EMPLOYMENT TRIBUNALS (SCOTLAND}

Case No: 4118413/2018

Held in Glasgow on 7, 8, 9 and 10 May 2019

Employment Judge S MacLean
Tribunal Member J Wallage
Tribunal Member R Taggart

Mr G McNaught	**Claimant In Person**
Wm Morrison Supermarkets Pic	**Respondent Represented by: Mr K McGuire, Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims are dismissed.

REASONS

Introduction

1. The claimant sent his ET1 claim form to the Tribunal's office on 11 September 2018. He claims discrimination on the grounds of the protected characteristic of disability. The disability relied upon is depression. The respondent agrees that the claimant is a disabled person for the purposes of section 6 of the Equality Act 2010 (EqA).

2. After two case management preliminary hearings and additional information from the claimant it was clarified that the claimant was making claims under

section 15 (discrimination arising from disability); section 20 (failure to make reasonable adjustments) and section 26 (harassment) of the Eq A.

3. The unfavourable treatment which the claimant said arises in consequence of his disability is: a failure to permit him to return to his role as a bakery manager in the Anniesland store (Anniesland); the failure to offer him the option to return to the Anniesland in an alternative role; and the failure to deal with his grievances for over a year. The respondent denied that the claimant was treated unfavourably as a consequence of his disability, if he was then the respondent said it was justified.

4. The claimant alleges that the respondent engaged in unwanted conduct related to disability when he was described as a suicidal maniac and was bullied by new managers who did not know him or his circumstances particularly in connection with his whistleblowing claim. The respondent denied harassment and raised time bar issues.

5. The claimant said that the respondent failed to make reasonable adjustments. The claimant had been asked to clarify the provision, criterion or practice (the PCP) on which he relied and had endeavoured to do so. At the final hearing he confirmed that the PCP was working unplanned excess hours with no break. He said that this put him at a substantial disadvantage in his ability return to his role as bakery manager with appropriate support. The claimant said that a reasonable adjustment would have been for the respondent to have provided more hours in the department. The respondent disputed that the PCP was ever applied to the claimant and the disadvantage occurred for other reasons.

6. At the final hearing, the claimant gave evidence on his own account. David Nelson, General Manager and Keith Brownlie, Regional People Manager, gave evidence for the respondent. The parties provided a joint set of productions to which the Tribunal was referred.

Law

7. Section 15 of the EqA states that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

8. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 the EAT said that the questions for the Tribunal are (i) did the claimant's disability cause, have the consequence of, or result in, "something"? (ii) Did the employer treat the claimant unfavourably because of that "something"? It does not matter in which order these questions are addressed.

9. *In Pnaiser v NHS England and another* [201 6] IRLR 170 (Mrs Justice Simler) summarised the proper approach to claims for discrimination arising from disability as follows: (i) The tribunal must identify whether the claimant was treated unfavourably and by whom, (ii) the tribunal then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant; (iii) the tribunal must then determine whether the reason was "something arising in consequence of the claimant's disability". That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator; and (iv) The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

10. Section 26 of the EqA so far as relevant provides that a person A harasses another B if A engages in unwanted conduct related to a relevant protected characteristic, and B the conduct has the purpose or effect of A (i) violating B's dignity or (ii) creating an intimidating, hostile degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect referred to, the following must be taken into account: B's perception; the other

circumstances of the case; and whether it is reasonable for the conduct to have that effect.

11. In *Pemberton v Inwood* [2018] EWCA Civ 564, the Court of Appeal held that to decide whether conduct has either of the proscribed effects, a tribunal must consider both: (i) whether the claimant perceives themselves to have suffered the effect in question (the subjective question) and (ii) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The tribunal must also consider all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that, if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

12. Section 20 of the EqA imposes a duty in employers in certain circumstances to make reasonable adjustment. The duty can arise when the disabled person is placed at a substantial disadvantage by an employer's provision criterion or practice (PCP). An employer will not be obliged to make a reasonable adjustment unless he knows or reasonably should know that the employee is disabled and likely to be placed at a substantial disadvantage because of the disability.

13. Section 123 of the EqA provides that a complaint under section 120 may not be brought after the end of (a) the period of three months starting with the date of the act to which the complaint relates; or (b) such other period as the employment tribunal thinks just and equitable.

The Issues

14. The issues that the Tribunal had to determine were:

    a. Are any of the claims time barred and if so is it just and equitable to consider them?

b. Was the claimant treated unfavourably by the respondent because of something arising in consequence of the claimant's disability?

c. If so, can the respondent show that the treatment is a proportionate means of achieving a legitimate aim?

d. Did the respondent engage in unwanted conduct related to a protected characteristic and did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment?

e. Did the respondent apply a provision criterion or practice (PCP): requiring employees was working unplanned excess hours with no break?

f. Did the PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled: the claimant has difficulty concentrating and takes more time to evaluate and complete tasks.

g. Did the respondent know, or could it reasonably be expected to know, that the claimant was likely to be placed at a substantial disadvantage compared to a person who is not disabled by the application of the PCPs?

h. If so, did the respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

i. Was it reasonable for the respondent to have made such adjustments considering the ECHR Code of Practice on Employment (2011)?

j. What remedy if any should the Tribunal award?

Findings in fact

15. The Tribunal makes the following findings in fact.

16. The claimant's employment with the respondent started on 4 August 2009. He is employed as Bakery Manager at the store at Anniesland, Glasgow (Anniesland).

