



EMPLOYMENT TRIBUNALS

Claimant: Mr M Adams

Respondent: Idverde Ltd

Heard at: Bristol (by VHS video) **On:** 15-17 March 2022

Before: Employment Judge Parkin

Representation

Claimant: Ms J Cox, lay representative

Respondent: Mr G Graham, Counsel

JUDGMENT having been sent to the parties on 31st *March 2022* and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim and response

1.1 By his claim presented on 26 November 2020 the claimant claimed disability discrimination and harassment relating to his employment with the respondent as a Toilet Cleaner, which is ongoing. He later clarified that his disability was a longstanding condition of fibromyalgia.

1.2 The respondent denied all his claims in its ET3 response presented on 15 January 2021, not then admitting that the claimant was disabled, and sought further detail of his claims.

2. The claimant provided further particulars on 13 July 2021 and there was then a case management hearing before Employment Judge Roper on 14 July 2021, at which the final hearing was listed with case management orders and the issues were closely identified. The respondent presented an amended response on 12 October 2021, admitting (as it had done at that hearing) that the claimant was disabled, but otherwise denying his claims.

3. The Issues

3.1 Time limits

The claim form was presented on 26 November 2020. The claimant commenced the Early Conciliation process on 1 October 2020 (day A) and the certificate was issued on 15 November 2020 (day B). Accordingly, any act or omission which took place before 2 July 2020 (which allows for any extension under the Early Conciliation provisions) is potentially out of time, so that the Tribunal may not have jurisdiction to hear that complaint.

3.1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

3.1.2.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act or omission to which the complaint relates?

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

3.1.2.3 If so, was the claim made to the tribunal within three months (plus the Early Conciliation extension) of the end of that period.

3.1.2.4 If not, were the claims made within a further period that the tribunal thinks is just and equitable? The Tribunal will decide why were the complaints not made in time and, in any event, whether it is just and equitable in all the circumstances to extend time.

3.2 Failure to make reasonable adjustments

3.2.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? Is so from what date? (This was no longer a live issue).

3.2.2 A "PCP" is a provision criterion or practice. Did the respondent have the following PCP, namely a requirement for the claimant to carry out his original duties as a toilet cleaner?

3.2.3 Did that PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that he had difficulty carrying out his normal duties, which exacerbated his condition?

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

3.2.5 What steps (the "adjustments") could have been taken to avoid the disadvantage? The claimant suggested he should have been moved to litter picking duties, which would have involved less strenuous and less unpleasant duties and which involved driving an open backed caged van.

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

3.2.7 Did the respondent failed to take those steps?

3.3 Harassment related to disability - Did the respondent do the following things:

3.3.1 On five or six occasions after 2018 on returning to work from a disability-related sickness absence the claimant was asked by Richard Hopkins "Did you enjoy your holiday?"; and

3.3.2 In February 2019 when the claimant's enclosed van was taken away without explanation (after the claimant had informed the respondent that he wasn't suitable for the job he was doing because of his disability) and gave him a van with an open back (but with the same toilet cleaning duties) Richard Hopkins asked him: "Enjoying your new van? and

3.3.3 On two occasions in December 2019, (as cited in ET1 and Case Management Order, but actually in April 2019) and September 2020 Mr Hopkins leaving letter communications to the claimant concerning disciplinary hearings in

public conveniences, rather than delivering them by hand (as stated in those letters); and

3.3.4 Mr Hopkins requiring the claimant to undergo disciplinary procedures and September 2020.

3.3.5 If so, was that unwanted conduct?

3.3.6 Did it relate to the claimants protected characteristics, namely his disability?

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

3.3.8 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

4. The hearing, witnesses and credibility

4.1 The parties had provided their consent in writing in advance of the hearing for determination by an Employment Judge sitting alone. There was an agreed Bundle (1-216); the respondent provided a draft chronology, and list of key dates and of personnel.

4.2 The claimant, Mark Adams, gave evidence on his own behalf and the respondent called Ralph Mattravers, Supervisor; Richard Hopkins, Contract Manager; Rebecca Doe, Contract Manager; Charles Elliott, Contract Manager and Nicola Easdale, Operations Director.

