contacted by their manager and invited to attend home/depot visits. The primary purpose of these visits is stated to be colleague welfare; to better understand the nature of the illness; and to offer any support which may facilitate a return to work. Where there is a recurring medical condition a medical opinion as to the colleague's ability to sustain the required levels of attendance should also be sought and it will also be necessary to consider, alternative employment, reduced duties or hours and any other reasonable adjustments. Ultimately if the colleague's sickness absence is likely to continue for a period of time without a return to work date or the colleague is unable to complete their duties and it is not possible to make sufficient adjustments to the colleague's role that would enable their

return, dismissal on the grounds of ill health capability may be considered.

32. Disciplinary– this provides for the sort of approach one expects to see within a large organisation, with an emphasis on a fair procedure including an investigatory stage and a menu of escalating disciplinary outcomes according to the severity of the case ranging from counselling to dismissal.

33. Grievance – again this is the sort of grievance policy and procedure one expects and provides for informal resolution as the first step stating:

> 'Most grievances can be resolved quickly and informally through discussion with a Manager. If the colleague feels unable to speak to their Manager, for example, because the complaint concerns him or her, then they should speak informally to a more senior Manager, People Manager or GMB Representative. If this does not resolve the issue. The colleague should follow the formal procedure below.'

34. The claimant commenced employment with the respondent as a warehouse operative at its Erith distribution centre (known as the CDC) on 7 March 2005. In late 2010 the claimant's role changed to that of full-time driver the necessary health checks having been carried out given the significant health and safety issues arising from the driving of an LGV both for the individual employee and the public.

35. It is clear that the claimant is intelligent and articulate. He is well educated, hard-working and conscientious. Providing for his young family is, of course, very important to him and he takes his family responsibilities very seriously.

36. Very unfortunately in November 2013 the claimant sustained an injury at work (although he did not record it in the accident book at the time). As a result of that injury he continues to suffer from a prolapsed disc and is disabled. His disability continues to have an impact on the type of work that he is able to perform and he is unable to do overly physical or manual work. The claimant's situation has also had a significant adverse impact on his mental health although this has not been relied upon as a disability.

37. As a result of that injury the claimant was absent from work from 11 November 2013 to 19 September 2014 during which he was in regular contact with management and he was also referred to the respondent's occupational health service (OH).

38. In an OH report dated 21 August 2014 the adviser confirmed that the claimant was fit to return to work with some adjustment and that should he not return to work within a month a discussion about 'capability' should be considered. This was reference to being taken through the respondent's capability process described above. (Several OH reports followed throughout 2014-2017 – reference is only made below where they are specifically relevant to the issues.)

39. At a meeting with his then manager on 2 September 2014 the claimant said that he would like to come back to work two days a week and there was

discussion about his need for micro-breaks, his ability or otherwise to perform his duties and whether there were other sorts of duties available for him. His manager specifically confirmed that the respondent was:

> 'unable to create a transport clerk position as we don't have a vacancy'

40. An OH report dated 15 September 2014 confirmed that the claimant was fit to return to his normal role. Agreement was reached that he would reduce his weekly hours to 18 and this was recorded in a formal change to his terms and conditions by letter dated 2 October 2014. The claimant described this change as being one of compulsion as his only other realistic option was that he would be put through the capability process, but he accepted in his evidence that as far as the respondent was aware he appeared to be agreeing to return to work on those terms

41. The claimant continued in that role on those hours until 8 February 2015 when unfortunately he suffered a further accident at work resulting in cervicalgia. An OH report dated 5 March 2015 confirmed that a return to work was not feasible due to neck and back pain. The claimant remained on sick leave due to this injury until 17 April 2015. Thereafter he returned to work initially for an office based role two days a week including general clerical duties and then from 12 June 2015 for two days per week on 'trunking' duties - a less physically demanding driving role working out of the Dartford centre (known as the XDC). Notes of a meeting between the claimant and Mr Lowe, Operations Manager, dated 4 June 2015 show that the claimant was happy to return to those duties but that they could only be accommodated for as long as Dartford needed them. Mr Lowe noted that if those duties were retracted they would need to meet again to discuss capability.

42. The claimant remained on trunking two days a week until 15 January 2016 when he self certified an absence due to back and leg pain and then again self certified an absence from 26 February 2016 to 18 March 2016 due to back pain.

43. In an OH report dated 19 April 2016 the adviser noted that a return to full duties was likely to exacerbate the claimant's pain and that she was unable to advise on any further reasonable adjustments. She stated:

    > 'It may be for the business to consider how long you can support him going forward given that his symptoms remain unchanged and a change in his shift pattern has not allowed a return to full duties.'

    She also said that the lack of an improvement in his symptoms rendered him unfit for full duties and that she was unable to predict when he would be able to so return and no routine OH review was required.

44. The claimant, with considerable effort on his part, returned to work from 18 March 2016 through to 14 July 2017 on trunking duties two days a week but then commenced a further period of sick leave on 14 July 2017 due to difficulties with his lower back.

