EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: Southern Electric Power Distribution PLC

RECORD OF A PRELIMINARY HEARING

Heard at: Southampton (by CVP) **On:** 10, 11, 12, 13 (in chambers) January 2022

Before: Employment Judge Dawson, Ms Goddard, Mr Spry Shute

Appearances

For the Claimant: Mr Wheaton, counsel

For the Respondent: Mr Stirrat, solicitor

RESERVED JUDGMENT AND ORDERS

1) The claimant's claims are dismissed

2) Pursuant to rule 50(3)(c) of the Employment Tribunals Rules of Procedure 2013, this judgment and the written reasons for it and any other document entered onto the register shall be anonymised so that the claimant cannot be identified. In order to ensure that the claimant cannot be identified her colleagues will also have their identities anonymised to the extent necessary.

REASONS

Introduction

1. The claimant brings claims of disability discrimination pursuant to sections 15, 19 and 21 Equality Act 2010 and claims of harassment related to sex and on the basis of unwanted conduct of a sexual nature pursuant to section 26 Equality Act 2010.

2. The claimant commenced employment for the respondent on 26 August 2019 as an Administrator. She was based at the New Forest depot and also worked from the Poole office.

3. It is admitted by the respondent that whilst she was employed by it, the claimant was disabled by reason of persistent delusional disorder.

4. The hearing took place between 10th and 13 January 2022 (the final day being when the members of the tribunal met to reach their decision). The claimant and the respondent were both represented and we were grateful to both advocates for the care and professional skill they exhibited in presenting their respective clients' cases in a difficult case.

5. The decision was reserved rather than given orally at the request of the claimant and with the consent of the respondent.

Issues

6. The issues were recorded in some detail at the hearing on 3 February 2021. The tribunal went through the list of issues, again in some detail, at the outset of this hearing and both parties confirmed that the issues remained the same. Neither party sought to vary the issues throughout the hearing. They are set out in the annex to these Reasons.

Orders pursuant to Rule 50

7. In the course of the hearing, the claimant made reference to having been raped and her belief that her colleagues within the respondent were planning to rape her. Many of the allegations she makes in this case are of a sexual nature and those allegations as well as her disability engage article 8 of the European Convention on Human Rights.

8. At the end of the hearing both parties sought orders anonymising both the claimant and;

    8.1 those against whom she had made allegations and

    8.2 others involved in the case,

    where the identification of those persons would assist in the identification of the claimant.

9. The respondent submitted that, in any event, it sought anonymisation of all persons against whom the claimant had made allegations due to the nature of the allegations against those people.

10. The parties only sought anonymisation in the judgment and reasons and any documents being entered into the Record. They did not seek a further restricted reporting order (an earlier one had been made during the course of the proceedings but expired at the outset of the final hearing).

11. Although the consent of both parties is a relevant factor in considering whether to make orders under rule 50, the tribunal must still exercise its own discretion, having regard to the relevant legal principles.

12. It is, of course, the case that regardless of any order we make victims and alleged victims of the majority of sexual offences, including rape, are entitled to lifelong anonymity.

13. Rule 50 Employment Tribunal Rules of Procedure is as follows:

> 50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.
>
> (2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
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> (3) Such orders may include—
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> (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;
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> (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;
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> (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
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> (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.
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> (4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be

revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above—

(a) it shall specify the person whose identity is protected; and may specify particular matters of which publication is prohibited as likely to lead to that person's identification;

(b) it shall specify the duration of the order;

(c) the Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998(a).

14. It is a general principle that justice should be open (see Scott v Scott [1913] AC 417 and Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993).

15. We must consider the Convention rights contained within the European Convention of Human Rights. The relevant rights which are engaged in the current case are as follows: Article 6, Article 8 and Article 10.

16. Article 6 provides:

"In the determination of his civil rights and obligations…, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the public life parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

17. Article 8 concerns the right to respect for private and family life. It is a qualified right which provides that everyone has the right to respect for his private and family life, his home and his correspondence. The right is qualified by the exception 'except such as is in accordance with the law and is necessary in a democratic society… For the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others.'

18. Article 10 provides for the freedom of expression and is qualified in the same manner as the Article 8 right.

19. In Fallows v News Group Newspapers Ltd [2016] IRLR 827, Simler P said at paragraph 48

> The authorities to which both I and the employment judge were referred, including Guardian News and Media Ltd, HM Treasury v Ahmed [2010] UKSC 1, [2010] 2 AC 697, A v British Broadcasting Corporation [2014] 2 WLR 1243, In re S (a child) (identification: restriction on publication) [2004] 3 WLR 1129 and Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819, [2013] 1 WLR 2993, emphasise the following points of relevance to this appeal:
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> (i) That the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice;
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> (ii) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation;
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> (iii) The open justice principle is grounded in the public interest, irrespective of any particular public interest the facts of the case give rise to. It is no answer therefore for a party seeking restrictions on publication in an employment case to contend that the employment tribunal proceedings are essentially private and of no public interest accordingly;
>
> (iv) It is an aspect of open justice and freedom of expression more generally that Courts respect not only the substance of ideas and information but also the form in which they are conveyed. Thus as Lord Rodger recognised in Guardian News and Media Ltd:
>
> 'Judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on.'