4.3 Credibility of witness evidence is important in most Tribunal cases and, where available, contemporaneous documents can often be more accurate than individual memories of past events. In the course of this hearing, I formed the view that the claimant was not simply very weak on dates (as he acknowledged), but was not a reliable historian and had a very partial memory on many matters. He was wrong in his claim form and in what he explained to Judge Roper about the date of the first hearing dealing with sickness absence, which was early as April 2019 and not December 2019. There were more significant defects in the claimant's version and evidence at the hearing. He was pressed on matters not contained in the grievance made to his employer in January 2020, such as why there was no mention of him being denied a change of duties to the caged van driver/litter picker role nor of sarcastic comments by Mr Hopkins about enjoying his holiday (when he had been absent sick). His explanation of the omissions lacked credibility especially when he resorted to the explanation that he was limited to 1,000 words in his grievance complaint. There was no such limitation in the respondent's grievance procedure, which was plainly followed by the claimant with the assistance of his daughter with the written grievance then run by his trade union representative before presentation, and the actual wordcount is about 500 words; in essence, the claimant was making things up on the spot and I rejected this explanation. The allegations of sarcastic comments towards him by Mr Hopkins were not included in his witness statement at all despite Judge Roper's clear direction to include everything he was complaining of. In oral evidence the claimant somewhat dismissively said the only adjustments the respondent implemented for his role as toilet cleaner were that they provided a cobweb brush. In fact documentation in October 2018 records that there was also the provision of deck/scrubbing brushes alongside the introduction of chemical cleaners to reduce the physical scrubbing which the claimant had previously needed to do. Recognising that the claimant continued to have legitimate

concerns about storage of chemicals in service rooms at each toilet location and at having to carry chemicals around in whichever van he was using, this was nonetheless an example of his incomplete memory or even him over-egging his oral evidence.

4.4 That is not to say that I accepted everything the respondent's many witnesses put in evidence but in general terms their evidence, as set out in witness statements and confirmed orally, was consistent with the contemporaneous documents.

5. The facts

From the oral and documentary evidence, I made the following key findings of fact on the balance of probabilities.

5.1 The respondent is part of a major horticultural and grounds maintenance business, servicing both the private and public sectors, with a contract to provide services to Somerset West and Taunton Council.

5.2 The claimant transferred over to the respondent from the predecessor council Taunton Deane Borough Council under a TUPE transfer on 1 February 2017. He was employed by the council from 2004 both as a senior toilet cleaner and then as a toilet cleaner, attending and cleaning various council public toilet facilities. He travelled between the various sites assigned to clean and maintain them and identify issues, being provided with a small van. He was always mindful that he remained on the transferee Council's terms and conditions of employment, protected under TUPE.

5.3 The claimant has the physical condition of fibromyalgia, which over the years has caused him to incur considerable sickness absence all identified in the claimant's attendance/absence records as "other".

5.4 After a number of sickness absences on 21 August 2018, Mr Hopkins, his Contract Manager, next in line above the claimant's direct line supervisor Mr Mattravers, decided to refer the claimant for Occupational Health assessment (102-103).

5.5 He was assessed by Dr Anthony Kelly on 25 September 2018, who confirmed the underlying condition of fibromyalgia, associated with widespread, chronic (long lasting) pain, stating:

"In my view he is likely to meet disability criteria under the disability provisions of the Equality Act due to the permanent nature of his condition and the limiting effect this has on day-to-day activities such as kneeling gardening and carrying out DIY, however this is a legal decision ultimately and not a medical one."

Dr Kelly reported that there were no concerns with the driving element of the toilet cleaner role but that:

"Clearly he was struggling to cope with his role but as of his pain and his perception of there being a mismatch between the demands of the role and his capabilities. In my view he is unfit for his normal role and is unlikely to sustain regular attendance and effective service in his current role due to the

widespread nature of his pain; the effect this is having on limiting his functional abilities; and the likelihood that his condition will continue to fluctuate for the foreseeable future”.

and he recommended permanent adjustments:

“He may be able to manage his role if the workload is reduced and tasks that require him to kneel for prolonged periods or work above shoulder height for prolonged periods are avoided. If this is deemed impractical by management you may want to consider re-deployment to an alternative lighter role if this is available to him” (104-106).

5.6 Following that report Mr Hopkins carried out a Personal Factors Assessment on 24 October 2018 (109-110), with two further Review meetings, in later October 2018/early November. At the first review, Mr Hopkins noted:

“From 31 October Mark began to work by himself. Although he encountered a few aches and pains this seemed successful and mark is happy to continue with solo duties.

We have implemented two out of three of the changes required, cobweb brushes and deck/scrubbing brushes.

Mark has used the cobweb brush successfully and found it helped, but as yet (not) used the scrub/deck brushes.

The chemical we have ordered has yet to arrive, but will be in place from Tuesday, our next delivery. Mark has asked for a chemical change as he feels the one we are using is not helping with cleaning event it is not powerful enough to clean which results in him having to over exert and this can inflame his condition. I will source a new product...

We discussed that Mark needs to understand his condition and know the signs of it when it will potentially flare up and adjust his work load to suit. If he feels that his condition is about to flare up during his working day we discussed that Mark must make either Ralph (supervisor) or me aware... (112-113).

