Case No: 2500336/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr P Doona

Respondent: Nissan Motor Manufacturing (UK) Ltd

Heard at: Newcastle On: 9-12 May 2022 (deliberations 13 May 2022)

Before: (1) Employment Judge A.M.S. Green
(2) Mrs D. Newey
(3) Mr S, Wykes

Representation
Claimant: In person
Respondent: Ms C Millns - Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant's claim of breach of the duty to make reasonable adjustments (not issuing a Pension Statement to disabled employees who were members of DIS) is well founded and the respondent will pay the claimant £11,704.93.

2. The Tribunal recommends that the respondent issues an annual pension statement to the claimant as soon as reasonably practicable after the end of the applicable financial year and no later than 31 May in the year in question.

3. The remaining claims of breach of the duty to make reasonable adjustments, direct disability discrimination and indirect discrimination, being out of time and it not being just or equitable to extend time, the Tribunal has no jurisdiction to hear those claims.

REASONS

Introduction

1. For ease of reference, we refer to the claimant as Mr Doona and the respondent as Nissan.

2. Mr Doona presented his claim form to the Tribunal on 4 March 2021 following a period of early conciliation which started on 31 December 2020 and ended on 11 February 2021. He is claiming direct disability discrimination under the Equality Act 2010, section 13 ("EQA"), indirect discrimination under EQA, section 19 and failure to make reasonable adjustments under EQA, section 20.

3. In summary, he claims the following. He is employed by Nissan, a motor car manufacturer. He started working for Nissan on 1 June 1992. In 1996, he suffered a serious accident at work rendering him unable to continue with his occupation as manufacturing staff. He suffered a serious back injury. He was placed on Nissan's Disability Income Scheme ("DIS") in 1998. DIS is an insured scheme, underwritten by Legal & General ("L & G"). During his absence, he studied for, and obtained, Graduate Membership of the Chartered Institute of Personnel and Development and has also obtained a master's degree in Human Resources Management. He also did some contract work for Nissan through a third-party employer called North East College ("NAC"). He remains permanently disabled from his former work notwithstanding surgical intervention. It is because of his inability to work and remaining off work indefinitely that his membership of the DIS was approved on 25 July 1998.

4. Mr Doona was offered a settlement from L & G which he rejected. In October 2020, Mr Doona was informed that he would be paid 50% of his final salary as his pension. He believes that this is discriminatory because of his disability. When he originally presented his claim to the Tribunal he alleged, amongst other things, that Nissan were liable to make good the shortfall in his pension. He subsequently withdrew that aspect of his claim and has referred the matter to the Pensions Ombudsman for determination.

5. The parties worked collaboratively throughout this litigation. By way of general observation, we were most impressed with the documentation prepared by Mr Doona. Notwithstanding that he is a litigant in person, the quality of his documentation including his witness statement and written submissions was of a very high standard and equal to, if not better than, examples that we have seen in other cases where a party has been professionally represented. We were also impressed by the quality of the paper bundles that were prepared by Nissan's external firm of solicitors.

6. We worked from paper bundles. The following people adopted their witness statements and gave oral evidence:

    a. Mr Doona

b. Ms Anna Kelly

c. Ms Carrie Young

d. Mr Steve Tiffin

Mr Roland Craven also gave oral evidence. He was subject to a witness order and had not prepared a witness statement. He gave oral evidence in chief and was cross examined. Ms Millns and Mr Doona prepared skeleton arguments upon which they relied and expanded in their closing oral submissions. We allowed Mr Doona extra time to prepare his closing oral submissions given that he was a litigant in person. We also made reasonable adjustments to accommodate Mr Doona's disability which consisted of taking regular breaks and allowing him to stand up as and when he needed to stretch his back and to help to alleviate his obvious pain and discomfort.

7. In reaching our decision, we have carefully considered the oral and documentary evidence. The fact that we have not referred to every document in the bundle should not be taken to mean that we have not considered it.

8. Where crucial facts are in dispute, the law imposes a burden of proof to determine which side has the ultimate responsibility of proving his or her case to the court or tribunal. As a general rule in civil proceedings, the onus of proving the case is placed on the claimant — he or she must show that the court or tribunal has jurisdiction to hear the claim, that he or she is entitled to bring the claim, and that he or she is entitled to the remedy sought. The civil law standard of proof is on the balance of probabilities. This means that if Mr Doona satisfies a Tribunal that his version of events in support of the claim is at least 51 per cent 'more likely than not', the claim will succeed, provided, of course, that the employer does not go on to establish a valid defence.

9. In discrimination claims under the EQA, claimants benefit from a slightly more favourable burden of proof rule in recognition of the fact that discrimination is frequently covert and therefore can present special problems of proof. Broadly speaking, EQA, section 136 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation.

<u>The claims and the response</u>

Direct discrimination

10. Mr Doona alleges that Nissan did not alert him of vacancies and in doing so treated him less favourably that it would have treated others in comparable circumstances. He says this was because of his disability.

Indirect discrimination

11. Mr Doona alleges that Nissan applied the following provision, criteria or practices ("PCP"):

    a. It did not issue pension statements to disabled employees who were members of DIS.

    b. It failed to give him information regarding Nissan's share scheme.

    c. When it issued a pension statement to Mr Doona, it was in a different format to those employees who were not in the DIS.

    d. It did not alert disabled employees who were members of DIS to suitable vacancies at Nissan.

    Nissan accepts these are PCPs.

12. In terms of the disadvantage that Mr Doona says that he suffers because of these PCPs he alleges the following:

    a. He could not challenge the accuracy of his pension benefits.

    b. He did not have accurate figures to make decisions or representations about Nissan's pension scheme.

    c. He was unable to obtain shares in Nissan.

    d. He may have lost the opportunity to return to employment rather than remaining on long term sickness absence.

    The duty to make reasonable adjustments

13. Mr Doona relies upon the same PCPs as for his claim for indirect disability discrimination.

14. Mr Doona alleges that the PCPs put him at a substantial disadvantage compared to someone without the disability in the ways as in his claim for indirect discrimination.

15. Nissan denies liability. Its primary position is that all of the claims are out of time and it would not be just and equitable to extend time to allow the merits of them to be adjudicated. Its position concerning the substantive merits of the claims is:

    a. The claims lack merit. Nissan did not treat Mr Doona unfavourably because of his disability and his claims must fail.

    b. The operational reason for the claims is not because Mr Doona believes they have merit but that he feels aggrieved by what he sees to be unfairness in the DIS rules regarding his pension which he calls a "shortfall" in his pension accrual. This shortfall issue has clearly had a significant impact on Mr Doona triggering the claims that he has made.

The issues

16. The parties have agreed the following list of issues.

Time limits

17. Were the discrimination complaints brought within the time limit in of the EQA section 123?

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

    b. If not, was the conduct extending over a period?

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

    d. If not, is it just and equitable for the Tribunal to extend time for the presentation of the complaint pursuant to EQA section 123(1)(b)?

Direct discrimination

18. Did the Nissan do the following: not alert Mr Doona of vacancies at Nissan?

19. Was Mr Doona subject to less favourable treatment?

20. In doing the act complained of, did Nissan treat the Mr Doona less favourably than it would have treated others in comparable circumstances?

21. If Mr Doona was subject to less favourable treatment, was it because of his disability?

Indirect discrimination

22. Did Nissan have the following PCPs:

    a. Not issuing pension statements to disabled employees who were members of DIS;

    b. Failing to give Mr Doona information regarding Nissan's company share scheme. This is denied by Nissan;

    c. When issuing a pension statement to Mr Doona, issuing them in different format to those employees not on DIS; and

    d. Not alerting disabled employees who were members of DIS to suitable vacancies within Nissan. Nissan accepts that it applies this PCP.

23. Did Nissan apply the PCP to Mr Doona?

24. Did Nissan apply the PCP to employees who were not members of the DIS or would it have done so?

25. Did the PCP put those employees referred to above at a particular disadvantage when compared with employees who were not disabled namely:

    a. Mr Doona was unable to challenge the accuracy of his pension benefits;

    b. Mr Doona did not have accurate figures to make decisions or representations about Nissan's pension scheme;

    c. Mr Doona was unable to obtain shares in Nissan; and

    d. Mr Doona may have lost the opportunity to return to employment rather than remain on long term sickness absence.

26. Did the PCP put Mr Doona at that disadvantage?

27. Was the PCP a proportionate means of achieving a legitimate aim?

The duty to make reasonable adjustments

28. Did Nissan have the following PCPs:

    a. Not issuing a Pension Statement to disabled employees who were members of DIS?

    b. When issuing a Pension Statement to the claimant upon request it was in a different format to those employees not in DIS?

    c. Failing to give Mr Doona information concerning Nissan's share scheme? Nissan denies this.

    d. By not alerting disabled employees who were members of DIS to suitable vacancies within Nissan? Nissan accepts that it applies this PCP.

    e. failing to take reasonable steps to rectify the concern of incorrect calculations?

