EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113754/2021

Held in Glasgow on 26 to 28 April 2022
Deliberations 29 April 2022 and 11 May 2022

Employment Judge D Hoey
Members V Alexander and E Farrell

Mr S Johnstone	**Claimant** **Represented by:** **Mr Johnstone - Father**
Royal Mail Group Limited	**Respondent** **Represented by:** **Ms Maher - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The unanimous judgment of the Tribunal is that the respondent failed to comply with the duty to make reasonable adjustments in respect of the failure to provide the claimant with a disabled car parking space in the staff car park from 4 October 2021 (in breach of sections 20 and 21 of the Equality Act 2010).

2. The remaining claims are dismissed, such claims being ill founded.

3. The Tribunal awards the following by way of compensation:

    a. A sum of £3,000 in respect of injury to feelings less 10% in respect of the unreasonable failure to comply with the ACAS Code (£300). The compensation awarded to the claimant to be paid by the respondent is therefore £2,700 (**TWO THOUSAND SEVEN HUNDRED POUNDS;** and

b. Interest is also awarded to the claimant in the sum of £145.32. (**ONE HUNDRED AND FORTY FIVE POUNDS AND THIRTY TWO PENCE**).

REASONS

1. By ET1 accepted on 17 December 2021 the claimant claimed that he had been subject to a number of discriminatory acts related to his disability. The respondent disputed the claims.

2. The hearing was conducted in person with the claimant's father and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly.

3. The Tribunal discussed with the parties how a Tribunal hears evidence and the rules as to hearing of evidence. The claimant's father understood the position and was able to lead the evidence required and challenged the respondent's witnesses appropriately.

Case management

4. The parties had worked together to focus the issues in dispute and had provided a statement of agreed facts and a list of issues. Both documents were refined as the case progressed.

5. A timetable for the hearing of evidence had been agreed and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. Each witness had provided a written witness statement with the evidence being appropriately challenged.

Issues to be determined

6. The issues to be determined were discussed during the hearing and a list of issues was provided and has been updated following the hearing. As the respondent concedes that the claimant was a disabled person at all material times, disability status was not an issue.

Direct discrimination because of disability – section 13 Equality Act 2010

a. Did the respondent subject the claimant to the following treatment: On 1 October 2021, Mr Lawless stating to the claimant that he would speak to his line manager about excluding him from Team Meetings 'in case you say something inappropriate because of your Asperger's'.

b. If so, was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than they treated, or would have treated others (''comparators'') in not materially different circumstances? The claimant relies upon a hypothetical comparator.

c. If so, was this because the claimant is a disabled person?

Discrimination arising from disability — section 15 Equality Act 2010

a. Was the claimant treated unfavourably by the respondent failing to provide the claimant with a quiet space to study?

b. If so, was this due to something arising in consequence his disability, namely the claimant's inability to concentrate on the apprenticeship study material and/or take the time the claimant needed to properly understand what the apprenticeship assignments were asking?

c. If so, was the treatment a proportionate means of achieving a legitimate aim, namely that the respondent had to ensure that there was sufficient and adequate accommodation for all employees to carry out their work in the delivery office and had to work within the confines of the space that was available?

Reasonable adjustments – sections 20 and 21 Equality Act 2010

a. The provision, criteria or practice ''PCP'' relied on by the claimant is:

    i. Interviewing disabled job candidates in the same way as non-disabled job candidates.

    ii. Expecting disabled members of staff to perform the same task in the same time as non-disabled members of staff.

iii. Allowing non-disabled staff members to park in the staff disabled bays.

b. Did the respondent have such a PCP(s)?

c. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

i. He then required to take the unadjusted interview and was subjected to unnecessary stress, anxiety, impact and overwhelm as a result.

ii. He then required to perform the task in the same time causing stress, anxiety, impact and overwhelm and a sense of failure as a result.

iii. He then required to use the customer disabled bays and was subjected to risks to his health and safety and verbal abuse by staff for doing so.

d. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

e. If so, would the steps identified by the claimant, namely:

i. Modifying the pace, structure and manner of the interview to enable the disabled candidate to perform on equal terms as a non-disabled candidate; and/or

ii. Allowing longer time to process the task and formulate a response before undertaking the task; and/or

iii. Ensuring that the claimant was able to park in one of the staff disabled parking bays;

f. have alleviated the identified disadvantage?

g. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so?

Harassment — section 26 Equality Act 2010

a. Did the respondent engage in the following conduct:

i. On 9 and 14 October 2021, the respondent's staff (a lorry driver from Glasgow and a Customer Service Point Representative from Kilmarnock respectively) verbally abusing the claimant for parking in the customer disabled parking bay;

ii. In the period from 30 September to 20 October 2021, the respondent's staff (4 or 5 different people on 4 or 5 different occasions) verbally abusing the claimant for not wearing a facemask, despite the fact he was exempt from doing so; and

iii. In the period from 30 September to 20 October 2021, Mr Lawless criticising the claimant on a daily basis for not performing fast enough.

b. If so, was it unwanted conduct?

c. If so, was it related to disability?

d. If so, did the conduct have the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

e. Has the respondent demonstrated that it took all reasonable steps to prevent any harassment?

Case management

7. The parties had agreed productions running to 465 pages with additional documents being inserted in the course of the hearing.

8. The Tribunal heard from the claimant, Mr Watret (who was Mail Processing Unit Manager at the time), Mr Docherty (Line Manager) and Mr Lawless (Workplace Coach).

Facts

9. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The chronology which the parties produced, which was finalised after the hearing has assisted the Tribunal in making relevant findings.

Background

10. The respondent is responsible (amongst other things) for the delivery of letters throughout the country**.**

11. The claimant is a disabled person for the purposes of the Equality Act 2010 and was so at all material times for the purposes of this claim. His disabilities comprised Asperger's syndrome, dyslexia, visual stress, PTSD, depression and anxiety.

12. The claimant entered into an apprenticeship agreement. The document was stated to be subject to the Secretary of State's apprenticeship sector for the sector in which the respondent operated (Transport and Logistics) and would be Express Delivery Operative Level 2. The role was Postal Apprentice and was a full time role. The claimant would be required to carry out such duties as required of him and would have regular meetings with his mentor to review his progress and discuss any problems. He was to learn on the job which would be supplemented by online learning and assignments.

Policy documents

13. There were a number of policy documents relevant to this claim, about which the claimant was aware. One such policy was the grievance procedure whereby any issues an employee had could be raised firstly informally and then via the formal procedure. The employee would have the right of appeal against the outcome if dissatisfied.

14. The respondent also had a Code of Business Standards which set out the standards expected of all staff. There was also a Bullying and Harassment Procedures Agreement in place together with Guides.

People

15. Mr Watret was Mail Processing Unit Manager at the Kilmarnock delivery office. He was responsible for running the mail operation for 6 postcodes, distributing mail to a further 5 delivery offices and processing mechanised mail for 10 delivery offices. He managed 144 post people and 6 managers.

16. The next level of management down was Line Manager. Mr Docherty was one of the 4 line managers employed at Kilmarnock. He was responsible for managing around 50 post people. There were a number of other teams managed by their own line manager. The intention was that the claimant would work in Mr Docherty's team.

17. The respondent also engaged Workplace Coaches who assist new starts and train staff in tasks. Mr Lawless was a workplace coach. He reported to Mr Docherty.

Training

18. Regular briefings take place with staff on different topics. Workplace learning sessions took place once a week for 30 minutes. At least twice a year the respondent required all staff to undergo training sessions on equality/bullying and harassment in the workplace and on acceptable behaviours. The specifics of the training given to staff was not provided to the Tribunal.

Apprenticeship

19. The respondent had wished to engage new talent and having paid the apprenticeship levy wished to engage with the apprenticeship process. It was agreed that the Kilmarnock Delivery Office would engage one apprentice.

20. Mr Watret received training from the Apprentice Project Team and underwent between 4 and 6 hours training which included the apprenticeship programme and how the training would look. Mr Lawless also spent between 1 and 2 hours with Mr Lawless, a workplace coach (who was previously a post man and who undertook delivery and training duties). Mr Lawless had been with the respondent for over 20 years and had been a manager for 10 years.

21. The training to be provided to apprentices was similar to the training given to non-apprentice postal worker new starts with the training taking place over a lengthier period of time. There was also set times for learning. The project team had given Mr Watret the proposed 10 day induction plan and had encouraged the plan to be followed to ensure apprentice learning needs were met. Mr Watret stuck a copy of the plan on his wall and crossed out the days as they passed. He did not follow the plan religiously and instead aimed to cover each of the tasks set out during the claimant's engagement.

Interview

22. The claimant was invited to interview that took place on 28 July 2021. No specific adjustments had been communicated to the respondent by the claimant prior to the interview and the interview proceeded on the basis as had been advised to the claimant. The claimant had advised the respondent that he was disabled on his CV (which was not produced to the Tribunal).

23. The claimant performed well at the interview. The claimant had told the respondent he had recently returned from the armed forces and his uncle was a postie and he had always been interested in the role. He was looking forward to structure and getting back to work. The claimant was able to answer the questions put to him well and he impressed the interviewer. The claimant scored 32 out of 40 and the interviewer's summary was: "the

claimant's answers were considered and methodical and provided good feedback to the scenarios presented. I expect he will be an asset to the business".

24. The claimant did not raise any concerns about how the interview was conducted during or after the interview with the respondent.

Occupational Health referral

25. On 27 August 2021 following the claimant's disclosure that he was disabled, the respondent sought an occupational health report. That report was received by the respondent on 9 September 2021. The occupational health physician advised the respondent that the claimant was fit for the role of postal apprentice subject to the following adjustments: "Extra time is needed with written and reading tasks, tinted glasses need to be used for work for screens and paper work; needs access to mobile telephone to be able to deal with information (for example to make up a list so he can remember things and telephone his father or fiancée if needing help due to feeling overwhelmed about anything); at times needs to double check with a manager about instructions which he has been given by that manager; at times might need to take 5 minutes (time out) to process what is going on if he starts to feel slightly overwhelmed by anything; any imminent changes at work need to be communicated to him with as much notice as possible and finally if he is needing to do some type of work for example he would need a quiet space if possible to be able to do that work". No follow on action was required.

26. This report was seen and understood by Mr Watret. He did not provide the report to those employees who would be working with the claimant or training him but he advised them that the claimant was covered by the Equality Act 2010 and would require to be given extra time to complete tasks and that as much notice as possible should be given of any changes to planned tasks.

27. Mr Docherty has worked for the respondent for over 20 years and started off as a postman for 10 years. He has been a line manager for over 5 years and manages around 50 post people. Mr Watret had advised Mr Docherty around September 2021 that the claimant would be joining as an apprentice in Mr

Docherty's section. Mr Docherty was told that the claimant required a number of adjustments due to Asperger's. Mr Docherty's normal approach is to ensure a plan is created that suits each individual new start. He seeks to tailor training and experience to each individual and their specific needs. He understood the claimant would require more time to get up to speed and was prepared to make that accommodation for the claimant. The claimant was to work with Mr Lawless given he had prior knowledge and experience of Asperger's.