5.7 The second review was on 11 December 2018 (112-3). Mr Hopkins noted:

“All changes now been implemented, although Mark believes the hemical is not the correct one, RH to source another chemical to trial. Both the cob and scrubbing brush has helped with Marks condition, although he is currently using the remaining of his holiday allocation... Mark is happy with all the changes made.”

5.8 The claimant had continued to experience periods of sickness absence in October 2018 and then did so again between January and March 2019.

5.9 In March 2019 he suggested to Mr Hopkins he could potentially carry out a litter picker/van driver role. Whilst there were no vacancies at that time, Mr Hopkins decided in consultation with HR to refer the claimant to Occupational Health again in order to ascertain his suitability. This was the only occasion he expressly raised that role with Mr Hopkins as potentially being suitable for him instead of his toilet cleaner role.

5.10 He was assessed on 10 March 2019 and Dr Pamela Collins, Occupational Health Specialist reported on 19 March (121-123). She advised that the claimant would be able to do lightweight litter picking, provided appropriate aids were available to allow him to avoid bending/kneeling, but would have difficulty

carrying out full litter van driver role which would involve significant heavy manual handling particularly above shoulder height with lifting heavy fly-tipped items such as furniture or hardcore, with removal of roadkill weighing between 2 to 75 kg and shovelling hardcore in any amount of quantity; these tasks would be likely to aggravate his symptoms. Her conclusion that there were:

“... aspects of this role which may be within his capability and would not be likely to aggravate symptom management. However, in my opinion, adjustments are likely to be required to allow him to avoid recurrent slash repetitive heavy manual handling and the lifting and shifting of items above shoulder height”.

5.11 Mr Hopkins therefore concluded this job was even more physically demanding role than the cleaning role with adjustments the claimant was carrying out. Whilst Mr Hopkins was not explicit about this, I inferred that he told the claimant he did not consider him suitable for a transfer to the litter picker/van driver role. Although no doubt the claimant was disappointed to learn this, he did not raise any grievance or challenge to the decision and therefore remained as a toilet cleaner.

5.12 On 4 April 2019, the claimant attended a Managing Attendance meeting, at the first stage of the respondent's absence review mechanism. He was aggrieved at the manner of delivery of the letter to him calling him at short notice to the meeting and had pressed Mr Hopkins whether it was a disciplinary and he should have representation. The letter, in an envelope addressed to him, was left in the locked service room at one of the toilets he serviced, and thus the envelope was only going to be seen by him (as the sole toilet cleaner assigned) or perhaps by some other employee with a key and authorised access to the room.

5.13 Mr Hopkins took HR advice about the nature of the meeting but was told and passed on to the claimant that it was not a disciplinary hearing and that he had no need for representation. This was plainly wrong because he was subjected to a disciplinary warning, but it was not deliberately wrong on Mr Hopkins' part. The claimant's appeal against the warning was unsuccessful but the 6-month term elapsed without further warning or disciplinary action and he remained a toilet cleaner.

5.14 On 5 April 2019, the respondent wrote with the outcome of the meeting (124), notifying the claimant of a 6-month warning for “hitting the trigger points” in the Managing Attendance Procedure procedure (2 or more occasions of absence in any 3-month period). The letter recorded that the respondent had made adjustments for him in his role to help with his condition including removing scrubbing brushes and replacing them with a spray chemical and providing extendable cobweb brushes. It continued:

“We discussed the storing of chemicals and it was agreed that a plan will be put in place going forward in order for you to be able to store the chemicals in store cupboards rather than in the vehicle. Richard is to source additional products to enable this to happen.

You expressed concerns regarding your workload however, we reiterated that we have made reasonable adjustments for you in your role which you have agreed has helped you”.

5.15 However, there was some further delay on the respondent's part in implementing the new system of generally storing the toilet cleaning chemicals

the claimant worked with (the alternative to his former heavy scrubbing) in a service room in each of the toilets and in Mr Hopkins sourcing biological cleaning fluids which were both effective and unlikely to give off noxious fumes as the more caustic chemical fluids did. The claimant continued to complain of his concerns that the chemicals caused fumes which affected him when he was in his van transporting them.

5.16 In August 2019, a specific vacancy for caged van driver i.e. a litter picker/van driver based at Taunton was advertised. The claimant did not apply for the vacancy.

5.17 On 23 October 2019 the claimant's van was changed from his enclosed back small van to an open back, grille-sided van. This was an exchange of van with Ralph Mattravers, prompted by Mr Mattravers as a result of the claimant's concerns. However, it was never fully explained to him that this was very much because of concerns he raised.

