THE EMPLOYMENT TRIBUNALS

Claimant: **Mr Patrick Ngugi**

Respondent: **Commissioners for HM Revenue & Customs**

Heard at: **Newcastle upon Tyne Hearing Centre**
On: **13th – 21st October 2021**

Before: **Employment Judge Johnson**

Members: **Mr W Roberts**
Mrs P Wright

Representation:

Claimant: **Mr R Owen (Citizens Advice Bureau)**
Respondent: **Mr R Crammond of Counsel**

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The claimant's complaints of unlawful race discrimination are not well-founded and are dismissed.

3. The claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

REASONS

1. The claimant was represented by Mr Owen of the local CAB. Mr Owen called to give evidence the claimant himself and his former work colleague, Mr Jason Anthony Waite. A witness statement was tendered from the claimant's wife Mrs Elisepha Gathua. However, Ms Gathua did not attend to give evidence and be cross-examined.

2. The respondent was represented by Mr Crammond of Counsel, who called to give evidence the following members of staff from the respondent:-

(i) Felix Bratcher
(ii) Gary Pointer
(iii) Julie Mullarkey
(iv) Leigh Tang
(v) Steven Albion Heckles
(vi) Mark Pasto
(vii) Paul Kelly
(viii) Andy Gibson
(ix) Ed Jones

3. The claimant and all the witnesses had prepared typed witness statements which were taken "as read", subject to supplemental questions, questions in cross examination and questions from the tribunal panel. There was an agreed bundle of documents (marked R1) comprising two A4 ring-binders containing a total of 1,572 pages of documents. Mr Crammond for the respondent prepared a skeleton argument which is marked RS1. The representatives had most helpfully prepared a joint agreed list of issues which was marked L1.

4. By a claim form presented on 19th March 2020, the claimant brought the following complaints:-

(i) unfair dismissal;
(ii) direct race discrimination, contrary to Section 13 of the Equality Act 2010;
(iii) race related harassment, contrary to Section 26 of the Equality Act 2010;
(iv) discrimination arising from disability, contrary to Section 15 of the Equality Act 2010.

The respondent defended the claims.

5. The claimant's race is Black African. The claimant suffers from dyslexia, post traumatic stress disorder and depression. The respondent concedes that the claimant was a "disabled person" within the meaning of Section 6 of the Equality Act 2010 by reason of his dyslexia and PTSD throughout the period of his employment with the respondent and, by reason of his depression from June 2018 onwards. The respondent accepts that it was aware of the claimant's disabilities throughout the relevant period.

6. The claimant joined the respondent in July 2015 and served in the Counter-Avoidance section as a tax investigator, until he was dismissed on capability grounds, due to unsatisfactory attendance, on 27th November 2019. The claimant had previously served as a soldier in the British army. During his service he served as a soldier in Iraq. He was formally diagnosed with PTSD by the Veterans` Mental Health Transition Intervention and Liaison Service in July 2018, which diagnosis was confirmed by consultant Doctor Brian Martindale in April 2019. The claimant was formally diagnosed with dyslexia in November 2016, but had displayed symptoms of dyslexia for some time prior to that.

7. The claimant described his symptoms as "being generally forgetful, finding it difficult to concentrate and taking longer than others to read and understand

documents and information". The claimant alleged that this "made him prone to making mistakes, including spelling errors and grammatical errors". His symptoms were particularly acute when he was working under pressure.

8. The Counter-Avoidance team was concerned with mass-marketed tax avoidance products, which had been subject to legal challenge and in respect of which tax payers had entered into negotiations with HMRC to discharge their tax liability. The respondent had technical experts called "Theme Leads" who set the strategic direction in respect of what the CA team could and could not do. There were then other technical experts called "Scheme Leads", who would allocate cases to investigators/case workers. The case worker's role was to calculate the tax liability, negotiate with the tax-payer or their agent and then prepare a formal deed between the tax payer and the respondent to settle the tax liability. Case workers, such as the claimant, would calculate the liability of the tax-payer by selecting the right workbook and using the respondent's guidance to select the correct information to input into the workbook. The workbook was essentially a calculator, designed to calculate the liability, following which the case worker would select the appropriate deed template to be completed and executed.

9. To ensure the calculations and deeds were done correctly, they were checked by more senior employees known as "Authorisers". The level of checking by the authorisers was risk-based and proportionate to two main factors, namely the error rate of the case worker and the capacity of the authorisers to check at any given time. If material errors were found, the calculations and deeds would be sent back to the case worker together with feedback from the authoriser as to how the errors should be corrected. The case worker would then correct the errors and resubmit the calculations and deeds to the authorisers for rechecking and authorisation.

10. The work of the Counter Avoidance Team was high profile and an area of political interest. Case workers had to handle confidential information and the calculation of tax due and preparation of the appropriate deeds which was extremely important.