28. Mr Watret discussed the claimant's training plan with Mr Docherty a few days before he was due to commence work. It was agreed that the claimant would be sent on duty with Mr Lawless, a workplace coach who had been trained to support new starts. Mr Watret would take the lead with regard to the apprenticeship programme with the support of his managers.

29. In advance of the claimant starting work Mr Docherty (who was Mr Lawless's line manager) had advised Mr Lawless that he would be the claimant's workplace coach. Mr Lawless had experience of Asperger's having managed an employee with Asperger's and having a child who was in the process of being diagnosed with Asperger's. Prior to the claimant commencing employment, Mr Watret had explained to Mr Lawless that the claimant had Asperger's and the claimant needed matters to be explained thoroughly to him. Mr Watret gave Mr Lawless a copy of the 10 day induction plan and the workplace coaches learning handbook (which runs to some 40 pages).

Claimant commences employment

30. The claimant's first day of employment was an online induction day. He first attended his place of work at Kilmarnock on 1 October 2021.

31. The claimant had been issued with a 10 day induction plan during his induction process. That set out tasks that the claimant would be expected to do during each of the days such that upon conclusion of the 10 day process the claimant would have covered the tasks needed to progress.

Day 1 – Friday 1 October 2021

32. The claimant was a blue badge holder and required to park in a dedicated space. Having structure is important for the claimant. The staff car park was full with non blue badge holders parking in the disabled bays in the staff car park. The claimant saw Mr Watret as he drove around the car park and Mr Watret was advised that the claimant needed a disabled bay (and had a blue badge). Mr Watret told the claimant to park in one of the 2 customer disabled spaces and attend the office. There was a culture within the respondent's Kilmarnock office that non-blue badge holders would park in the 4 staff disabled bays.

33. Following that encounter Mr Watret passed a message to his line managers to ensure staff were told not to park in the staff disabled bays (unless they had a blue badge). Mr Watret knew that parking in the customer disabled bay presented more challenges than parking in the staff disabled bay, given the hazards that arose on the walk to the staff entrance.

34. When the claimant met with Mr Watret on his arrival the claimant and Mr Watret discussed the claimant's adjustments. The claimant explained he had a 10 day induction plan which Mr Watret acknowledged and explained that the specifics would be covered but not necessarily in the order set out.

35. Mr Watret explained that the claimant would be given extra time to do his reading and writing tasks, that he could carry his mobile phone with him and that he would be provided with a lap top and could use various quiet spaces as needed. He was told that he would be given as much advance notice as to how his days would look. He was advised that the best way to learn about the operation was to "live it" as in experiencing it from the delivery office floor to the customer's letter box.

36. The claimant was introduced to other staff, including the workplace coach Mr Lawless. The claimant was shadowing Mr Lawless who would show him how to carry out the duties both inside the office and upon delivery. Mr Lawless explained to the claimant that he would ensure the claimant covered the items within the induction plan, albeit they may not be done in the same order as

set out in the plan. The content would be the same, just done on different days. At the time the claimant joined, there was an office wide revision in place which had taken up management time.

37. Mr Lawless liked working with the claimant and felt able to discuss matters openly. They had worked for hours together and talked to get to know each other. The claimant was open about his disability and Asperger's syndrome and their experiences of living with it (and Mr Lawless's experience of living with a very close family member going through diagnosis). During the discussion Mr Lawless told the claimant about a previous experience he had when he worked in England and his colleague (whom he supervised) who had Asperger's had made very inappropriate comments during a team meeting. He said he had recollected that changes were put in place following that issue, following a disciplinary hearing. One outcome had been that the individual was not to attend such meetings, and instead one to one briefings with the manager were to take place. During the informal discussion Mr Lawless advised the claimant that he would speak with his manager to check if there were any protocols or procedures which should be followed. He was advising the claimant that when he worked in England he had been told that his colleague with Asperger's was to be given one to one meetings to ensure the briefings were understood (and not taken out of context) rather than attend the briefings and he wanted to check the position in Scotland, as he had not worked with a colleague with Asperger's in Scotland before. The discussion continued and the claimant shadowed Mr Lawless delivering mail. The discussion was not personal to the claimant nor directed at him and the claimant was not told he would be "excluded from meetings in case he said something inappropriate because of his Asperger's" and the claimant was not excluded from any meetings.

38. The conversation between Mr Lawless and the claimant was friendly in nature and open. At no point did the claimant suggest the comments or discussion was inappropriate or of concern to him. The discussion was friendly in nature and supportive.

39. Mr Lawless spoke to Mr Watret. Mr Watret did not have any concerns about the claimant's ability to contribute and get value from team meetings and had no concerns about the claimant or his ability in that regard.

40. At the end of the day Mr Watret caught up with the claimant to see how he had got on and the claimant had said he had really enjoyed it.

41. During the discussion between the claimant and Mr Lawless the claimant had presented as happy and very enthusiastic. Mr Lawless gave the claimant his mobile phone number and told the claimant that he could contact him whenever he needed assistance. The claimant did not raise any concerns.

42. Mr Docherty made a point each day of catching up with the claimant on at least 2 occasions per day to check how he was getting on when he was in the office. Mr Docherty told the claimant that he should advise Mr Lawless about any gaps in his learning which could then be bridged. Mr Docherty was on leave from 2 October 2021 and returned on 13 October 2021.

Day 2 - Saturday 2 October 2021

43. On day 2 the claimant arrived again to find that the disabled spaces in the respondent's staff car park were again being used by vehicles that did not have a blue badge. It was the practice of the respondent to allow non blue badge holders of staff to use the disabled spaces in the staff car park. The claimant again parked in the customer disabled space. The claimant told Mr Lawless on 2 October that a postman had asked why he had parked in the customer disabled bay. Mr Lawless understood that this had been a normal interaction with the person checking why the claimant had parked there, rather than the discussion being heated or inappropriate. Mr Lawless advised the claimant that he should explain he had a blue badge and that would be the end of the discussion. The claimant did not suggest to Mr Lawless that he had been abused or harassed. The claimant was frustrated at having been challenged. Mr Lawless did not raise the matter with his line manager as he believed his responsibility was to train the claimant to be a postman.

44. The claimant was advised that he would be working again with Mr Lawless. The claimant explained that he had assignments to do with regard to his apprenticeship and Mr Lawless said he would speak with Mr Watret to ensure he was given time to do them. The claimant again worked with Mr Lawless and went on mail delivery. The claimant was given some mail to deliver.

45. The claimant had a good working relationship with Mr Lawless and Mr Lawless gave the claimant his personal mobile number. A WhatsApp exchange took place late afternoon (following the end of the shift) with Mr Lawless asking how the claimant's legs were. The claimant thanked Mr Lawless for the support over the last 2 days and said "it's actually been enjoyable" and thanked him again.

46. Mr Lawless said that he noticed the claimant was suffering by the end of the day but that he should not worry as he had done well and they would get through the training. He wished him a good weekend which the claimant reciprocated.

47. The claimant was concerned that he had not managed to complete his assignments and asked for his father's help to write an email to Mr Watret to raise his concerns. At 9.25pm the claimant sent an email to Mr Watret with the heading "Questions about Induction and Apprenticeship". He said that he had spotted that he was supposed to have done some learning activities over the last few days as pat of the specific daily requirements of the induction plan. The plan included daily tasks. He said he was supposed to have uploaded completed activities on specific dates and as he had been shadowing Mr Lawless, he was worried about falling behind with the apprenticeship learning. He asked if Mr Watret could help. At 7.22pm the next day (Sunday 3 October) Mr Watret replied saying that this was not a problem and he was well ahead of where he needed to be since day 4 was about outdoor learning which had been completed when out on delivery during the first few days. Mr Watret undertook to facilitate the claimant's indoor learning. For Mr Watret the claimant's email showed an eagerness to learn and not fall behind which Mr Watret saw as a positive sign.

48. The claimant replied saying “that’s fantastic”. He set out the tasks to be done and asked for access to a computer to allow him to complete the tasks. Mr Watret believed that the claimant was content with how things were.

Day 3 - Sunday 3 October 2021

49. As the majority of staff were not working, the claimant was able to secure a disabled space in the staff car park. This meant that the claimant was able to access the staff entrance easier. When he had to park in the customer disabled bays he had to walk a few more yards and walk through the yard and around the activity that took place in the yard, including storage trolleys and lorries. The walk from the customer disabled space to the staff entrance was substantially more risky than the walk from the staff disabled bay to the staff entrance and the claimant was subject to challenge from other staff when parking in the customer disabled bays, two facts known by the respondent..

50. The claimant worked on the frame and agreed to work overtime to assist the respondent. During 3 October 2021 Mr Lawless took the claimant to the Workplace Coach area to show him how to do the scanning and to show him the quiet area for him to do his learning. Mr Watret was keen to ensure the claimant was given as much experience as possible during his initial period.

Day 4 - Monday 4 October 2021

51. The claimant again was unable to find a disabled parking bay in the staff area and required to park in the customer disabled bay. He felt very self conscious and believed he was standing out.

52. Mr Watret had given the claimant a number of options as to locations for him to complete his indoor learning. Mr Watret wanted to give the claimant flexibility and choice as to the location which gave the claimant variety given the workplace was busy and potentially noisy with people working at different times. The claimant was given options of the workplace coaches’ corner (which could have other staff present), the worktime listening and learning room, the benefits office (which was very quiet but had no window) and the manager’s office. Mr Watret advised the claimant that if he wished a quiet

space (where no one was present) the claimant could ask him and Mr Watret would ensure the office was vacated for him when he wished. Although the claimant did not ask to work in the office, the claimant embraced the flexibility offered to him and worked in different locations to complete his indoor learning during his time with the respondent. Mr Watret was happy to vacate his office and give the claimant a quiet space if he needed it and the claimant was given that opportunity. At no stage during his time with the respondent did the claimant raise any concerns about the lack of a quiet space.

53. Mr Watret advised the claimant that he would spent the first hour to hour and a half by completing his learning and then the remainder with Mr Lawless on delivery. The claimant found the day overwhelming and exhausting.

54. In order to give the claimant as much notice as possible and with a view to allowing the claimant to secure as many additional skills in advance as possible (and avoid further delays once he became fully qualified) Mt Watret had arranged for the claimant to be spending a day on driver training on 6 October 2021. By email at 7.23pm Mr Watret told the claimant (to his personal email address which the claimant communicated from) that there was good news as driving training had been arranged for the Wednesday. A negative lateral flow test required to be carried out before the session which would be sorted out on the Wednesday morning. The claimant replied the next morning saying that was good news.