5.18 Whereas initially the claimant told Mr Hopkins he was happy with the swap of vans, and Mr Hopkins recorded this in his diary (215), he became less happy and raised concerns about the side grilles on his new van. That caused the respondent to have them removed so that it was simply an open-backed van with short side panels which themselves could be dropped down. In the event, the adjustment did not fully satisfy the claimant and almost a year later in October 2020, he and Mr Mattravers swapped vans back.

5.19 On 21 January 2020, the claimant raised a formal grievance (125-6). It was typed for him by his daughter who assisted him with preparing it and he then ran it past his UNISON representative before sending it to the respondent. It had been prepared in accordance with the respondent's formal Grievance Procedure (71-76), was headed: Formal Grievance and set out his desired outcome. The procedure set no word limit on what the employee can include in a grievance.

5.20 The claimant maintained Mr Hopkins was "picking on (him) through his action and attitude towards (him)":

"In April 2019 I was disciplined for taking time off due to illness, however my illness was due to my fibromyalgia which is a recognised disability...

I was informed if I had any further sickness within 6 months I would have been subject to a Stage 1 disciplinary, where I could potentially lose my job.

This 6 month period has now elapsed and since then Richard Hopkin has taken away the vehicle that was allocated to me, a van Inverde had purchased specifically for the task of being used by operatives tasked with cleaning the toilets.

I have now been allocated an open back van that is not suitable for the job that I do. This is because my equipment is exposed to the elements, the rear of the vehicle that is exposed becomes slippery as does the equipment I use.

As a result I have to carry the dustpan and brush loose in the cab.

Furthermore, at the disciplinary hearing in April one of the outcomes was that all chemicals used in the cleaning of the toilets were to be stored in service at each toilet and Richard Hopkins agreed to do this....

However, this has not been done and Richard has informed me that I have to carry the chemicals around in the back of the van.

I feel the current situation poses a health and safety risk both to myself and members of the public.

In October I again raised my concerns with Richard and advised him that I was not prepared to continue to carry fluid in the van as per the agreement reached in April 2019 following a change in type of chemicals used in the clinic process, his reply was "If I tell you to do something you have got to do it".

Following this conversation he took the van that'd Verde had purchased, as described above, away from me and allocated me with the open back vehicle. since this change in the vehicle I have expressed my concerns regularly with Richard and Ralph (the charge hand) and have been informed that this is what has been decided and this is the way it is going to be.

that has also been instances of Richard speaking to me in abusive manner, I now try to limit my contact with him unless absolutely necessary because of his attitude towards me...

The outcome he sought by way of resolution was:

"To have the vehicle I was allocated to the task I am employed to do returned to me.

To have the chemicals used to clean the toilet stored in the service rooms at each location as agreed.

For Richard Hopkins to desist in his bullying and belittling attitude towards me and show me more respect".

5.21 The grievance hearing was held before Rebecca Doe on 6 February 2020 (129-140). The claimant was accompanied Neil Anderson, his UNISON representative. At the meeting, Ms Doe asked him expressly what the claimant meant by saying Mr Hopkins spoke to him in an abusive manner and the claimant replied that Mr Hopkins said:

"I told you this, you do what I say, I'm the boss",
that he raised his voice and went red in the face, adding:

"If you disagree with anything he says he will get funny. When I suggested doing a job with Jamie Campbell" he said:

"No, I want you to effing do it"

and had used that language on more than one occasion which the claimant had complained of.

5.22 Ms Doe gave her grievance outcome by letter dated 20 February (142-144). She divided the claimant's grievance into 4, rejecting his first complaint that he had been discriminated by the instigation of absence management procedure in April 2019, concluding that the sickness policy had been followed correctly and noting the claimant had appealed unsuccessfully at an impartial meeting. She partially upheld his second complaint about the change of vehicle, and not being given the reason for the change, although she concluded that it occurred in order to resolve his concerns about storing chemicals in the back of his old vehicle. She added that it was his line manager's decision which vehicle he was allocated and recommended he continued using the open-backed vehicle but that the cages could be removed to alleviate the issue he raised about not being able to open up the sides of the cages whilst parked. She partially upheld his third complaint about storage of chemicals, recording that it had been agreed that Mr Hopkins would look at storing the chemicals on site, although she saw no health and safety issue given that the claimant was then driving the open-backed van and the chemicals were in a box. As to his dignity at work being breached by his line manager, she made no resolution but recommended mediation for the claimant and Mr Hopkins. Regrettably, as at the date of this hearing that

mediation had never taken place despite the evident poor working relationship and lack of effective communication between Mr Hopkins and the claimant and vice versa.

5.23 The claimant experienced further extensive sickness absence due to his fibromyalgia but also with some respiratory problems from his asthma from early February to mid-March 2020.