11. The claimant joined the respondent on 20th July 2015 following a graduate recruitment scheme. The claimant has an accountancy-based degree and joined as a HO grade investigator. The claimant's first line manager at SO grade was Mr Steven Albion Heckles. Mr Heckles was one of 10 authorisers located in Newcastle, supervising a team of approximately 90 members. The claimant was the only Black African member of the team.

12. At paragraph 10 of his witness statement, the claimant makes the general allegation that, "From the outset I felt I was excluded and marginalised. Other staff did not engage with me. I was treated differently from everyone else. This was because of my ethnicity." The claimant goes on to say that he stopped attending Christmas parties, because when he attended them no-one spoke to him. He alleged that he was not allowed to train other new colleagues and was "never given any work" for a period of between 2 and 4 months. The claimant alleges that "Managers never protected me and never stopped people who were not treating me right and the managers did some things which were not

appropriate." Apart from the claimant's specific allegations which are dealt with below, the tribunal found that the claimant had failed to provide any evidence whatsoever about these general allegations. The claimant did not mention which Christmas parties he had attended and which he had not. He did not name anyone who was allowed to undertake training when he was not. He did not give any specifics about what managers were expected to protect him from, which people had not "treated him right" and which things were done that were "not appropriate". The allegation that he was not given any work for between 2 and 4 months was wholly unsubstantiated and contrary to the evidence given by the respondent's witnesses. The claimant was invited to take part and did take part in "Secret Santa" events at Christmas time and brought presents back for his colleagues when he had been on holiday. He contributed towards leaving presents when colleagues retired or moved on. He was originally "buddied" with Jonny Little, an experienced HO. The tribunal found that the claimant had failed to prove any facts to support his allegation that he was generally excluded or marginalised.

13. The claimant alleged that Mr Heckles had suggested to him in late 2015 or early 2016, that he should be "demoted". Mr Heckles denied ever making any such suggestion to the claimant. Mr Heckles recollection was that at the end of an employee`s initial 12-month probation period, the voluntary downgrade is an option made available to an employee either as a reasonable adjustment in respect of disabilities or where the individual's performance indicates that they were struggling at their current grade. It is not something which can be imposed upon the employee at that stage. It is a "voluntary" downgrade and thus requires the agreement of the employee. The tribunal preferred Mr Heckles version of this matter and found that there had been no suggestion to the claimant that he should be demoted. The raising of the possibility of a voluntary downgrade was in no sense whatsoever related to the claimant's race.

14. The claimant alleged that his work was more closely scrutinised than the other case workers and that the reason for this was because of his race. The claimant was unable to provide any comparable statistics as to how often his work was scrutinised when compared with the level of scrutiny applied to his colleagues. The respondent's witnesses evidence was that all case workers have their work scrutinised by the authorisers in the same way. The respondent's witnesses evidence was that the claimant may well have received more feedback from the authorisers, but that was because there tended to be more errors in the claimant's work than there were in the work of his colleagues. In particular, the claimant struggled with punctuation and grammar and also with the preparation of the deeds. The reason for the level of feedback given to the claimant was entirely due to the number of errors with his work and was in no sense whatsoever influenced by his race.

15. In January 2019 the claimant's line manager, Mark Pascoe, considered it appropriate to place the claimant on a formal Performance Improvement Plan. This was because the claimant's performance over the previous weeks had fallen below the required standard. That decision was approved by both Mr Heckles and Liz Woods, the Business Unit Head. At the same time, it was proposed that an occupational health report be obtained, together with advice from the

respondent's RAST (Reasonable Adjustments Team) so as to ensure that the claimant had in place any adjustments or facilities which would enable him to perform to the required standard. The claimant took exception to being placed on the PIP. A meeting was arranged between the claimant and his manager, at which the claimant's trade union representative was in attendance. The claimant alleged that his performance had been satisfactory prior to Mark Pascoe taking over as his line manager. The tribunal accepted the respondent's witnesses` evidence that this was not the case. There had been problems with the claimant's performance from when he started work with in the CA team. Adjustments had been made to accommodate the claimant's dyslexia and the claimant confirmed that those adjustments were helpful to him. The tribunal found it entirely reasonable and appropriate for the respondent to place the claimant upon the PIP at that time. The authorisers had confirmed that the level of feedback which they had to give to the claimant was higher than that which was being given to the other case workers. The tribunal found that the decision to place the claimant on a PIP was in no sense whatsoever related to his race, but was entirely due to the level of his performance.