17. The claimant's terms and conditions of employment provide:

a. The claimant is entitled to up to 15 weeks basic contractual pay off set against statutory sick pay when absent from work because of ill health.

b. Grievances relating to employment require a resolution by referring to the respondent's grievance procedure. There is a Special Complaints Procedure available for employees who believe they have been harassed and bullied at work. The respondent has a whistleblowing procedure.

c. The claimant may be required to work on a permanent or temporary basis at any of the respondent's locations. If the change of place of work is permanent, the claimant is entitled to be given a reasonable notice of the transfer.

18. The claimant had a mental impairment (depression) at the relevant time and is a disabled person within the meaning of section 6 of the EqA.

19. The claimant had a period of sick absence related to his disability in early June 2016.

20. David Nelson was appointed Store Manager of Anniesland with responsibility for approximately 310 colleagues and 19 managers including the claimant. Mr Nelson had a senior management team consisting of five managers including Alan Johnstone, Market Street Services Manager to whom the claimant reported.

21. The claimant return to work around July 2016. Mr Johnstone had a return to work meeting with the claimant. The claimant was stressed by lack of resources in his department. Mr Johnstone explored if the claimant wished to step down as a manager. The claimant did not. Mr Johnston did not pursue the matter.

22. Around August 2016, Mr Nelson was chairing a meeting of team managers including the claimant during which Mr Nelson referred to another colleague who was under stress as being a "suicidal maniac" (the August 2016 Meeting). The claimant was upset by this comment but did not make any comment to Mr Nelson or any of his colleagues at or after the August 2016 Meeting.

23. The claimant had an injury at work in early August 2016 and was absent. He was then absent from work because of work related stress and depression from 28 August 2016.

24. The claimant had a telephone assessment with the respondent's occupational health provider, Medigold Health (OH) on 16 September 2016. The claimant was not fit to return to work. The claimant was struggling with what he perceived to be a large reduction in resources in his department. He felt unsupported. OH recommended that the respondent should consider more staffing in Anniesland as a possible adjustment to allow him to get his paperwork done.

25. The claimant attended an absence meeting with Mr Nelson on 25 October 2016 (the October 2016 Meeting). Tricha Gallagher, People Manager was present. The claimant referred to the August 2016 Meeting when he said Mr Nelson referred to a colleague as a "suicidal maniac". Mr Nelson said that he did not and asked why the claimant was raising this at an absence meeting. Mr Nelson had no recollection of having made the remark.

26. On 11 November 2016, the claimant returned to work at Anniesland on a phased return basis. The claimant had been referred to OH and was attending counselling. The claimant was positive that he would return to working in a full-time capacity after the four-week phased return period.

27. The claimant was unable to sustain his return to work. He felt that there were short staffing issues and lack of managerial support. The claimant did not attend work on 23 December 2016 following a recurrence of severe symptoms of low mood.

28. The claimant had a period of extended sick absence during which he attended several appointments with OH. The claimant confirmed that he received specialist care at home. He remained under the care of a specialist psychiatrist.

29. In June 2017 following a telephone consultation an OH report dated 22 June 2017 stated that the claimant was more likely to return within 12 to 16 weeks.

30. Around 2 August 2017 Nicol Rhodes of Network Vocational Rehabilitation Service prepared a draft return to work plan for the claimant (the Plan). The Plan anticipated the claimant returning to work in September 2017 on an eight-week phased return.

31. In September 2017, the claimant indicated that he wished to return to work on 25 September 2017.

32. A meeting was arranged on 26 September 2017 between Keith Brownlie, Regional People Manager and the claimant to review the Plan and update the claimant on the business (the September 2017 Meeting). Mr Rhodes and Ms Gallacher were present. Mr Brownlie said that Anniesland had changed dramatically. It was now a training store. There were increased visits by Directors and Pathway Candidates. It was agreed that a further meeting would take place following a period of pre-arranged annual leave by the claimant.

33. The claimant met with Mr Brownlie and Mr Nelson on 3 November 2017 (the 3 November 2017 Meeting). Ms Gallacher and Mr Rhodes were also present. Mr Brownlie referred to the changes at Anniesland mentioned at the September 2017 Meeting. He said that as a result, Anniesland was busier; more highly regulated and more frequently audited; the pressures in Anniesland had significantly increased. It was also around seven weeks from Christmas which was the busiest period. Mr Brownlie said that there were three options for the claimant:

    a. To work in a store a reasonable distance from the claimant's home as a bakery manager.

b. To work in a store a reasonable distance from the claimant's home as a baker.

c. To have an alternative role in a smaller store.

34. Mr Brownlie said the options were to allow the claimant a period of rehabilitation into the workplace following his absence and to give him an opportunity to build up some resilience within the role. There was a duty of care to ensure that the claimant was not exposed to any health risks while at work. Given the changes in the business Mr Brownlie was not confident about the claimant's return to his substantive post and felt that it would be at risk to his mental health. Mr Rhodes asked if this was temporary. Mr Brownlie said that it would be reviewed in three to six months to see how the claimant was coping. The claimant indicated that he felt that he would be disadvantaged, that Anniesland was the only store he was returning to. It was agreed that a further meeting would take place on 8 November 2017 once the claimant had an opportunity to consider his position.

35. At the meeting on 8 November 2017 (the 8 November 2017 Meeting) the claimant asked who wanted him to step down from his position; he felt there was an agenda. Mr Brownlie advised that no one was asking the claimant to step down. He was only being asked to consider the three options which had been discussed. Mr Brownlie reiterated why he considered that it was not appropriate for the claimant to return to Anniesland. The previous year had impacted on the claimant's wellbeing; it was the run up to Christmas; and there had been a dramatic change in the store. It was a training store; it was more demanding and highly paced. The claimant felt that he would be returning to people he knew at a store with which he was familiar. The claimant indicated that he wished to raise a grievance and at the end of the meeting produced a pre-prepared letter (the Grievance Letter) which stated:

"To whom it may concern, it is with deep regret that I have to take a grievance on the following two items namely (1) breach of contract and non-payment of wages and (2) disability discrimination. I hope we can resolve this soon."