55. Mr Watret had also arranged for the claimant to spend time with a different workplace coach who was an expert in the customer service point. Mr Lawless spoke to the claimant at the end of the day to ensure he knew what he was doing to ensure he was given advance notice.

Day 5 - Tuesday 5 October 2021

56. This was the claimant's day off.

Day 6 - Wednesday 6 October 2021

57. The claimant attended the office and again was unable to find an available disabled bay in the staff car park and he raised the issue again that he

required a disabled space in the staff car park. He was told by a manager that the matter would be brought up. Mr Watret caught up with the claimant prior to him commencing his driving and again spoke with him at the end of the day.

58. The claimant passed the driver training, scoring 60 out of 80 points.

Day 7 - Thursday 7 October 2021

59. The claimant was again unable to park in any disabled staff space and had to park in the customer disabled bay.

60. The claimant followed the apprenticeship plan and was outdoors working with Mr Lawless who was showing the claimant how best to deliver mail. Mr Watret caught up with the claimant at the start and at the end of the day.

61. Mr Lawless's approach had been on average to deliver to 3 homes per minute, where feasible. Mr Lawless was concerned that the claimant was not holding his mail properly and that the way he did so slowed him down. Because of the way the claimant was holding the bundle of mail he had to stop every 4 or 5 steps. That slowed him down considerably. On one occasion because of the way he held the mail, the elastic band snapped and the mail fell to the ground. The claimant was able to do the tasks but was not holding the mail in the best way to allow him to carry out the task quicker.

62. Mr Lawless supported the claimant and explained how he carried out the role and showed the claimant what to do and explained how to do it. Mr Lawless was supportive in his approach to the claimant but he was concerned that the claimant continued not to hold the mail in the most effective way such that his ability to deliver would be impaired. He explained the position to the claimant on 6 or 7 occasions. Mr Lawless explained to the claimant that he required to alter the way he held the mail to ensure he was not slowed down. Mr Lawless supported the claimant and encouraged him in a constructive way. Mr Lawless was not unfairly critical of the claimant.

63. Mr Lawless reminded the claimant of the best way to hold the mail and that "there was a knack to it" which would make it easier. Mr Lawless was trying to ensure no bad habits developed.

64. The claimant was told by Mr Watret at the end of the day that he would be attending the Glasgow Mail centre the following day as part of his induction as this was the earliest a visit could be accommodated by the Centre.

Day 8 - Friday 8 October 2021

65. Mr Watret had secured a visit for the claimant to the Glasgow Mail Centre which the claimant welcomed. Mr Watret spoke with the claimant during the day to let him know that by the end of the following week his 10 day induction would be complete and he could be going out on duty himself. This was Mr Watret's last working day before going on a week's leave and he wanted to ensure the claimant understood what the plan was.

66. In the course of 8 October 2021 the claimant had posted an entry on the internal social media site of the respondent that he was "following [his] apprenticeship schedule and visiting Glasgow mail centre, learning the proses – feeling excited".

67. Mr Watret was on annual leave week commencing 11 October and was not checking work emails as he was out the country (which coincided with some of Mr Docherty's leave).

Day 9 - Saturday 9 October 2021

68. Upon arrival the claimant found no staff disabled bays free. When he parked in the customer disabled bay another postal worker asked the claimant why he was parking there. The claimant explained it was due to the absence of spaces in the staff parking bay. The claimant felt he had been singled out given he had raised this on day 1. He was not verbally abused but had been asked why he was parking there (which upset the claimant). He worked with Mr Lawless during the day.

Day 10 - Sunday 10 October 202

69. This was the claimant's day off

Day 11 - Monday 11 October 2021

70. The claimant was ill due to flu like symptoms and ordered a PCT test. Mr Lawless had contacted the claimant by text to check he was OK.

Day 12 - Tuesday 12 October 2021

71. The claimant carried out the PCR test and sent it away. He had received positive feedback on his written work online.

Day 13 - Wednesday 13 October 2021

72. The claimant was not due to work this day and received a negative test result. He was advised to return to work the following morning.

73. The claimant told Mr Lawless that he had been tested negative. Mr Docherty made a point of calling the claimant upon his first day back from leave to see how he was feeling. Mr Docherty agreed with the claimant that he would spend some time in the morning with his indoor learning and then build up from half a route. That discussion took place via WhatsApp after 7pm.

74. Mr Docherty asked the claimant what he thought he would be able to do by way of a delivery. Mr Docherty's approach was to tailor learning to each individual, recognising that people learn at different speeds and have different skills. The claimant said that he was unsure what he could do as he had not been out by himself. Mr Docherty agreed with the claimant that he would be given half a round, which would ordinarily take 2 hours 15 minutes, but the claimant would be given 5 hours to complete. The claimant was given more time to complete the duty given his disability and that he was still training. The claimant said he would "give it a shot" and did not express any concerns about the suggestion. He was told to bring back any mail he had been unable to deliver and phone Mr Lawless if he needed any help.

Day 14 - Thursday 14 October 2021

75. The claimant was again unable to find a disabled space in the staff car park and parked in a customer disabled bay. He was asked why he was doing so by a member of the customer service point staff. The claimant explained it was due to the absence of spaces in the staff disabled parking bay. The claimant was not verbally abused but was asked why he was parking there (which upset the claimant and made him feel anxious).

76. The claimant spent the day working with Mr Lawless and was told that he would spend some of the day delivering a half route mail himself. The claimant was positive when asked about this during the day. The claimant found the work challenging given this was an area that was unfamiliar to the claimant. Some of the equipment had failed. Despite Mr Lawless being off shift, he advised the claimant via WhatsApp what to do. The claimant had been told by Mr Lawless that if he ran out of time he should telephone his manager and bring the mail back. The claimant had been given a half round to complete in the time it would ordinarily take for a full round.

77. Upon returning to the office the claimant was asked by a colleague why he was not wearing a face mask. He was exempt from doing so (and had a lanyard indicating this although it is not known whether the colleague saw the lanyard). The claimant felt overwhelmed at being challenged.

Day 15 to day 17 - Friday to Sunday 15 to 17 October 2011

78. The claimant did not attend work on 15 and 16 October and 17 October was his day off. Mr Docherty had made welfare calls to the claimant.

79. The claimant had emailed Mr Watret explaining that he was unable to attend work due to sickness. He believed he had not been supported given the tasks he had been asked to do. He was anxious about the potential for being disciplined for incorrectly carrying out the tasks he had done, when he believed he had not been given sufficient training. He did not feel safe to return to work and believed he was being misused as a sole delivery person and not an apprentice. He said he needed a few days to recover.

Day 18 - Monday 18 October 2021

80. On 18 October 2021 the claimant emailed Mr Watret saying that after having had time off with still not feeling 100% and trying to deal with the impact of what happened on 14 October 2021, he suggested a meeting to discuss matters.

81. Mr Watret had been on leave and upon his return on 18 October 2021 sent the claimant an email agreeing to meet the claimant on 19 October 2021. After reading the emails Mr Watret spoke with Mr Docherty and Mr Lawless to discuss how the claimant had performed during his absence. The claimant had been absent with flu like symptoms on 11 and 12 October and upon returning to work on 14 October Mr Lawless believed the claimant had struggled. The claimant had been given a half route to do. He was given the time it would normally take to do a full round to complete it.

Day 19 - Tuesday 19 October 2021

82. The claimant was again unable to park in the disabled bay within the staff car park as this had been used by non-blue badge holders.

83. The claimant had brought the issue of his being unable to park in a staff disabled bay up with managers during the course of his employment. He was told it would be dealt with, but the position remained the same. He had raised it with his union representative who had advised the claimant make a comment about it in a WhatsApp group which was not attractive to the claimant since that would have made the claimant stand out.

84. The claimant met with Mr Watret on 19 October 2021. The claimant explained that he had a number of concerns about how the apprenticeship had progressed. He was concerned that he had not been given sufficient support and that the adjustments he needed, including the need for clear instructions and time to assimilate changes and the ability to ask questions to check understanding had not been fully implemented. He was concerned that having to park in the customer disabled bay led to him standing out and that had made him anxious and overwhelmed.

85. Mr Watret listened to the points the claimant made. It was a lengthy meeting and Mr Watret explained the expectations of the role and the apprenticeship programme with the intention that the claimant become a part time post person with significant learning time and opportunity given to study for this apprenticeship. The claimant would be responsible for his learning but there would be regular check ins. The claimant was advised that his day to day interaction would be with Mr Docherty, and that Mr Watret would mentor him and support him as needed. Mr Watret had explained to the claimant that the apprenticeship programme was new to the staff in Kilmarnock but that there was support available.

86. With regard to the disabled parking situation, Mr Watret advised the claimant that he would brief staff again to instruct them not to park in the disabled bays unless they had a blue badge. He explained that he would take a firm line with anyone who had not complied.

87. Mr Watret believed that the claimant had found the meeting constructive and the meeting had ended in a positive way. He was keen to work with Mr Docherty and develop the working relationship. Following the meeting the claimant joined his colleagues for a work time learning session and later was allowed to go home to collect his tinted glasses to enable him to complete his computer work.

88. Following the meeting Mr Watret advised Mr Docherty that time should be set aside to ensure the clamant completed his modules and learning. It was agreed that a plan would be set up which would be achievable with a workload that the claimant found comfortable. Mr Docherty met with the claimant and discussed a comfortable workload. The claimant was told to think about things and work out what feels right for him. Mr Docherty advised the claimant that it normally takes 4 to 6 weeks to reach the required standard and that support would be available for the claimant to ensure he could develop at his own pace. The claimant was told a plan would be devised to ensure the claimant was comfortable. The claimant indicated that he was comfortable with the approach.

89. At no time during discussions between the claimant and Mr Docherty did the claimant raise any concerns about feeling harassed or uncomfortable or that he believed he was being discriminated against.

90. The claimant completed the tasks given to him. At the end of the day Mr Watret had a discussion with Mr Docherty to ensure the claimant had tasks for the day ahead.

91. By this stage the claimant had completed all of the tasks on his induction plan except training on a high capacity trolley.

Wednesday - 20 October 2021

92. At 6.21am on 20 October 2021 the claimant sent an email to Mr Watret, copied to Mr Docherty stating that he felt unable to attend work due to feeling overwhelmed, anxious and distressed and he would be in touch with regard to the next steps. At 1241 the claimant sent a further email headed "resignation". The reasons for his resignation were that the claimant felt he had been mistreated and discriminated against because of his disability. He said he had already followed the grievance process by contacting his manager but he believed his managers had ignored his reasonable adjustments. He said he was too unwell to work his notice period. The respondent acknowledged the claimant's email later that day.

Post employment issues

93. The Claimant's employment with the Respondent ended on 30 September 2021.

94. The claimant's net rate of pay was £338.33 with a gross rate of weekly pay of £358.07. He was also entitled to 3% pension contributions. The claimant receives universal credit allowance of £63.73 a week and is in receipt of carer's allowance (whereby his partner cares for him).