29. Did the PCPs put Mr Doona at a substantial disadvantage compared to someone without his disability, in that:

    a. He was unable to challenge the accuracy of his Pension Benefits;

    b. He did not have accurate figures to make decisions or representations about Nissan's pension scheme;

    c. He was unable to obtain shares in Nissan; and

    d. He may have lost the opportunity to return to employment rather than remain on long term sickness absence?

30. Did Nissan know or could it reasonably have been expected to know that Mr Doona was likely to be placed at that disadvantage?

31. What steps could have been taken to avoid the disadvantage?

32. Was it reasonable for Nisan to have to take those steps?

33. Did Nissan fail to take those steps?

Remedy

34. Is it just and equitable to award compensation? What amount of compensation would put Mr Doona in the position he would have been in but for the contravention of EQA?

35. Has Mr Doona taken reasonable steps to mitigate his loss?

36. Should the Tribunal recommend that Nissan take steps to reduce any adverse effect on Mr Doona? What should it recommend?

37. What financial losses has the discrimination caused Mr Doona?

38. If not, for what period of loss should Mr Doona be compensated?

39. What injury to feelings has the discrimination caused Mr Doona and how much compensation should be awarded for that?

40. Has the discrimination caused Mr Doona personal injury and how much compensation should be awarded for that?

41. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

42. Did the Respondent unreasonably fail to comply with the ACAS code of practice? If so, is it just and equitable to increase or decrease any award payable to Mr Doona? By what proportion, up to 25%?

43. Should interest be awarded? How much?

Findings of fact

44. Nissan is a vehicle manufacturer based in Sunderland. It employs approximately 7000 people.

45. The following people are relevant to Mr Doona's claims:

    a. Ms Katie Bell, the senior personnel controller at Nissan who received Mr Doona's appeal to his grievance response on 26 December 2020.

    b. Dr Broome, the company Doctor for Industrial and Organisational Health who are the occupational health specialists used by Nissan.

c. Mr Paul Cox, a member of the Nissan Company Council who attended the grievance meeting and the appeal meeting with Mr Doona.

d. Mr Rowland ("Ro") Craven, who is now retired but was a pensions manager employed by Nissan from 17 September 2007 to 24 August 2018 in the Pensions Section.

e. Ms Jane Devanney, Nissan's Lead HR Partner who assisted the appeal process following Mr Doona's grievance. She has since retired from Nissan.

f. Dr Stephen Duckworth OBE, Chief Executive of Disability Matters Ltd ("Disability Matters").

g. Mr Nick Edwards, Mr Doona's consultant from Disability Matters who assisted him in returning to work.

h. Mr Dominic Gillespie, Mr Doona's Employee Relations Controller when he joined the DIS.

i. Ms Katie Heyes, a Personnel Controller at Nissan.

j. Mr Francis Hill, a Nissan Senior HR Controller in 1998 when Mr Doona joined the DIS.

k. Mr Sean Hodgson, a Nissan HR Controller during Mr Doona's time on the DIS.

l. Ms Anna Kelly, a Nissan Senior Controller who undertook the investigation into Mr Doona's grievance raised on 21 October 2020.

m. Ms Judith Mawson, a member of Nissan's HR personnel who handled Mr Doona's DIS membership from October 1998.

n. Mr Steven Tiffin, Nissan's Company Secretary and Finance Manager. Mr Tiffin was the grievance appeal hearing officer.

o. Mr Don Woods, who was Mr Doona's Supervisor when he joined the DIS.

p. Dr Wollaston, a Company Doctor for Industrial and Organisational and Health.

q. Ms Carrie Young, who was head of Nissan's pension section from 2018 to 2022. Ms Young undertook the stage 1 investigation into Mr Doona's grievances raised with the Pension Fund Trustees.

46. Mr Doona was originally employed in 1992 in Manufacturing until he experienced back problems in February 1996. He suffered a slipped disc in his back when lifting a box in 1996. After an operation and, in an attempt to rehabilitate him, Nissan found a position for Mr Doona within their Engineering Department undertaking administrative functions. He continued to attend intensive physiotherapy and rehabilitation but the

Company Doctor ultimately decided that there was no suitable employment for Mr Doona and it was recommended that, given he would be off work indefinitely, he should join the DIS. The DIS is an insured scheme underwritten by L & G for Nissan's disabled employees. Nissan applied on behalf of Mr Doona to join the DIS and this was approved on 29 December 1998 back dated to 25 July 1998. L & G assumed responsibility for paying benefit from that date [83, 263-274].

47. On 19 June 2000, L & G wrote to Nissan to confirm that following a reassessment of the claim, benefit would continue to be paid [86]. L & G also noted that Mr Doona was interested in investigating the prospect of obtaining further academic qualifications to enable him to find a new career. Consequently, L & G offered him the opportunity to undergo an assessment with a Career Consultant who might be able to assist him in that regard. Details of the Career Restart programme offered by an organisation called EuroCareer were enclosed in the letter. L & G. would pay any fees

48. On 30 August 2000, Mr Doona confirmed that he would accept the opportunity to work with EuroCareer [91].

49. On 7 October 2003, Ms Heyes wrote to Dr Broome [93] requesting that he examine Mr Doona to check his current medical condition and the degree of his incapacity to confirm whether he met the criteria of the DIS. At that time, Mr Doona had been undertaking administrative related duties in Personal and extracurricular studies in that area.

50. Mr Doona attended a meeting with Ms Heyes on 7 October 2003. Notes of the meeting were taken and have been produced [96]. It is recorded, amongst other things, that Mr Doona had completed a degree in HR management and that he found personnel very interesting and, in particular, employment law. It is also noted that Mr Doona is recorded as saying that he was interested in discrimination law in particular. Under cross examination, it was put to him that he had a greater knowledge of employment law than the ordinary person on the street. In response, he suggested that he knew about contract law but when he was pressed on this, he accepted that he knew about employment law and discrimination law. He said that he had his course books and had an idea of what discrimination law was but had not kept up to date. We disagree on that latter point given the high quality of Mr Doona's 47-page witness statement and his written submissions which illustrates his facility with referring to case law on areas such as discrimination both of which he prepared in support of his claim before the Tribunal. He knew what protected characteristics were under EQA and that disability is a protected characteristic. Indeed, we were impressed with his knowledge especially given that he is a litigant in person. Mr Doona is not ignorant of employment law and discrimination law and has been aware of it from at least 2003.

51. We also note that at the meeting he discussed with Ms Heyes whether he had been in contact with EuroCareer. It is recorded that he had spoken to them but matters had not been taken further because Mr Doona's GP did not think he was fit to work. It is recorded that Dr Wollaston had been very nervous about Mr Doona returning to work in case there was a relapse. As a result, Mr Doona's GP tended to agree with Dr Wollaston and supported the conclusion that he should not return to work. It is also noted that Mr

Doona said that he felt that he could return to work in an administrative capacity and explained that he had looked at other organisations but had found it hard to get work because of the amount of time that he had been absent because of his illness. It was agreed that Ms Heyes would await the outcome of the referral to Dr Broome and she would contact Mr Doona if further action were required.

52. On 7 October 2003, Dr Broome wrote to Ms Heyes [94]. He noted that Mr Doona had recently completed a master's degree in human resource management and that he had done some project work for Nissan's Personal department involving the Design and Production of computerised Software for various personal functions. He also noted that Mr Doona hoped that he would be able to obtain a full-time position at Nissan in the future either in Personal or Training if a post became available. Dr Broome also noted that Mr Doona had told him that he was able to do computer work but could only sit comfortably for 15-20 minutes before changing posture. In his conclusion, having examined Mr Doona, he appeared to have less discomfort from when he had last assessed him in 1999 but his mobility was still significantly affected by back pain which was a chronic problem. He noted that from a work perspective, it was entirely unrealistic for Mr Doona to contemplate any significant manual work and certainly a return to production line work in Trim & Chassis would be out of the question. However, Dr Broome observed that Mr Doona had demonstrated his ability to undertake administrative/clerical duties, sufficient to gain his degree. In his opinion, employment in that sort of role would appear to be well within his capabilities provided that appropriate ergonomic safeguards were in place with respect to computer workstation set up and he had the flexibility to move and change posture as comfort dictated. He ended the letter by stating that he did not anticipate that his advice would change significantly in the foreseeable future.