36. By letter dated 9 November 2017, Mr Brownlie acknowledged the Grievance Letter. He reiterated the reasons why the respondent could not accommodate the claimant's return to work at Anniesland and the three options for the claimant's rehabilitation into the workplace following his absence. Mr Brownlie indicated that if the claimant was not fit to work to return to work in another store then the claimant was not fit to return to work in line with his terms and conditions of employment. Mr Brownlie reiterated that the respondent was unable to accommodate all the recommendations outlined in the Pan in Anniesland although the respondent felt that this could be offered in an alternative store. Mr Brownlie stated:

"We have looked at the contents of your letter of grievance and believe that the points you raise relate directly to your return to work capability. No decision has been made with regard to this yet, however the next step in this process is as we suggest above to obtain detailed medical advice and make a decision based on this evidence.

Once the decision has been made, it would be appropriate then for you to raise any concerns about the outcome. We do not think it would be fair and reasonable to duplicate this process.

In summary, we are proposing the following:

If you are fit and able to return to work as a bakery manager in a store other than Anniesland then please contact us and we will make the necessary arrangements for your return. We will also arrange for you to meet with our occupational health team.

For the avoidance of doubt, we do not feel your return to work should be to the Anniesland store and as such we will not be proposing this as an option at this time. However if you feel given the above you still feel incapable of returning to work, you should return to your doctors and get a sick note absenting you from work."

37. Ms Gallacher investigated the grievance about the deductions from wages and this was resolved by the end of November 2017.

38. On 13 December 2017, the claimant, Mr Rhodes, Mr Brownlie, Mr Nelson and Ms Gallacher met (the December 2017 Meeting). It was confirmed that the claimant's payments grievance had been resolved. Mr Nelson asked how the claimant was being discriminated. The claimant said that this was because he was being asked to go to another store and would need to explain to everyone why he had been absent. It would not help his illness. He also referred to the comments made by Mr Nelson in August 2016. Mr Brownlie asked why the claimant considered that he could not return to another store. The claimant said that Anniesland was his store. A factor in his sick absence in December 2016 was schedules changing. Mr Brownlie said that the larger store would be a higher pressure however the claimant said he wanted to return to Anniesland.

39. The claimant participated in a further medical assessment with the OH on 14 December 2017. The claimant reported that his overall wellbeing had improved. He was aware of the changes in the workplace at Anniesland and and was keen to return to there as he felt it was familiar.

40. A meeting took place on 15 February 2018 attended by the claimant, Mr Rhodes, Mr Nelson, Mr Brownlie and Ms Gallacher (the February 2018 Meeting). The claimant was informed that the role of the duty manager had changed. The claimant was invited to give an update on his position. There was discussion about possible stores to which the claimant might return. He mentioned Crossmyloof and Newlands. The claimant said that he was thinking of moving house to Gourock. He had looked at Greenock and Johnstone. Mr Brownlie thanked the claimant and said that he would do some background checks and contact the claimant

41. After a telephone assessment of the claimant on 7 March 2018, OH issued a report dated 13 March 2018. It was confirmed that the claimant was progressing well and would remain supported by a psychiatrist and community psychic nurse for some time. The report reiterated the claimant's desire to return to a familiar environment and his belief that with the adequate support in place, he could return to Anniesland. It was recommended an

individual stress management was carried out before the claimant returned to work.

42. Mr Nelson conducted a meeting with the claimant on 9 May 2018 which was attended by Mr Rhodes and Ms Gallacher (the May 2019 Meeting). Mr Nelson said that he did not consider it was in the claimant's best interests to return to Anniesland but return as a baking manager in another store which would facilitate a four-week refresher role. The claimant was informed that no one had taken over from him as the bakery manager in Anniesland.

43. On 4 June 2018, the claimant was invited to attend a welfare meeting with Mr Nelson and Ms Gallacher to confirm the claimant's date of return to work and the details of his phase to return to work plan. It was acknowledged that the claimant's desire was to return to his role in Anniesland, but the respondent continued to consider this was not in the claimant's best interest as it believed that the return to work needed to be carefully managed and supported while the claimant reintroduced himself into the business. The letter stated that if the claimant did not agree a date of return to a store other than Anniesland the respondent felt that the claimant was not taking reasonable steps to support his return to work and the respondent would consider how to proceed in managing the absence which may include ceasing his pay.

44. At the meeting on 8 June 2018, the claimant was accompanied by Mr Rhodes (the June 2018 Meeting). Ms Gallacher took notes. Mr Nelson said as the claimant was able to return to work the integration process would begin with a phased return in Newlands. The claimant asked why his grievance had not been heard. Mr Nelson said that it would be dealt with on his return to work. The claimant said that he had looked at other stores but had not said that he would go to them. The claimant said he wanted to return to work; he asked for a plan that he would return to Anniesland then he would go to Newlands.

45. Mr Nelson wrote to the claimant on 22 June 2018 to confirm the phased return to work in the Newlands bakery store as bakery manager. This would allow the respondent to closely manage and support the claimant's phased return to work and would also mean that the respondent could support the claimant

with any temporary reasonable adjustments which might be needed to fully integrate himself into the business. The letter expressed disappointment that the claimant did not agree with the proposal and insisted that he would only return to work at Anniesland. The letter stated:

"We understand that you are prepared to agree to a phased return at a smaller store, however you are clear that at the end of the phased return, you would only consider moving back to Anniesland store permanently, something that we are not able to commit to at this time."