95. Following the claimant's resignation, he took no steps to find alternative work. The claimant had low self esteem and ongoing confidence issues which led to low mood. The claimant sees his General Practitioner and is awaiting

formal psychology input. He is of the view that he cannot seek alternative work until he has received psychology input. The claimant did not take any steps to prepare himself for work or equip himself with skills for work.

96. The claimant had applied for the postal apprenticeship role because of the structure the role had provided for him and because he believed the respondent supported persons with disabilities. The claimant did not seek any similar roles.

Observations on the evidence

97. Broadly speaking the Tribunal found that each of the witnesses did their best to recall events and provide credible and reliable evidence. On occasion recollections were found to be incorrect or some errors were made.

98. On occasion the Tribunal found the claimant would accentuate matters that suited his perspective which may have been due to the claimant's firm belief that he had been discriminated against or due to his memory. In some significant respects there was an absence of evidence before the Tribunal. Thus the Tribunal was unable to make findings as to the alleged verbal abuse the claimant asserted he has sustained as a consequence of his not wearing a mask or having parked in the customer bays. The Tribunal considered that the claimant's recollection arose as a result of his having considered matters after the event combined with his fervent belief that his disability was the reason for the treatment. From the evidence, the Tribunal considered the interactions the claimant had to have been normal interactions amongst individuals rather than abuse, which was supported by what was said by the claimant to Mr Lawless at the time. There was a lack of substantive detail as to the interactions, which may have been due to the absence of such detail.

99. The Tribunal was satisfied that Mr Watret followed the script at interview which the claimant was expecting. While the claimant believed Mr Watret had said he was going to abandon the agreed approach and ask his own questions, the notes taken by Mr Watret at the time in the interview document supported his position. The Tribunal considered that the claimant may have believed Mr Watret had said he would not follow the agreed approach and assumed that

had happened but there was no basis for that. The claimant accepted in cross examination that it was a belief he had, but there was no specific evidence upon which to base that belief. While he had noted his belief in his diary of events, the Tribunal preferred the evidence of Mr Watret in this regard together with the contemporaneous notes he took.

100. The claimant also asserted that he had not been supported by Mr Lawless but Mr Lawless had given the claimant his mobile telephone number and told him to contact him whenever he needed support. In WhatsApp messages Mr Lawless and the claimant had exchanged chatty messages and Mr Lawless had been positive about the claimant.

101. The claimant was also of the view that he had been harassed due to his not having a facemask and for parking in the customer disabled bay. The agreed list of issues had outlined that the claimant had allegedly been verbally abused for parking in the customer disabled bays on 9 and 14 October 2021 by a lorry driver from Glasgow and customer service point representative but the Tribunal found a lack of substantive evidence around this issue. The Tribunal was satisfied that the claimant had raised the lack of a disabled space in the staff car park with Mr Watret and that he had told his managers to remind staff not to park in the bays unless permitted to do so but the Tribunal was not satisfied that the claimant had been "verbally abused" for doing do. The Tribunal was satisfied the claimant was unhappy at his parking in the customer disabled bay having been raised and this frustrated him. The Tribunal was also satisfied that the Mr Watret (and other staff) knew that requiring a disabled person to park in a customer disabled bay created more challenges than parking in the staff car park given the placing of equipment and the route that had to be negotiated to locate the staff entrance.

102. The Tribunal was also not satisfied that there was substantive evidence of "4 or 5 different people on 4 or 5 different occasions verbally abusing the claimant for not wearing a facemask" as outlined in the list of issues. The Tribunal was satisfied that the claimant was asked why he was not wearing a facemask which was a discussion that had taken place, as the person in question was concerned that the claimant did not have a facemask. It was

possible that the person had not seen the lanyard the claimant wore and may not have known that the claimant was exempt. The Tribunal was satisfied from the evidence led that the interaction was a normal interaction between 2 people. It was not abusive (albeit the claimant was unhappy at the issue having been raised). Other than a belief on the part of the claimant, there was no other evidential basis for these assertions. The Tribunal was not satisfied the facts had been established as alleged.

103. The Tribunal was satisfied that the evidence given by the respondent's witnesses was evidence they believed to be true and that the witnesses did not intend to misrepresent the position. While there were a small number of points Mr Watret made which were mistaken, such as having a discussion with Mr Docherty about the end of the claimant's induction and commencement of his role, which Mr Docherty said had not occurred (as he was on leave), those issues were not material to the issues to be determined.

104. The Tribunal was satisfied that Mr Watret supported the claimant and wanted to ensure the apprenticeship was a success. Mr Watret understood the need to ensure adjustments were made and sought to do so. It would have been more helpful had Mr Watret provided the full detail of the Occupational Health report with both Mr Docherty and Mr Lawless but he did explain the broad adjustments needed and the claimant was clearly capable of raising an issues given he was an articulate and intelligent individual.

105. This was the first experience of an apprentice the team in Kilmarnock had and there were a number of learning points. One of the challenges in this case was the fact that at the point the claimant joined the Kilmarnock office the office was subject to a revision which had led to significant management resource being used with potential resource changes (amongst other things). The lack of precision as to who the claimant's day to day line manager was (and communication of this to him) gave rise to uncertainty together with the unfortunate fact that both Mr Watret and Mr Docherty were on leave at some point at the same time. These issues were significant given the claimant needed certainty and structure to his working day.

106. It was regrettable that the claimant chose to resign rather than seek to resolve the issues given the desire of the respondent to work with him following the meeting on 19 October 2021.

Law

Burden of proof

107. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(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."*

108. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

109. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

110. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

111. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

112. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

113. Thus in direct discrimination cases the tribunal can examine whether or not the treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule.

114. The Tribunal was also able to take into account the Employment Appeal Tribunal decision in this regard in **Field v Steve Pye & Co** EAT2021-000357.

115. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

Direct discrimination

116. Discrimination is defined in section 13(1) as follows: “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

117. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: “On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

118. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law,

however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person.

119. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed** 2009 IRLR 884, in most cases where the conduct in question is not overtly related to [the protected characteristic], the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. That is what the Tribunal has been able to do in this case.

120. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In **Amnesty International v Ahmed** 2009 IRLR 884 the Employment Appeal Tribunal recognised two different approaches from two (then) House of Lords authorities - (i) in **James v Eastleigh Borough Council** 1990 IRLR 288 and (ii) in **Nagaragan v London Regional Transport** 1999 IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan**, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the application of E) v Governing Body of the Jewish Free School and another** 2009 UKSC 15. The burden of establishing less favourable treatment is on the claimant.

121. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of **Anya v University of Oxford** 2001 IRLR 377.

122. In **Glasgow City Council v Zafar** 1998 IRLR 36, also a (then) House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. She must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

123. In **Shamoon v Chief Constable of the RUC** 2003 IRLR 285, a (then) House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

124. The Equality and Human Rights Commission Code notes at paragraph 3.4 that it is more likely an employer's treatment will be less favourable where the treatment puts the worker's at a "clear disadvantage", which could involve being deprived of a choice or excluded from an opportunity. At paragraph 3.5 the Code notes that the worker does not need to experience actual disadvantage (economic or otherwise) as it is enough the worker can reasonably say they would prefer not to be treated differently from the way they were treated. The example given is of a worker who loses their appraisal duties which could be less favourable treatment.

125. It is also important to note that the treatment would be "because of the protected characteristic" if it was "a substantial or effective though not necessarily the sole or intended reason for the treatment" (**R v Commission for Racial Equality** 1984 IRLR 230).

126. Chapter 3 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Discrimination arising from disability

127. Section 15 of the Act reads as follows:-

"(1) a person (A) discriminates against a disabled person (B) if –

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

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

(2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".

128. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

129. To succeed under section 15, the following must be made out:

a. there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see para 5.7)).

b. there must be "something" that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability; and

d. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

130. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170: *"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. 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."

131. As to justification, in paragraph 4.27 the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:- is the aim legal and non-discriminatory, and one that represents a real, objective consideration? If so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

132. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31*: "although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

133. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be*

sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."

134. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

135. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

136. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

137. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

138. Chapter 5 of the Code contains useful guidance in applying the law in this area and the Tribunal has had regard to that guidance.

Reasonable adjustments

139. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in sections 20 and 21 and Schedule 8. Paragraph 20 of Schedule 8 states: "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an interested disabled person has a disability and is likely to be placed at the disadvantage". This is considered in chapter 6 of the Code.

140. The importance of a Tribunal going through each of the constituent parts of section 20 was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.

141. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Code at paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 and **Ishola v Transport for London** [2020] EWCA Civ 11.

142. For the duty to arise, the employee must be subjected to "substantial disadvantage in comparison to a person who is not disabled" and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines "substantial" as being "more than minor or trivial". The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability (**Sheikholeslami v University of Edinburgh**, 2018 IRLR 1090).

143. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer.

144. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. It is for the Tribunal to assess this issue. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards.

Harassment

145. In terms of section 26 of the Equality Act 2010:

> (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."

146. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the

conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim.

147. For example in **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses 'will not readily volunteer' that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic 'cannot be conclusive of that question'.

148. At paragraph 7.10 of the Code the breadth of the words "related to" is noted. It gives the example of a female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

149. The question of whether the conduct in question "relates to" the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906).

150. Section 26(4) of the Act provides that:

"(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;

(c) the other circumstances of the case;

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

151. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill:

"In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

152. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant's perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

153. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant's dignity or creating the relevant environment) the claimant's perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (**Lindsay v LSE** 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words "intimidating, hostile, degrading, humiliating and offensive" and said "Tribunals must not cheapen the

significance of these words. They are an important control to prevent trivial acts causing minor upset being caught".

154. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Reasonable steps defence

155. Section 109(1) of the Equality Act 2010 states that: 'Anything done by a person (A) in the course of A's employment must be treated as also done by the employer'. The employer's knowledge or approval of the act in question is not relevant (section 109(3)). The employer has a defence under section 109(4) which states: "In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A… (a) from doing that thing, or (b) from doing anything of that description.' it can show that it took all reasonable steps to prevent A from doing that thing or from doing anything of that description."

156. Thus, for an employer to be liable for the discriminatory conduct of one of its employees, three things must be established: that there is, or was at the relevant time, a relevant employment relationship between the employer and the alleged discriminator, that the conduct occurred 'in the course' of employment (as widely defined) that the employer failed to take all reasonable steps to prevent the conduct in question.

157. What amounts to 'all reasonable steps' will depend on the circumstances but examples might include providing supervision or training and/or implementing an equal opportunities policy. The Equality and Human Rights Commission Employment Code (at paragraph 10.52) suggests the following: implementing an equality policy, ensuring workers are aware of the policy, providing equal opportunities training, reviewing the policy as appropriate, and dealing effectively with employee complaints.