20. We would not consider it a sufficient reason for granting anonymity to the respondent's witnesses that they have been embarrassed by the allegations which have been made against them. By this judgment those allegations are found

to be not proven. We see no infringement of the rights of the respondent's witnesses under article 8 if it is made clear that the allegations which were made against them were not proved.

21. However we do consider that it is important that the claimant should not be identified. Although it has not been necessary for the purposes of this judgment to recount all of the allegations which the claimant made during the course of the hearing, even those which have been referred to clearly engage the claimant's rights under Article 8. That is the case in relation to the claimant's disability and also in relation to the allegations of sexual harassment which she has made, especially when they are seen in the context of her disability. It can be readily understood why it would be distressing to the claimant to be identified in the context of these proceedings.

22. Given that the parties have requested that written reasons be provided in place of an oral decision, and given that this judgment can set out the reasons for its conclusions without the need to identify the claimant or the respondent's witnesses, we consider that the claimant has satisfied us that it is appropriate to anonymise her in the judgment and reasons. We consider that the claimant's rights under article 8 outweigh any need to identify her pursuant to the principles of open justice or freedom of expression.

23. We also largely accept the assertions of the claimant that it is likely that if we identify those employees of the respondent against whom allegations were made or who investigated her concerns at her workplace, by the use of jigsaw research the claimant could be identified. In those circumstances we grant the anonymisation sought. It is not, however, necessary to anonymise the identity of the investigator who investigated the claimant's allegations given that she is based in a different office to the claimant and must carry out many allegations each year, nor the identity of the respondent's employee who heard the claimant's appeal and who is situated in another office to the claimant. We consider those people are sufficiently remote from the events to avoid any risk of identification of the claimant if they are identified.

Law

Discrimination because of Something Arising from Disability

24. In respect of a claim of discrimination arising from disability, under section 15(1) of the Equality Act 2010 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.

25. Under section 15(2), this 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.

26. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31. She held:

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

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

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(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 s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.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 something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. 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.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26-34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

27. In Private Medicine Intermediaries Ltd v Hodkinson, HHJ Eady QC held

> [24] The protection afforded by s 15 applies where the employee is treated "unfavourably". It does not necessitate the kind of comparison required by the use of the term "less favourable treatment" as in other forms of direct discrimination protection; neither is it to be understood as being the same as "detriment". "Unfavourable treatment" suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability. It will be for an ET to assess, but treatment that is advantageous will not be unfavourable merely because it might have been more advantageous.

Indirect Discrimination

28. As for the claim of indirect disability discrimination, under section 19(1) of the Equality Act 2010 a person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision criterion or practice is discriminatory in

these circumstances if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put, B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim.

29. In respect of a provision criterion or practice (PCP) in the case of Ishola v Transport for London [2020] ICR 1204 the Court of Appeal held "however widely and purposively the concept was to be interpreted, it did not apply to every act of unfair treatment of a particular employee, as that was not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments was intended to address; that, in context, all three words carried the connotation of a state of affairs indicating how similar cases were generally treated or how a similar case would be treated if it occurred again" (taken from the head note).

Reasonable Adjustments

30. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the Equality Act 2010.

31. Section 20 of the Equality Act 2010 provides in respect of the duty to make reasonable adjustments as follows:

> "(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage

32. Paragraph 20 of Schedule 8 to the Equality Act 2010 provides

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-
>
> (a) …;
>
> (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

33. In Environment Agency v Rowan [2008] IRLR 20, the EAT gave guidance on how an employment tribunal should act when considering a claim of failure to make reasonable adjustments. The tribunal must identify:

> "(a) the provision, criterion or practice applied by or on behalf of an employer, or;
>
> (b) the physical feature of premises occupied by the employer;
>
> (c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant'.'

34. The question of whether a one-off act can be a PCP is also answered by the decision in Ishola.

35. The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1).

General Provisions

36. Some parts of the Equality Act 2010 apply to more than one type of discrimination. They include the following sections:

39 Employees and applicants

(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.

109 Liability of employers and principals

(1) ...