46. In relation to the claimant's concern that the grievance alleging disability discrimination about the decision not to allow the claimant's return to the Anniesland at the present time had not been heard Mr Nelson stated that the grievance related to the reasons for the claimant not returning to work which had been addressed on more than one occasion at the various meetings. Mr Nelson said that the reason was that a return to the Anniesland "at this moment in time" was not in best interests of the claimant's health. The letter continued:

"To be clear, we are not saying that you cannot return to Anniesland in the future, however our priority for you is a fully supported return to work at a smaller store to allow us to fully support you. Given this, we believe that the concerns you raise as part of your grievance have been considered and responded to."

47. The letter concluded that the respondent considered that it had acted reasonably and supported the claimant on full pay. The claimant was now choosing not to return to work so payment was ceasing with immediate effect given that both the claimant and OH confirmed that the claimant was fit to return to work. The claimant was urged to reconsider his position.

48. The claimant sent an email to the respondent's CEO regarding the failure to progress his grievance. This resulted in Ben Wrigley, Employee Relations Manager Retail emailing the claimant and discussing matters with him.

49. Mr Wrigley noted that the claimant felt that he was prevented from returning to work. Mr Wrigley's understanding was that there was a reluctance to allow the claimant to return to Anniesland until a period of rehabilitation/training was undertaken during a phased return to work. He acknowledged that the claimant's position was that he had been told he would never return to the Anniesland which he believed was due to his salary and that money would be saved by relocating him to another store. Mr Wrigley suggested that it was a sensible option for the claimant to undertake a phased return to work in an alternative store given the reasons for the claimant's period of absence and his time out of the business. A move back to Anniesland could then be considered at the point at which all parties were comfortable that it was the right move for the claimant and the business taking into his account his health. The claimant acknowledged that it might be many months before a move to Anniesland could be achieved. Mr Wrigley proposed in the next fortnight that an arrangement be made to support the claimant's return to work and a visit to Anniesland to familiarise himself with the store and the management team when confirmation which store the claimant would return to and the details of his phased return would be agreed.

50. Mr Wrigley sent an email to the claimant on 12 July 2018 advising as follows:

"We spoke about you returning to Anniesland and it was agreed that whilst we could arrange a familiarisation day for you at the store; it would not be appropriate for you to return to work period to be carried out in Anniesland. You agreed to this point and said that even if your return to work took up to six months, you would be happy for this to take place in an alternative store, so long as you could work towards a return to Anniesland when it was considered appropriate. Again this was confirmed in my follow up email to you.

In light of your most recent email, I have arranged for a grievance hearing to take place with an independent manager to consider your points. The appointed manager will be in contact with you to arrange this."

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51. The claimant notified ACAS to consider early conciliation on 12 July 2018. The ACAS certificate was issued on 12 August 2018.

52. The claimant attended a grievance hearing meeting on 13 August 2018. He was accompanied by his sister. The grievance was heard by Gavin Brown, Store Manager.

53. On 3 September 2018, Mr Brown wrote to the claimant advising him of the outcome of the grievance. It was not upheld.

54. The ET1 claim form was sent to the Tribunal on 7 September 2018.

55. The claimant appealed the decision and the appeal hearing took place on 18 October 2018. The appeal was partially upheld in relation to non-payment of wages.

Observations on Witnesses and Conflict of Evidence

56. The Tribunal considered that the claimant gave his evidence honestly based on his recollection and perception of events. As explained below the Tribunal considered that at times the claimant's position at the final hearing was incongruent with the contemporaneous correspondence and the evidence of the respondent's witnesses.

57. Mr Nelson was a credible witness who gave his evidence candidly. The Tribunal noted that Mr Nelson said that he did not recall referring to a colleague as a suicidal maniac at the August 2016 Meeting. He had spoken subsequently to someone else who was present at the August 2016 Meeting and they had confirmed that he had done so.

58. Mr Brownlie was a credible and reliable witness whose evidence was consistent with contemporaneous correspondence. There was no written record of the 3 September 2017 Meeting between the claimant and Mr Brownlie. However, there was no material conflict of evidence about what was said at that meeting.

59. The claimant gave evidence about a conversation with Mr Johnstone, his line manager in July 2016 when Mr Johnstone introduced himself and asked if the

claimant would consider stepping down to a baker. The claimant declined, and no action was taken. The claimant believed that there was an agenda to demote him and make salary savings. Mr Johnstone did not give evidence at the final hearing. Mr Nelson said that Mr Johnstone reported to him. The first that Mr Nelson was aware of this was when he read the productions. Mr Nelson recalled that the claimant had returned from sick leave and believed that any discussion would be in the context of a return to work interview and what could be done to support the claimant. Mr Nelson was adamant that there was no agenda to remove the claimant from Anniesland. The claimant still had not been replaced.

60. The Tribunal considered that it was likely that this conversation took place especially as the claimant made a note of it in August 2016. However, in view of the claimant's recent absence and him continuing as Bakery Manager the Tribunal felt that it was also likely that the comment was made in the context of supporting the claimant rather than there being an agenda to demote him and make savings. While the claimant alluded to there being an agenda to remove him to make savings there was no evidence to support this.

61. The claimant said that at the August 2016 Meeting Mr Nelson referred to a colleague as a suicidal maniac. Mr Nelson did not recall saying this. He was surprised if he had. He agreed that it was an inappropriate comment and he could understand why people would be offended. The Tribunal considered that it was likely that the comment was made by Mr Nelson given another colleague recalled it in the context a manager not attending the meeting because he was under pressure.

62. The claimant gave evidence about his return to work in November 2016; the pressure of working in the run up to the holiday period and the lack of resources. The respondent's witnesses acknowledge that the period up to Christmas was the busy period in the year. They did not accept that there was a requirement to work unplanned excess hours with no breaks. While the Tribunal acknowledged in the retail business employees often work longer hours in the Christmas period it was not satisfied on the evidence before it

that the respondent had a practice that employees work unplanned hours with no break.