16. The claimant alleged that Mr Pascoe, Mr Pointer, Mr Heckles and/or Miss Mullarkey "unfairly criticised his time management". Nowhere in his witness statement does the claimant provide any evidence about this allegation. The claimant alleged that he was criticised for using his mobile phone whilst at his workplace, whilst his colleagues were not criticised. The claimant was unable to provide any specific examples. The respondent's witnesses denied that allegation. Whilst there was a general rule that mobile phones should be kept out of sight, none of the respondent's witnesses could recall having to criticise the claimant or anyone else for improper use of their mobile phone. There was no evidence of the claimant arriving for work late or leaving from work early or improperly managing his work. There were occasions when the respondent made it clear to the claimant that he should take more time undertaking his work, if this would reduce the number of errors being made. The claimant alleged that his work was delayed because the authorisers would send work back to him with corrections, following which the claimant would undertake those corrections and return the work to the authorisers. The authoriser would then identify additional errors which the claimant says could and should have been identified when the work was first examined. The claimant said, "this caused some delay for which I was unfairly criticised". The tribunal found that the claimant's allegations about time management were wholly unsubstantiated.

17. The claimant alleged that in both January and May 2019 Mr Pascoe disciplined him for making errors, without taking into account his mental health issues. In fact, the only occasion when the claimant was "disciplined" was when he committed two breaches of the respondent's data security policy. The first was in November 2018 and the second was in April 2019. On each occasion the claimant had inserted the wrong company name into e-mails sent to an agent for a different company. On the first occasion, that agent had raised a formal complaint and that resulted in the claimant being given an informal, verbal, warning to take extra care when sending e-mails to customers. On the second occasion, Mr Pascoe had to consider whether this further breach amounted to serious misconduct or gross misconduct. Due to his uncertainty, he took advice

from the respondent's HR department as to how the incident (being a second offence) should be categorised. HR in turn advised Mr Pascoe to determine whether the incident was a "breach" or a "serious breach", as that would determine the level of misconduct. The difference was that a finding of gross misconduct could result in the claimant being dismissed, whereas a finding of serious misconduct would likely be a warning. Mr Pascoe was advised that the incident would not be considered to be a serious breach and that the appropriate sanction was a first written warning. That is the sanction which was imposed. The tribunal did not accept the claimant's interpretation of these incidents as acts of direct race discrimination. The imposition of the informal, verbal, warning and first written warning were in no sense whatsoever influenced by the claimant's race. They were reasonable and appropriate sanctions to be imposed due to the claimant's breach of the respondent's data security policy. The tribunal was satisfied that any other employee who had committed the same offence would have been treated in exactly the same way.

18. The claimant alleges that throughout his employment the reason why he made errors which were identified in feedback from the authorisers was because he had not had the nature of the work properly explained to him. The respondent's evidence was that the claimant was given the same training as all the other case workers and indeed was given further and additional training because of the number of errors he was committing. Specific adjustments were made to enable the claimant to reduce the number of errors with his work, particularly with regard to his dyslexia. Additional time was provided to the claimant as and when he needed it and the level of the claimant's workload was reduced when compared to that of the other case workers. There were occasions when the claimant refused to utilise those computer programmes which had been supplied to him because of his dyslexia. The claimant had his probation period extended twice, so that he could be provided with additional training so as to enable him to achieve the necessary standards. The tribunal found this allegation to be wholly unsubstantiated. The tribunal found that the respondent's treatment of the claimant with regard to his training was in no sense whatsoever influenced by his race.

19. The claimant alleged that in or about July 2015, Mr Heckles made derogatory comments about him stating that he had a "crazy accent". Mr Heckles denied making any such comment. Mr Heckles evidence was that, "I've never said this or anything to that effect. I would never describe a colleague's accent as crazy. This is clearly potentially offensive and goes against all my views on creating a diverse and inclusive environment. I don't think Patrick has a crazy accent, and I've never had any difficulty understanding him because of his accent." There was no corroborative evidence to support this allegation raised by the claimant. No informal or formal complaint was made by the claimant at the time. The tribunal found that the claimant had not proved on the balance or probabilities that this incident took place. The claimant alleges that, in mid-2018, one of his colleagues at a similar level called him a "f***ing knob". That colleague confirmed to the tribunal that he had indeed used that phrase. His explanation was that he had tried to help the claimant with some calculations, but when the calculations were returned to the claimant, the claimant had identified that the calculations remained inaccurate and the claimant began to laugh at the colleague in front of everyone

else. The colleague was so upset that he left the office, but the following day he spoke to his manager and explained that he accepted he should not have used that kind of language at work and would apologise to the claimant. This is what happened, and the claimant accepted the apology. The tribunal found that the comment was made, but also found that it was in no sense whatsoever related to the claimant's race. It was a comment which would have been made to the colleague to any other member of staff who had behaved in the same way as the claimant. The claimant alleged that in April 2019 the same colleague referred to the claimant as an "alien". Again, the colleague denied making that comment and said to the tribunal that such a comment clearly had a negative implication and would not reflect his views. Again, the claimant raised no complaint at the time and produced no corroborative evidence to support that allegation. The tribunal was not satisfied that the claimant had proved that the comment was made.