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

37. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

(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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

38. In Madarassy v Nomura International PLC [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

39. In Hewage v Grampian Health Board [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Knowledge

40. We have already set out the statutory provisions in relation to knowledge in respect of claims under sections 15 and 21 Equality Act 2010.

41. Knowledge of disability, whether actual or constructive, must be knowledge of the following matters: a physical or mental impairment, that it is of sufficient long-standing or likely to last 12 months at least and that it sufficiently interfered with the individual's normal day-to-day activities to amount to a disability. However, there is no need for the employer to be aware of the specific diagnosis of the condition that creates the impairment - see Jennings v Barts and the London NHS Trust EAT 0056/12 and Donelien v Liberata UK Ltd [2018] IRLR 535,.

42. In that regard we must consider whether the respondent ought reasonably to have asked more questions on the basis of what it already knew. We must also consider what the respondent would have discovered had asked the questions it should have done (A v Z UKEAT/0273/18).

Findings of Fact and Conclusions

43. We set out our findings of fact by reference to the list of issues. It is not necessary for us to rehearse all of the evidence that we heard since some of it did not go to the issues which we must consider.

44. We consider it is helpful to an understanding of our judgment to set out our conclusions in respect of each of the heads of claim at the same time as we set out our findings of fact and have structured these reasons accordingly.

Disability

45. At an earlier stage of the proceedings the claimant was asked to disclose the evidence she relied upon in support of her assertion that she was disabled. She disclosed a letter from a general practitioner dated 16 June 2020 and a letter from a consultant psychiatrist dated 26 October 2020.

46. Both letters states that the claimant has been diagnosed with persistent delusional disorder. Only the letter from the psychiatrist sets out the impact of the disorder on the claimant. The psychiatrist states "this condition means that she has issues with trust, she has a tendency to link people and events on no or spurious evidence, meaning she has a tendency to develop beliefs about people and events that are false. This will be very confusing for her, causing her to feel very anxious and socially isolated. However this does not need to affect her work at all, as the false beliefs tend to be very specific. However it can affect the relationship in the workplace. Persistent delusional disorder is characterised by the development either of a single delusion or a set of related delusions which are usually persistent or lifelong." (Page 444 of the bundle).

47. On the basis of that evidence the respondent had conceded that the claimant was disabled.

48. In the early part of her evidence before us, the claimant stated that, in fact, her disability had only affected her on 2 occasions while at work, both occasions related to absence from work, once when she said she had been bullied and once when her father was ill. She was asked about the assertion by the psychiatrist that the condition caused her to have false beliefs on the basis of no evidence and the claimant denied that was the case. She stated that the psychiatrist had only seen her once and that she had not suffered from delusions since she started working many years ago. She said that the psychiatrist had written what she did because the psychiatrist refused to believe what the claimant was telling her about an incident when she had been raped.

49. The claimant confirmed that she continued to take Olanzapine.

50. The respondent sought to rely upon the claimant's diagnosed disability and the effects as described by the psychiatrist to persuade us that the claimant's evidence in relation to the allegations of sexual harassment could not be relied upon. The claimant's evidence was that her account could be relied upon because she no longer suffers from delusions. If is, of course, the fact that even if somebody does have delusions they may also be the victim of harassment.

51. We have not needed to resolve that dispute since we have been able to form our view that the sexual harassment did not occur as alleged without needing to take account of the claimant's persistent delusional disorder. To put it another way, if the claimant had appeared before us without persistent delusional disorder we still would not have been satisfied on the evidence that the allegations made were accurate. The claimant has proved no facts from which we could conclude that she was the victim of harassment as she alleges.

52. Against that background we turn to the list of issues.

Discrimination because of something arising from disability

Unfavourable treatment

53. At issue 3.1 we are required to consider whether the respondent treated the claimant unfavourably by dismissing her, by not investigating her complaints appropriately and by not upholding her appeal.

54. The brief background, in this respect, is that the claimant commenced employment around 28 August 2019. She was subsequently dismissed, on the basis that her probationary period had not been successful, by letter dated 14 February 2020 (page 124 of the bundle). She then appealed against that dismissal and an appeal hearing commenced on 12 March 2020. The appeal hearing was then adjourned and the final outcome was communicated to the claimant on 22 April 2020.

55. We accept that both the dismissal of the claimant and the failure to uphold her appeal was unfavourable treatment.

56. We do not find that the respondent failed to investigate the claimant's complaints appropriately.

57. The claimant made a number of complaints prior to her dismissal, as follows.

58. In September 2019, the claimant said that she had been bullied when a man called John stood on the stairs with his thumb in the middle of his eyebrows in an intimidating fashion and another man elbowed her on purpose. She went off sick for 4 days. The claimant was asked about that situation in a meeting with Z on 13 February 2020. She was asked whether the situation was resolved and she said "yes everything was resolved, they brought John in for a meeting and we held a meeting, I didn't think what he said was valid though… I took 4 days off as I didn't want to get elbowed again…". (page 121).