63. The claimant said that after the 3 November 2017 Meeting he sent a letter to "HR Dept Morrisons, Anniesland". The letter refers to a meeting on 28 October 2017 and a further meeting arranged on 8 November 2017. It records the three options proposed by Mr Brownlie on 3 November 2017. In relation to the bakery manager option it states, "stay as the bakery manager but move to another store. Same rate of pay just now but will be assessed in 3 to 6 months and may indeed reduce depending on the store average wage." The claimant said that this was his understanding. Neither Mr Nelson or Mr Brownlie had seen this letter before the joint set of productions was prepared. They also said that at no point did they say that the claimant's wages would be reduced. The claimant did not refer to this letter at the 8 November 2017 Meeting nor was it mentioned by the other attendees. The Tribunal accepted that the letter dated 6 November 2017 was not received by Mr Brownlie, Mr Nelson or Ms Gallacher. The Tribunal also considered that while this might have been the claimant's belief it was unlikely that at there was any mention of reducing the claimant's pay at the 3 November 2017 Meeting as there was no reference to this in the contemporaneous handwritten and typewritten notes of the meeting. All that was being reviewed in three to six months was the store and whether the claimant was coping.

64. There was conflicting evidence about the claimant's return to Anniesland. The clamant said that he was he told that he would "never ever" return to Anniesland. This was disputed by Mr Nelson and Mr Brownlie. Mr Brownlie's evidence was that at the 3 November 2017 Meeting the claimant was given three options for his return to work none of which was at Anniesland, but this would be reviewed in three to six months. At the 8 November 2017 Meeting Mr Brownlie told the claimant was told that he "will not be coming back to Anniesland"; "You are not going to return to Anniesland at the moment". In the letter of 9 November 2017 Mr Brownlie wrote that the claimant's return to work should not be to Anniesland and he was not proposing this as an option "at this time". In June 2018 Mr Nelson also referred to a phased return to work at

Newlands and a return to Anniesland "at this moment in time" was not in the claimant's interest but that did not mean that he could not return to Anniesland in the future.

65. The Tribunal considered that the meetings focused on the claimant returning from a long-term absence; facilitating the Plan and supporting his phased return to work. Mr Brownlie and Mr Nelson did not consider that this could be accommodated at Anniesland because it was a training store. From the comments about the temporary nature of the arrangement (to be reviewed in three to six months) the Tribunal did not consider that they had decided that the claimant would never return to Anniesland. However, the Tribunal accepted that this is was what the claimant heard despite the correspondence that followed indicating otherwise.

66. The Tribunal heard some evidence about the claimant's concerns about the impartiality of Mr Brown who ultimately considered his grievance in August 2018. The conduct and outcome of the grievance process was not part of the claim before the Tribunal. Accordingly, the Tribunal did not consider that it was appropriate to make findings other than those set out above.

Submissions for the Respondent

67. To the extent that the Tribunal has jurisdiction it was invited to dismiss the claims. The claim form was sent on 7 September 2018. The early conciliation certificate issued on 12 August 2018 appears to have been emailed to the claimant on 11 August 2018.

68. The Tribunal was referred to section 15 of the EqA. Reference was also made to *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 and *Pnaiser v NHS England and another* [2016] IRLR 170.

69. The Tribunal was reminded that proceedings may not be brought after the end of three months starting with the date of the act to which the complaint relates, or, such other period as the tribunal thinks just and equitable (see section 123 EqA). The exercise of discretion should be the exception, not the rule see *Bexley Community Centre (t/a Leisure Link) v Robertson* [2003]

EWCA Civ 576. If the complaint relates to an act such as a decision time starts to run from the date of the act, see *Virdi v Commissioner of the Police of the Metropolis* [2007] IRLR 24. Where a complaint relates to "conduct extending over a period, the conduct is to be treated as occurring at the end of that period for limitation purposes. However, this does not apply to the situation where an alleged discriminatory has ongoing consequences.

70. The act complained of is a failure to permit the claimant to return to his role as Bakery Manager at the Anniesland. The claimant says that he was informed at the 3 November 2017 Meeting that he would not be returning to the Anniesland. This claim is therefore time-barred. The claimant has not put forward enough evidence for time to be extended on 'just and equitable' grounds. On this basis alone, the claim must fail.

71. If the claim is not time-barred, looking at approach set out in *Pnaiser:* (i) there has been no unfavourable treatment. The respondent put forward options for the claimant to return to work. At no point - contrary to the claimant's assertion did the respondent said that the claimant could never return to the Bakery Manager role at Anniesland. The respondent's position was that he should not return there 'at this point' or for the point of view of a phased return to work. In such circumstances it is difficult to see how the claimant has been treated "unfavourably"; (ii) the respondent's position was that the claimant should not return to his role in Anniesland as part of his phased return because in the period he had been off there had been significant changes to the store, the store was now a 'training store', it was probably the busiest store in terms of customers and turnover, and the claimant had had 'issues' with the store on a previous occasion; (iii) the respondent's reason was not "something arising in consequence of the claimant's disability". At this point the claimant was not signed off work and his position (accepted by the respondent) was that he was fit to return to work. The issue between the parties was how the arrangements for his return to work would be put in place; (iv) it is accepted that the claimant was disabled, and the respondent had knowledge of it.

72. If the above arguments not accepted, the claim should still fail because the respondent's actions amount to proportionate means of achieving a legitimate aim, see *Homer v Chief Constable of West Yorkshire Police* [201 2] ICR 704. The respondent's witnesses gave evidence, in summary, that the paramount purpose was the claimant's health and wellbeing. This is a legitimate aim. The respondent's approach was proportionate because it did not rule out the claimant's return to Anniesland in the future. Indeed, Mr Nelson's evidence was that the claimant's role had never been replaced at Anniesland.