20. The claimant alleged that during a conversation in March 2019, Mr Heckles said that he was struggling to know where to place the claimant because when he was on holiday he was normally served by brown people and was not used to working with someone like the claimant, meaning a black person. In his evidence to the tribunal, Mr Heckles accepted that he may on one occasion have had a discussion with the claimant during which he was explained that he was finding it difficult to find a place for the claimant within the organisation and which may suit the claimant's accountancy based background. Mr Heckles insisted that he would never use the phrase "brown people" to say that he was not used to working with "people like Patrick". The tribunal preferred Mr Heckles version of this exchange and found it unlikely that Mr Heckles had used or would use the language alleged by the claimant. Again, no formal complaint was raised at the time by the claimant.

21. The claimant alleged that in or about April 2019 he overheard Mr Pointer discussing his new neighbours with a colleague. Mr Pointer had allegedly said that these new neighbours had invited Mr Pointer round for a house-warming drink, during which they would sing Christmas carols. Mr Pointer had expressed to his colleague that he found this behaviour not to be normal for a house-warming party. The claimant's evidence was that he was sat behind Mr Pointer and overheard what was being said. The claimant's allegation was that the "not normal" comment was directed towards Christians generally, and that Mr Pointer knew the claimant was a Christian and that this was because of his race. The tribunal found that the comments made by Mr Pointer were not directed at the claimant, nor could any reasonable person interpret them as being directed towards the claimant's African ethnicity because Black Africans are more likely to be Christians. The tribunal found this allegation to be wholly unsubstantiated.

22. The claimant alleged that in August 2018, Mr Bratcher made inappropriate comments to the claimant having learned that the claimant was married, because Mr Bratcher had thought the claimant was gay. The claimant's evidence at paragraph 37 of his statement was that, "Inappropriate comments were made to me about not having got married because a colleague thought I was gay." The claimant does not set out exactly what was alleged to have been said; by whom it was said or in what circumstances. The claimant alleged that this incident had taken place in or about August 2018. During that time, Mr Bratcher's evidence

was that he was only in the same office as the claimant for approximately 6 days and was simply not around the claimant when he was in the office. Mr Bratcher's evidence was that he did not and does not think that the claimant was gay, particularly because the claimant had previously talked about his ex-wife and his dating life. The tribunal found that the claimant had failed to prove on the balance of probabilities that these comments had been made. Furthermore the claimant had not established why, if such comments had been made, they were related to his race.

23. The claimant alleged that at a time prior to August 2018, a female colleague had "wrongly accused me of looking at her inappropriately". That colleague gave evidence to the tribunal to the effect that she became aware that the claimant had been sat staring at her from his desk at the opposite end of the office. The lady met the claimant's gaze and because he continued to stare, asked him if everything was ok. The claimant said he was fine and stopped looking at the lady. The lady raised no formal complaint, but did mention it briefly to her line manager at her next one to one meeting. On a second occasion, the claimant said to this lady, "I'm going to watch you work". The lady felt uncomfortable at this comment, but did not respond. She again raised the matter with her manager, who explained that he had asked the claimant to sit nearer the team within which this lady worked so that he could observe how they worked and hopefully learn from their practices. The lady involved gave evidence to the tribunal, stating that she felt genuinely uncomfortable about the way in which the claimant was watching her. The tribunal found that the claimant had not been "wrongly accused" of looking at this lady in an inappropriate manner. Even if the lady involved had been oversensitive about the matter, raising it with her line manager was in no sense whatsoever related to the claimant's race. The lady would have done the same had she been made to feel uncomfortable by being watched by a white man.

24. Those were the claimant's allegations of unlawful direct race discrimination and race related harassment. The Tribunal found that the claimant had not proved on the balance if probabilities that any of these incidents had occurred as he described them.

25. The next allegations raised by the claimant were of unfavourable treatment because something arising in consequence of his disability, contrary to Section 15 of the Equality Act 2010. The claimant alleged that being disciplined in mid-January and May 2019 amounted to unfavourable treatment because of something arising in consequence of his disability. This is the same allegation referred to above, in relation to the two breaches of the respondent's data security policy. The claimant has accepted that on both occasions e-mails containing incorrect information was sent to the wrong company or its agent. The claimant alleges generally that his dyslexia, depression and post-traumatic stress disorder make him forgetful and make it difficult for him to concentrate. He says, "I am prone to making mistakes such as spelling errors and missing out words, particular if working under pressure. I have to constantly look things over to check for mistakes. I get confused with things such as names and other detailed information. As a result I am slower in completing tasks and producing results."