53. On 10 October 2003, L & G wrote to Ms Heyes [97]. The purpose of the letter was to offer Mr Doona the opportunity to work with the consultant from Disability Matters who would be able to help him improve his quality-of-life and help him to return to gainful employment. They would contact Mr Doona to introduce themselves and to arrange a meeting. There is a manuscript note on this letter dated 13 October 2003 written by Ms Hayes confirming that she spoke to Mr Doona about this and he was happy to gain work experience if possible.

54. A meeting between Mr Doona and Mr Nick Edwards, the Project Director at Disability Matters was scheduled for 17 December 2003 [98].

55. In 2003, Mr Doona applied to Nissan' Plant HR Department for the position of HR Graduate. He did not pass the aptitude test [181].

56. Mr Doona met Mr Edwards on 17 December 2003 and followed up the meeting by writing to him on 14 January 2004 [99]. The letter was copied to L & G. In the letter, Mr Edwards confirmed that he had written to L & G to advise them that Mr Doona was keen and motivated to return to work. He had also notified L & G that he had successfully obtained an MSc in Human Resource Management and commended him for that achievement. It is also noted that he hoped to arrange another meeting with Mr Doona and the Nissan personnel department in late February/early March.

57. On 5 February 2004, Ms Heyes wrote to L & G [101] confirming that Nissan was agreeable to arranging a meeting in early March with Mr Edwards to discuss the possibility of Mr Doona returning to work.

58. On 7 September 2004, Mr Edwards emailed Ms Heyes [103] to confirm that he had recently been in touch with Mr Doona. The tenor of the conversation was that he had noted that two posts in Personnel at Nissan had been advertised and filled. He reported that Mr Doona was a little disappointed and surprised that he had not been approached by Nissan to be considered for some of these vacancies given that he had the skills and qualifications to undertake the work in Personnel. He also reported that Mr Doona was speaking to his union official about the situation. Mr Edwards had promised to write to Ms Heyes to appraise her of the situation and he had also told Mr Doona that it might have been the case that Ms Heyes was unaware of the vacancies.

59. In 2004, Mr Doona asked for a pension statement. This was for the purposed of getting a mortgage. He was not provided with the statement.

60. On 31 May 2005, Dr Duckworth wrote to Mr Ashmore, Nissan's Director of Personal to update him [104]. He reported that it was unlikely that there would be any further surgical or medical interventions on Mr Doona's back and that he was keen to find a new job within Nissan. He also commented on the fact that Mr Doona had gained a number of qualifications at a high level in HR and was very interested in personnel issues around absence management. He expressed the opinion that it was the right time to develop a structured transitional return to work plan with Mr Doona and to that end he asked whether there were any positions in Personnel for him, initially under permitted work rules.

61. Ms Heyes replied to Dr Duckworth in a letter dated 1 September 2005 [105]. She acknowledged that Mr Doona frequently kept in touch with members of the HR Department on a friendly basis. She also stated that they were sympathetic towards his career aspirations and recognised his genuine interest in the field of HR. However, there were no vacancies planned in the Department for the foreseeable future. Nissan were reviewing their organisational structure within all of their administrative functions and Ms Heyes could not see how they could help Mr Doona.

62. On 17 December 2008, L & G wrote to Ms Heyes [107] outlining that Mr Doona was required to attend a DIS assessment. At this time, Mr Doona had been working for 10 hours per week in Nissan's HR offices via an agency.

63. In 2008, Mr Doona asked for a pension statement for the purposes of re-mortgaging his house. He was not provided with a statement.

64. In February 2017, Nissan established a Company Share Scheme devised to afford all employees the opportunity to buy shares. Under cross examination Mr Doona accepted that he knew about the Company Share Scheme in 2017. On 18 September 2017, Mr Doona helped to produce a PowerPoint presentation for new joiners outlining the ability to join the Share Incentive Plan [281-317]. He had also sent an email to Nissan about the

Company Share Scheme. He did not get a reply. Under cross examination he admitted that he did not chase for a response and he did not complain about the lack of a response. When he was asked why, he replied that he thought it was because he was a member of the DIS. He admitted that this was simply an assumption. He also admitted that he had not blamed or suggested at the time Nissan was discriminating against him because of his disability. It was also put to him that if he had persisted at the time for a response, he would have been told that he was eligible to join the Company Share Scheme. He accepted that no one had told him that he was not eligible. He said, "I just let it go." It was put to him that if it had been a problem at the time, he could have raised a grievance. To which he replied, "I could have, but I did not."

65. On 20 October 2017, Mr Doona received an HR excellence award from Nissan in recognition of successful business partnering approach with increased shop presence and special focus on attendance related matters (with a reduction in absence rates) [112].

66. In March 2018, pension arrangements changed; all employees (except those in the DIS) transferred from a Final Salary Scheme to a Career Average Revalued Earnings Scheme. Members of the DIS remained in the Final Salary Scheme until 2020.

67. On 15 March 2019, Mr Doona received his second HR excellence award from Nissan in recognition of his outstanding HR contribution for Nissan. [112].

68. On 7 July 2020, Mr Doona emailed Ms Young [113]. In his email, he made Ms Young aware that he had not received anything regarding his pension notwithstanding that he had requested a projection several times over the years. He acknowledged that he received an annual funding summary but nothing more. He thought it important for him to know what was projected with a change from the Final Salary Scheme. He wanted to know where he stood before speaking to someone at the Company Council.

69. The question regarding issuing pension statements is touched upon by Ms Young in her witness statement. In paragraph 12, she says that she was told by Capita (the pension scheme administrators) that there was no record of any statements (beyond those specifically asked for by Mr Doona) being sent by Capita or AON (the previous administrators of the Nissan pension scheme). She states:

> *Therefore I was unable to comment on the content of these or why members of DIS had not received [them]. While it is true that the pension statements were not issued because of the specific nature of the calculations required, DIS members were always able to request a copy from the Pensions team or directly through Capita. I cannot recall any members of the DIS scheme ever requesting an annual statement other than the claimant in August 2020.*

70. In his evidence under cross examination, Mr Craven said that he had joined Nissan in 2007. He explained that Nissan paid the then administrators (AON) to provide benefit statements. Nissan changed the administrators to Capita in 2014. He said that the law had changed regarding pensions

statements to cover things such as pension sharing orders for divorcing couples and the administrators had to provide for that when issuing pension statements. He also explained that matters were also more complicated for calculating pension entitlement for senior executives which added to the cost of running the pension scheme. The pension trustees had taken advice and it was decided that pension statements would not be issued to members of the DIS, divorcee employees and senior executives. If these people wanted an annual statement, they needed to request one to be provided. He was also clear in his evidence that this requirement was not simply limited to members of the DIS. In his mind they were trying to streamline the administration because there were concerns about the cost of issuing special category annual statements (approximately £300 per statement). Nissan had taken advice on the way to handle a small group of people. If annual statements were to be issued to them, this would hold up issuing statements to thousands of other employees. Mr Craven recalled that Capita had been tasked with communicating this change to the DIS members and others who would be affected. However, he could not remember whether this had actually happened because, in his words "there was no change."

71. The question of pension statements was also canvassed with Mr Doona in his oral evidence. Under cross examination, he said that he did not receive any annual pension statements for the entire time he was a member of the DIS until he asked for one in 2020. Previously, when he was working and before he joined the DIS, he said that he received an annual pension statement at the end of each financial year (I.e. in April/May).

72. Having considered the evidence regarding the issue of pension statements, we find that it was more probable than not that Mr Doona ceased receiving annual pension statements when he joined the DIS on 25 July 1998. Alternatively, although Nissan decided to stop issuing annual pension statements to members of the DIS and others such as divorcing couples and senior executives in 2014, this fact was not communicated to Mr Doona. The earliest date when Nissan stopped sending pension statements to Mr Doona was 20 November 1998 and the latest date was sometime in 2014.

73. On 11 August 2020, Mr Barclay, of Pensions Operations at Capita produced a pension summary for Mr Doona [114]. The summary was predicated on Mr Doona retiring aged 60 on 15 October 2028 under the DIS rules. It projected a full annual pension of £7800 per year.

74. On receiving this pension projection, Mr Doona emailed Ms Young on 12 August 2020 [115]. He had two questions. He wanted to know whether the projection would stay the same if/when "we" (i.e. members of the DIS) change to another pension scheme and whether it was possible to get a projection based on him not having suffered his accident and had stayed as a top of the band member of the manufacturing staff with the company until the age of 57.

75. On the 18 August 2020, Mr Doona sent an email to Ms Young [116]. He said that he had been asked to get a breakdown of how his pension had been calculated and asked if she could arrange that for him.