5.24 Mr Hopkins made a further Occupational Health referral on 13 March 2020 (148-9) which led to the Consultant Occupational Health Physician, Dr Lindsay Fawcett's report on 26 March 2020. He considered the claimant would be fit to return to his duties at the end of the period of self-isolation (resulting from the Covid-19 pandemic) subject to appropriate advice on personal protective equipment relating to Covid (153-4).

5.25 In 2020, public toilets were closed for several weeks at the start of the national lockdown. As a result, the Council liaised with the respondent as to what special alternative duties workers such as toilet cleaners who would not be carrying out their usual work could be engaged upon. It was agreed that exceptionally the claimant and his colleague Jamie Campbell would be allocated to cover shifts of cleaning at and litter picking in the grounds of and approach roads to a hall of residence/hostel which was being used to house homeless people. They each worked at and around the hostel for 3 4 days a week in April-May 2020. For the rest of his working time, the claimant was engaged on what was similar to the litter picker/van driver role including bin emptying and even including work for 2 days' extensive removal of fly-tipped rubbish.

5.26 Whilst the exact duration of this phase before public toilets re-opened is not entirely clear on the evidence (perhaps only 6-8 weeks, possibly as much as 8-12 weeks), the claimant resumed his toilet cleaning role thereafter.

5.27 On 16 July 2020 a disciplinary investigation was initiated against the claimant (155-172). This resulted from his work colleague Jamie Campbell alleging to Ralph Mattravers that the claimant deliberately took time off sick when he knew Mr Campbell would be away from work such as on leave. Jamie Campbell had texted Mr Mattravers:

"Wow. Mark told me he's got a good doctor can not believe he's done it agen every time I book off he goes off sic naw the toilets are gona go dawn hill lol".

When Mr Mattravers replied: "Tell me about it", Mr Campbell replied:

".. he was talking to me Thursday saying haw it's not right taking him off town round to do power washing it should be the person in villidges as they don't need as much visits then he went on to say but hes got a very good doctor I wish had said to u about it naw haw can he get away with being off sic so much hes doing it deliberately lol he was also saying the auther day about how he wants the toilets to go back to the council and saying about how it fucks the company when um booked off and he goes sic out of the blue"

Mr Mattravers reported this on to Mr Hopkins and Jamie Campbell then supported his allegation in a short statement.

5.28 When Mr Hopkins checked Mr Campbell's leave dates against the claimant's sickness absences, the records appeared to bear out the allegation, with three periods of overlapping dates. However, Mr Hopkins did not make the decision alone to pursue the disciplinary investigation, since he was wary of

instigating another grievance from the claimant. He sought guidance from his own line manager, Paul James, and the HR Director and HR Business Partner. He was advised to proceed with the investigation but on the basis that, if it needed a disciplinary hearing, that should be held by a different manager.

5.29 Mr Hopkins held an Investigation interview with the claimant on 12 August 2020 (163-4). The claimant accepted that it looked as if there is a pattern with the dates but maintained he did not know when his fibromyalgia would flare up and that it was just coincidence since he did not know when his colleague was off.

5.30 Mr Hopkins checked the vehicle tracker records and considered that there had been an opportunity for the claimant and Mr Campbell to have spoken on 16 July. He therefore put the matter forward for a disciplinary hearing, again after seeking approval from HR.

5.31 By letter dated 3 September 2020, the claimant was invited to a disciplinary hearing (176-177). The letter was "hand delivered" i.e. left in the locked service room at one of the toilets the claimant was to clean, in an envelope addressed to him. Mr Hopkins then telephoned the claimant to tell him there was a letter waiting for him.

5.32 On 8 September 2020, Charles Elliott held the claimant's disciplinary hearing on the allegation of "disrupting contract by taking sickness" (178-180). Mr Elliott was a Contract Manager not involved in the claimant's management or the contract he worked within and was experienced in dealing with disciplinary investigations and hearings. The claimant was accompanied by a colleague, Jim Chant. He provided medical evidence from his GP explaining his fibromyalgia to be the cause of his absences and himself explaining that the condition caused him "flare-ups". He again accepted that there was a pattern between Mr Cameron's leave dates and his sickness absence but maintained that he did not know when Jamie Campbell was off. Having heard from the claimant and seen his medical evidence, Mr Elliott found no case to answer since he considered it was one individual's word against another (i.e. Mr Campbell and the claimant) and he could not establish the claimant had pre-planned his absences. He notified his decision to the claimant that day at the re-convened hearing. Having identified a poor working relationship between Mr Hopkins and the claimant, he suggested mediation between them which Mr Adams agreed to; this was initially arranged for 2 October 2020 but did not proceed.