45. At a meeting with Mr Gaughan on 27 July 2017 the claimant confirmed that he could do anything except driving and that he was waiting to see a specialist. It was agreed that Mr Gaughan would look to see if there were any clerical duties available for the claimant. Mr Gaughan also again referred the claimant to OH and a course of physiotherapy was paid for by the respondent which the claimant completed. An OH report dated 4 August 2017 confirmed that the claimant was not fit to return to a driving duty but he could return to work in an office and that 'if operationally feasible' it would be prudent to permit the claimant to return on restricted duties in an office. A referral to the musculoskeletal assessment and treatment service was also advised which was subsequently processed by Mr Gaughan.

46. At a further meeting with Mr Gaughan on 11 August 2017 it was clear that the claimant wanted to return to work but Mr Gaughan confirmed that there was no duty available in the office and it was agreed that working in the warehouse was not an option for the claimant because of the temperature. There was also discussion about whether it would be possible for him to work in a store or doing admin in the store. He confirmed that he would not be able to do picking or stacking. In his evidence the claimant also confirmed that he would not have been able to work on checkouts in any of the stores as that duty occasionally involves lifting heavy goods.

47. At a further meeting on 12 September 2017 Mr Gaughan confirmed that there was:

> 'nowhere to go for redeployment either clerical/stores explained options and discussed capability. [The claimant] is not interested in this and feels very upset by this and wants to put in a grievance saying he feels like we are throwing him in the bin.'

48. On 18 September 2017 the claimant submitted a grievance letter to the General Manager. This included:

- 'The company is fully aware of the physical health challenges am going through since November 2013 due to accident at work when offloading at Asda Crawley store as a driver.

- These health conditions and the side effect of the medication am currently on has made it difficult for me to carry out my normal driving duties.

- The company occupational health personnel and my general practitioner (G.P) has advise the company to give me an alternative work which will be suitable for my current condition since 20/07/2017.

- I have provided my qualifications to the company to show, that I can execute other works.

> Having work with the company since 2005 as an able person till the injury at work in 2013 which has disabled me, all that the company is saying is there are no alternative work for me and so I should consider incapabllity to exit the company.
>
> I deeply feel that the company is not dealing with me fairly and I will be grateful if you can get me an alternative work which will be conducive to my current health issue.'

49. Mr Boland, Transport Operations Manager, wrote to the claimant on 4 October 2017 confirming that two appointments had been set up to hear this grievance but as the claimant had said that his representative was not

available on either date and he had also requested sight of his personal file which would take some time to arrange, the hearing was generally postponed until the claimant confirmed that he was ready to proceed.

50. The claimant replied on 16 October 2017 confirming that he no longer needed to see his personal file and asking that the grievance be considered without a hearing and dealt with on the papers only. He also recapped what his grievance was about including:

> 'Why the company want me to consider incapability due to my current health condition although the company occupational health personal and my G.P has advised that I can carry out light duties, the company has not still find me any work since 20th July 2017, this is stressing me and getting me depress.'

51. Mr Boland replied on 10 November 2017 having investigated the grievance and set out his findings. He did not uphold the grievance stating that as the claimant had been absent for 28 weeks it was in keeping with the policy for Mr Gaughan to speak to him about the capability process and that they had looked at alternate roles but for various reasons they were not appropriate. He also explained that there were no office based roles available and a role could not be created for the claimant.

52. The claimant's appeal against this decision was heard by Mr Town on 5 December 2017. He wrote to the claimant on 8 December 2017 informing him that the appeal was unsuccessful. He confirmed that the respondent had not started the capability process and that it would not be started until the claimant's contractual sick pay had expired allowing alternatives duties to be explored informally before they were explored through a formal process. He also confirmed that the claimant needed to keep looking at the respondent's online job portal and apply for any role that might be suitable for him. He also confirmed that any applications for managerial roles would have to go through the normal recruitment process but suggested that the claimant meet with Mr Joyce – his line manager - in order to better understand what skills he would need to become a manager.

53. On 23 January 2018 Mr Gaughan wrote to the claimant informing him that the capability process was being formally started and he was invited to a meeting on 31 January 2018 to discuss this in more detail to ascertain what support he may require to enable him to meet the performance required.

54. The claimant attended that meeting together with his union representative. The claimant alleged that the correct process had not been followed and the meeting was adjourned so that an OH opinion could be obtained. Notes of the meeting - headed 'first capability meeting' - were prepared and signed as an accurate record by both the claimant and his representative.

55. The necessary referral to OH was prepared on 5 February 2018 and in the resulting report it was confirmed that the claimant was not currently fit to return to work and there was no foreseeable return to his full and substantive duties and that the only viable option was for him to return to alternative duties, such as an office based role.

56. The capability meeting resumed on 14 February 2018 and again the claimant was accompanied by his representative with notes signed as accurate by all who attended. The claimant was clear that he wanted to return to work in an alternative role but that he could continue to do trunking if that was the only option. Agreement was reached that a driving assessment would be arranged.