26. In his evidence to the tribunal, the claimant did not identify what was the "something" which arose as a consequence of his disability and which led him to make these two particular mistakes. The claimant accepted that he would have to identify the name of the recipient of the e-mail, type that name into the e-mail, check it and then send it. Those were not spelling or grammatical errors. Words were not missed out. The claimant may however have been "confused with things such as names and other detailed information". The claimant did not deal with these specific incidents in his witness statement. At paragraph 26, he simply states, "On one occasion towards the end of April 2019 after making a mistake I was told in a threatening manner by Mark Pascoe that "the next one will be the sack." The claimant does not forward an explanation as to why in these two specific incidents, confidential information was sent to the wrong person. The tribunal was not satisfied that the claimant had established that sending the wrong information to the wrong recipient was something which arose in consequence of his disability.

27. The claimant's general approach to these matters was that these were innocent mistakes and that, because of his disabilities, he should not have been subjected to any form of reproach or disciplinary action. The tribunal accepted the evidence of the respondent's witnesses, which was that such information (including calculations of tax due and repayment programmes for that tax) was extremely confidential and should never be sent to the wrong people. There was considerable potential for damage to the respondent's reputation and the possibility of compensation having to be paid. The respondent had provided the claimant with those adjustments which he had requested and which he considered to be reasonable in the circumstances. Despite those adjustments, the claimant made two very similar mistakes within a very short space of time. The tribunal was satisfied that in all the circumstances, it was entirely reasonable for the respondent to give the claimant an informal warning on the first occasion and a first written warning on the second occasion. Those were entirely proportionate in all the circumstances, so as to protect the reputation of the respondent and to make the claimant aware that such errors were regarded as serious, as well as being avoidable.

28. The claimant alleges that in January 2019, he was accused by Mr Pascoe and Mr Heckles of making 19 calculation errors, when in fact he had only made 4 calculation errors. The tribunal accepted the evidence of Mr Pascoe and Mr Heckles, which was that 19 errors had indeed been identified, but only 4 of those were regarded as serious errors. Those errors were pointed out to the claimant by way of feedback in the normal way, were corrected in the normal way and no other "accusation" was made. There were certainly no sanctions imposed upon the claimant. The tribunal was not satisfied that providing the claimant with feedback about these matters amounted to "unfavourable treatment". Again, the claimant did not provide any evidence whatsoever to show that any of these calculation errors were due to "something" which arose in consequence of his disability. In the event, it was entirely reasonable and proportionate for the respondent to point out to the claimant those calculation errors.

29. The claimant alleged that, as part of the investigation into the second data security breach, it was suggested to Internal Governance that this amounted to

"gross misconduct and merited dismissal". The tribunal found that this is not what happened. Mr Pascoe was genuinely concerned that a second, identical, mistake had been made by the claimant within a short space of time. As part of his consideration as to how to proceed, Mr Pascoe took advice from the respondent's HR department. Mr Pascoe was unsure as to whether this second data security breach would be regarded as a "breach" or a "serious breach". The difference between the two was relevant, in that one may result in an allegation of misconduct, whereas the other could result in an allegation of gross misconduct. The tribunal found that it was entirely reasonable and proportionate for Mr Pascoe to make those enquires. Mr Pascoe never alleged that the claimant had committed an act of gross misconduct and never suggested that the claimant should be dismissed. Furthermore, the claimant had not produced any evidence to show that his errors which led to Mr Pascoe making that enquiry were caused by "something" which arose in consequence of his disability. Mr Pascoe making the enquiry could not fairly be categorised as "unfavourable treatment". Again, Mr Pascoe's behaviour in making the enquiry was entirely proportionate in all the circumstances.

30. The claimant alleged that in April 2019 he was told by Mr Pascoe that his next mistake "will be the sack". Mr Pascoe denied ever saying any such thing to the claimant. Mr Pascoe referred to the wording of the first written warning, which is a document which was handed to the claimant by Mr Pascoe. A copy appears at page 881 in the bundle and states:-

> "I find the misconduct case substantiated and therefore issue you with a first written warning. This warning will remain on your personal HR file for twelve calendar months from 29th April 2019; that is until 28th April 2020. You will not be eligible for promotion during this time. Should you commit another act of misconduct within this time, you may receive a final written warning, or if gross misconduct, save in exceptional circumstances, you may be dismissed without notice and without pay in lieu of notice. It is therefore very important that you improve your standard of conduct and behaviour to that expected of all staff and act professionally at all times."

31. The tribunal was not satisfied that the claimant had proved on the balance of probabilities that the alleged comment had been made by Mr Pascoe.

32. The claimant alleged that in January 2019 he had been placed upon a performance improvement plan and that this amounted to unfavourable treatment because of something arising in consequence of his disability. The respondent accepted that the claimant had been placed upon a performance improvement plan, for the reasons set out above. The tribunal accepted that being placed upon a performance improvement plan may well have been regarded as "unfavourable treatment". The reason for the claimant being placed upon the performance improvement plan was, in simple terms, because of his poor performance, because of the number of errors he was making and because of the two data security breaches. The claimant has not produced any evidence to show that his poor performance or either of the data security breaches was because of something which arose in consequence of his disability. In the event, the tribunal

was satisfied that it was entirely reasonable and proportionate in the circumstances for the respondent to place the claimant upon a personal improvement plan, at that time, in all the circumstances. The purpose of the PIP was to provide the claimant with an opportunity over a period of time, with guidance from the respondent, to improve the standard of his performance.