73. The above submissions about time bar were made about the failure to offer the claimant the option to return to the Anniesland store in an alternative role. Alternatively, the requirements of section 15(1) EqA have not been satisfied.

74. A further reason why this claim should be dismissed: the claimant's position was that he would only return to Anniesland as a Bakery Manager. At no point in the return to work process did the claimant give any indication that he was at all interested or would consider a return to Anniesland as a baker. On this analysis the claimant has not been treated unfavourable. The claimant cannot legitimately comply about a failure to offer him a position that he had shown no interest in accepting or even considering. The claimant accepted in evidence that his position was that he would only return to Anniesland as a Bakery Manager.

75. In relation to the claim that the respondent failed to deal with the claimant grievance, this relates to the letter produced by the claimant at the close of the 8 November 2017 Meeting. The respondent's position is that the points raised in the letter (at least in relation to disability discrimination) related directly to the return to work process and could be looked at in that process.

76. This claim is time-barred. The claimant produced his letter of grievance on 8 November 2017. Time should not be extended on just and equitable grounds.

77. If not time-barred, the claim should in any event be dismissed. With reference to the approach set out in *Pnaiser:* (i) there has been no unfavourable treatment. The claimant accepts that his complaint relating to his wages was resolved within a matter of weeks. The main point that the claimant says he

was concerned about was the arrangements for his return to work. That point was discussed and worked through at length in the meetings the claimant had Mr Nelson and/or Mr Brownlie concerning his return to work. It is noteworthy that when the grievance was heard in August 2018, the outcome was not in the claimant's favour (although the point about non-payment of wages was overturned on appeal). The claimant criticised the conduct (and conclusion) of the grievance process in evidence but this forms no part of his claim before the Tribunal; (ii) the respondent's position was that the issues raised in the grievance could be dealt with at the ongoing meeting and it would not be beneficial to the claimant to have a 'parallel process'. Mr Nelson also gave evidence that in his experience at least if an employee raises a grievance but is absent from work, the grievance will be heard on the employee's return to work; (iii) the respondent's reason was not "something arising in consequence of the claimant's disability". In fact, the respondent took the approach that it could address matters as part of the ongoing return to work process. Further down the line R said that it would hear the claimant's grievance on his return to work. In fact, the claimant's grievance was heard when he had not returned to work. There was no link between the respondent's approach and "and something arising in consequence" of the claimant's disability. At the relevant times the claimant was fit to return to work but (from June 2018 at least) refused to return to work until his grievance had been heard.

78. The Tribunal was referred to section 26 of the EqA. The harassment claim refers to the allegation that the claimant was described as a 'suicidal maniac'. The meeting to which this allegation relates took place in August 2016. This is two years and one month before the claim was lodged (and at the date of the hearing almost three years ago). This claim is clearly out of time. Time should not be extended on just and equitable grounds. The claimant said that (one reason) he did not bring the claim at the time of the allegation was that because he could not get "corroboration". The claimant knew that he could bring a claim but chose not to do so. The claimant said that he was not really aware of time limits but gave no further explanation of this. The claimant has had at least some previous experience of employment law issues (he entered into settlement agreements concerning employment matters) and he had

access to advisers on employment law matters. The delay in bringing the claim has caused prejudice to the respondent because the person the claimant says made the comment (Mr Nelson) now has no recollection of making the comment. There was also a dispute in the evidence as to how many people were still present at the meeting when the comment was allegedly made, whether Robert Pollock was at the meeting, and the circumstances in which the comment was allegedly made.

79. If not time barred the claim should in any event be dismissed. The claimant now accepts that he was not described as a 'suicidal maniac'. The claimant says however that words were used at a meeting at which he attended. The approach to be taken is an objective test with subjective elements. If the comment was made, the claimant has not established that it was made with the purpose of violating his dignity or creating an intimidating etc environment. Furthermore, it is submitted that the comment did not have the effect violating the claimant's dignity or creating an intimidating etc environment.

80. Looking at all the relevant circumstances, it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him (the objective question). The comment was not made to the claimant or with reference to him. Mr Nelson did not know that the claimant says he has had 'suicide issues' in the past. The claimant did not complain about the comment or raise a grievance about it at the time or within a reasonable time thereafter. It did not result in the claimant not being able to continue to work in Anniesland where Mr Nelson was store manager. The claimant appears not to have raised any issue about the comment until he referred to it at the 8 November 2017 Meeting. In such circumstances the claim should not be upheld.

81. In respect of the claimant's allegations that he was bullied by new managers particularly in relation to a whistleblowing claim his evidence on this aspect was vague. He referred to a meeting with a manager in August 2016 where he says he was asked to 'step down'. This claim is out of time and time should not be extended on just and equitable grounds. The meeting allegedly took place over two years before the claim form was presented (and now almost

three years ago) and the claimant has not advised on any reason why the claim was not brought within time.

82. If not time barred, the claim should be dismissed. Mr Nelson gave evidence of his conversation with the manager about this meeting. Any comment made was made in a supportive capacity and the claimant was not asked to step down. The claimant does not satisfy either the 'subjective question' or the 'objective question' referred to in the *Pemberton* case.

83. Turing to the claim of failure to make reasonable adjustments the Tribunal was referred to section 20 of the EqA. The duty can arise where a disabled person is placed at a substantial disadvantage by an employer's provision, criterion or practice (PCP). An employer will not be obliged to make reasonable adjustments unless it knows or reasonably should know that the employee is disabled and likely to be placed at a substantial disadvantage because of their disability. The Tribunal will be aware that it is for it to determine on an objective basis whether a particular adjustment would have been reasonable in the context of that facts before it.