59. We find that although the claimant may not have felt that what John said was valid, the respondent clearly took her concerns seriously and dealt with them.

60. In or around December 2019, the claimant had made a complaint about a colleague Y. She raised her complaint with human resources and X, the head of the claimant's region, met with her to discuss her concerns. Her note of that meeting appears at page 109. In that meeting X asked whether the claimant would like her to discuss the situation with Y and the claimant replied that she did not want her to do so, she just wanted her to be aware. In those circumstances the investigation carried out by the respondent was, we find, sufficient.

61. During the course of her employment the claimant had also complained about noise in the office. We accept the evidence of the respondent that the office was a busy open plan office but we also accept the evidence of Z who told us that she changed the seating arrangements and asked two colleagues who had particularly loud ringtones to adjust their phone volume. We accept there was nothing more that could be done.

62. At the outset of the appeal hearing on 12 March 2020 the claimant presented a lengthy document which made, for the 1st time, the allegations of sexual harassment which form these proceedings as well as a significant number of other allegations. The claimant wanted those allegations to be investigated as part of her appeal against dismissal. Thus the appeal was not concluded on the day and the respondent's Lead Investigator in Group Security & Investigations, Gillian Forrester, was appointed to investigate the allegations. Prior to working for the respondent the investigator had been employed for a number of years by Strathclyde Police and Police Scotland as a police officer.

63. The investigator was provided with the claimant's allegations and spoke to the claimant over the telephone on 7 April 2020. She made notes of the call. She asked the claimant to send to her relevant emails and anything else that she considered relevant.

64. Having reviewed the information and what the claimant said to her during the interview, the investigator reached the conclusion that she did not feel there was sufficient evidence or justification to investigate further. She decided to take no further action. She made a 7 page report dated 13 April 2020. (Page 161)

65. At this stage the claimant had not mentioned her disability to the respondent and the investigator did not know of it. Her decision could not have been based on any assumptions about the claimant's disability.

66. Whilst it is unusual for an investigator not to speak to the people against whom the allegations are made, the investigator has set out in detail in her report why she came to that conclusion. The conclusion part of the report states "[the claimant] made an official complaint by letter following her dismissal. I discussed each point of her complaint at length and she has been unable to provide dates or evidence to substantiate her allegations in order to take this investigation any further."

67. We find that the investigation which was carried out was reasonable. We do not find that it was unfavourable treatment.

68. Thus we find that the respondent did not treat the claimant unfavourably by failing to investigate her complaints appropriately.

Something arising in consequence of the claimant's disability

69. At issue 3.2 we are required to consider whether various things arose in consequence of the claimant's disability.

70. The claimant asserts that when she was bullied at work or was under stress she would be absent from work. Although in the early part of her evidence the claimant

said that she was off work in September 2019 because of her disability, later on in her evidence she stated that she did not know whether her absence was anything to do with her mental health condition. She said it was difficult to tell. She went on to say that she had been made to feel really low by being elbowed but whether she would feel "low and rubbish" if she did not have the disorder, she had no idea.

71. Having regard to the medical evidence as well as the claimant's own evidence. we are unable to find any cogent evidence that the claimant's persistent delusional disorder meant that when she was bullied at work or was under stress she would be absent.

72. Issues 3.2.2 and 3.2.3 require us to consider whether the claimant spoke to Gillian Forrester and Austin Cobb and Ian Boucher in an open and naïve way and, if so whether that was because of her disability. We have seen no evidence that the claimant spoke to those people in an open or naïve way. It is fair to say that the claimant is plain speaking, for instance in her evidence before us she suggested that Z did not know what she was talking about, and similar sentiments were expressed during the investigation and appeal process by the claimant about various people, but we do not consider that she was speaking in a particularly open or naïve way. Even if that was the case, again there is nothing on which we could find that such speaking arose in consequence of the claimant's disability.

73. Those findings are sufficient to dispose of the claim under section 15 of the Equality Act 2010. The claimant has not established her case that certain things arose in consequence of her disability which could have caused the unfavourable treatment.

Knowledge

74. However, much of the tribunal hearing was spent discussing the question of whether or not the respondent knew or could reasonably have been expected to know of the claimant's disability. In deference to the evidence which was called and the submissions which we heard in this respect, will set out our findings in respect of that issue even though it does not, in fact, require determination in the light of our findings.

75. The claimant relied upon 3 main assertions in support of her argument that the respondent should have been aware of her disability.