158. The Employment Appeal Tribunal issued guidance as to the approach tribunals should adopt when determining whether an employer has satisfied

the 'reasonable steps' defence in **Canniffe v East Riding of Yorkshire Council** 2000 IRLR 555, when it held that the proper test of whether the employer has established the defence is to identify first, whether there were any preventative steps taken by the employer, and secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable. The question as to whether such steps would in fact have been successful in preventing the act of discrimination in question was not determinative. The steps taken by the employer do not need to be successful in order for the defence to be made out. As Burton J said at paragraph 14: "The employer, if he takes steps which are reasonably practicable, will not be inculpated if those steps are not successful, indeed, the matter would not be before the court if the steps had been successful, and so the whole availability of the defence suggests the necessity that someone will have committed the act of discrimination, notwithstanding the taking of reasonable steps".

159. The context is important, such as whether or not the employer knows of particular risks. Steps which require time, trouble and expense may not be reasonable steps if, on assessment, they are likely to achieve nothing (**Croft v Royal Mail Group plc** 2003 ICR 1425).

160. Equal opportunities training that is delivered long before the act of discrimination, and not followed up on, is unlikely to meet the 'reasonable steps' defence. In **Allay (UK) Ltd v Gehlen** 2021 ICR 645, the Tribunal accepted that employees had received training that covered harassment but noted that the training had been delivered two years prior to the harassment and was 'clearly stale'. A reasonable step would have been to provide refresher training. The Employment Appeal Tribunal found that the less effective the training is, the more quickly it becomes stale and that is necessary to consider not only when any training took place but how thorough and forceful it was (see paragraphs 35 and 37). The Tribunal concluded that the training had become stale not merely because one individual had made racist comments but because other colleagues and managers knew

harassment was taking place but took no action in response to it (paragraphs 48 and 50).

161. The Employment Appeal Tribunal emphasised that in considering the defence, a Tribunal should identify the steps taken by the employer, consider whether they were reasonable and consider whether any other steps should reasonably have been taken. It is not generally sufficient to determine whether there has been training as the nature of the training should be considered and the extent to which it may be effective with a consideration as to what happened in practice. Rather than simply say the training was satisfactory (or unsatisfactory) findings should be made as to the policies and training that existed, and if the Tribunal considers it should be refreshed, when would it be reasonable to do so. The burden is firmly on the employer to establish the defence and the legislation encourages employers to take significant and effective action to combat discrimination in the workplace.

162. Generally speaking the defence is limited to steps taken before the discriminatory act occurred given the statutory wording (see **Mahood v Irish Centre Housing Ltd** EAT 0228/10) and it is not sufficient for an employer to show that the discrimination was promptly remedied (see, for example, **Fox v Ocean City Recruitment Ltd** EAT 0035/11). In **Al-Azzawi v Haringey Council (Haringey Design Partnership Directorate of Technical and Environmental Services)** EAT 0158/00 the Employment Appeal Tribunal held that the aim of the statutory provision is to *prevent* discrimination from occurring and so when considering whether an employer has made out the defence, the Tribunal must look at events that took place before the discriminatory incident. Subsequent events are relevant to the question whether the defence has been made out only in so far as they shed light on what occurred before the act complained of (such as by demonstrating that a policy that exists on paper was not in fact operated in practice).

163. In **Allay (UK) Ltd v Gehlen** (above) the Employment Appeal Tribunal considered that the Tribunal was entitled to conclude that the training employees had received was stale, not only because racist comments had been made but also because a colleague who heard the racist comment did

not report it, and two managers who had been informed about the racist remarks did not take any action either. Thus actions following the unlawful act can be taken into account to a limited extent.

Remedies

164. In the context of a breach of the 2010 Act compensation is considered under section 124, which states:

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate …

(4) Subsection (5) applies if the tribunal—

(a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119…….

165. Section 119 states:

(3) The sheriff has the power to make any order which could be made by the Court of Session –

(a) in proceedings for reparation

(b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings(whether or not it includes compensation on any other basis)….."

166. The Tribunal has discretion as to whether to make a recommendation (which is a recommendation the respondent take specified steps to obviate or reduce the adverse effect upon the claimant of any matter to which the proceedings relate).

167. In considering remedy the Tribunal should consider an award for injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made noting that the award is compensating subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief and humiliation. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

"i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

168. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2021, the Vento bands include a lower band of £900 to £9,100, a middle band of £9,100 to £27,400 and a higher band of £27,400 to £45,600.

169. The higher band applies to "the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment", the middle band "for serous cases which do not merit an award in the highest band" and the lower band "for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence".

170. General principles that apply to assessing injury to feelings awards were given in **Prison Service v Johnson** 1997 IRLR 162 where it was noted that such awards are compensatory and should be just to both parties. They should compensate fully but not punish any party. Awards should not be too low to diminish the policy of the legislation. Awards should have some broad general similarity to the range of personal injury awards and Tribunal should d take into account the value in everyday life of the sums in question and the need for public respect for such awards.

171. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. The question is "what would have occurred if there had been no discriminatory dismissal..... If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss." The test under the 2010 Act is not what is just and equitable – ***Hurley v Mustoe (No. 2) [1983] ICR 427***.

172. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

173. Interest may be awarded in discrimination cases under the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 at a daily rate of 8%. No interest is due on future losses. Where the awards exceed £30,000, they require to be grossed up to account for the incidence of taxation under the Income Tax (Earnings and Pensions) Act 2003 sections 401 and 403 and ***Shove v Downs Surgical plc [1984] IRLR 17***.

174. Where a party unreasonably fails to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (such as by failing to raise a grievance in relation to the matters arising) compensation awarded can be reduced by up to 25% under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Submissions

175. Both parties produced detailed written submissions and the parties were able to comment upon each other submissions and answer questions from the Tribunal. The Tribunal deals with the parties submissions as relevant below, but does not repeat them in detail. The parties full submissions were taken into account in reaching a unanimous decision.

Decision and reasons

176. The Tribunal spent time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision. The Tribunal deals with issues arising in turn.

Direct discrimination because of disability – section 13 Equality Act 2010

177. The first issue that arose was whether the respondent subjected the claimant to the following treatment: On 1 October 2021, Mr Lawless stating to the claimant that he would speak to his line manager about excluding him from Team Meetings 'in case you say something inappropriate because of your Asperger's' and that such treatment was less favourable treatment.

178. In his evidence the claimant accepted that he had not been told by any manager that he was not to attend meetings and that it was his workplace coach, Mr Lawless, who had discussed with him on 2 October an incident which he had been involved with in a previous role with an employee who had Asperger's Syndrome.

179. The respondent's position was that Mr Lawless indicated that he said that he would take advice from Mr Watret on the matter and that the claimant was not aware of having been excluded at any meetings (and that such an approach could not amount to unlawful discrimination). The respondent's agent argued it was not less favourable treatment. The claimant's position was that as a result of an incident in 2006/7 where Mr Lawless had been advised to exclude a person with Asperger's from meetings, his approach to dealing with the claimant's position was thereby affected and discrimination ensued. It was alleged that Mr Lawless' action effectively created the practice and stereotype that he would treat other Asperger's Disabled members of staff in the same way.

180. The Tribunal found that Mr Lawless said he had previous experience of a direct report having been excluded from meetings due to the consequence of his disability and he wished to seek advice as to whether or not the approach that was taken in that case was company policy. The Tribunal concluded that

this was not less favourable treatment. Mr Lawless had previous experience of a situation involving an employee with Asperger's and told the claimant about his experience. He also told the claimant that he would seek the input of his line manager. That was the correct approach. The matter arose during a discussion between the claimant and Mr Lawless with Mr Lawless being open with the claimant and stating what his experience was. There was no suggestion from the claimant that he was unhappy with what had been said and did not raise any issues following the discussion.

181. The claimant was not excluded from meetings because of a stereotypical belief as to his disability. Mr Lawless was telling the claimant he would seek advice as to how best to deal with the matter given the approach that had been taken before as he had understood there may have been a protocol in place.

182. The Tribunal applied the guidance from the Code in considering this issue. The treatment of the claimant was not reasonably regarded as putting him at a "clear disadvantage", in terms of depriving him of a choice or excluded any opportunity. The Tribunal did not consider that the claimant could reasonably say he would prefer not to be treated in the way he was. The claimant was being told that his line manager was checking something about which he had experience. He was not being told he was going to be treated in a certain way, The treatment in this case was not less favourable treatment.

183. It was not less favourable treatment to seek guidance from a manager (and tell an employee that was what was happening) in respect of something that had happened in the past (to check whether a protocol existed).

184. As the treatment did not amount to less favourable treatment it was not necessary to consider the other elements of this claim. The direct disability discrimination claim is ill founded and is dismissed.

Discrimination arising from disability — section 15 Equality Act 2010

185. The first issue was whether the claimant was treated unfavourably by failing to provide the claimant with a quiet space to study. The respondent disputed

that this had been made out as there were at least 3 places where the claimant could study, and did so. He was given the choice and flexibility. He was given the option of an office which would be vacated if needed or e could other places. The respondent's position was that the claim was fundamentally flawed as he has been unable to show that any unfavourable treatment was arising from his disability. A failure to provide the claimant with access to quiet spaces was not unfavourable treatment arising from disability.

186. The claimant's father argued that the issue was the failure to provide a specific space at a specific time to ensure there was a quiet space available. One of the required adjustments was the provision of a 'Quiet Workspace' to study for his Apprenticeship. Whilst the claimant was shown some so-called 'quiet locations' that actually were in use by other staff members and was told that he had to choose which of them to use, at no time did the respondent dedicate a space or time to provide a 'Designated' Space for him in which to study.

187. The Tribunal found that the respondent's submissions have merit and they were upheld. The claimant was given a choice of places to carry out his learning, which were quiet spaces. In particular the claimant had the offer of using an office which would have been vacated at the appropriate time.

188. The Tribunal was satisfied that the first element of this claim had not been made out as the claimant had been given a suitable quiet place to study. There was no unfavourable treatment. While the claimant may have wished a specific place at a specific time, it was not unfavourable treatment on the facts of this case given the places the claimant was given and the flexibility afforded to him.

189. While it was not necessary to consider the other aspects of this claim, the Tribunal considered the next issue, if there had been unfavourable treatment. The next issue was whether the treatment was due to something arising in consequence of his disability, namely the claimant's inability to concentrate on the apprenticeship study material and/or take the time the claimant needed to properly understand what the apprenticeship assignments were asking.

190. The respondent's agent argued that this did not make sense as the "something" in this case was not the reason for the unfavourable treatment relied upon. The claimant's father argued that it was, but was unable to explain what the link was.

191. Having considered matters carefully the Tribunal finds that the "something" in this case – the claimant's inability to concentrate on the apprenticeship study material and/or take the time the claimant needed to properly understand what the apprenticeship assignments were asking – was not the (or a) reason for the unfavourable treatment (failing to provide a quiet place to study).