76. Mr Doona chased Ms Young for a response. On 24 September 2020, he emailed her again [118]. He said, amongst other things:

> *I have been waiting for over two months now for the illustration of how my Pension is currently calculated and how it will be calculated if/when the pension changes. To be totally honest it is starting to make me anxious.*
>
> *As you can imagine this is very important to me but I am aware that my case is different to the majority on the scheme. As mentioned previously it is also important as I had taken my Company Disability Income Scheme and my Company Pension into account when I accepted a settlement for compensation for my accident.*
>
> *I know you are busy but and at the moment I don't know where I stand. If you can send me the contact details of the Pension Administration company I will make a Subject Access Request to see if I can get my information that way.*

77. On 24 September 2020, Mr Doona received a second pension statement set out in the form of an Excel spreadsheet [119]. It was incorrect regarding his annual salary uplift and he was issued with a corrected version [163].

78. On 21 October 2020, Mr Doona submitted a formal grievance to Nissan. [120]. He said amongst other things:

> *…I would like to register a number of complaints regarding my Company pension in that I have been misled and ill-informed. Also due to the circumstances around this I believe that I am being discriminated against because of my disability.*
>
> *Following an accident at work I was placed on the Company Disability Scheme in 1998. When I joined the scheme I was told in my HR meeting that I did not need to worry about my pension as I would remain on a final salary pension and both mine and the companies contributions would be paid by Legal & General, the policy provider on my behalf. I received regular statements regarding my projected pension and it was clear that the above statement was accurate. However several years ago I stopped receiving these projections and took for granted that they must have stopped producing them for everybody.*
>
> *Due to recent DB pension proposal I asked for a projection on my pension. I was devastated to read that I would only receive an annual pension of £7080.00 on retirement at the age of 60. How could this change so dramatically?*
>
> *The grounds of my complaint are:*
>
> 1. *At the time of going on DIS it was verbally explained to me that my pension will be taken care of and I have nothing to worry about. The only thing I was given in writing is a small paragraph*

in the Disability Income Scheme saying the payments will be made to the pension from the policy.

2. *I was never made aware of this apparent calculation for the DIS pension which appears in the Pension Rule Book!*

3. *I was never given nor do I know anyone else who has had or seen a copy of the pensions rulebook!*

4. *Who authorised the stopping of my annual statements?*

5. *Why were they stopped as I was still classed as an active member? Do we not give statements to disabled active members whilst all other active members receive them?*

6. *Why was I not given paperwork on how the DIS scheme works and what the effect would be on my pension?*

7. *Due to lack of transparency from the company I believe I have suffered detriment. If I had been aware of the huge shortfall from the start I would have been able to put other things in place for my retirement.*

I have spent 22 years believing that despite my life changing accident at work I could look forward to a reasonable retirement. Unfortunately, due to Nissan's gross negligence I will be unable to retire until I am 67 years of age at the earliest.

…

79. In paragraph 67 of his witness statement, Mr Doona provides some background as to why he waited until 21 October 2022 to submit his grievance. He says it was the first opportunity for him to raise this matter and to ask for an explanation regarding his concerns. He says:

> *I did not want to cause any major problems and I thought if I brought these concerns to the HR Department to the grievance procedure, they could be dealt with quickly and without great complexity.*

80. On 20 November 2020, a grievance meeting was held to address the grievances and during that meeting, Mr Doona raised two further grievances. Mr Doona was accompanied by Mr Cox. Ms Bell and Ms Kelly also attended the meeting.

81. On 30 November 2020, all employees in the DIS transferred from the Final Salary Scheme to the Career Average Revalued Earnings Scheme.

82. On 14 December 2020, Ms Kelly wrote to Mr Doona on behalf of Nissan in response to his grievance [122]. His grievance was not upheld. She stated, amongst other things:

…

You confirmed your desired outcome from this grievance was to receive a 100% pension and not one reduced by 50%, as you had recently been informed, or, if that should not be possible, you would like to be compensated in some way for the perceived negligence of the Company. In addition to this, you wanted the DIS scheme to be managed more effectively, with increased and improved communication to employees.

…You told us that you are aware that Legal & General have been making pension contributions on your behalf (20%) but you disputed any knowledge of the rules of the Nissan Pension Plan (NPP). Upon investigation, I have been informed by the Pensions team that these rules have always been available to all NPP members and are held with the Pensions team on site at NMUK. Please contact Carrie Young, Payroll & Pensions Senior Controller if you require assistance with this.

[Ms Kelly then quotes from the NPP rules from 1998 relating to the DIS pension].
…

When you apply this criteria to your case it totals a score of 36, as you were 30 years old and had 6 years' service at the point you were placed on DIS. As 36 is less than 50, you would have an entitlement of 50% of your pension benefits. In summary, whilst I cannot confirm exactly what you were told in your meeting 22 years ago, when you were placed on DIS, I can confirm that the NPP rules, outline the DIS pension calculation.

In our meeting, you also explained that you felt due to the lack of communication and transparency from the company you had suffered a significant detriment. You went on to say that if you had been made aware of the shortfall initially that you would have been able to make alternative financial plans for your retirement that would have allowed you to retire comfortably. You explained that in February 2012, you were offered a settlement from L & G, the offer was made up of 2 parts; part 1 was a full and final settlement of £150,000 in the second part would entitle you to a pension of £3,116.93 per annum, based on the assumption that you would retire in 2023. From reviewing the email documentation and speaking with you, I confirm that you turn down this offer and informed Ro Craven of such on 13 February 2012, as below.

This indicates that in 2011 you were informed that you had accrued pension of £3,116.93. At that point you had 19 years' service in the NPP. Therefore, I think it is reasonable to assume that you did have visibility of the lower pension amount in 2011 and could have made any necessary plans or adjustments in your future retirement. I also noted that there did not appear to be any queries raised at the time.

Another point you raised was your annual pension statements stopping, you asked why this had happened as you were still an active member of the pension scheme. I can confirm that we have checked with our accounts manager at Capita and unfortunately

there is no record of any statements sent to you from AON at all, therefore, I am unable to comment on the content of these. In our meeting, I asked if you had copies of the statements, however you confirmed that you also did not. Paul Cox told us that he had been made aware that, when Ro Craven had joined the Company, he had discovered the Pensions statements for DIS members to be incorrect such that the decision to stop issuing two employees on DIS. I have spoken to Carrie Young regarding this matter and she informs me that Ro Craven took the decision to stop sending out standard annual statements as they did not cater for all circumstances, for example DIS employees, divorced employees etc. Upon the move to Capita around 6 years ago benefits statements were reviewed and decision was made to provide DIS members with information upon request.

In addition, whilst it is true that DIS members no longer receive a pension statement because of the specific nature of the calculations required for their pension, DIS members can request a pension statement at any time from the NMUK Pensions team.

You explained that you had a memo from Judith Mawson from November 1998 which informed you of how your pension contributions would be paid. I have reviewed the memo below however although this does indeed explain the way the contributions were to be paid, including the fact they would no longer appear on your payslip, it does not confirm amounts or percentages.
…

You felt that as a result of your disability you have been put at a detriment and treated less favourably than other employees. In our meeting you raised a number of concerns in relation to this, which we investigated and our feedback is as follows:

- *You are not allowed to vote for Company Council Representatives however you are able to use them. The company takes the view that employees, who are not at work do not vote in Company Council elections, however as you say, you can use Company Council and their representatives if you require. The same principle applies to anyone on long-term sickness absence leave or maternity leave.*

- *You are not informed of any vacancies within the Company unless you are in work. Typically, when an employee has been placed onto DIS, it is because they are unfit for any work in the longer term therefore, we felt it reasonable to assume that you would not be fit for any vacancies and so details of these positions within the Company need not be distributed to you. That said, I understand you had access to vacancy details through your WorkDay account, whilst working part-time with NAC.*

- *You would not have received any communications had you not been working part-time. Again, DIS members do not receive department communications once they are placed on*

the scheme however you would have received all communications through your email address… being part of the NMUK-Personnel list.

- *You had been dissuaded from applying for the graduate scheme. I cannot comment on this claim, as I was unable to find anyone within the department, who could recall this.*

- *You had previously worked in Graduate Recruitment and felt that you were essentially forced out of the role. In the HR Department, we endeavour to rotate employees where possible, in order to maximise opportunities for development and, as you know, the Graduate Recruitment role has been used for this purpose on a number of occasions. There is no question of your capability in this role with NAC, however, for career development, the decision was taken for a Graduate controller and placement to move into the section and you were assigned to working closely with the Employee Relations team on absence reporting.*

Having considered all of the above, I don't believe any of the above amounts to less favourable treatment. On the contrary, I believe that after you were placed on DIS, to suit your needs, medically and financially through NAC you were allowed to choose the amount of hours worked, start and finish times and on occasion work from home if needed. At your request, in order to allow you to continue receiving benefit payments, a 10 hour per week contract was agreed.