57. Mr Gaughan held a further meeting with the claimant on 6 March 2018 where the purpose of the driving assessment was explained and its possible consequences both positive and negative, including that the capability process might be resumed. The claimant undertook that assessment on 15 and 16 March 2018 which he passed comfortably.

58. At a meeting between the claimant and Mr Gaughan on 21 March 2018, again the claimant was accompanied by his representative with notes signed as accurate by all who attended, Mr Gaughan expressly referred to the positive outcome of the driving assessment which he described as 'great' and stated that the respondent would be looking for the claimant to return to work on Friday 23 March and asked if that was all right. The claimant replied yes. Mr Gaughan went on to confirm that trunking was not a full duty and not a permanent role. He also said that any future sickness because of the claimant's back 'may' result in non-payment of contractual sick pay (as reflected in the contemporaneous notes made by an independent notetaker and signed as accurate by both the claimant and his union representative). After a brief adjournment Mr Gaughan again confirmed that the claimant would start at 21.00 and asked him if he was happy to start from Friday to which the claimant said yes and further that:

> 'with the threat that has been set by [Mr Gaughan] that if I go off sick again I would straight go to capability I don't cause sickness for myself and if I think that I have a condition would pose a risk to myself and other road users I would not compromise.'

He then asked if he would be doing his old rota when he returned on 23 March and it was confirmed he would.

59. We find accordingly that the claimant agreed at this stage to continue working as a driver. It is true that he was aware that if he did not return to work he would face capability proceedings but, especially in light of his own comments about not returning to work if he posed a risk, we find that this did not amount to compulsion.

60. Mr Gaughan wrote to the claimant on 23 March 2018 confirming the discussion and agreement reached in that meeting as follows:

> '1. You're driving assessment with Marvin Rothman 15th & 16th of March. Your assessment was positive so we agreed you would return to work on Friday 23rd March.
>
> 2. The MSK report from 21" February 2018 makes reference to 'normal duties' before your absence you were doing the Lutterworth Trunks, these trunks are not a CDC activity, These jobs are an XDC activity. Therefore this will not be a long term task and store deliveries will need to be resumed. We will look to plan you on a store delivery Friday 1st June, you will be accompanied by a DM. The purpose of this is to ascertain if you are ready to assume normal duties.

3. It is my belief your eagerness to return to work has been hastened because your sick pay is running out. I believe you have elongated your sickness to exhaust the company sick pay. Any future periods of sickness pertaining to your ailment may result in non-payment of company sick pay and going straight to into a capability meeting.

4. During your absence you raised a grievance, this centred around how you felt you had been treated. This is disappointing especially given the amount of patience and support you have been given by the company. Going forward if you are unhappy about something come and talk to us, no need for grievances.

5. You have said all through your sickness you can no longer drive and need an office job. The moment your CSP runs out you can drive. This is unacceptable. You said to [Mr] Town you didn't want the capability to start until CSP had expired. He has honoured this, if you go sick again with your back we will start capability straight away and will not wait.

6. It was explained to you that this was the 2nd occasion where you have been absent for 26 weeks, when you return to work you will investigated for patterns. Michael (GMB rep) felt this was unfair and that the business understands your health as we have honoured your sick pay, if we understand you were unwell and not able to do your duties where is the duty-of-care. And, an investigation would suggest you had 'faked' the illness. I explained again that the investigation would be carried out into patterns as per normal protocol. The outcome of the investigation is not predetermined. You will have every opportunity to offer up any concerns at the investigation.

Should you have any questions pertaining the meeting I am more than happy to discuss.

I believe there to be no ambiguity in the contents of this letter and that the expectation is clear.'

61. On 13 April 2018 Ms Sains wrote to the claimant inviting him to attend an investigation meeting with her at 21:00 hours on 20 April 2018 regarding his sickness patterns. He was informed of his right to be represented at the meeting and that it was important that all meetings take place in a timely manner.

62. That meeting took place on 20 April but started 35 minutes late. There was a dispute between the parties as to the reason for the late start and who was to blame for that. In any event Ms Sains postponed the meeting until 27 April, again to start at 21:00 hours, to ensure that there was sufficient time to deal with it before the end of her shift (even taking into account that she would have been willing to stay late in order to conclude it). Notes were prepared of the meeting in the usual way which were signed by Ms Sains, the notetaker and the claimant's representative, Mr Pearson. The claimant tried to write something on the notes but Ms Sains would not allow that and his comment was scribbled out and accordingly the claimant refused to sign the notes.

63. Immediately following the meeting the claimant wrote out, in the company of Mr Pearson, a grievance and took it to the relevant office to file it. That grievance said (as far as it is possible to read as the copy before us is very feint):

'I hereby write this letter to request a grievance hearing against [Ms] Sains and [Ms Smiley] who conducted a meeting on this day the 20/04/2018.