    75.1 Firstly she says that at a meeting with X on 6 November 2019 she had said that she felt like walking out onto the A31 in her lunch breaks.

    75.2 Secondly, she says that on 9 December she had a meeting with X when she told her that her health was her priority and she had been taking 2 tablets for her mental health but was now taking 1.5 tablets.

    75.3 Finally, she says that in her document which she presented at the appeal hearing she reiterated the point about having felt she wanted to walk onto the A 31 in November 2019.

76. The claimant did not dispute the respondent's assertion that she had not raised the question of disability at all during the process in which her probationary period was reviewed, in the meeting following which she was dismissed or during the appeal.

77. The respondent's evidence, which we accept, was that at the return to work interviews following her periods of absence, the claimant was asked whether there was anything which the respondent should know about or take into account and she was also asked if there was anything else she wished to say during the meeting following which she was dismissed (see page 123). The claimant did not suggest that her absences were because of her disability or that her disability was affecting her in any other way or, indeed, that she had a disability.

78. We do not find, on the balance of probabilities, that the claimant said, during the meeting in November with X, that she felt like walking onto the A31. If we were wrong in that respect and she did say anything to that effect, we consider that it would only have been a brief remark of the type which might be made when somebody is having a bad day. We accepted X's evidence that she would have taken any suggestion of that nature seriously. She told us that in the week previously, someone had told her that they were having suicidal thoughts and she had contacted the head of HR, she had stayed with that person while they made a doctor's appointment and taken them home and made sure they had somebody with them over the following weekend. She had then checked in with them on the following week. We considered that evidence was honest and accurate and that had the claimant made any comment with any substance about wanting to walk onto the A31, X would have recalled that and acted upon it.

79. In respect of the meeting in December 2019, whilst it is true that the claimant told X that she had been taking tablets for her mental health, she was giving the impression that the health condition was getting better. The note of the meeting shows that X asked if there was any assistance that could be given or anything that the respondent needed to be aware of and the claimant said not at the moment. The claimant was reminded of the Employee Assistance Programme and told that if there was anything she wanted to raise she knew where X was. We do not think that the respondent knew, at that point, that the claimant had an impairment which had a substantial adverse impact on day-to-day activities and was likely to last at least 12 months. There was nothing that the claimant said that would have shown the respondent, in particular, that the condition was having a substantial adverse impact on day-to-day activities.

80. Our conclusion in that respect is reinforced by the claimant's own evidence (given in these proceedings) that;

    80.1 her disability only affected her on the 2 occasions when she took time off work,

    80.2 she made a conscious decision not to mention her health condition as part of the dismissal and appeal process because her mental health condition did not affect her ability to work and she did not feel it was relevant.

81. In respect of the document which the claimant submitted in the course of her appeal it does, at page 144 of the bundle, detail the alleged discussion with X. It states "I had an induction Day at Thatcham which we were able to discuss how we found SSE so far. I said how awfully I had been treated… He advised me to speak to HR. I did this as soon as I was back in the New Forest Depot. They arranged a meeting for myself and X. I explained to X that on my lunch breaks I felt like I wanted to walk out on to the A 31!". Again we do not think that statement gave actual notice of the fact that the claimant had a condition which was causing a substantial adverse impact on day-to-day activities and which was likely to last 12 months.

82. Moreover, we find that the respondent did make sufficient enquiries of the claimant. As we have said, in the return to work meetings the claimant was asked if there was anything else she wanted to say and was also asked that question during the probationary review process. The claimant agrees that she made a conscious decision not to disclose her disability.

83. Finally, we are satisfied that even if the respondent should have asked more, the claimant still would not have disclosed her disability and the respondent still would not have discovered that she had an impairment which had a substantial adverse impact on her day-to-day activities and had lasted or was likely to last more than 12 months.

84. Thus had it been necessary we would have resolved the knowledge issue in favour of the respondent.

85. The claim of discrimination because of something arising from disability does not succeed.

Indirect Discrimination

PCPs

86. The claimant asserts that the respondent applied 3 PCPs to her employment.

87. The 1st PCP alleged is that the respondent had a practice of not telling employees (and in particular the claimant) what would be discussed at a probationary meeting. The meeting referred to is the meeting of 13 February 2020.

88. On 6 February 2020, the respondent wrote to the claimant inviting her to attend a meeting under the probationary procedure to take place on 13 February 2020. The letter gave the date and location of the meeting and stated "As a result of concerns about your ability to meet the conditions of your probationary service we are seriously considering your suitability for continued employment, with particular reference to concerns you have raised with the role and environment; absence during your first 5 months in the role and concerns relating to teamwork and communication". The letter said that the claimant could be accompanied by a representative of her choice and that a possible outcome was the termination of the claimant's contract.