84. Tribunals should avoid general discussions as to the way an employer has treated an employee (see *Royal Bank of Scotland v Ashton* [2011] ICR). Tribunals considering a reasonable adjustment claim must identify: (i) the provision, criterion or practice applied by or on behalf of an employer (ii) the identity of non-disabled comparators, and (iii) the nature and extent of the substantial disadvantage suffered by the claimant, in comparison to the non-disabled comparators. In assessing what adjustments are reasonable, the focus must be on the practical result of the steps which the employer can take, not on the thought processes of the employer when considering what steps to take (see *Environment Agency v Rowan* [2008] IRLR 20).

85. An employer is not under a duty to make reasonable adjustments if it does not know or could not reasonably be expected to know that the employee was disabled and that the employee would be substantially disadvantaged compared to non-disabled employees.

86. The duty to make reasonable adjustments arises so as to prevent any given disadvantage from continuing. A risk assessment of itself cannot remedy the disadvantage, so cannot be a reasonable adjustment in itself (see *Tarbuck v Sainsbury Supermarkets Ltd* UKEAT/01 36/06). In *West v The Royal Bank of Scotland pic* UKEAT/0296 the EAT made the further point that in any event it would not be a reasonable adjustment for an employer to carry out a workplace assessment until an employee is in a role and has a workplace to assess.

87. The claimant's claim for breach of the duty to make reasonable adjustments should be dismissed. A claim for failure to make reasonable adjustments is an omission and not an act and time starts to run for the purposes of bringing a claim when "the person in question decided on it" (section 123(3)(b) of the EqA), The claimant's claim is time barred and time should not be extended.

88. If the claim is not time barred, it should in any event be dismissed. The claimant appears to rely upon a PCP of a requirement to work excessive hours with no breaks on a regular basis. Mr Brownlie and Mr Nelson both said there was no such requirement. Furthermore, the respondent could not at the relevant time be reasonably expected to know that such a PCP (if it existed) placed the claimant at a substantial disadvantage. The claimant has not made out the other aspects of this claim.

89. If the claimant is successful, he seeks compensation for injury to feelings. For cases presented after 1 April 2018 (but prior to 1 April 2019) the relevant *'Vento'* bands are: (i) a lower band of £900 to £8,600 (for less serious cases), (ii) a middle band of £8,600 to £25,700 (for cases that do not merit an award in the upper band), and (iii) an upper band of £25,700 to £42,900 (for the most severe cases).

90. If the claimant is successful, this is not a case where there have been repeated acts of discrimination. The claimant says that certain individual acts of the respondent amount to discrimination. There is no allegation of direct discrimination. The appropriate award of compensation if the claimant is successful would be around the middle of the lower band.

Submissions for the Claimant

91. The claimant did not make submissions. He asked the Tribunal to consider all his claims. He said that he had an accident at work in August 2016 which his why he did not raise concerns about the comments made by his managers sooner. The claimant said that he did no say that he would return to work at another store. He only confirmed that he had gone to look at some stores.

Discussion and Deliberation

92. The Tribunal started its deliberation by asking if any of the claims were time barred and if so was it just and equitable to consider them?

93. The Tribunal reminded itself that the three-month time limit for bringing a discrimination claim is not absolute and can be extended where the Tribunal thinks it is just and equitable. This discretion is the exception rather than the rule.

94. Guidance to what is just and equitable requires consideration of the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. See *British Coal Corporation v Mrs J Keeble & Others EAT/496/96.*

95. In respect of the harassment claim (section 26 of the EqA) the claimant allegations relate to comments made by Mr Johnstone on the claimant's return to work in July 2016 and by Mr Nelson at the August 2016 Meeting. The claimant first expressed his concern about the comment made by Mr Nelson at the October 2016 Meeting.

96. In respect of the claim relating to unfavourable treatment (section 15 of the EqA) the claimant says that his unfavourable treatment was the failure to

permit him to return to the role of Bakery Manager at Anniesland; failing to offer him a return to an alternative role at Anniesland; and a failure to deal with his grievance for over a year.

97. The claimant says that he was told at the 3 November 2017 Meeting that he would not be returning to the Anniesland. There was no offer by the respondent that the claimant return to Anniesland in another capacity. This was when the claimant became aware of the decision that he would not be returning to work in Anniesland as Bakery Manager or in any other capacity.

98. The claimant raise his grievance by letter which he handed to Mr Brownlie at the 8 November 2017 Meeting. Mr Brownlie acknowledged the Grievance Letter on 9 November 2017 and advised that it related to the claimant's return to work capability and no decision had been made yet. The Tribunal considered that this was when the claimant knew that the respondent had decided not to deal with the Grievance Letter (in so far as it related to matters other than pay) through the grievance process. While the Grievance Letter referred to disability discrimination it made no reference to the allegations which the claimant makes in his harassment claim.

99. In respect of the reasonable adjustment claim, the claimant said that the provision, criterion or practice (PCP) that place him at a substantial disadvantage because of his disability was working unplanned excess hours with no break. The claimant did not return to work at any store. The Tribunal was not satisfied on the evidence before it that there was a PCP of working unplanned excess hours with no break.

100. It seemed to the Tribunal that requiring the claimant to work his phased return to work in a store other than Anniesland could be a PCP. The decision to require the claimant to return to work at a store other than Anniesland was made on 3 November 2017. The Tribunal did not consider that it placed the claimant at a substantial disadvantage in comparison to a non-disabled employee based at Anniesland returning after a similar length of absence. If it did the respondent could not have reasonably known that. The claimant did not return to work therefore no workplace assessment could be carried out.