My reasons for this grievance are as follows:

1) Their attitude towards me at the meeting was very bad.

2) [Ms Smy] was shouting at me in the meeting as the notetaker. I did not expect that from her.

3) They did not give me the opportunity to say anything before they adjourned the meeting.

4) I wanted to write on the notes where I [illegible] no opportunity was given to me to say anything before I sign the minutes.

5) The scheduled date which is 27th of April 2018 the starting time 21.00 cannot be possible because I start [illegible]. I have to meet with the union rep before the meeting starts.'

64. We find that Ms Sains and Ms Smy were frustrated by the late start of the meeting and were robust in dealing with the claimant and expressed themselves accordingly. We do not find however that they were 'very aggressive' as alleged by the claimant and we do not find that they were shouting.

65. The investigation meeting resumed as planned on 27 April 2018 but was adjourned almost immediately by Mr Joyce as the claimant had no representative available to him.

66. On or around 27 April the claimant and Mr Joyce had a conversation regarding Mr Joyce's decision not to allow the claimant's grievance dated 20 April 2018 to proceed. On 22 May 2018 Mr Joyce also wrote to the claimant explaining why. He said:

'The meeting was an investigation and as such we do not need to give you notice before we hold the meeting and therefore it is at the discretion of the investigating manager whether you are given time with your representative to prepare. On looking at the notes started from the meeting you did in fact take 35 minutes with your representative before attending the meeting which was due to start at 21.00 but did not start till 21.35 so you were allowed time with your representative. Also on looking at the notes the meeting did start but no questions were asked into the allegation so your opportunity to answer the allegations would be at the rescheduled date of the 27th April 2018. I must also inform you that you do not have the right to write on the notes taken in a meeting and if you have anything to say it would be recorded in the notes and if you do not agree with the notes that have been captured you can challenge these when signing the notes at the end of the meeting. I feel all the points you have raised in your letter are points that can be discussed at the investigation and if forwarded at the disciplinary and if a sanction is issued these are points of appeal. I am also concerned with the fact that when the meeting was resumed which was your opportunity to answer the allegations it had to be carried out in your absence as your behaviours within this meeting were unacceptable and not in line with the ASDA values.'

Taking this written response into account we conclude that the claimant's allegation that Mr Joyce told him on 27 April 2018 that his grievance would not be heard because the investigation meeting at which he alleged he had been shouted at had not occurred is proved.

67. The investigation meeting resumed on 4 May 2018. The claimant disagrees with the account given by Ms Sains of his behaviour at the meeting. Having considered the evidence of both of them together with the contemporaneous notes (the first part of which were signed as an accurate record by his representative) and also the statement given by that representative in the

later grievance investigation, we conclude that Ms Sains's account of the meeting is accurate. At its commencement Ms Sains asked the claimant if he was happy to continue and he said he was not because he had raised a grievance against both her and Ms Smy following the meeting on 20 April 2018 and that therefore it was inappropriate for them to now be conducting this meeting. He also referred to a lack of sufficient notice of the meeting. Ms Sains adjourned the meeting for 15 minutes as the claimant had become 'agitated and cross'. When the meeting resumed the claimant was still unwilling to proceed and his behaviour deteriorated. He was shouting and talking over Ms Sains. Ms Sains and Ms Smy became frightened of the claimant and Ms Sains closed the meeting informing the claimant that it would proceed in his absence. That is what happened and Ms Sains concluded that there was a pattern of absence that warranted being forwarded for disciplinary action. She wrote to the claimant on 8 May 2018 inviting him to a disciplinary hearing on 27 May 2018 'to respond to the allegation of Absence Patterns'.

68. On 24 May 2018 claimant submitted a third grievance expressly complaining that the capability and disciplinary processes had been commenced against him because of his disability and amounted to various breaches of the 2010 Act.

69. A grievance meeting was consequently held by Mr Quinlan on 6 June 2018 who carried out full and proper enquiries including interviewing Mr Joyce and the claimant's representative Mr Pearson.

70. Mr Quinlan met the claimant on 27 June 2018 and informed him that his grievance was not upheld. He wrote to the claimant on 4 July 2018 confirming the same together with detailed reasons. In summary he did not find that he had been discriminated against or victimised. He concluded that the respondent had made every effort to retain him in work through reasonable adjustments. He also found that there had been no error on the part of Mr Gaughan or Mr Joyce with regard to the handling of the claimant's grievance about Ms Sains & Ms Smy.

71. The claimant appealed against that outcome on 10 July 2018. Mr Town dealt with that appeal and met the claimant on 1 August 2018. He did not uphold the appeal and in a conversation with the claimant after the meeting – which was not noted - sought to give the claimant advice about trying to find a way forward. There is a dispute between the claimant and Mr Town as to what was said during this conversation. Mr Town's evidence was that he said that the claimant was becoming unmanageable and referred to the fact that he knew the claimant <u>would think</u> he was being hard on him. The claimant's evidence was that Mr Town said that he knew <u>he was</u> being hard on him. We prefer Mr Town's evidence. He was generally a calm and credible witness. Given his overall attitude and actions toward the claimant, our view is that if he had thought that he was being hard on the claimant, he would not have taken the action that he did i.e. he would not have intended to be hard on him. Our view is it is more likely that the claimant has misremembered what Mr Town said. Mr Town also set out a cogent rationale for his decision in a lengthy outcome letter sent on the same day.