89. On the 6 February 2020, the respondent had also had a meeting with the claimant to discuss her performance. It is apparent from the notes at page 117 that the

claimant's absence was discussed as were issues around the team and communication. The "action" section of the notes records "Will invite you to a formal probationary meeting next Thursday 13th February regarding meeting conditions of probationary service and suitability for employment in this role. Specifically relating to concerns you have raised with the role and environment, absence in the first 5 months and performance concerns with teamwork and communication. Outcome could be extension of probation or termination of contract".

90. The minutes of the probationary meeting on 13th February 2020 show that the claimant raised no concerns about being unsure as to what the meeting was about.

91. In those circumstances do not find that there was a PCP as alleged. The claimant was told what would be discussed at the meeting on 13th February 2020.

92. The 2nd PCP alleged is that the respondent did not give employees sufficient time to read the material which was relied upon in probationary meetings and again refers to the meeting of 13 February 2020.

93. The respondent's case, which we accept, was that there was no material which was relied upon in the meeting. The claimant had been told about concerns on 2 previous occasions, she was aware of the concerns which existed and of her own absence record. The respondent simply did not rely upon any material. There is no evidence that there was a provision criterion or practice of the respondent that it would not give employees time to read material which was relied upon.

94. The 3rd PCP is that the respondent did not give the claimant the outcome of the appeal meeting until 22 April 2020 or any notes of the appeal meeting within 10 days. It is true that those things did not happen. They did not happen as a consequence of the claimant handing in her 8 page document at the outset of the appeal hearing and wanting the matters set out in it to be investigated before a decision was made in respect of her appeal.

95. Having regard to the guidance given by the Court of Appeal in Ishola, we do not consider that the matters referred to in the 3rd alleged PCP can be properly said to amount to a PCP. What happened was not part of a state of affairs indicating how similar cases would be treated, the respondent was simply on a one-off basis responded to the situation which presented itself to Mr Cobb. Therefore we do not find that this was a PCP.

Disadvantage

96. Again, that is sufficient to dispense with this part of the claim. However we record that even if the PCPs did exist as alleged, we have seen no evidence that they placed disabled persons generally at a disadvantage or placed the claimant at a disadvantage. A practice that employees would not be told what will be discussed at a probationary meeting or that employees will not be given time to read material at a probationary meeting would, on the face of matters, disadvantage all employees equally. Likewise a provision of not providing appeal notes within 10 days or other delays within the appeal process. There is no evidence that the

claimant was particularly disadvantaged by those matters. The claimant says that she was caused excessive worry but she has adduced no evidence that her levels of worry were any different to anyone who was not disabled.

97. Thus, this claim does not succeed.

Reasonable Adjustments

98. Issues 6.1 and issue 6.4 appear to overlap and we will return to them below.

PCPs

99. For the reasons which we have given we do not find that the respondent had the PCPs set out at issues 6.2.1, 6.2.2 and 6.2.4 of the list of issues.

100. In respect of issue 6.2.3 we do not find that the respondent had a provision criterion or practice of conducting the proceedings as quickly as possible. The claimant had 2 informal probationary meetings before the meeting at which she was dismissed (on 6 January 2020 and 6 February 2020). After the meeting on 13 February 2020 there was a reasonable period to allow proceedings for the appeal to be prepared and, on 12 March 2020, the appeal was properly adjourned to consider the claimant's additional allegations. We find that the respondent has behaved reasonably in the way it conducted the proceedings and there is no evidence that it was seeking to conduct the proceedings as quickly as possible.

101. Thus we do not find that any of the PCPs alleged by the claimant existed in this case and, again, that is sufficient to deal with this part of the claim.

Disadvantage

102. Again, however, also for the reasons we have given, we do not find that there is any evidence that the PCPs alleged (if they did exist) placed the claimant at a substantial disadvantage compared with a nondisabled person.

Knowledge

103. For the reasons we have given above we do not find that the respondent knew or could reasonably have been expected to know that the claimant was disabled during the times at which she was employed. We find that the respondent did not know and could not reasonably be expected to have known that the claimant was likely to be placed at the disadvantage she alleges, namely that she would worry excessively. The claimant had not said anything to that effect to the respondent and we find that the respondent had made all of the enquiries it needed to. Had the respondent pressed the claimant further, we find that she would not have given the respondent any further information.

104. Thus the claim of failure to make reasonable adjustments fails.

Harassment related to Sex

105. Before being offered the job, the claimant was interviewed by W and V. The claimant says that W behaved inappropriately by asking whether the claimant had

family, whether she lived with anyone and that W flirted with her by asking about her hobbies and interests, telling her that he had similar hobbies and interests and saying he was about to have a baby.