33. The claimant alleges that, following an occupational health assessment on 21st May 2019, the respondent failed to carry out the recommendations made by the occupational health specialist. The OH report appears at pages 971 – 974 in the bundle. It refers to the claimant's "depression and stress which he perceives to be work related" and that the claimant "has been experiencing symptoms of low mood since the beginning of the year and following the events in work which you detail in the referral."

The OH report recommends the following adjustments to support the claimant's return to work:-

- Meet with Patrick regularly to offer support, review and agree activity
- Allow flexible work hours and a paced workload when required
- It is good practice to schedule periodic breaks away from the workstation for five – ten minutes per hour, doing alternative duties
- Allow breaks to use stress management techniques
- As he does to return to work he is likely to benefit from a phased return to work to help him to manage his levels of fatigue, I would suggest commencing on 50% of his contracted hours and increase these gradually over a period of four weeks

The claimant alleges that these adjustments were not made. However, the claimant has not presented a complaint of failure to make reasonable adjustments contrary to Sections 20 – 21 of the Equality Act 2010. The claimant alleges that the respondent's failure to implement those recommendations amounted to unfavourable treatment because of something arising in consequence of his disability. The tribunal was satisfied that the respondent could not have made those adjustments until such time as the claimant physically returned to work, or at least made known to the respondent the date when he intended to do so. Neither of those things happened. Therefore, the respondent did not fail to carry out those recommendations. Accordingly, there was no unfavourable treatment.

34. The final act of unfavourable treatment alleged by the claimant was his dismissal. The respondent concedes that the dismissal did amount to unfavourable treatment. The dismissal was because of the claimant's continued absence. That absence was something which arose in consequence of his disability. However, the claimant had by then been absent from work for a continuous period of almost 6 months. The claimant had made it clear that he was not yet ready to return to work, nor could he give any clear indication as to when he may be fit to return to work. The claimant did not refer to any forthcoming treatment or medication which may have made a difference to his condition and which may have improved his health to such an extent as he would have been able to return to work within the foreseeable future. At no stage did the claimant or his trade union representative suggest to the respondent that an additional period of time may

have made some difference to the claimant's ability to return to work. The Tribunal accepted the evidence of the respondent`s witnesses, as to the impact on the department of having the claimant on long-term sick leave. His absence had to be covered by his colleagues, who were already extremely busy with their own work. This impacted upon the performance of the entire team. Their situation was exacerbated by the lack of any indication as to when the claimant may return to work.

Unfair dismissal

35. The claimant was continuously absent from 2nd May 2019 until he was dismissed on 23rd October 2019. That was a period of almost 6 months. At the end of that period, the claimant was unable to give any indication that he was fit to return to work or that he may be able to return to work at any time within the foreseeable future. The claimant did not refer to any medical treatment which may have alleviated his symptoms and thus made it likely that he could return to work. The claimant did not suggest that a change in his role or duties may permit him to return to work.

36. Throughout his absence, the claimant attended a number of "KIT" (Keep In Touch) meetings with either Steve Heckles or Paul Kelly. Those meetings took place either in person (with the claimant being accompanied by his trade union representative) or by telephone. In person meetings took place on 16th May, 12th June and 10th July. On 7th August there was a formal attendance review meeting. On 3rd September there was a formal attendance referral meeting and on 25th September a KIT meeting at which the claimant was advised that he would be going on to half pay. On 30th September the claimant's absence was referred to a decision manager and on 23rd October the decision was taken to dismiss the claimant on capability grounds because of his long-term absence.

37. The claimant appealed against his dismissal stating, "I consider the dismissal to be discriminatory". The appeal letter describes the various incidents which form the subject matter of his discrimination complaints to the Employment Tribunal. Nowhere in the appeal letter does the claimant raise any concern about the procedure followed by the respondent which led to the claimant's dismissal. In his pleaded case on the claim form ET1, the claimant makes no complaint about the procedure followed by the respondent which led to his dismissal. In his evidence to the tribunal, the claimant makes no complaint about the procedure followed by the respondent which led to his dismissal. The claimant's position is simply that his absence was because of anxiety, stress and depression and that this had been caused by the alleged discriminatory conduct by his colleagues.