During the investigation process, I have been made aware of 3 other former DIS employees, who retired from the company, they also received a pension based on the aforementioned calculation. In addition, I have been advised that we have not received any complaints or grievances from employees, who have retired from the DIS. I therefore think it is reasonable for me to assume that you have not been treated any differently to anyone else on DIS.

Conclusion

In reaching a decision, we felt that the following points were significant in relation to your specific complaints:

- *While we have not been able to confirm exactly what you were or were not told in your DIS meeting in 1998, the DIS pension calculation was set out in the NPP rules.*

- *You were provided with a lower pension statement in 2011, which showed a pension of £3,116.93, despite having 19 years' of NPP service at that point. I'm not aware that you raised any concerns or queries about your pension at that point.*

- *There are no records available to us of any AON statements you might have received. However, no DIS members are*

provided with annual statements, though they were available on request at the time.

- *The rules of the NPP, which include the process for calculating DIS pension, are applied to all DIS members.*

- *Following your accident at work, the Company placed you on DIS then, when you were keen to do something within the workplace, a part-time role within the HR Department was created to suit your needs, working for NAC.*

- *I would also like to point out that you receive an annual pay award of 5% each year which has been higher than other employees.*

As a result of all of the above, I feel in conclusion, I can find no evidence to support your claims, therefore, I cannot uphold your grievance.

83. On 17 December 2020, Ms Young wrote to Mr Doona having completed her stage I investigation on behalf of the Pension Plan Trustees into his grievances and did not uphold his complaint [129]. She said, amongst other things:

My decision

As you are aware you were placed onto the Disability Income Scheme in 1998 and you will remain on the scheme until you reach the age of 60 at which point you can take your retirement benefits from the Nissan Pension Plan.

The Nissan Pension Plan follows a set of Rules for calculating pension benefits for all members including those members who are in receipt of Disability Income Scheme benefits.

The Rules for Disability Income Scheme members use the age at which you were placed onto the Disability Income Scheme (a copy of the Rules is in Appendix 1). In your case you were 37 years old with six years of service. This gives an aggregate of age/service of 43.

The Rules then use a reduction factor, in your case as the aggregate is under 50, there is a reduction factor of 50% of accrued benefit which provided you with a pension benefit of £7,080 pa. I attach a breakdown of the calculation for your records (please see Appendix 2).

You do not have to take your pension benefits from the Nissan Pension Plan at age 60, you can choose to defer until a later date, should you wish to do so. As the Disability Income Scheme only runs until age 60, these benefits will cease at that point.

…There is no legal requirement to provide statements to members, however, these are available on request.

I am sympathetic to your situation and appreciate that this may seem unfair to you. However, your benefits must be administered in accordance with the Plan's Trust Deed and Rules ("the Rules"). I am unable to change your benefits, or the calculation of your benefits, without express instructions from the Trustees and the Company.

…

84. On 26 December 2020, Mr Doona formally appealed the grievance outcome [136]. The reasons for his appeal were:

I feel the decision taken was wrong and the decision was taken without reviewing all the available evidence. I have attached responses to the points given in that decision document and I respectfully ask that this could be reviewed as part of my appeal. I have highlighted where I have replied to Anna Kelly's response.

85. Mr Doona attended his grievance appeal meeting on 29 January 2021. The meeting was chaired by Mr Tiffin with Ms Devanney in attendance. Mr Cox accompanied Mr Doona. At that meeting, the main point of his complaint was his dissatisfaction with the fact that his pension, when he retired from Nissan, would be reduced by 50%. However, the crux of his appeal was his belief that he had been discriminated against by Nissan as a result of his DIS employee status. He believed that he had missed out on various things, none of which had been applied to non-DIS employees.

86. Mr Tiffin dismissed the appeal setting out his reasons in a letter dated 11 March 2021 [164]. He stated, amongst other things:

…

Conclusion

- *in terms of your pension, I sympathise with your current position. In the absence of any supporting evidence on either side, I cannot make any comment on what did or did not happen with regard to the explanation about your pension at the time that you moved onto DIS or at any point thereafter. However, I witnessed your distress at your current predicament when we met and realise this is a very difficult time for you.*

- *I accept that you and the rest of the DIS employees did not receive annual pension statements for a period of time and this was after you received inaccurate statements. I cannot comment on the detail of this, as I could not view any examples of this or any evidence of timescales etc. I can see and agree with you that this is not good practice. However, I also recognise that, like all DB pension scheme members, you*

could have requested a statement at any point during the 22 years on the scheme and did not do this. This is difficult to understand, especially over such a long period of time.

- *The above comments notwithstanding, I am not in a position to be able to change the decision of the Pension Trustees about your pension. From my investigation, I can see that they are following the rules of the pension scheme. I realise that you claim to have been unaware of this particular rule of the pension scheme, however I do believe you have been treated no differently to any other member of the fund who only has access to these rules on request.*

- *Moving on from this issue of your pension to that of discrimination, my thoughts were that DIS employees are indeed treated differently to current employees, who carry out work for the Company but that this treatment is justified. DIS employees are not able to work and so do not need to be issued with details of vacancies. I can see from your paperwork that, at a certain point, the Company Doctor advised you to be fit for suitable positions but, unfortunately, no such positions were available. I also thought it noteworthy that you had access to all of NMUK's vacancies, something which is more difficult to do for the majority of DIS and non-DIS employees.*

- *In the same vein, your complaints about not being able to vote for Company Council representatives, not vote in the Company's Negotiations, not issued with information about the appointments to the Board of Trustees, did not, in my view, amount to discrimination, given the fact that DIS employees are in a unique position within the Company and do not need this sort of interaction with the Company. My view was also influenced by the point that you did not make any kind of complaint about any of these things in the previous 22 years since he joined the Scheme. This question is how significant these things had really been to you until your issue with your pension calculation.*

- *My final point relates to your actual acceptance onto DIS, which indicated to me that you had, in fact, been treated more favourably than the majority of NMUK employees, who find themselves in a similar position to the one you were in prior to your DIS acceptance. Most NMUK employees, who find themselves completely incapacitated as a result of a medical condition, whether this is work-related or not, are dismissed for medical incapacity. The number of employees, by contrast, who are considered for and accepted onto DIS is minute. As such, you have maintained a pension for your retirement at no cost to yourself, something that those people, who have lost their job, have not been able to do. I appreciate that this doesn't resolve the issue of your pension complaint but it does not, I feel, support a claim of discrimination.*

87. It is common ground between the parties that Mr Doona worked at Nissan as an employee of NAC (an agency) as per a table produced to the Tribunal and reproduced below [180], either on a paid or an unpaid basis on the following dates:

Start	End	Company	Work	Paid/Unpaid
2004	6 Weeks	Unipress HR Department	Unipress Review of Sickness Absence	Unpaid
2005	6 Weeks	Nissan Sunderland Plant HR Dept	Admin Work at Nissan	Unpaid
2006	4 Weeks	Durham County Council HR Department	Council Absence Project	Unpaid
2007	Ad Hoc	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Unpaid
2008	Ad Hoc	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Unpaid
2009	Ad Hoc	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Unpaid
2010	Ad Hoc	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Unpaid
01/04/2010	25/03/2011	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Paid
26/03/2011	15/04/2012	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Unpaid
16/04/2012	10/04/2013	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Paid
11/04/2013	10/04/2014	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Unpaid
11/04/2014	02/08/2015	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Unpaid
03/08/2015	02/08/2016	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Paid
03/08/2016	02/08/2017	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Paid
03/08/2017	02/08/2018	Nissan Sunderland Plant HR Dept	Placement & Graduate Recruitment	Paid
03/08/2018	02/08/2019	Nissan Sunderland Plant HR Dept		Paid
03/08/2019	20/11/2020	Nissan Sunderland Plant HR Dept		Paid

88. In his oral evidence under cross-examination, Mr Doona confirm that NAC was contracted to provide placements at Nissan. He resigned his employment with NAC on 20 November 2020 at the same time that he had presented his grievance to Nissan. He was being paid for the work that he had been doing at that time. He explained that he was allowed to earn £110 per week after tax which equated to approximately £500-£600 per month. He was permitted to work under the terms of the DIS rules. For the majority of the time that he had been working at Nissan via NAC he had been in the HR Department assisting with Placement & Graduate Recruitment. In his

oral evidence Mr Tiffin said this involved arranging graduate recruitment events to enable prospective employees to visit the Plant. The work would involve liaising with universities.