5.33 On 30 September 2020, the claimant then also raised a formal grievance against Mr Hopkins (185-187):

"Dear Human Resources. I would like to make a formal grievance against my line manager Richard Hopkins. I feel discriminated against due to my disability I was called in for disciplinary for gross misconduct I feel my disability was not taking into consideration although the case was dismissed this has caused me to feel hurt upset and anxious this is not the first occasion he said made me feel like this and I feel going forward it will continue, there was a mediation meeting arranged for this Friday 2 October which have been cancelled by the advice of ACAS I feel no alternative than to take their advice on going forward with this matter

5.34 On 21 October 2020, the claimant requested the return of his old van and this was promptly arranged by Mr Hopkins and Mr Mattravers.

5.35 The claimant's grievance hearing was heard on 26 October 2020 by Nicola Easdale, Operations Director (185-187), leading to her letter of outcome on 9 November (190-191). She recorded that they had agreed his grievance concerned two main areas: 1) that although the disciplinary was raised, it was subsequently not cancelled prior to the formal meetings taking place despite the submission of a GP report, and 2) bullying in the workplace from the line manager, Richard Hopkins. She concluded his grievance was unfounded but she too suggested mediation:

"1. On review the notes from the formal interview and discussing this with Charles Elliot - I can confirm that the doctor's report - which is the key document relating to proving your instances of flare up of fibromyalgia was not submitted until the formal meeting... However when you gave this to Charles the disciplinary was dismissed. So as this was key evidence and not handed over prior to your meeting, I think that the full process was followed and I feel there is no claim for a grievance to be raised on this.

2. In relation to your second point and again to make it very clear- Richard Hopkins is not your line manager- your line manager is Ralph Mattravers. So whilst you say you are feeling bullied by Richard, actually you should have limited interface with Richard as Ralph would be your day to day contact.... To raise a claim of bullying there is a formal procedure to follow. Notwithstanding that the points you that you come out with in relation to bullying from Richard maybe just fall into some of the categories on the Dignity at Work policy although they are a little vague, I feel that they are more related to a breakdown in the relationship between you and the Senior Managers within the organise station...

As a result of the above I feel it is a shame that the disciplinary was posed and then a subsequent grievance has followed, for what appears to be a breakdown in communication."

5.36 After the claimant presented his ET1 claim form on 26 November 2020, there was another vacancy advertised for a caged van driver i.e. litter picker to be based at Taunton Deane. The claimant did not apply for this vacancy.

6. The parties' submissions

6.1 The respondent challenged the claimant's credibility: he had not established that he raised the caged van/litter picking role but was blocked by Mr Hopkins on numerous occasions; his first grievance and his witness statement made no reference to sarcastic comments about holidays or the van; he made up being limited to 1000 words when faced with awkward questioning. Why was the claim not brought earlier within the time limits? His account that he did not discuss bringing a claim with his trade union representative despite knowing he could do so and using the phrase disability discrimination in his first grievance did not stand scrutiny; his evidence lacked credibility.

6.2 The EAT authority of Newcastle City Council v Spires showed that the Tribunal was confined to the issues set before it: should the claimant have been given a litter picking role having regard to him saying he did that role during the Covid lockdown. The matter of chemical cleaners and any delay storing them in the toilets and whether it was necessary for the van to be changed were not in issue and did not help the Tribunal. The respondent had made adjustments: providing chemicals so there was less scrubbing and physical work. Archibald v

Fife Council established that there is no duty to create a role for a person who is disabled; the overarching purpose is to enable a person to remain in work with the employer. Ultimately his section 21 claim could not succeed because he claimant has continued to do the role and there was no further substantial disadvantage after adjustments were made.

6.3 During lockdown, Mr Hopkins' work was a hybrid role between cleaning and litter picking not the ordinary duties of a caged van/litter picker. In the exceptional period when the toilets were closed, he did weekly shifts at the hostel along with Jamie Campbell and on other days some bin emptying with two days did fly-tipping. This was not the full role considered in March 2019 (121) which the claimant was not suitable for because of his difficulty with manual handling. Occupational health advice in March 2020 was that he would be fit to carry on his normal duties. If he was blocked in being considered for the caged van driver/litter picker in March 2019, time ran from then; the claim was plainly out of time and it was not just and equitable to extend.

6.4 As to harassment, the claimant lacked credibility about sarcastic comments. The error in his claim form as to the date of the first disciplinary proceedings (April not December 2019) was never corrected; this claim was out of time. It is not harassment to invite an employee to a sickness review meeting to discuss absence just because those absences may be as a result of disability. The 2020 allegation that the claimant was manipulating his absence obviously needed to be investigated, as the claimant himself accepted in the investigatory interview with Mr Hopkins (164). This matter turned upon whether the claimant's version that his absence was genuine was believed and ultimately was a matter for Mr Elliott who only accepted it when he had the medical evidence. Leaving letters for the claimant in the locked service room was certainly not harassment.