38. At the decision manager's meeting on 17th October 2019, the claimant was again accompanied by his trade union representative. The claimant informed Mr Gibson, the decision maker, that he really liked his work, but that the stress of the PIP and what he considered to be pressure from management had led to him becoming depressed and that was the cause of his absence. The claimant's trade union representative explained that the claimant also suffered from post-traumatic stress disorder, memory loss and dyslexia. When asked if he felt able to return to work, the claimant said he could not give any indication as to when he

may be fit enough to return to work. When asked whether he would consider a move to a different role, the claimant's trade union representative suggested that the claimant "may want to take a break from HMRC for the sake of his mental health." The claimant then confirmed that he felt able to do the job, but could not cope with the stress that came with it when he was unwell.

39. Mr Gibson's decision was based upon the fact that the claimant had been absent from work for almost 6 months, remained unfit for work and was unable to give a date or any indication as to when he may be well enough to return to work. The claimant was unable to take up any alternative role, such as a sideways move or a downgrading. In the absence of any prospect of the claimant returning to work to his current role and his refusal to consider an alternative role, Mr Gibson came to the conclusion that the claimant should be dismissed on the grounds that he was no longer capable of performing the role for which he had been employed.

The law

40. The claimant's complaints of unlawful race discrimination and unlawful disability discrimination are governed by the provisions of the Equality Act 2010. The claimant's complaint of unfair dismissal is governed by the provisions of the Employment Rights Act 1996. The relevant provisions from those statutes are set out below.

Equality Act 2010

Section 4 The protected characteristics

The following characteristics are protected characteristics –

Age;
Disability;
Gender reassignment;
Marriage and civil partnership;
Pregnancy and maternity;
Race;
Religion or belief;
Sex;
Sexual orientation.

Section 6 Disability

(1) A person (P) has a disability if--

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

Section 9 Race

(1) Race includes--

(a) colour;
(b) nationality;
(c) ethnic or national origins.

(2) In relation to the protected characteristic of race--

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;

(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.

(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.

(4) The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

(5) A Minister of the Crown may by order--

(a) amend this section so as to provide for caste to be an aspect of race;

(b) amend this Act so as to provide for an exception to a provision of this Act to apply, or not to apply, to caste or to apply, or not to apply, to caste in specified circumstances.

(6) The power under section 207(4)(b), in its application to subsection (5), includes power to amend this Act.

Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex--

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Section 15 Discrimination arising from disability

(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.

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--

(i) violating B's dignity, or

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

(2) 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).

(3) 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.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

Section 39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)--

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)--

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

Employment Rights Act 1996

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

41. The claimant's complaints of direct race discrimination, contrary to Section 13 of the Equality Act 2010, require the claimant to establish less favourable treatment, which is not the same as merely unfavourable treatment. It is the **equality,** rather than the **quality** of the treatment that really matters. This necessitates an element of comparison for the claimant to establish that he has been treated differently and less favourably than a comparator (actual or hypothetical). If an actual comparator is relied upon, the relevant circumstances of the actual comparator must be materially the same as the complainant. If the claimant is unable to find an actual comparator then he may instead rely upon a hypothetical comparator whose hypothetical circumstances are not materially different.

42. Such cases ought to be approached by adopting a two-stage test; (a) first to ask whether there was less favourable treatment and (b) second to ask whether it was on the grounds of race. In other words, the tribunal must ask "the reason why" question after the less favourable treatment has been proven to exist. However, sometimes it is simply easier to ask the "reason why" question first. In other words, why was the claimant treated the way he was?

43. The burden of proof is set out in Section 136 of the Equality Act 2010. It is for the claimant to prove primary facts from which the employment could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination. The words "could conclude" means that "a reasonable tribunal could properly conclude" from all the evidence before it. That means that the claimant must set up a prima facie case. A mere difference of status plus a difference in treatment (which might indicate the possibility of discrimination) is not sufficient to reverse the burden of proof automatically. Something more is generally required to shift the burden. If the claimant does not prove such facts, the claim will fail. In deciding whether the claimant has proved such facts, the tribunal will usually depend upon what inferences it is proper to draw from the primary facts found by the tribunal. In

considering what inferences or inclusions can be drawn from those primary facts, the tribunal must assume that there is no adequate explanation for those facts. Where the claimant has proved such facts, the burden of proof moves to the employer. It is then for the employer to prove that it did not commit, or is not to be treated as having committed, that act. To discharge the burden, it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of race or disability. That requires the Tribunal to assess whether the employer has proved an explanation for the facts from which such inferences can be drawn and whether that explanation is adequate to discharge the burden of proof.

44. With regard to the claimant's allegations of harassment related to race, Section 26 specifically identifies those matters which must be taken into account by the tribunal in deciding whether an act of harassment has occurred. The proper approach was identified in **Richmond Pharmacology v Dhaliwal [2009 IRLR336].** The requisite elements are:-

    (i) unwanted conduct;
    (ii) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him, and
    (iii) must be on the grounds of race.