72. The claimant commenced the early conciliation process on 6 July 2018 and it concluded on 12 July 2018. The ET1 was submitted on 3 September 2018.

Conclusions

73. Discrimination arising from disability (issues 1-5)

74. It follows from our findings above that the treatment alleged at issues 1.1-1.3 (save that in issue 1.1 Mr Gaughan said that future absences ‘may’ result in non-payment of sick pay not that they ‘would’) happened but that at 1.4 did not.

75. We find however that the treatment at issues 1.1 & 1.2 was not unfavourable. Commencing capability proceedings, although unwanted by the claimant, did not intrinsically put him at a disadvantage or put a hurdle in front of him. Indeed the purpose of the process expressly includes finding ways of assisting the employee to return to work with whatever adjustments are reasonably necessary. Similarly the comments made by Mr Gaughan on 21 March 2018 (and confirmed in writing) did not put the claimant to a disadvantage. He was simply and rightly putting the claimant on notice of the respondent’s policy and possible future consequences for him if he went sick again and that policy was applied to him. The claimant later described this as a threat. We do not find that to be a reasonable categorisation or description of what Mr Gaughan said.

76. We agree with the claimant that the treatment at issue 1.3 was unfavourable (notwithstanding his own poor behaviour). Although reference to a disciplinary hearing does not mean that a finding of guilt will be made and punishment will be imposed, the fact of going through disciplinary processes was inevitably a stressful experience for the claimant. It certainly put a hurdle in front of him, the nature of a disciplinary process being fundamentally different to a capability process even if the outcomes may end up being the same.

77. We also agree, as conceded by the respondent, that that unfavourable treatment arose in consequence of the claimant’s disability as his periods of sickness which were being investigated were because of his disability.

78. The only remaining question therefore is whether the respondent has a defence to the unfavourable treatment at issue 1.3. It undoubtedly had a legitimate aim of managing long term absence so as to avoid absenteeism, save cost and management time and allow the respondent to plan its workforce and operational needs with certainty. In all the circumstances of this case however, we do not find that forwarding the case to disciplinary proceedings was a proportionate means of achieving that aim.

79. The claimant’s poor behaviour at the investigatory meeting with Ms Sains, whilst not excused by the mishandling of his grievance by the respondent, is explained by it. He was right that he should not have had to attend that meeting with Ms Sains and Ms Smy whilst he had a live grievance against

them arising out of the previous meeting. His inappropriate reaction to that led to the meeting being concluded in his absence and without his explanation of his patterns of absence being considered at that stage which is the whole point of that investigatory stage. It cannot then have been proportional - considering the relative impact of the unfavourable treatment on the parties - to forward the matter on to the disciplinary stage.

80. Accordingly, the claim of discrimination arising from disability succeeds in respect of the treatment identified at issue 1.3 only. That treatment took place after 7 April 2018 and is therefore in time.

81. <u>Reasonable Adjustments and Indirect Discrimination (issues 6-16)</u>

82. We find that the matters alleged at issues 7.1 and 7.2 did amount to PCPs. The respondent's application of its capability and disciplinary procedures was a general practice. Although a specific decision on particular facts within those processes would not amount to a PCP but a one-off matter, the initial decision to commence and then generally to continue those processes in line with policy does amount to a PCP. The PCP alleged at issue 7.3 however is not made out on the facts as found above. There was no 'requirement' that the claimant continue to drive an LGV following his driving assessment but rather he agreed to do so. Further, that agreement was a one-off act in response to specific individual circumstances

83. As to whether the proved PCPs put the claimant to the necessary substantial disadvantage (for the purposes of the reasonable adjustments claim) or particular disadvantage (for the purposes of indirect discrimination), we conclude that they did not. As found above, the capability process was not inherently disadvantageous and further, it could and would be commenced against any employee with more than three weeks absence (although in practice much longer) irrespective of ability or disability. As for the application of disciplinary proceedings in circumstances where there is a suspected absence pattern, it is clear by reference to the cogent examples given by Ms Sains of the sort of patterns that attract consideration, that this PCP was applied to all employees and did not have disproportionate impact on the disabled e.g. regular repeated absence at Christmas or in the summer holidays etc.

84. Accordingly the reasonable adjustments claim and indirect discrimination claims fail. (In his evidence and submissions, the claimant did refer in general terms to a named colleague in respect of his indirect discrimination claim. That colleague had not been identified in the list of issues as a comparator and no evidence was given as to his circumstances. We could not therefore take that into account.)