192. If the respondent had treated the claimant unfavourably (by failing to provide a quiet place to study) the reason would not have been in any sense connected to the "something" relied upon in this case. Considering the evidence before the Tribunal, the Tribunal was satisfied that the reason why the claimant was given the spaces he was given was because the respondent wished to ensure the claimant had flexibility to work on his assignments and consider the matters in a place that suited him. This aspect of the claim had not been established in evidence.

193. As the claim had not been made out, it is not necessary to consider whether or not the treatment was objectively justified and the claim under section 15 of the Equality Act 2010 is ill founded and is dismissed.

Reasonable adjustments claim – sections 20 and 21 Equality Act 2010

194. The Tribunal considered each of the 3 reasonable adjustments claim separately.

First reasonable adjustments claim – failing to adjust the interview

195. The provision, criteria or practice - "PCP" - relied on by the claimant was interviewing disabled job candidates in the same way as non-disabled job candidates.

196. The respondent's agent argued that this had not been established since reasonable adjustments to the interview process would have been

implemented had these been required. None had been requested. It was argued that there had been no evidence presented to the Tribunal to demonstrate that the respondent knew, or ought reasonably to have known, that the claimant was disabled and required adjustments to the interview as at the date of the interview on 28 July 2021. In any event the respondent argued that the interview had in fact gone as was anticipated and the structure the claimant had desired was present. It was submitted that it was only when the Occupational Health report was received on 9 September 2021 that the respondent became aware of the reasonable adjustments which the claimant required which post dated the interview.

197. The claimant's father argued Mr Watret admitted that he interviewed the claimant in the same way as he would a non-disabled candidate. He also admitted that he saw no reason to seek any guidance from the HR team regarding interviewing disabled job candidates. This demonstrated, he argued, that the PCP "Interviewing disabled job candidates in the same way as non-disabled job candidates" existed. The claimant's father argued that one would reasonably expect a senior manager to check what a disabled candidate needed.

198. The first issue was not an easy issue to determine. This was because the parties had not clearly considered the matter. During the hearing there had been a suggestion the issue was that Mr Watret had allegedly deviated from what the claimant was expecting which created the issue, rather than the assertion Mr Watret had not deviated from the normal approach to interview.

199. Because this issue had not been fully considered, there was a lack of evidence as to the position. There was no clear evidence, for example, as to what the norm would have been nor what adjustments the claimant argued would have removed the disadvantage alleged. From the evidence before the Tribunal, the approach that was taken in respect of the claimant's interview was as the claimant expected and as Mr Watret had intended to follow. The Tribunal did not find that Mr Watret had told the claimant that he was abandoning the desired approach in favour of his own questions.

200. Given the approach that was taken was consistent with what the claimant had expected (given he was able to answer each of the questions clearly and intelligently) it was possible the structure had been adjusted from the norm but it was more likely than not that the structure of the interview was as the claimant expected, which is likely to be what he was told, and would have been the normal approach to be taken in interviews such as these. On that basis the PCP did exist and was applied to the claimant.

201. The next question was whether the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, in that he then required to take the unadjusted interview and was subjected to unnecessary stress, anxiety, impact and overwhelm as a result.

202. The respondent argued that Mr Watret had concluded that the claimant would be 'an asset to the business' and was offered the job and that prior to obtaining the Occupational Health report there has been no evidence led to establish that the respondent had knowledge of any reasonable adjustments which the claimant required and the claimant has certainly not led any evidence of asking for any reasonable adjustments to be made to the interview process. On this basis the respondent could not have reasonably been expected to know the claimant was likely to be placed at any such disadvantage.

203. The claimant’s father argued that the claimant was required to take the unadjusted interview and was subjected to unnecessary stress, anxiety, impact and overwhelm as a result. The consequence of failing to offer a range of reasonable adjustments for the disabilities that Mr Watret saw on the claimant’s CV resulted in the outcome that Mr Johnstone felt anxious. The action of interviewing all candidates in the way same regardless of disability caused a substantial disadvantage on those who are disabled and therefore placed the claimant under unnecessary stress.

204. From the evidence presented to the Tribunal, the Tribunal was not satisfied that the claimant was put at substantial disadvantage in comparison to persons not disabled by being required to attend an unadjusted interview and

thereby be subject to stress, anxiety, impact and overwhelm. This was supported by the fact that the claimant performed well at interview (and no issues as to the interview were raised at the time or subsequently). While the claimant may have believed that he was being put at a disadvantage, the Tribunal was satisfied the interview did not in fact cause the claimant any disadvantage.

205. Even if the Tribunal was wrong in its conclusion as to substantial disadvantage, the respondent did not know and could not reasonably have been aware that the claimant was likely to be placed at the disadvantage relied upon. There was no evidence before the Tribunal that showed the respondent knew of the impact that an unadjusted interview would place upon the claimant. While his CV had not been presented to the Tribunal (which was what the claimant's father said in submissions would have shown what the respondent knew), the evidence before the Tribunal was that while Mr Watret knew the claimant had a disability, he did not know the disadvantages the claimant says arose as a consequence of the unadjusted interview (and it would not have been reasonable for him to know such disadvantage). The Tribunal found the interview proceeded as the claimant had expected it to. No adjustments to the interview had been sought by the claimant nor had the respondent been alerted to the consequences that could flow if it was not adjusted. The Occupational Health report had not been obtained prior to the interview and there was no evidence of any adjustments being raised with the respondent prior to the interview. The respondent did not know and could not have known about the substantial disadvantage relied upon.

206. The Tribunal was satisfied the claimant was able to perform on equal terms as a non disabled candidate. He was given sufficient time to answer each question and performed extremely well.

207. From the evidence before the Tribunal there were no further steps which would have been reasonable for the respondent to have taken in relation to the interview to have removed the disadvantage relied upon. The claimant was clearly capable of answering the questions and dealing with the way in

which the interview proceeded without any concerns arising. His performance was such that he was considered likely to be an asset to the business.

208. This first reasonable adjustments claim is therefore ill founded and is dismissed.

Second reasonable adjustments claim – same levels of performance

209. The second claim related to expecting disabled members of staff to “perform the same task in the same time as non-disabled members of staff”.

210. The respondent’s agent denied that the PCP was applied. The respondent obtained an Occupational Health report in advance of the claimant commencing employment. In terms of additional time being required the relevant wording in the Occupational Health report is that 'extra time is needed with reading and writing tasks'. Mr Watret was clear in his evidence that he was familiar with the Occupational Health report, that he had read it and discussed it with the claimant and that he was able to implement all of the reasonable adjustments as overall manager of the unit. Both Mr Lawless and Mr Docherty were candid in their evidence that they had not read the Occupational Health report but they were both quite clear that Mr Watret had advised them both in very clear terms that the claimant required more time to do his tasks as a reasonable adjustment as he has Asperger's Syndrome.

211. All three of the respondent's witnesses indicated that the claimant was provided with additional time to perform his duties. The evidence of Mr Lawless, Mr Docherty and Mr Watret was clear in that the claimant was not expected to perform a full duty but that he had been sent out on a half duty. This was a reasonable adjustment put in place in recognition of the fact that the claimant required additional time. It could be argued that the reasonable adjustment was unsuccessful on that day but that on the claimant's next day at work, 19 October, that both Mr Docherty and Mr Watret had discussed with the claimant what support could be put in place/adjustments made to allow him to be successful in his role.

212. The claimant's father argued that Mr Lawless admitted that, as the Workplace Coach he expects every new starter, whether disabled or not, to deliver mail at the rate of '3 letterboxes per minute' to be declared as 'up to standard'. He further admitted that this is not a National Policy but is "part of the Kilmarnock MPU 'culture'". This demonstrated that the PCP "expecting disabled members of staff to perform the same task in the same time as non-disabled members of staff" existed.

213. The PCP in this case was framed in a very wide manner. It was that the respondent expected disabled employees to "perform the same task in the same way as non disabled members of staff". The specific task was not set out in the PCP. It was not stated explicitly to be expecting 3 homes to be covered per minute.

214. Mr Lawless's position was that he expected staff that he took on his rounds (whom he was training) to reach the stage of delivering 3 letterboxes a minute but he accepted that this was a very rough approach since the distance to each letter box could vary and it was a rough rule of thumb. Further the respondent was clear in stating that they tailored the approach for each individual to the individual's specific needs (and there was no specific requirement as to how many houses should be visited in a specific period of time). Thus the claimant was given 5 hours to complete a run which a fully trained employee would expect to complete in half that time.

215. Mr Lawless was showing the claimant what he expected of fully trained post people and was seeking to equip the claimant with the skills to deliver mail efficiently. There was no expectation that the claimant reach the standard Mr Lawless expected of fully trained post persons immediately since the respondent was prepared to reduce its expectations where required, whether by reason of the individual's approach or due to a disability.

216. The Tribunal found that given Mr Lawless expected fully trained post persons to deliver roughly to 3 homes per minute, this was a provision, criterion or practice that was applied to the claimant, which would have engaged when

he was fully trained. It was applied to the claimant as an ideal requirement during his training period. It was something for him to work towards.

217. The next issue is whether the PCP placed the claimant at a substantial disadvantage in comparison with a person who was not disabled. This was a matter for evidence. The Tribunal considered whether there was any disadvantage that was more than minor or trivial and compared this with persons who were not disabled.

218. There was no evidence before the Tribunal that demonstrated that the claimant, as a disabled person, was at any substantial disadvantage compared to someone who was not disabled with regard to requiring him to reach the desired standard. The issue was the inability to hold the bundle of mail in the most efficient way. The difficulty the claimant had would have been the same as any trainee who was learning the role (who was not disabled). There is no evidence that allowed the Tribunal to find that he was placed at any disadvantage compared to a person who was not disabled with regard to this issue. The claimant's disability had no bearing on the desired outcome of 3 letterboxes per minute from the evidence presented. The claimant was taking time to learn the way to carry out the role as any other apprentice would. The issue was the way he carried the bundle of mail which was not shown to be in any way connected to his disability. There was no evidence that suggested the claimant was more likely to not meet the desired standards than a non-disabled person. There was no substantial disadvantage.

219. Even if the Tribunal was wrong in finding that there was no substantial disadvantage, the Tribunal considered the respondent took all reasonable steps to remove any disadvantage that arose. The Tribunal is satisfied that the PCP was adjusted to suit the claimant's needs. In other words the respondent did take such steps as were reasonable to have removed any disadvantage the claimant encountered as a result of his disability. The claimant was given such additional time he needed to complete the task.

220. The respondent's agent had argued that the issue was not about one particular duty on one particular day but rather the general requirement to carry out the role. A plan had been put in place for the claimant which was tailored to each person and adjusted as it progressed. There was no requirement to do the job within a certain amount of time even if one particular coach had such an expectation on his route. The Tribunal considered that submission to be an accurate exposition of the position.