89. On the question of Nissan alerting Mr Doona of vacancies, he was taken to his response to the findings in the grievance that he prepared [146]. In his opinion, he believed that Nissan should have actively encouraged him to apply for positions and that they knew that he had been disappointed for not been considered for two administrative roles within Personnel in September 2004. Disability Matters had raised the matter with Ms Heyes. Under cross-examination he was asked to amplify and what he meant by this. He replied that he expected to be notified of vacancies that were coming up from a member of senior management so that he would have the opportunity.

90. Mr Doona was also asked whether Nissan should have done anything more than that. He replied that it should have seen if he was interested in the position(s) advertised and then arrange a medical to check that he was fit enough for the role. It was put to him that this was not the claim that he had made to the Tribunal. His claim was that Nissan had failed to alert him of possible positions and he was asked to confirm whether that was still the case and he said that it was. He said that he wanted to be informed by senior management about the roles. When he was asked how that would work in practice, he replied that they could have come to him and spoken to him about them when he was at work. He said that it had not been a major problem for him when he was unaware of his pension shortfall and when he was working at Nissan through NAC. When he had been working, he had been in the office. He was then asked about when Nissan should have started notifying him of vacancies to which he replied as soon as he went on to the DIS from 1998. He said there had been an ongoing failure to provide this information and he said that he had concluded that Nissan had discriminated against him from when he applied to the company in 2004 for the two administrative positions which he “let go”. Mr Doona was challenged on this in his cross examination and he was asked whether he was seriously suggesting that there was continuing discrimination since 1998 notwithstanding that he did not pursue a claim in respect of the two administrative positions in 2004. In response, he said “it was not causing me a major detriment by not getting the roles.” He also confirmed that he had not raised a grievance at the time despite the fact that he knew about the grievance procedure and the first time that Nissan learnt of his dissatisfaction about job vacancies was 16 years later when he raised his grievance in 2020.

91. Mr Doona was also cross-examined about his relationship with EuroCareer which he confirmed had ended in October 2003. He accepted that there was nothing to stop him from asking Nissan or L & G for assistance to which he replied that if he had done that, he would have got sick of asking and would have felt that he was being a pest. However, on being questioned further, he accepted that in principle it was open to him if he thought that his career had not been progressing to have sought help and he could have gone back to Nissan to ask if he could use EuroCareer to provide him with further assistance whose aim was to help people in his predicament to get back into the workplace. He also accepted that he did not do that. He said that he thought that Nissan believed that because he was on the DIS, he could not go back to work. It was put to him that if he felt trapped in the DIS, he

could have taken more steps to get off it and return to work at to which he replied, "I did." This was notwithstanding that he had not contacted EuroCareer and Disability Matters.

92. Mr Doona was taken to his NAC employment record [181] and he accepted that he had not raised a grievance throughout the period he had been doing paid and unpaid work at Nissan until November 2020.

93. We also heard evidence about how Mr Doona could find out about work without being actively notified of upcoming vacancies by Nissan senior management. He accepted that he was quite capable of checking for job adverts at Nissan or if he heard by way of mouth. He said that he had actively looked for positions until about 2007 when he was asked why he stopped doing this, he said that he was sick of getting knocked back. The Tribunal heard from Mr Tiffin about how vacancies were notified. He said that there were job boards in various locations at the Sunderland plant including in the HR Department. Vacancies would also be posted on the Nissan intranet called "Workday." Workday is accessible on site and also remotely. He understood that remote access simply required an employee to use a laptop. Mr Tiffin believed that Workday had been operational for the last five years. Vacancies would be posted on those job boards and also externally on the company website. He accepted that Nissan had not actively notified Mr Doona or others who were on the DIS because he did not believe it was right to bombard them with job vacancies in a vehicle plant employing some 7000 people in circumstances where those individuals, by virtue of being on the DIS, were unable to return to work. In his opinion, actively notifying those individuals of vacancies could be tantamount to "rubbing salt into the wound."

94. Mr Doona was asked about his complaint concerning the format of the pension statements that he had received. He said that they were different from the standard format provided to employees who are not on the DIS. He referred to an example of a standardised pension statement [181]. He told the Tribunal that the example produced was in fact Mr Cox's annual pension statement which had been anonymized and redacted. He said that he had not been given accurate figures in order to make representations but accepted that "format" was about the way in which information is laid out and it was different to accuracy of information. However, he reiterated the point that he believed that the two statements that he had received had been inaccurate. When he was pressed once again about the fundamental difference between the format of a pension statement and the accuracy of the information contained within it, he replied "if I had it in the same format as them, I would have had the same accurate information." It was also put to him that in the claim presented to the Tribunal he had not complained about the accuracy of the information contained in the pension statement. His complaint was directed against the format of the statement. He continued to make the point that the information contained was inaccurate. We find that his complaint was about format and not about accuracy despite his claim to the contrary. He has erroneously conflated two separate concepts.

95. 22 years have elapsed since Mr Doona became a member of the DIS. A considerable period of time elapsed prior to him presenting his claim on 4 March 2021. In seeking to understand why he took so long to complain to

the Tribunal we have the benefit of paragraphs 98 and 99 of his witness statement. He says:

> *98 I have given the Respondent numerous opportunities to remedy this matter without having to resort to legal proceedings. Even when I supplied proof in the form of the relevant legislation, they refused to make changes. They just seem to make further excuses for not implementing the change.*
>
> *99 The very last thing I wanted to do was to take this to a Tribunal.*

Applicable law

Time limits

96. EQA, section 123(1) provides that proceedings of this nature may not be brought after the end of:

    a. the period of 3 months starting with the date of the act to which the complaint relates, or

    b. such other period as the employment tribunal thinks just and equitable.

97. The question of when the time limit starts to run is more difficult to determine where the complaint relates to a continuing act of discrimination, such as harassment, or to a discriminatory omission on the part of the employer, such as a failure to confer a benefit on the employee. EQA, section 123(3) makes special provision relating to the date of the act complained of in these situations. It states that:

    a. conduct extending over a period is to be treated as done at the end of that period (EQA, section123(3)(a);

    b. failure to do something is to be treated as occurring when the person in question decided on it (EQA, section.123(3)(b)). In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it.

98. In **Hull City Council v Matuszowicz 2009 ICR 1170, CA**, the Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point. The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option,

however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Both Lord Justice Lloyd and Lord Justice Sedley acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice that may be caused could be, to a certain extent, alleviated by the tribunal's discretion to extend the time limit where it is just and equitable to do so. Sedley LJ added that:

> *claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission.*

In M's case the claim as formulated asserted a case of continuing omission to comply with the duty to make reasonable adjustments. On the terms of the claim as put forward, that omission continued until 1 August 2006. The Court accepted that the Council could have asserted an intervening date from which time started to run on the basis of there being an inconsistent act or the expiry of the period in which, had the employer been acting reasonably, it would have made the adjustments. However, no case of that kind was advanced by the employer either in its ET3 or before the employment tribunal or the EAT. It followed that the appeal would be allowed. The claim was in time and would be remitted for consideration by the employment tribunal.

99. EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

100. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980 (**British Coal Corporation v Keeble and (Ors) 1997 IRLR 336, EAT**). That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information;

the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

101. The relevance of the factors set out in **Keeble** was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**. In that case, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented three days late. It noted that the judge had referred to the factors set out in S.33(3) of the Limitation Act 1980, following **Keeble**. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the three-day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that he could have complained of them in their own right as soon as they occurred or immediately following his resignation. As for A's assertion that he had mistakenly believed that he could benefit from an automatic extension of time under the early conciliation rules, the judge was entitled to take the view that this did not justify the grant of an extension, given that A had left it until very near the expiry of the primary deadline to take advice and then chose not to act on that advice because he thought that the solicitors had misunderstood the position. With regard to the **Keeble** factors, the Court pointed out that the EAT in that case did no more than suggest that a comparison with S.33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. In the Court's view, it is not healthy for the **Keeble** factors to be taken as the starting point for tribunals' approach to 'just and equitable' extensions, as they regularly are. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate **Keeble**-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in **Keeble** – the length of, and the reasons for, the delay. The Court noted that, while it was not the first to caution against giving **Keeble** a status that it does not have, repetition of the point may still be of value in ensuring that it is fully digested by practitioners and tribunals.