85. <u>Harassment (issues 17-22)</u>

86. This claim is predicated on allegedly 'very aggressive' behaviour by Ms Sains and Ms Smy towards the claimant in the meeting on 20 April 2018.

87. As stated above we have not found that that behaviour took place and therefore this claim fails. Even if we are wrong about that, we conclude any such behaviour was not related to the claimant's disability but was because the meeting had started very late. The claimant argues that this still means that it was related to his disability as the meeting was due to discuss his absence pattern and his absence pattern arose from his disability (which the respondent accepts). Our finding however is that the late start to the meeting was a clear break in that causal chain.

88. Accordingly the harassment claim fails.

89. <u>Victimisation (issues 23-28)</u>

90. Our findings on the alleged protected acts are:

    a. Although there is no express reference to discrimination or the 2010 Act in the original grievance dated 18 September 2017 or the follow up on 16 October 2017, it is clear on the face of these letters that the claimant was referring to the substance of what could be a reasonable adjustments claim. Accordingly we find that this grievance (issue 23) was a protected act.

    b. The grievance raised on 20 April 2018 (issue 24) concerning the behaviour of Ms Smy and Ms Sains however was not a protected act. It contained no express or implied reference to any of the matters required by section 27(2) of the 2010 Act.

    c. The grievance dated 24 May 2018 (mistakenly referred to in the list of issues at para 25 as 29 May) was plainly a protected act and accepted as such by the respondent.

91. As for the alleged detriments to the claimant because he did the two proved protected acts:

    a. We have found that Mr Gaughan did tell the claimant on 21 March 2018 that it was disappointing that he had raised another grievance and asked him to talk to him directly before doing so in the future (issue 26.1). This was plainly in response to the first protected act. We do not find however that Mr Gaughan's comments amounted to a detriment. What he said amounted to no more than an accurate summary of the respondent's grievance policy and further amounted to an invite to discuss matters of concern to the claimant. Further he simply expressed his opinion about the claimant's decision to raise a grievance with no associated element of punishment or disadvantage.

    b. As stated above, the factual allegations at issues 26.2-4 are proved and did amount to detriments. Mr Joyce's reasoning in not progressing the grievance was seriously flawed. It is clear that the claimant had raised a grievance about the handling of the meeting on 20 April by Ms Sains and Ms Smy. In those circumstances either the grievance should have been dealt with before that investigation meeting resumed or the meeting should have been taken by another

manager. Accordingly the claimant was denied the opportunity for his grievance to be heard. However, Mr Joyce's actions were in response to that grievance which as found above was not a protected act and therefore did not amount to victimisation. Similarly, Ms Sains did not invite the claimant to the resumed investigation meeting or the disciplinary meeting because of any protected act but because she was (wrongly) following normal process.

c. As found above, the alleged comments by Mr Town at issue 26.5 are not proved. Clearly he did not uphold the claimant's grievance appeal – the other part of issue 26.5 – and that did amount to a detriment. Although as already indicated we disagree with the respondent's handling of the claimant's grievance dated 20 April 2018, Mr Town's conclusion was not because of any protected act by the claimant but for the reasons set out in the outcome letter dated 1 August 2018.

92. Accordingly the victimisation claims fail.

Remedy Hearing

93. A 3 hour remedy hearing will now be listed. Whilst acknowledging that we have not yet heard evidence with regard to remedy nor heard submissions, the parties may find it helpful for an indication that our provisional view is that the one successful claim of discrimination arising from disability is likely to attract an award in respect of injury to feelings only (no losses having flowed from the unlawful act). Further, given that the disciplinary process which flowed from that claim concluded in the claimant's favour on appeal (after these proceedings commenced), that award is likely to be in the lower Vento band or the lower range of the middle band.

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Employment Judge K Andrews
Date: 23 November 2021

APPENDIX – AGREED LIST OF ISSUES

DISCRIMINATION ARISING FROM DISABILITY (S15 EQUALITY ACT 2010 ("EQA")

1. Did the Respondent treat the Claimant unfavourably by:

    1.1. On 21 March 2018, Tony Gaughan, Shift Manager ("**Mr Gaughan**"), told the Claimant he had been elongating his sickness absence to exhaust sick pay and that any future period of sickness would result in non-payment of sick pay and result in capability proceedings being commenced against C [para 26, 19];

    1.2. On 23 January 2018, Mr Gaughan taking the decision to commence capability proceedings against the Claimant [para 27, 19]. Claimant was invited to a capability meeting by Mr Gaughan on 23 January 2018 [481] and the first meeting took place on 31 January 2018 [482]-[486];

    1.3. On 4 May 2018, by Gillian Sains, Department Manager ("**Ms Sains**") forwarding the Claimant to a disciplinary hearing [534]-[537] which caused disciplinary proceedings to commence against C [para 28, 19]. Claimant being notified of this decision on 8 May 2018 [538] or on 11 May 2018;

    1.4. Compelling the Claimant to continue working as a driver following the driving assessment on 15 and 16 March 2018 [para 29, 19].