101. The early conciliation certificate was issued on 12 August 2018. The Tribunal considered that the complaints were out of time.

102. The claimant was unrepresented and had prepared the ET1 claim form on his own account. He was not aware of time limits for bringing claims. He had received advice around the time of his return to work, but this was not legal advice and did not relate to raising Employment Tribunal proceedings. The Tribunal's impression was that the claimant's focus was on getting back to work and he was not contemplating Employment Tribunal proceedings at that stage and had made no enquires about the process.

103. Having heard evidence from the claimant, Mr Brownlie and Mr Nelson the Tribunal did not consider that the cogency of evidence about the return to work was affected by the delay. The claimant had a clear recollection about what he said was discussed at the various meetings. The respondent's witnesses recalled events and there were contemporaneous notes and correspondence.

104. The Tribunal did however consider that the cogency of evidence in relation to the harassment claims was affected. The claimant evidence was vague about when this meeting with Mr Johnstone took place and Mr Johnstone did not give evidence. Mr Nelson gave evidence about what Mr Johnstone said to him about the discussion. The Tribunal understood that the conversation between Mr Nelson and Mr Johnstone happened after the proceedings were raised which was two years after the alleged harassment took place. Mr Nelson did not recall making the comment at the August 2016 Meeting. There was some uncertainty about whether the alleged comment was about the claimant or another colleague.

105. The Tribunal considered that it was not just and equitable to extend the time limit in respect of the claims under section 20 and section 26 of the EqA. Accordingly, the Tribunal did not have jurisdiction to hear the reasonable adjustment and harassment claims. It was however just and equitable to extend the time limit in respect of the claims under section 15 of the EqA.

106. The Tribunal then considered whether the claimant was treated unfavourably by the respondent because of something arising in consequence of the claimant's disability.

107. The Tribunal referred to the statutory definition under section 15 of the EqA. The provision requires there to be (a) unfavourable treatment (b) because of "something" (c) the "something has to have arisen from the claimant's disability; and (d) which the respondent cannot show was a proportionate means of achieving a legitimate aim.

108. The Tribunal noted that case authorities requires an investigation of two issues (a) did the respondent treat the claimant unfavourably because of an (identified) something; and (b) did that "something" arise in consequence of the claimant's disability. The first issue requires an examination of the respondent's state of mind to establish whether the unfavourable treatment in issue occurred by reason of the respondent's attitude to the relevant "something." The second issue is an objective matter: whether there is a causal link between the claimant's disability and the relevant "something."

109. The Tribunal understood that the claimant's position was that there were three issues of unfavourable treatment: the failure to permit him to return to the role of bakery manager at Anniesland; the failure to offer him the option to return to an alternative role at Anniesland; and the failure to deal with his grievances for over a year.

The failure to permit the claimant to return to the role of bakery manager at Anniesland

110. The Tribunal was not satisfied on the evidence that the respondent refused to allow the claimant to ever return to Anniesland. There was evidence that the respondent refused to allow the claimant to return to work at Anniesland at the point of his phased return. When the claimant had previously been on long term absence his phased return had been at Anniesland. The Tribunal was satisfied that the refusal to allow the claimant to return to a phased return at Anniesland was unfavourable treatment. The Tribunal considered that the something was that Anniesland had changed dramatically; it was training

store and there were increased visits by Directors and Pathway Candidates. This was not something arsing in consequence of the claimant's disability.

111. In any event the Tribunal considered that the respondent had a legitimate aim of ensuring the claimant's well-being and sustained return to work. By asking the claimant to return to a store where the adjustments sought by the claimant in the Plan could be accommodated and supported was a proportionate means of achieving that aim particularly as the respondent was willing to consider a return Anniesland in the three to six months.

The failure to offer the claimant the option to return to an alternative role at Anniesland

112. The Tribunal agreed with the respondent's submission about this issue. The claimant was candid that he was not interested and did not raise the possibility of returning to Anniesland in any capacity other than a bakery manager the Tribunal therefore did not consider that he had been treated unfavourably.

The failure to deal with the claimant's grievances for over a year

113. The Tribunal found that Ms Gallacher investigated the grievance about the deductions from wages and this was resolved by the end of November 2017. The claimant confirmed this at the December 2017 Meeting.

114. The Grievance Letter referred to disability discrimination but gave no further explanation. Mr Brownlie understood this to be about the arrangements for the claimant returning to work which were being discussed at meetings with Mr Brownlie and/or Mr Nelson. However, at the December 2017 Meeting the claimant also referred to the comment made by Mr Nelson. At the June 2018 Meeting Mr Nelson said that the claimant's grievance would be heard when he returned to work. The claimant's grievance was heard in August 2018 and he had not returned to work.

115. The Tribunal considered that the claimant had been treated unfavourably because his grievance about a decision not to allow him to return to work at Anniesland following a long absence was taken by Mr Brownlie/Mr Nelson and they were conducting the meetings about the return to work. The reason

was that Mr Brownlie considered that the issue that has been raised was being considered at other meetings; it was not beneficial to have a parallel process; and it was not usual to deal with grievances while an employee is absent from work. The Tribunal noted the part of the claimant's grievance relating to pay was dealt with while he was absent from work. However, the Tribunal considered that the reason for the unfavourable treatment was not something arising in consequence of the claimant's disability. The claimant was medically fit to return to work; he did not return (from June 2018) because he wanted his grievance heard.

116. The Tribunal was not satisfied that the claimant was treated unfavourably because of something arising in consequence of his disability.

117. Having reached the conclusions, it had the Tribunal did not need to consider remedy and dismissed the complaints.

Employment Judge: S Maclean
Date of Judgment: 11 July 2019
Entered in register: 15 July 2019
and copied to parties