6.5 In submissions for the claimant, it was submitted that he relied upon his evidence that he did not understand timeframes or what matters could be brought forward to the Tribunal. He contended inadequate adjustments were made such as the fluids still being carried in the vehicles; even three years later the adjustment of putting them into storage rooms had not been implemented. The claimant did not expressly ask for a change of van; the point he was making was that fumes were coming through into the cab and endangering his health. The full information about the first disciplinary proceedings was withheld from him, obviously to put him at a disadvantage; the outcome was a Stage 1 warning, which was upheld. At the first disciplinary hearing he lacked representation because the letter was delivered on a Friday for a Tuesday hearing but his trade union representative only worked Wednesday to Friday. He had been too scared to challenge the 6-month written warning and was too scared to apply for the caged van driver/litter picker job in case he lost his TUPE protected status. However, during the Covid lockdown when the public toilets were closed, the claimant felt he was fulfilling the role of a caged van driver/litter picker on the days he was not at the homeless hostel and he even did fly-tip cleaning on one occasion during this period; therefore, he could have fulfilled the role.

6.6 It was never recognised by the respondent or Mr Hopkins that the claimant was disabled until the preliminary hearing. Mr Hopkins had never accepted that the claimant was truly disabled and did not accept the Occupational Health advice and his TUPE protection. The claimant explained the absence of detail about sarcastic comments as being that he did not fully understand the process,

even when putting forward his grievance in writing and orally in the grievance meeting.

7. The Law

7.1 By section 4 of the Equality Act 2010, protected characteristics include disability.

7.2 By section 6:

- (1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- (2) A reference to a disabled person is a reference to a person who has a disability...

7.3 Section 20 provides a duty to make adjustments, as follows:

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A...
- (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...

and Section 21 deals with failures to comply with that duty:

- (1) A failure to comply with the first...requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

7.4 Protection against harassment related to protected characteristics including disability is set out at Section 26, as follows:

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B...
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

7.5 The statutory time limits in respect of claims to the Employment Tribunal are at sections 123 and 140B:

- (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable...
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 140B provides for extension of time limits to facilitate Early Conciliation before institution of proceedings.

7.6 On burden of proof, Section 139 provides:

- (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...

7.7 In particular in respect of the section 21 claim, I applied the principles of the long-established House of Lords authority in Archibald v Fife Council [2004] ICR 954. In essence, there is positive duty upon the employer to make reasonable adjustments (which may amount to positive discrimination in favour of the disabled employee) where the provision, criterion or practice i.e. the employer's requirements or arrangements put the disabled employee at a substantial disadvantage in comparison with non-disabled people. The duty to make reasonable adjustments could include transferring a disabled employee from a post which he cannot carry out any longer, perhaps even though that employee is not the best candidate for that job. It is for the Tribunal to determine what amount to reasonable adjustments where the duty applies, in all the circumstances. I followed the guidance of the Employment Appeal Tribunal in Newcastle City Council v. Spires UKEAT/0334/10 to the effect that I should only determine the claims identified in the proceedings (i.e. those in Judge Roper's list of issues). Finally, had regard to the guidance in the EHRC Code of Practice on Employment (2011) in considering reasonable adjustments: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of the employer's financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.

8. Conclusions

8.1 Reasonable Adjustments claim

By soon after March 2019, it was apparent to the claimant that Mr Hopkins had decided in the light of Occupational Health advice that a transfer from the toilet cleaner position with adjustments to the caged van driver/litter picker role was not appropriate. I infer that Mr Hopkins told him so, after the claimant had seen that OH advice. Applying section 123(4), that was when the act was committed by the respondent and from when the limitation period runs. That was when Mr Hopkins made his decision and the fact that the claimant remained as a toilet cleaner is the consequence of the act rather than a continuing act in itself. Accordingly, the reasonable adjustments claim is out of time and, in terms of proceedings commenced in November 2020, very well out of time. Since the decision was not challenged by the claimant (and not even raised in the claimant's first grievance later in January 2020), he has not satisfied me that it is just and equitable to extend time to consider it.

8.2 However, and in the alternative, I would have determined that there was no failure to make reasonable adjustments on the part of the respondent in connection with any change of role. My consideration, whilst limited by Spirex to the matters in issue, enables me to determine what would have been reasonable adjustments which may be wider than simply the claimant's suggestion. Clearly, the respondent did require the claim to continue in his original role as toilet cleaner and the initial Occupational Health assessment showed that his physical limitations resulting from his fibromyalgia did put him at a substantial disadvantage in comparison with non-disabled colleagues in that role. I conclude that the respondent here made reasonable adjustments for him in the role of toilet cleaner from March 2019 onwards, albeit there may have been delays in the specific arrangements for storage of chemicals at the public toilet sites, in the form of replacing manual scrubbing by the use of cleaning chemicals or fluids and provision of cobweb and deck/scrubbing brushes to ease the manual effort needed. Moreover, I conclude that a change to the role of caged van driver/litter picker would not have been a reasonable adjustment at that time, particularly in the view of the OH advice from Dr Pamela Collins. There is simply no evidence before me to suggest that any other role might have been made available as a reasonable adjustment.