221. The claimant's father argued that the claimant had been required to perform the task in the same time causing stress, anxiety, impact and overwhelm and a sense of failure as a result Mr Lawless admitted that, as the Workplace Coach, he expects every new starter, to deliver mail at the rate of '3 letterboxes per minute' to be declared as 'up to standard'. The consequence of failing to offer any reasonable adjustments resulted in the outcome that Mr Johnstone became overwhelmed and excessively stressed, impacted, experiences raised anxiety and was left to feel a sense of failure. That submission did not recognise the steps that were in fact taken to assist the claimant which removed any disadvantage he suffered by ensuring the workload was reduced to a manageable level the claimant found comfortable.

222. The Tribunal found that even if staff were expected to deliver to the standard Mr Lawless sought, that position was adjusted on an individual basis and was adjusted for the claimant. The respondent took all reasonable steps to remove any disadvantage the claimant believed he suffered.

223. The Tribunal therefore found that the second claim in respect of the failure to comply with the duty to make reasonable adjustments was ill founded and is dismissed.

Third reasonable adjustments claim – allowing non disabled staff to use bays

224. The final claim was allowing non-disabled staff members to park in the staff disabled bays.

225. The respondent's agent argued that the Occupational Health report had a list of reasonable adjustments but did not mention that the claimant required a

disabled parking space. The duty to make reasonable adjustments will not arise unless the employer knows or ought reasonably to know of the disabled person's disability and that the disabled person is likely to be placed at a substantial disadvantage.

226. The claimant's father argued that Mr Watret and Mr Lawless both admitted in their evidence that there was a 'culture' at Kilmarnock MPU where non-disabled staff would park in the Staff Car Park disabled bays, and that this practice was not addressed, challenged or changed by the MPU Management. This demonstrated that the PCP "allowing non-disabled staff members to park in the staff disabled bays" exists.

227. The Tribunal considered the claimant's father's submissions to have merit and upheld them. It was accepted that there was a culture of allowing non-blue badge holders to park in the blue badge holder's spaces. The PCP did therefore exist and it was applied.

228. The respondent's agent argued that if the Tribunal found that an employee disabled parking space was a reasonable adjustment which the respondent was required to make then the earliest date that this duty arose would have been Friday 1 October when the claimant advised Mr Watret that he had a blue badge. The respondent did make a reasonable adjustment by advising the claimant that he was permitted to park in the customer disabled parking bays whilst they undertook efforts to stop employees parking in the staff disabled parking bays. In Mr Watret's evidence he indicated that he had made efforts to speak to managers within the unit in order to ensure that employees no longer parked in employee disabled spaces if they did not have a blue badge. Mr Watret accepted that these efforts had not been successful but that he advised the claimant at the meeting on 19 October that he would take a firmer line with anyone who continued to park in the employee disabled parking spaces. The claimant resigned the following day. The respondent had taken steps which it is reasonable for it to have taken to avoid the alleged relevant disadvantage to the employee. However, as Mr Watret conceded these steps had been unsuccessful as of 19 October but that was only 17 days after the respondent became aware that the claimant held a blue badge

and a mere 10 working days for the claimant. It was argued that the claimant was not placed at a substantial disadvantage. He was allowed to park in customer disabled spaces.

229. The claimant's father argued that the disadvantage was clear. The consequence of failing to offer a staff disabled parking space for the claimant and directing him to use the customer disabled bays resulted in a Health and Safety breach in addition to singling him out as disabled. In order to reach the staff entrance to the MPU the claimant was required to transit the Loading/Unloading Area with obstacles to cross and additional hazards to address that would not have been present had he been able to park in the staff disabled spaces. Mr Lawless explained the Loading/Unloading is a controlled area as there are moving vehicles and heavy equipment moving around it at all times including Heavy Goods Vehicles bringing bulk mail from the Glasgow and other regional centres. In addition to the increased safety factors, by parking in the customer disabled bay the claimant's father argued that the claimant was aggressively challenged for parking there.

230. The Tribunal considered the claimant's father's submissions to have merit and upheld them. By allowing staff to park in the blue badge area, the claimant was put at a substantial disadvantage since he had to walk from the customer disabled bays to the staff entrance and negotiate hazards that would not exist if he parked in the staff disabled bay. He was also challenged for parking in the customer disabled bay which was unlikely to have happened had he parked in the staff disabled bay.

231. The respondent was aware of the disadvantage to which the claimant was put since it knew that the claimant required structure to his day. When the claimant arrived on the first day and told Mr Watret he needed a disabled parking space, it ought to have been obvious, given the claimant's disabilities and the terms of the Occupational Health report, that if he is unable to find a space, he would become overwhelmed and anxious. The claimant had made it clear both to Mr Watret and to Mr Lawless that the absence of a disabled space in the staff car park had caused him considerable concern. Mr Watret understood this which was why he told his managers to instruct his staff to

apply the rules with regard to blue badge holders. The respondent knew it was more hazardous to walk into the staff entrance from the customer disabled bay and that the claimant had been challenged for parking there.

232. The Tribunal found that it would have been reasonable for the respondent to have ensured that one disabled bay within the staff car park was available. There were no other blue badge holders engaged in the Kilmarnock office and there was more then one disabled bay in the staff car park. The Tribunal did not consider it sufficient for Mr Watret to require managers to advise staff about the change without taking urgent action to ensure the instruction had been followed. It would not have been difficult for the respondent to have taken steps to ensure a dedicated space was reserved for the claimant. The respondent should have ensured within, at most, 3 days of becoming aware that staff had not implemented the instruction they were given. It would have been possible to have reserved the space and ensured the claimant was able to park in the staff car park safely. The Tribunal concluded it would have been reasonable for the respondent to have provided a disabled parking space within the staff car park by 4 October 2021. The failure to do so amounted to a failure to comply with the duty to make reasonable adjustments.

233. The Tribunal finds that this claim is well founded and upheld it.

Unlawful disability harassment

234. The Tribunal considered each of the 3 harassment claims separately.

First harassment claim – verbal abuse for parking in customer disabled bay

235. The first issue was whether the respondent engaged in the conduct relied upon, namely that on 9 and 14 October 2021, the respondent's staff (a lorry driver from Glasgow and a Customer Service Point Representative from Kilmarnock respectively) verbally abused the claimant for parking in the customer disabled parking bay.

236. The respondent’s agent argued that the claimant failed to provide any evidence, or to adequately specify this claim, to establish what precisely was said to him which had the purpose or effect of violating the claimant's dignity,

or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It was submitted that even if this conduct did take place that it was not conduct related to the claimant's disability, particularly as there is no evidence that any alleged perpetrators were aware of fact of the claimant having any disability and that the comments related to a protected characteristic. The evidence from Mr Lawless said the postman who spoke to the claimant about parking in the disabled parking spaces did so as he did not know that the claimant was disabled, and hence entitled to park there. Mr Lawless was of the opinion, from speaking to the claimant, that it had been an 'interaction' between two people and he was quite clear that the claimant had not indicated that the postman was using abusive language or being aggressive. There is no evidence that any conduct amounted to harassment.

237. The claimant's father argued that Mr Lawless confirmed that the claimant had been confronted by a member of staff for parking in the customer disabled bays. The claimant stated that this also happened with different members of staff on the 9th and 14th October 2021. On the 9th it was a HGV driver from Glasgow and the 14th another CSP member of staff. In both cases the confrontation was aggressive and unwanted. This led to the claimant feeling humiliated and subsequently made the customer car park a hostile environment. The daily anxiety of fearing being intimidated by other staff members when parking in the customer disabled bay has significantly impacted on the claimant's health and ability to work.

238. The Tribunal found the respondent's submissions to have merit and upheld them. The Tribunal was not satisfied that on 9 and 14 October 2021 the claimant had been "verbally abused" for parking in the customer disabled parking bay. The Tribunal found that on these occasions the claimant had been asked by a colleague why he was parking in the disabled customer parking bay. That this was a normal interaction between 2 people and was not verbal abuse. The Tribunal did not find that the claimant was upset. He was annoyed at having been asked why he was parking there but the interaction was not unwanted conduct related to disability. There was no evidence that the conduct on any of the occasions was related to disability

(and was more likely to be due to the belief there was no disability). The Tribunal was not satisfied that the conduct was related to disability.

239. If the Tribunal was wrong in its conclusion that the conduct had been shown to be unwanted conduct related to disability, the Tribunal considered the next issue which is whether the conduct had the purpose of violating the claimant's dignity or creating an adverse environment for him within the meaning of section 26(1)(b) Equality Act 2010. The purpose of the conduct was more likely than not to have been to ensure only customers who were disabled parked in the customer disabled bays. It did not have the purpose of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for him within the meaning of section 26(1)(b).

240. Next the Tribunal considered the effect of the treatment. From the evidence presented the Tribunal found that the conduct did not have the effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for him within the meaning of section 26(1)(b). The claimant was frustrated at having been asked why he was parking there but the Tribunal did not find it violated the claimant's dignity or created an intimidating hostile degrading humiliating or offensive environment for him within the meaning of section 26(1)(b)..

241. The Tribunal then considered whether it was reasonable for the conduct to have the effect alleged. The Tribunal must take into account the claimant's perception and all the circumstances of the case and whether it was reasonable for the conduct to have that effect. In any event the Tribunal did not consider that it would be reasonable for it to have the effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for him within the meaning of section 26(1)(b). In context, the behaviour was legitimate and unobjectionable. A colleague was asking why the claimant was parking in a disabled customer bay. The colleague was unlikely to know about the claimant (or his disability) nor the instruction he had received to park there.

242. The Tribunal found the first claim in respect of harassment was unfounded and is dismissed.

Second harassment claim – verbal abuse for not wearing a face mask

243. The first issue for the second claim was whether the respondent engaged in the conduct relied upon, namely in the period from 30 September to 20 October 2021, the respondent's staff (4 or 5 different people on 4 or 5 different occasions) verbally abused the claimant for not wearing a facemask, despite the fact he was exempt from doing so.

244. The respondent's agent argued that the claimant has failed to provide any evidence, or to adequately specify this claim to establish what was allegedly said which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It was submitted that this is not conduct related to the claimant's disability, particularly as there is no evidence that any alleged perpetrator was aware of fact of the claimant having any disability. In any event, the claimant had not led any evidence to suggest that, if comments had been made to him about not wearing a face mask, that the people making them were aware of his disability and that the comments related to a protected characteristic. Mr Watret had indicated that there are other employees who are face mask exempt in the delivery office and wear lanyards and that he did not understand why the claimant would be targeted for this. Mr Watret also explained that employees had been briefed on employees being face mask exempt.