2. Did the following arise in consequence of C's disability:

    2.1. The Claimant's sickness absence between 11 November 2013 and 19 April 2014?

    2.2. The Claimant's sickness absence from 8 February 2015 to 17 April 2015?

    2.3. The Claimant's sickness absence from 15 January 2016 to 20 February 2016?

    2.4. The Claimant's sickness absence from 26 February 2016 to 18 March 2016?

    2.5. The Claimant's sickness absence from 14 July 2017 to 15 March 2018?

3. If the Respondent did treat the Claimant unfavourably (as set out at paragraph 1 above), was this because of his sickness absences (as set out at paragraph 2 above)?

4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says

that its aims were [para 48(b), 52]:

4.1. Ensuring that its colleagues are medically fit to undertake a safety critical role;

4.2. Requiring its colleagues to attend their contractual role on a regular basis; and

4.3. Managing long term capability absence so as to save cost and management time and allow the Respondent to plan its workforce and operational needs with certainty.

5. Did the respondent know, or could it reasonably have been expected to know that the claimant had an impairment with his lower back?

Note, it is accepted that the Respondent knew of the impairment at the time of the unfavourable treatment alleged.

FAILURE TO MAKE REASONABLE ADJUSTMENTS (S20 & 21 EQA 2010)

6. Did the Respondent know, or could it reasonably have been expected to know that the claimant had was disabled with a lower back impairment caused by his C4-C5 prolapsed disc?

[See 5. Above]

7. Did the Respondent apply to the Claimant a provision, criterion or practice **("PCP")** [para 32, 20]**:**

7.1. "*the capability proceedings commenced on 31 January 2018;*

7.2. *the disciplinary proceedings; and*

7.3. *the requirement to continue to drive a 44 tonne LGV following a driving assessment on 15 and 16 March 2018.*" [paras 7.a-7.c at 118].

8. Did the PCPs put the Claimant at a 'substantial disadvantage' (i.e., one that is more than minor or trivial) compared to those who do not suffer from the Claimant's disability, which the Respondent knew or ought reasonably to have known would have that effect? In particular:

8.1. in relation to the PCP referred to in 7.1 above:

8.1.1. was the Claimant put to the substantial disadvantage as he then had to take part in capability proceedings?

8.1.2. did the Respondent know, or ought the Respondent to reasonably have known that this PCP put or would put the Claimant to the substantial disadvantage identified in paragraph 8.1.1?

8.2. in relation to the PCP referred to in 7.2 above:

8.2.1. was the Claimant put to a substantial disadvantage as he then had to take part in disciplinary proceedings brought against him?

8.2.2. did the Respondent know, or ought the Respondent to reasonably have known that this PCP put or would put the Claimant to the substantial disadvantage identified in paragraph 8.2.1?

8.3. in relation to the PCP referred to in 7.3 above:

8.3.1. was the Claimant put to the substantial disadvantage of being required to return to his contractual role following the driving assessment on 15 and 16 March 2018?

8.3.2. did the Respondent know, or ought the Respondent to reasonably have known that this PCP put or would put the Claimant to the substantial disadvantage identified in paragraph 8.3.1?

9. What steps could have been taken to avoid the disadvantage? The Claimant suggests at [para 33, 20]:

9.1. in relation to the PCP referred to in 7.1 above, the Respondent could have made the following adjustments:

9.1.1. finding the Claimant alternative employment at Erith CDC or another of its many businesses in London and the surrounding area;

9.1.2. re-training the Claimant for an alternative role;

9.1.3. not subjecting the Claimant to the capability process; and/or

9.1.4. making the reasonable adjustments that the Claimant's GP and occupational health suggested.

9.2. in relation to the PCP referred to in 7.2 above, the Respondent could have not subjected to

the Claimant to the disciplinary process [para 33.4, 20]?

9.3. in relation to the PCP referred to in 7.3 above, the Respondent could have made the following adjustments:

9.3.1. finding the Claimant alternative employment at Erith CDC or another of its many businesses in London and the surrounding area;

9.3.2. re-training the Claimant for an alternative role;

9.3.3. making the reasonable adjustments that the Claimant's GP and occupational health suggested.

10. Was it reasonable for the Respondent to take those steps (and, if so, from what date)?

11. If so, did the Respondent fail to take those steps?

INDIRECT DISCRIMINATION (S19 EQA 2010)

12. Did the Respondent applies the PCPs identified in paragraphs 7.1 to 7.3 [para 34, 20]?

13. Did the PCPs put the Claimant at a particular disadvantage (i.e., something that could be reasonably seen as unfavourable) as follows:

13.1. in relation to the PCP referred to in 7.1 above, was the Claimant put to a particular disadvantage as he then had to take part in capability proceedings?

13.2. in relation to the PCP referred to in 7.2 above, was the Claimant put to a particular disadvantage as he then had to take part in disciplinary proceedings brought against him?