45. In determining whether the conduct has the effect of violating the claimant's dignity or creating the relevant environment for the purposes of Section 26 (1) (b), the Tribunal must take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. The Court of Appeal said in **Land Registry v Grant [2011 EWCA-CIV-769]** that tribunals must not cheapen the significance of those words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

46. Section 15 deals with what is commonly known as "discrimination arising from disability". It is for the claimant to establish three things:-

    (i) unfavourable treatment;
    (ii) that the treatment was because of "something"
    (iii) that the "something" arises in consequence of the claimant's disability.

    If so, then the respondent must show that the treatment was a proportionate means of achieving a legitimate aim.

47. The claimant need only establish that they have been treated unfavourably – the test is not "less favourable treatment". Accordingly, no comparator is required. There is a relatively low threshold of "disadvantage", which is sufficient to trigger the requirement for the respondent to justify the treatment.

48. The unfavourable treatment must be **because of** the relevant **something**, which must itself **arise in consequence** of the disability. This is **not** a question of whether the claimant was treated less favourably because of his disability **[Basildon and Thurrock NHS Foundation Trust v Weerasinghe – 2016 ICR305].**

49. The Employment Appeal Tribunal has provided guidance on the correct approach to Section 15 cases in **Pnasier v NHS England – UKEAT/0137/15.**

(a) The 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 upon by B. No question of comparison arises.

(b) The Tribunal must determine the cause of 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 contentious or uncontentious 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 the 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 must 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. Having regard to the legislative history of Section 15 of the Act, the statutory purpose which appears from the wording of Section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact, assessed robustly in each case, whether the something can properly be said to arise in consequence of disability.

(e) However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(i) It does not matter precisely in which order these questions are addressed. Depending upon the facts, the 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.

Unfair dismissal

50. The respondent relies upon "capability" as its potentially fair reason for dismissing the claimant. The respondent's position is that the claimant was no longer capable of performing work of the kind for which he had been employed, because of his long-term absence. That is a potentially fair reason under Section 98 (2) (a). The relevant authorities which provide guidance to the tribunal on the interpretation of that statutory provision are as follows:

Spencer v Paragon Wallpapers Limited [1977 ICR301]
BS v Dundee City Council [2014 IRLR131]
East Lindsay District Council v Daubney [1977 ICR566]
HJ Heinz Company Limited v Kenrick [2000 IRLR144]

51. The basic principles established by those cases are as follows:-

(i) It is essential to consider whether the employer can be expected to wait any longer for the employee to return. The tribunal must expressly address this question, balancing the relevant factors in all the circumstances of the individual case;

(ii) Those factors include whether other staff are available to carry out the absent employee's work, the nature of the employee's illness, the likely length of his or her absence, the cost of continuing to employ the employee, the size of the employing organisation and the unsatisfactory situation of having an employee on very lengthy sick leave;

(iii) A fair procedure is essential. This requires in particular, consultation with the employee, a thorough medical investigation (to establish the nature of the illness or injury and its prognosis) and consideration of other options (in particular alternative employment within the employer's business). In one way or another, steps should be taken by the employer to discover the true medical position prior to any dismissal. Where there is any doubt, a specialist report may be necessary. The employer must take into account not only the employee's current level of fitness, but also his or her likely future level of fitness;

(iv) The employee's opinion as to his or her likely date of return and what work he or she will be capable of performing should be considered.

Conclusions

52. With regard to the claimant's allegations of direct race discrimination and harassment on the grounds of race, the tribunal was not satisfied that the claimant had proved facts from which it could infer that then there had been a discriminatory reason for any treatment. The claimant has failed

to establish a prima facie case in respect of any of those allegations. In each case, the respondent has provided a satisfactory explanation. The allegations of direct race discrimination and harassment on the grounds of race are not well-founded and are dismissed.

53. With regards to the claimant's allegations of unfavourable treatment because of something arising in consequence of his disability, where there was a difference between the claimant's evidence and that of the respondent's witnesses, the Tribunal preferred the evidence of the respondent's witnesses. The tribunal was not satisfied that the claimant had shown that any alleged treatment was because of something which arose in consequence of his disability. There was no causal connection between any treatment and the claimant's disability. In each case, the respondent's treatment of the claimant was in any event a proportionate means of achieving a legitimate aim. The allegations of unfavourable treatment because of something arising in consequence of his disability are not well-founded and are dismissed.

54. With regard to his dismissal, the tribunal was satisfied that the respondent could not reasonably be expected to wait any longer for the claimant to return to work. The claimant had been absent from work for almost 6 months, at which stage he was unable to give any indication whatsoever as to when he may be fit to return to work. The claimant's medical condition had been identified and there was no disagreement as to that condition. There was no suggestion of any treatment in the foreseeable future which may have assisted the claimant in returning to work and achieving a reasonable level of attendance. The claimant has raised no objection to the procedure followed by the respondent which led to his eventual dismissal. The tribunal was satisfied that the respondent had followed a fair procedure throughout the claimant's absence, which ultimately led to his dismissal. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
17 January 2022

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