102. The Court of Appeal's approach in **Adedeji** was followed by the EAT in **Secretary of State for Justice v Johnson 2022 EAT 1**. There, an employment tribunal had concluded that J's harassment claim was issued only a few weeks out of time at the most and that it would be just and equitable to extend time. In doing so, it decided that a lengthy delay in the claim being brought to trial, which was neither party's fault, was not relevant. The delay in question was due to J's concurrent personal injury claim, which resulted in the harassment claim being stayed for several years. On appeal, the EAT held that the tribunal had erred in directing itself that it was only the period by which the complaint was out of time that was legally relevant. It

was clear from **Adedeji** that tribunals should consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period. Those consequences included whether allowing the claim to proceed would require the tribunal, for whatever reason, to make determinations about matters that had occurred long before the hearing. Accordingly, in the instant case, although it was neither party's fault that there had been a considerable delay in the claim being heard, this was nevertheless a factor that the tribunal was required to consider.

103. The strength of the claim may be a relevant factor when deciding whether to extend time. In **Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT** the Appeal Tribunal noted that tribunals may, if they think it necessary, consider the merits of the claim, but if they do so they should invite the parties to make submissions. However, this is not necessarily a definitive factor: even if the claimant has a strong case, time may not be extended for it to be heard.

104. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. Where the act complained of is a single act of discrimination, this will not usually give rise to any problems. A dismissal, for example, is considered to be a single act and the relevant date is the date on which the employee's contract of employment is terminated. Where dismissal is with notice, the EAT has held that the act of discrimination takes place when the notice expires, not when it is given (**Lupetti**). Rejection for promotion is also usually considered a single act. In this case, the date on which another person is promoted in place of the complainant is the date on which the alleged discrimination is said to have taken place (**Amies v Inner London Education Authority 1977 ICR 308, EAT**).

105. In **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA** one of the arguments before the Court was that in the absence of an explanation from the claimant as to why she did not bring the claim in time and an evidential basis for that explanation, the employment tribunal could not properly conclude that it was just and equitable to extend time. However, the Court of Appeal rejected this argument. It held that the discretion under EQA section123 for an employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard. However, there is no requirement for a tribunal to be satisfied that there was a good reason for the delay before it can conclude that it is just and equitable to extend time.

106. The leading case is **Barclays Bank plc v Kapur and (Ors) 1991 ICR 208, HL**, which involved a pension scheme that allegedly discriminated against a group of Asian employees. The argument on time limits centred on whether the operation of the pension scheme was a continuing act that subsisted for as long as the employees remained in the bank's employment (in which case their complaints were presented in time) or whether it was a single act that took place when the bank decided not to credit the employees' service in Africa for the purpose of calculating pension entitlement (in which case their complaints were time-barred). The House of Lords found in favour of the employees and ruled that the right to a pension formed part of their overall remuneration and, if this could be shown to be less favourable than that of other employees, it would be a disadvantage continuing throughout the period of employment. It would not be any answer to a complaint of race discrimination that the allegedly discriminatory pension arrangements had first occurred more than three months before the complaint was lodged.

107. Crucially, their Lordships drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time. Thus in **Sougrin v Haringey Health Authority 1992 ICR 650, CA**, the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. There was no suggestion that the employer operated a policy whereby black nurses would not be employed on a certain grade; it was simply a question whether a particular grading decision had been taken on racial grounds. That case can, however, be contrasted with the case of **Owusu v London Fire and Civil Defence Authority 1995 IRLR 574, EAT**, in which an employee complained that he was discriminated against by his employer's refusal to award him promotion. While the EAT agreed that a specific failure to promote or shortlist was a single act — despite its continuing consequences — it drew a distinction with the situation where the act (a failure to promote) took the form of 'some policy, rule or practice, in accordance with which decisions are taken from time to time.' Accordingly, the tribunal did have jurisdiction to decide whether there was in fact such a discriminatory practice.

108. In **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA,** the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' In that case the claimant, who was a

female police officer, claimed, while on stress-related sick leave, that she had suffered sex and race discrimination throughout her 11 years' service with the police force. She made nearly 100 allegations of discrimination against some 50 colleagues. In determining whether she was out of time for bringing complaints in respect of these incidents, the EAT upheld an employment tribunal's ruling that no 'policy' of discrimination could be discerned and that there was, accordingly, no continuing act of discrimination. However, the Court of Appeal overturned the EAT's decision, holding that it had been side-tracked by the question whether a 'policy' could be discerned in this case. Instead, the focus should have been on the substance of the claimant's allegations that the Police Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. The question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

109. In **Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16** an employment tribunal found that the decision to commence a disciplinary investigation against H was an act of discrimination, but it was a 'one-off' act and was therefore out of time. H appealed, arguing that the tribunal had been wrong to treat the decision to instigate the disciplinary procedure as a one-off act of discrimination rather than as part of an act extending over a period ultimately leading to his dismissal. Referring to Hendricks (above), the EAT observed that the tribunal had lost sight of the substance of H's complaint. This was that he had been subjected to disciplinary procedures and was ultimately dismissed – suggesting that the complaint was of a continuing act commencing with a decision to instigate the process and ending with a dismissal. In the EAT's view, by taking the decision to instigate disciplinary procedures, the Trust had created a state of affairs that would continue until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences. Once the process was initiated, the Trust would subject H to further steps under it from time to time. The EAT said that if an employee is not permitted to rely on an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. In order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage of a lengthy procedure, an employee would have to lodge a claim after each stage unless he or she could be confident that time would be extended on just and equitable grounds. However, this would impose an unnecessary burden on claimants when they could rely upon the provision covering an act extending over a period. The EAT therefore concluded that this part of H's claim was in time.

Direct discrimination

110. Disability is a protected characteristic. Section 13 (1) of EQA defines direct discrimination as follows:

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

Indirect discrimination

111. EQA, section 19 provides that indirect disability discrimination occurs where:

a. A applies to B a PCP.

b. B has a disability.

c. A applies (or would apply) that PCP to persons who do not have B's disability.

d. The PCP puts (or would put) those with B's disability at a particular disadvantage when compared to other persons.

e. The PCP puts (or would put) B at that disadvantage.

f. A cannot justify the PCP by showing it to be a proportionate means of achieving a legitimate aim.

The duty to make reasonable adjustments

112. EQA sections 20 and 21 imposes a duty on employers to make reasonable adjustments to help disabled employees and former in certain circumstances. The duty can arise where a disabled person is placed at a substantial disadvantage by:

a. An employer's PCP

b. A physical feature of the employer's premises.

c. An employer's failure to provide an auxiliary aid.

113. However, an employer will not be obliged to make reasonable adjustments unless it knows or ought reasonably to know that the individual in question is disabled and likely to be placed at a substantial disadvantage because of their disability.

114. The Equality and Human Rights Commission Employment Statutory Code of Practice (the "EHRC Code"), which the Tribunal must consider, if it appears relevant, contains a non-exhaustive list of potential adjustments that employers might be required to make.

115. It is for the Tribunal to objectively determine whether a particular adjustment would have been reasonable to make in the circumstances. It

will consider matters such as whether the adjustment would have ameliorated the disabled person's disadvantage, the cost of the adjustment in the light of the employer's financial resources, and the disruption that the adjustment would have had on the employer's activities.

116. The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage 'in comparison with persons who are not disabled' (EQA, section S.20(3)– (5)). This makes it clear that a comparative exercise is required to ascertain whether a disabled person is put at a substantial disadvantage. Although the statutory wording might suggest that the comparison is to be made with the population at large, case law has established otherwise. In **Smith v Churchills Stairlifts plc 2006 ICR 524, CA,** for example, the employer had withdrawn the offer it made to S of a place on a training course after discovering that his disability would leave him unable to carry a full-sized radiator cabinet when visiting customers. The tribunal did not consider that a requirement that employees carry a cabinet put S at a substantial disadvantage compared with persons who are not disabled, since a majority of the population would find it difficult to carry the cabinets. On appeal, the Court of Appeal considered that the comparison undertaken by the tribunal was flawed. In its view, the correct comparators were not the population at large but the six successful candidates who were accepted onto the training course.

117. In **Fareham College Corporation v Walters 2009 IRLR 991, EAT**, the EAT emphasised that the comparative exercise in a reasonable adjustments claim, which involves a class or group of non-disabled comparators, differs from that which is applied in the individual, like-for-like, comparison required in cases of direct sex or race discrimination. Cox J held that 'in many cases the facts will speak for themselves, and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play'.

118. The EAT's decision is reflected in the EHRC Code, which states:

> *The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular [PCP] or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly — and unlike direct or indirect discrimination — under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's* (para 6.16).

119. In **Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT**, the EAT explained that the purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. It therefore held that an employment tribunal had erred when, having accepted that the University applied a PCP that S should attend work at the School of Engineering, it held that S was required to prove facts from which the tribunal could conclude that S would be placed at a substantial disadvantage by that PCP because of her disability. Allowing S's appeal, the EAT held that this is not what the statutory test requires. Section 20(3)

does not contain a strict causation test but requires a comparative exercise to test whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have any disability.