106. The claimant made no complaint at the time. During her evidence to us she was asked whether it was possible that she had misinterpreted polite chat or small talk and said that that at the interview she did not "think anything of [the comments]" but that "after subsequent events I now do".

107. We heard from W . He told us that the interview was very structured. There were set questions, however for about 5 minutes at the start he would talk with an interviewee about their CV but not ask personal questions. He said that he may have asked where she lived. He denied asking the claimant about her hobbies or interests but accepted that he may have spoken about the fact that he was expecting a child with his wife.

108. Given that the claimant only came to the conclusion that there was something wrong with the interview after subsequent events took place, there is a real risk that her recollection has been influenced by the subsequent events which she is unhappy about. Recollections do change, particularly when one looks back some time after an event and when other things have happened.

109. We accept the evidence we heard from W and do not think find that he asked any inappropriate questions of the claimant. In any event we would not have found there was anything inappropriate about asking an interviewee about their hobbies or interests.

110. The claimant then alleges that when V showed the claimant out of the building at the end of the interview, the claimant turned around and caught W staring at her behind and her legs as he left the room.

111. In cross-examination the claimant said that when she looked back and saw W looking at her inappropriately he did not avert his eyes but just carried on staring at her behind. The claimant agreed that she had not made this allegation until some 8 months after the event.

112. W's account was different. He said that he would probably have stood up as the claimant left the room, he and V would have been on one side the desk and the claimant on the other. V showed the claimant out using a key card and W says that he just thanked claimant for the interview and that was it.

113. We do not find that the claimant's account is credible. Not only was there a significant lapse in time before she made the allegations but we find it implausible that when, on her account, W was caught looking at her he would simply carry on staring at her behind. We accept the denials of W and do not find this allegation proved.

114. The next allegation of harassment is that when W telephoned the claimant to offer her the job she felt that he was masturbating because he made a grunting noise. In her evidence she stated that it was a grunting noise which was horrible and out of context in the conversation. It was put to her that she did not think that W was

masturbating at the time and only came to that view afterwards. She replied "yes, after I was sacked".

115. Even if W made a grunting noise which was out of context it is surprising that the claimant would come to the conclusion that the most plausible explanation for such a noise was that he was masturbating. Even if the claimant had asserted at the time that she felt W was masturbating, it is difficult to see how she came to that conclusion based only on a grunting noise.

116. The allegation becomes more implausible when it is acknowledged that the claimant made it, for the 1st time, 8 months later and after she had been sacked. We do not find that the claimant is lying, but we do find that her recollection was, by this stage, inaccurate.

117. Moreover W not only denies the allegation but points to the fact that he was in a room with windows on one side and a window in the door on the other side of the room. The room was opposite a kitchen.

118. The claimant has not proved any facts upon which we could conclude that W was masturbating whilst making her the offer of a job.

119. The claimant then asserts that between her being offered the interview and commencing work for the respondent, W spoke inappropriately to colleagues who then, as a result, did not respect the claimant's personal and professional life. It was recorded at first the case management hearing that the claimant could give no particulars of what W said or who he said it to. That position remained the same at this hearing. The claimant has simply made an assumption based on the fact that the working environment was one which she did not find to be friendly when she joined.

120. Assuming it to be true that the working environment was not friendly, there is nothing upon which we could base a finding that was because W had said something to someone. The claimant has attributed no motivation to W for doing so and no one has suggested to the claimant that W had spoken to them. The working environment could simply be an unfriendly one. However, in fact, we are not satisfied on the evidence we have heard that there was a particularly unfriendly working environment. When a person joins a new office environment it is inevitable that they are not treated like an old friend, it takes time for people to get to know a new person and there is no evidence that this office was anything unusual.

121. The final allegation in this respect is that, in mid 2020, W when speaking to others stated that the claimant would "have sex with him and the claimant would say he had a small penis". Again, W flatly denies this allegation. We are not prepared to accept the claimant's evidence in this respect. We do not find the claimant's evidence to be credible given the assumptions that she has made in respect of the other allegations and we found W to be a credible witness.

122. As we have said, and for the purposes of clarity, in reaching those conclusions we have not relied upon the alleged effects of the claimant's disability.

123. We are not satisfied that the claimant has proved any facts from which we could conclude that the allegations of harassment are well founded and this claim is dismissed.

Final conclusions

124. Having regard to our findings of fact and conclusions set out above claimant's claims are dismissed.

Employment Judge Dawson
Date: 14 January 2022

Judgment sent to the parties: 20 January 2022

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP
The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so.