8.3 Harassment claims

Turning to the harassment claims, there is no detail as to dates in the claimant's allegation that Mr Hopkins said sarcastically: "Did you enjoy your holidays?" after his fibromyalgia flare-up sickness absences. I was not satisfied on the balance of probabilities that such comments were made. In any event, any adverse comments in these terms or to the same effect by Mr Hopkins would have been very early in the history of events about which I have heard at this hearing. Following the claimant's initial grievance, Mr Hopkins adopted a very wary approach to contact with and actions towards the claimant. Accordingly, I find this allegation is out of time but again consider it not just and equitable to extend time to deal with it and once again note that it did not appear expressly in the written grievance of January 2020 or oral amplification at the grievance hearing. For

clarity, if in time, I would have not found unlawful harassment in respect of issue 3.3.1 and 3.3.5-3.3.8, since I did not find the conduct alleged took place.

8.4 Regarding the similar allegation of: "Are you enjoying your new van?", I completely accept Mr Hopkins' explanation that he may well have enquired of the claimant whether the change of van in October 2019 was satisfactory; in turn, this probably prompted his diary entry on 23 October 2019 that the claimant was happy with the change of van. Such a query from a senior manager, next above the claimant's line supervisor, would be entirely natural in the circumstances. It transpired that the claimant was not fully happy with the changed van, even when the subsequent removal of the grille sides made access to the back of the open van more straightforward. The respondent thereafter in October 2020 changed the claimant's van back by him swapping once again with Mr Mattravers. In all the circumstances, I again conclude that any such comment was out of time having been made in or about October 2019 and that it would not be just and equitable to extend time. In any event, I do not find on the balance of probabilities that any such sarcastic comment or comments were made, still less with the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

8.5 Leaving letters for the claimant in toilets. Whilst the letters were sent addressed to the claimant these were left in a private locked service area at the toilets. There appears to be some confusion over the expression "hand delivered" which in my view does not ordinarily mean delivered into the hand of the claimant but is making a contrast in delivery method with postal or email delivery. Viewed objectively as well as subjectively, there can be no sensible objection to this method of delivery when the manager Mr Hopkins was not the immediate manager or supervisor and was not in daily contact with the claimant and it does not amount to unlawful harassment. In any event, the first example, wrongly identified as December 2019 but really in April 2019, is out of time and it is not just and equitable to extend time to deal with it.

8.6 Finally, the requirement to undergo disciplinary procedures should first have referred to April 2019 not December 2019 and is very considerably out of time but the claimant has not established that it is just and equitable to extend time. This matter was expressly relied upon in the claimant's grievance which referred to his fibromyalgia as a recognised disability; he had known the outcome ever since early April 2019 and there was nothing preventing him presenting this claim many months earlier.

8.7 As to the allegations of harassment in September 2020 relating to the disciplinary proceedings then, I find that the claimant presented these in time within the primary limitation period. I again conclude that the method of delivering the letter to him - leaving the letter for the claimant in the locked service room at the public toilets he had the responsibility of cleaning - did not amount to unlawful harassment related to his disability. Moreover, I find that there was an ample basis for Mr Hopkins investigating and then putting the matter through following his investigation to a disciplinary hearing which he was never going to chair, notwithstanding the full medical evidence produced later at the disciplinary hearing which Mr Elliott took into account in determining that there was no case for the claimant to answer. Since the claimant accepted throughout that there appeared to be a pattern of his sickness absences matching Mr Campbell's leave, the only action that could really amount to harassment is that Mr Hopkins

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did not decide for himself that the investigation should not proceed to a disciplinary hearing because of the claimant's history of sickness absence related to his fibromyalgia. I do not conclude that this was unlawful harassment by Mr Hopkins within section 26(1) having regard to subsection (4) in the context of Mr Campbell's serious allegation that the claimant had declared to him that he would go sick to avoid lone working. Whilst the medical evidence produced at the hearing before him ultimately swayed Mr Elliott to decide as he did, I do not find that this makes Mr Hopkins' earlier choice to proceed with the matter (made with HR advice) to a hearing thereby wrong or an act of unlawful harassment. Accordingly, the claims of harassment based upon the September 2020 disciplinary proceedings are dismissed.

Employment Judge Parkin

Date: 7 April 2022

Reasons sent to parties: 26 April 2022

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