13.3. in relation to the PCP referred to in 7.3 above, was the Claimant put to a particular disadvantage in that he was required to return to his contractual role following the driving assessment on 15 and 16 March 2018?

14. Did any of the PCPs at paragraphs 7.1 to 7.3 place others who were also disabled by way of a lower back impairment at a disadvantage? In particular:

14.1. There must be no material difference save for the protected characteristic relied on and the circumstances of the Claimant and the comparator group. Who is within the appropriate pool for comparison?

14.2. What proportion of the pool is disabled?

14.3. Within the pool how does the PCP affect those not disabled? How many are not disadvantaged by it?

14.4. By comparison of those disabled that are disadvantaged against those not disabled but disadvantaged by the PCP, does the protected group suffer a particular disadvantage?

15. If the claimant was a member of the protected group, is there a causal link between the particular disadvantage set out in paragraph 13 and the PCPs at paragraph 7.1 to 7.3?

16. If so, can the Respondent show that it the application of the PCP was a proportionate means of achieving a legitimate aim? The Respondent says that its aims were [para 48(c), 52-53]:

16.1. Ensuring that its colleagues are medically fit to undertake a safety critical role;

16.2. Requiring its colleagues to attend their contractual role on a regular basis;

16.3. Managing long term capability absence so as to save cost and management time and allow the Respondent to plan its workforce and operational needs with certainty; and

16.4. Ensuring a consistent approach to all colleagues who breach ASDA's policies and/or act in a way potentially classified as misconduct.

HARASSMENT (S26 EQA 2010)

17. On 20 April 2018, were Gillian Sains and Sally very aggressive towards the Claimant during an investigation meeting which culminated in them shouting at him? [para 15, 16]

18. If so, was this unwanted conduct?

19. Did it have the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for environment for him?

20. Did the Claimant perceive their actions as having the necessary effect on him under s.26 EQA?

21. Was it reasonable for the Claimant to have perceived their actions as having the necessary effect on him in all of the circumstances?

22. Was the conduct related to the Claimant's lower back impairment?

VICTIMISATION (S27 EQA 2010)

23. Did the Claimant do a protected act by raising a grievance on 16 October 2017 as the capability process had been discussed with him despite him being fit to work in an office-based role [para12, 16]?

24. Did the Claimant do a protected act by raising a grievance on 20 April 2018 concerning the behaviour of Sally Smy and Gillian Sains [para16, 17]?

25. Did the Claimant do a protected act by raising a grievance on 29 May 2018 concerning the behaviour of Sally Smy and Gillian Sains [para21, 17]?

26. Did the Respondent subject the Claimant to the following treatment:

26.1. On 21 March 2018, Mr Gaughan telling C that it was disappointing that he raised another grievance and asking him to talk to him directly before doing so in the future [para 36, 21];

26.2. On 27 April 2018, Danny Joyce told him his grievance would not be heard because "*the investigation meeting at which he was shouted at by Gillian Sains and Sally Juy had not occurred*" [para 16, 17; para 7, 42].

26.3. On 4 May 2018, C was invited to a reconvened investigation meeting with Ms Sains and Sally Smy [para 8, 42] in spite of him having recently raised a grievance against them on 20 April 2018. This was in the particulars of claim [paras 16 & 17, 17].

26.4. On 11 May 2018, C was invited to a disciplinary hearing on 27 May 2018 following the investigation meeting held in his absence on 4 May 2018 [para 10, 42]. The allegation here is the decision to commence disciplinary proceedings against C.

26.5. On 1 August 2018, at his grievance appeal hearing, Gavin Town did not uphold C's appeal [para 13, 43] and told him he was "*not manageable and that he knew he was 'being hard' on [C]*" [para 38, 21].

27. If so, did the Respondent subject the Claimant to a detriment?

28. If so, was it because the Respondent believed the Claimant had done (or might do) a protected act?

JURISDICTION

The Claimant filed an ACAS EC notification on 6 July 2018, the Certificate issued on 12 July 2018 [1].

The ET1 was presented on 3 September 2018 [2].

29. In respect of each of the acts complained of above, when did each act occur?

30. In respect of the allegations identified in the paragraphs 8.1.1, 8.2.1 and 8.3.1, in respect of the failure to make reasonable adjustments claim:

31.1 When did the individual do an act inconsistent with doing the act complained of?

31.2 If the individual did no inconsistent act, within what period might the individual have reasonably been expected to do it?

33 Were each of the allegations pursued brought (taking account of the early conciliation period) within the period of 3 months starting with the date of the act to which the complaint relates?

The Respondent asserts that having regard to the date of the presentation of the claim and the effects of early conciliation, any act/omission which occurred before 7th April 2018 is prima facie out of time.

33 If not, does the Tribunal consider that the acts together form a continuing course of conduct of which the last act of discrimination is in time?

34 If the Tribunal finds that the Claimant has been discriminated against but that such acts of discrimination do not represent a course of continuing conduct of which the last act is in time, would it be just and equitable to extend time to hear the claims?