Recoupment

The recoupment provisions do not apply to this judgment.

Appendix

List of Issues

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Disability

2.1 The claimant says the disability is Persistent Delusional Disorder, the respondent admits that amounted to a disability at the relevant times.

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the respondent treat the claimant unfavourably by:

3.1.1 Dismissing her;

3.1.2 Not investigating her complaints appropriately

3.1.3 Not upholding her appeal

3.2 Did the following things arise in consequence of the claimant's disability? The claimant's case is that because of her disability,

3.2.1 when she was bullied at work or was under the stress she would be absent from work,

3.2.2 when she spoke to Gillian Forrester in respect of the investigation she spoke in an open and naïve way,

3.2.3 when she spoke to Austin Cobb and Ian Boucher in respect of the appeal she spoke to them in an open and naïve way.

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim?

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 Could something less discriminatory have been done instead;

3.5.3 How should the needs of the claimant and the respondent be balanced?

3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

4. Indirect discrimination (Equality Act 2010 s. 19)

4.1 A "PCP" is a provision, criterion or practice. Did the respondent have or apply the following PCPs:

4.1.1 Not telling employees generally or the claimant, in particular, what would be discussed at a probationary meeting, in this the meeting on 13th February 2020;

4.1.2 not giving employees generally or the claimant, in particular, sufficient time to read the material which was relied upon in probationary meetings in this case on 13th Feb;

4.1.3 not giving the claimant the outcome of the appeal meeting until 22 April 2020 or any notes of the appeal meeting within 10 days

The respondent denies that those PCPs existed, or that they could amount to PCPs.

4.2 Did the respondent apply the PCP to the claimant?

4.3 Did the respondent apply the PCP to persons with whom the claimant did not share the same protected characteristic or would it have done so?

4.4 Did the PCP put persons with whom the claimant shared the characteristic, at a particular disadvantage when compared with persons with whom she did not share the characteristic?

4.5 Did the PCP put the claimant at that disadvantage in that they caused her excessive worry.

5. The respondent does not seek to rely upon a defence of justification.

6. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.2.1 Not telling employees generally or the claimant, in particular, what would be discussed at a probationary meeting, in this the meeting on 13th February 2020;

6.2.2 not giving employees generally or the claimant, in particular, sufficient time to read the material which was relied upon in probationary meetings in this case on 13th Feb;

6.2.3 Conducting proceedings as quickly as possible

6.2.4 Not giving notes of the appeal meeting within 10 days

The respondent denies those PCPs existed.

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that in that they caused her excessive worry.

6.4 Did the respondent know or could it reasonably have been expected to know that the claimant was disabled or was likely to be placed at the disadvantage?

6.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 Inform her in advance of the reason and the fact of the meetings;

6.5.2 provide adequate time to read the material and to consult with a TU rep (minimum of 5 clear working days before a hearing)

6.5.3 To provide all written materials gathered in an investigation in advance of the hearings (minimum of 5 clear working days before a hearing

6.5.4 To provide notes of meetings soon after (no more than 5 working days later);

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7. Harassment related to sex (Equality Act 2010 s. 26)

7.1 Did the respondent do the following things:

7.1.1 During her initial interview with W and V, W said inappropriate things in the interview on 17 July 2019 being;

7.1.1.1 whether the claimant had family;

7.1.1.2 whether she lived with anyone;

7.1.1.3 . W flirted with the claimant in that he asked about the claimant's hobbies and interests and told her about his interests and said he had similar ones and said he was about to have a baby.

7.1.2 . V showed the claimant out of the building at the end of the interview, just before they reached the door, the claimant turned around and caught . W staring at her behind and at her legs as he had left the room.

7.1.3 The claimant when offered the job felt . W was masturbating during the telephone call on the 23rd July at approximately 2.35pm in that he made a groaning sound out of context of the situation

7.1.4 The claimant believes that W spoke inappropriately about the claimant to other colleagues soon after she started working for the employer, who then as a result did not respect the claimants personal and professional life. The claimant can give no particulars of what he said or who he said it to but believes that he did something.

7.1.5 In around Mid-January 2020, . W while speaking with V and U stated to them that the claimant would "have sex with him, and that the claimant would say he had a small penis". He intimated that he wished to have an affair which her.

8. If so, was that unwanted conduct?

8.1 Did it relate to the claimant's protected characteristic, namely sex?

8.2 Alternatively was it of a sexual nature?

8.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.4 If not, did it have that effect? The Tribunal will 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.

9. Remedy

Discrimination

9.1 What financial losses has the discrimination caused the claimant?

9.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.3 If not, for what period of loss should the claimant be compensated for?

9.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

9.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

9.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.7 Should interest be awarded? How much?