245. The claimant's father argued that this issue was raised with Mr Watret, at the meeting held on 19th October 2021. The claimant confirmed he experienced fear of entering the workplace, excessive anxiety, humiliation, a sense of injustice (as he was face mask exempt due to his disability), verbal harassment and daily panic. This led to the workplace becoming a hostile environment for him. The claimant's father argued that it did not matter how pleasant the exchange had been since the respondent's staff ought to have

known that those with lanyards were exempt and it was the fact of challenging the claimant which was unwanted conduct.

246. The Tribunal considered the respondent's agent's submissions to have merit on this issue and upheld them. The Tribunal did not find from the evidence presented to it that the claimant had been subject to "verbal abuse" for not wearing a face mask on various (unspecified) occasions. Prior to the 19 October 2021 meeting, the claimant had not raised this issue at all. The Tribunal considered that the clamant may have been asked why he did not wear a mask given the prevailing pandemic and conditions but from the evidence before the Tribunal that was a normal discussion as between colleagues. It was not unwanted conduct related to disability.

247. If the Tribunal was wrong in its conclusion that the conduct had been shown to be unwanted conduct related to disability, the Tribunal considered the next issue which is whether the conduct had as its purpose violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant within the meaning of section 26. Even if the treatment had been established in evidence, the Tribunal considered that it was more likely than not that the purpose of the behaviour was to ensure the rules applicable at the time with regard to face coverings were followed. It was more likely than not that the requests made to the claimant to wear a face covering would have been because those responsible had not seen the claimant's lanyard and were not aware that he was exempt. He was a new employee and there was no evidence the staff knew about his position. The requests made of the claimant (to wear a face covering) would have been legitimate. The purpose was in no way to violate the claimant's dignity nor to create an intimidating, hostile, degrading, humiliating or offensive environment for him.

248. The Tribunal then considered whether or not the effect of the conduct was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. It was more likely than not from the evidence that the claimant was annoyed at this issue having been raised given he was exempt. It was more likely than not from the evidence before

the Tribunal that the conduct did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him incidents. The Tribunal took account what the claimant said, the context and the evidence before the Tribunal in reaching that view.

249. The Tribunal would have been satisfied that, in any event, it would not have been reasonable for the claimant to believe that the conduct violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal must take into account the claimant's perception and all the circumstances of the case and whether it was reasonable for the conduct to have that effect. The issues arose amidst the pandemic and the claimant was being asked to wear a face covering in circumstances where the was no evidence those asking the claimant knew that he was exempt from doing so. While the claimant believed the instruction to wear the covering was unfair, it was not reasonable to believe the effect of the instruction was to violate his dignity or create an intimidating hostile degrading humiliating or offensive environment for him in all the circumstances and in light of the evidence before the Tribunal.

250. This claim in respect of unlawful harassment has not accordingly been made out. It is ill founded and dismissed.

Third harassment claim – daily criticism of the claimant

251. The first issue was whether respondent engaged in the conduct relied upon, namely in the period from 30 September to 20 October 2021, Mr Lawless criticising the claimant on a daily basis for not performing fast enough.

252. The respondent's argent argued that the actions of Mr Lawless was not unwanted conduct relating to the claimant's disability and that the conduct did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant spent four days shadowing/assisting Mr Lawless. Mr Lawless explained that he would have treated any other employee in the same manner as he treated the claimant and that he felt that in his role as a Workplace Coach, that it was his duty to encourage the claimant to learn the

correct techniques to deliver mail and to increase his pace. He accepted in his evidence that he did provide constructive feedback to the claimant but there was no indication that this amounted to anything that could possibly resemble harassment. Text messages show the positive relationship between Mr Lawless and the claimant at the relevant time. The exchanges are encouraging, supportive and friendly in tone. The evidence certainly does not point to this being a hostile relationship and the claimant did not lead any evidence which demonstrated that there was any unwanted conduct from Mr Lawless was related to his protected characteristic and had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The respondent submitted the evidence does not, objectively, demonstrate that the claimant met this test.

253. The claimant's father argued that when Mr Johnstone was with Mr Lawless he encountered daily criticism. This led to increased anxiety and panic and Mr Johnstone felt degraded and was left to feel any time spent with Mr Lawless would be hostile.

254. The Tribunal preferred the respondent's submissions and found them to have merit and upheld them. Mr Lawless was supportive of the claimant and had a good working relationship with the claimant. The claimant may have found the tasks difficult. Mr Lawless may also have found it difficult to assist the claimant who struggled to hold his mail in the correct way despite having been shown how to do so and told how to do so on a number of occasions. That was Mr Lawless's role to show the claimant how to best carry out the role. The claimant would learn by making mistakes and develop the best way to deliver mail, in a supportive environment. The claimant was not criticised on a daily basis but instead he was supported in carrying out his role.

255. The attempts to assist the claimant to learn the role may have been unwanted in the sense the claimant struggled to acquire the skills immediately but that was not surprising given the claimant was learning. It was not unwanted conduct related to the claimant's disability. It was conduct focused on assisting the claimant develop the best way to do the job.

256. If the Tribunal was wrong in its conclusion that the conduct had been shown to be unwanted conduct related to disability, the Tribunal considered the next issue which is whether the conduct had as its purpose violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant within the meaning of section 26. Even if the treatment had been established in evidence, the Tribunal considered that it was more likely than not that the purpose of the behaviour was to assist the claimant in acquiring the necessary skills to carry out the role efficiently. The requests made of the claimant (to deliver the mail in the way he was being shown and to carry out the task as directed) were legitimate. The purpose was in no way to violate the claimant's dignity nor to create an intimidating, hostile, degrading, humiliating or offensive environment.

257. The Tribunal then considered whether or not the effect of the conduct was to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. It was clear that the claimant was annoyed at being unable to master the skills he was being taught at the time he was being taught them. From the evidence before the Tribunal the conduct did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him incidents. The Tribunal took account what the claimant said, the context and the evidence before the Tribunal.

258. The Tribunal would have been satisfied that, in any event, it would not have been reasonable for the claimant to believe that the issues had the relevant effects. The Tribunal must take into account the claimant's perception and all the circumstances of the case and whether it was reasonable for the conduct to have that effect. The claimant was being shown how to carry out a role that he had not done before in circumstances unfamiliar to him within a supportive environment that existed and the relationship which existed between the claimant and Mr Lawless. While the claimant believed the instructions and direction he was being given was unfair, it was not reasonable to believe the effect of the instructions was to violate his dignity or create an intimidating

hostile degrading humiliating or offensive environment for him in all the circumstances and in light of the evidence before the Tribunal.

259. The third claim in respect of unlawful harassment is not well founded and is dismissed.

Reasonable steps

260. For completeness, the Tribunal considered the submissions of the respondent that the respondent had, in any event, taken all reasonable steps to prevent any harassment from occurring. The Tribunal had limited evidence in this regard. While evidence had been led about training sessions having taken place, there was no evidence as to the content of these sessions nor as to how effective the sessions were. Had it been necessary to determine this issue from the limited evidence before it, the Tribunal would not have been satisfied that the respondent had taken all reasonable steps to have prevented harassment occurring.

Remedy

261. The Tribunal has found that the respondent unlawfully discriminated against the claimant by failing to ensure a dedicated parking space was available for him in the staff car park. This happened on more than one occasion and was raised by the claimant on a number of occasions. The claimant felt stressed and overwhelmed as a consequence.

262. The Tribunal considered that the correct remedy in respect of this failure was to make an award for the injury to feelings the claimant sustained as a consequence of this failure. The Tribunal considered the evidence carefully and decided that an award in respect of the injury to his feelings would be fair and just. Applying the law in this area the Tribunal considered that the award should fall within the lowest **Vento** band. The Tribunal considered the unlawful discrimination and the occasions when it had occurred and the anxiety that it had caused the claimant on each occasion. Having carefully reflected upon matters and having considered the evidence led very carefully the Tribunal

concluded that it would be fair, reasonable and just to award the sum of £3,000 for injury to feelings for the unlawful discrimination he suffered.

263. The claimant did not lose any direct financial sums as a consequence of this act of unlawful discrimination but it was clear that the discrimination affected the claimant and the sum awarded took account of the discriminatory conduct and the impact upon the claimant.

264. That sum is subject to interest from the date the act occurred until the date of calculation. The Tribunal considered it fair and just to commence that calculation from day 4 of the claimant's employment, namely 4 October 2021 to date.

265. The respondent argued that the claimant accepted in his evidence that he did not follow the respondent's grievance procedure before resigning. It was the respondent's position that the claimant unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures by failing to raise a grievance in relation to the treatment which he complains about. It was submitted compensation awarded should be reduced by up to 25%.

266. The claimant's position was that he did not believe the respondent would alter its position given the number of times he had asked that action be taken and so he considered raising the matter formally to be futile.

267. The Tribunal considered that the claimant did act unreasonably in not raising the matter formally and in not engaging the formal grievance process. The claimant had raised the matter informally and decided not to pursue the matter further (as he did not believe it would have made any difference). It was unreasonable on the facts of this case not to have engaged the formal process. The respondent had sought to be supportive of the claimant. Had a grievance been raised formally, the respondent would have been given the opportunity of resolving the matter.

268. The Tribunal considered that it was just, given the facts and context, to reduce the amount of compensation awarded by 10% to reflect the fact the claimant did not raise the matter formally.

269. The total compensation awarded is therefore £3,000 less 10% in respect of the unreasonable failure to comply with the ACAS Code (£300) giving £2,700. Interest is awarded at 8% from 4 October 2021 to date (221 days) (221 x 0.08 x 1/365 x £1500) giving £145.32.

Observations

270. The Tribunal did not consider it appropriate to make recommendations in this case and considered it just to award the above compensation as a remedy only. The Tribunal did wish to make a number of observations given the issues arising in this case.

271. The circumstances that gave rise to this claim were unfortunate and regrettable. The respondent wished to provide a supportive environment for the claimant and equip him with the skills necessary to develop into a postal worker. The claimant wished to find a suitable place for him to learn a new skill and earn an income.

272. It was regrettable that there were a number of circumstances that came together that resulted in the claimant choosing to resign from a role that he considered ideal for his future. The respondent did support the claimant but there were a number of ways in which matters could be improved. Ensuring line management responsibilities are clearly understood by all parties is an important factor, particularly when managers are on annual leave and new starts are in the business.

273. Secondly providing all relevant managerial staff with full details as to any Occupational Health report and specific adjustments, ideally with the worker present to discuss matters, is something that is important to ensure everyone works together and fully understands what is needed.

274. Finally, it was unfortunate that the claimant did not deal with the concerns he had through the formal grievance process which exists to provide a forum for the resolution of disputes such as these. It was possible that such a route could have led to a resolution for the claimant that regained his trust.

275. The Tribunal finally expresses its thanks for the professionalism of the parties in their conduct of this case and for working together to ensure the overriding objective was achieved.

Employment Judge: **D Hoey**
Date of Judgment: **11 May 2022**
Entered in register: **16 May 2022**
and copied to parties