120. In **Griffiths v Secretary of State for Work and Pensions 2017 ICR 160, CA**, the Court of Appeal referred with approval to the EAT's reasoning in the **Fareham College** case, dismissing the employer's suggestion that that case had been impliedly overruled by the EAT in **Royal Bank of Scotland v Ashton 2011 ICR 632, EAT**. The Court also rejected the employer's argument that the like-for-like comparison favored by the House of Lords in **London Borough of Lewisham v Malcolm 2008 IRLR 700, HL** (a case involving disability-related discrimination under S.24 DDA) was appropriate in reasonable adjustment cases. In the Court's view, the language of EQA, section 20 was very different from that of the old S.24 DDA, and the nature of the comparison exercise it required was clear: the question was simply whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person.

121. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage (para 20(1)(b), Sch 8 EQA).

122. EQA, section 212(1) provides that a substantial disadvantage is one which is more than minor or trivial. The EHRC Code states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see para 8 of App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability.

123. In **Smith v Churchills Stairlifts plc 2006 ICR 524, CA**, the Court of Appeal confirmed that the test of reasonableness in the context of what is now EQA section is an objective one, and it is ultimately the employment tribunal's view of what is reasonable that matters. A claim of a failure to make reasonable adjustments may therefore require a tribunal to take the unusual step of substituting its own view for that of the employer, in marked contrast to the approach taken in respect of unfair dismissal, where such an approach amounts to an error of law. The contrast between the two jurisdictions was highlighted by the EAT in **Royal Bank of Scotland v Ashton 2011 ICR 632, EAT**. There, the Appeal Tribunal held that an employment tribunal had erred by focusing, as would be appropriate in an unfair dismissal claim, on the reasonableness of the process by which the employer reached the decision not to make a proposed adjustment. The EAT emphasized that, since the reasonable adjustment provisions are concerned with practical outcomes rather than procedures, a tribunal's

focus must be on whether the adjustment itself can be considered reasonable.

Discussion and conclusions

Direct discrimination

124. Mr Doona's claim is out of time and it would not be just and equitable to extend time. The Tribunal does not have jurisdiction to hear his claim for the following reasons.

125. Mr Doona believes that there was a continuing series of omissions in failing to notify him of job vacancies from 1998 to present. Time would start running from when Nissan might reasonably be expected to notify Mr Doona. One way of doing this would have been via job adverts. Mr Doona alleges that he should be directly informed of job vacancies. Over the 22 years since he went on to DIS, he did not apply for any vacancies other than two roles in 2004 and when he was unsuccessful, he let it go. In 2004 Mr Doona knew that he was not being told about job vacancies directly but he did not complain about that fact. We believe 7 September 2004 was the date of the omission (i.e. when Disability Matters expressed dissatisfaction that Nissan had not approached Mr Doona in respect of those roles). This means that time would start to run from that date and would expire on 6 December 2004. His claim was presented on 4 March 2021. This was 17.24 years later. It is clearly out of time.

126. We do not think that it would be just and equitable to extend time to accept Mr Doona's claim for direct discrimination for the following reasons:

a. His explanation for not submitting is that, on his own admission, he decided to do nothing in 2004 when he was unsuccessful in respect of the two vacancies that he applied for. He simply "let it go."

b. In 2004, Mr Doona had recently graduated with a master's degree in human resources management and he had told Ms Heyes in October 2003 that he was not only interested in employment law but more particularly, discrimination law. He was not ignorant of his rights and could reasonably be expected to have submitted his claim in time.

c. The period of delay in submitting his claim to the Tribunal is considerable. This is a very stale claim. The cogency of evidence could be affected by the passage of time and whilst Ms Millns accepted in her submissions that Nissan would be able to deal with the documentary evidence, it did not have all of the relevant employees available to it who could speak about the allegations at the time when they should have been made in 2004. There is some force to that submission.

d. We are also mindful of the guidance in **Lupetti** and agree with Ms Millns that the claim is not strong. This is a relevant factor in deciding whether to exercise discretion on just and equitable grounds to extend time. In this regard, we note the following:

i. The comparator relied upon by Mr Doona is an employee who would have been absent from their substantive role for some other reason such as a person on maternity leave. Alternatively it would be a person on the DIS who did not share Mr Doona's disability. In his evidence, we noted that Mr Tiffin said that no employees on DIS or otherwise would have been approached directly about job vacancies. Consequently, Mr Doona was not treated any differently than any other Nissan employee.

ii. The reason for not directly notifying Mr Doona of job vacancies had nothing to do with his disability. Mr Doona has not made out a prime facie case. Mr Doona did not put this specific allegation to any of Nissan's witnesses. Furthermore, we also agree with Ms Millns that Nissan had a perfectly logical and reasonable reason why they decided not to notify Mr Doona directly about vacancies. It had nothing to do with his disability. It was because he was on the DIS which meant that he was not considered fit to work.

iii. At no stage did Mr Doona request to be informed of vacancies directly. Indeed, he accepted that he was able to access job vacancies on the notice board and he also looked in the local newspaper for vacancies. He would have been able to view job vacancies on Workday. He decided not to apply for any vacancies other than the two positions in 2004 for 22 years. He only alleged that he was a little disappointed that he missed out on the two positions in 2004 and even then, he did not complain about it at the time.

Indirect discrimination

127. In respect of the claim for failure to provide information on job vacancies, Mr Doona's claim is out of time and it would not be just and equitable to extend time for same the reasons given above regarding his claim for direct discrimination.

128. In respect of the claim that Nissan did not issue pension statements to disabled employees who were members of DIS we find that the claim is out of time and it would not be just and equitable to extend time for the following reasons:

a. For the reasons given above, the earliest date when Nissan ceased sending Mr Doona pension statements was 25 July 1998 (when he joined DIS) or 2014 (when it was decided that statements would not be sent to DIS members, divorcee employees and senior executives). If the former date is correct, Mr Doona should have presented his claim to the Tribunal no later than 24 October 1998. If the latter date is correct, he should have presented his claim within three months less one day of the date in 2014.

b. We have noted Mr Doona's explanation for the delay which is set out in paragraphs 98 and 99 of his witness statement. Essentially, he regarded presenting the claim to the Tribunal as a remedy of last

resort. Early conciliation ran from 31 December 2020 until 11 February 2021. Thereafter, Mr Doona was free to present his claim to the Tribunal and yet he waited another three weeks before doing so.

c. Given his postgraduate degree and his interest in employment law and, in particular, discrimination law, Mr Doona was not ignorant of his rights and could reasonably be expected to have submitted his claim in time.

d. We are also mindful of the guidance in **Lupetti** and agree with Ms Millns that the claim is not strong. This is a relevant factor in deciding whether to exercise discretion on just and equitable grounds to extend time. The appropriate comparator is an employee who is absent from their substantive role for some other reason (e.g. a person on maternity leave). Mr Doona was treated no differently. Having heard from Mr Craven, it was clear that when Nissan decided to stop issuing annual pension statements the decision not only affected the members of DIS but also other people such as employees who were divorcing and were subject to pension sharing orders and senior executives.

129. In respect of the claim that Nissan failed to give him information regarding the share scheme, we find that it is out of time and it would not be just and equitable to extend time for the following reasons.

a. Mr Doona knew of the existence of the share scheme. He prepared a slide presentation which covered the share scheme and formed part of the induction programme. Under cross-examination, Mr Doona did not deny that he was involved with the induction programme. He had sent an email to Nissan on 17 August 2017 about the share scheme and in his evidence, he said that he had not got a reply. Realistically, we believe that time expired for presenting his claim on 16 November 2017 as a reasonable period for him to expect a response to his email. This was not a continuing act. Even if we were to take a more generous view as to how long he could be expected to wait for a response before issuing proceedings, at its highest this could be a few weeks or months. However, this does not help Mr Doona because his claim would still be significantly out of time.

b. The claim was presented 3.30 years out of time. His explanation for the delay was his assumption that he was not eligible to join the scheme and yet he did nothing about it at the time. It was a false assumption and he could easily have sought further information at the time to allay his concern regarding eligibility.

130. In respect of the claim that Nissan issued a pension statement to Mr Doona in a different format to those employees who were not in the DIS, we find that it is out of time and it would not be just and equitable to extend time for the following reasons:

a. Mr Doona received two pension statements. The first statement was received on 11 August 2020 [114]. The second statement was

received on 24 September 2020 [119]. The latest date for submitting his claim to the Tribunal (in respect of the second statement) would have been 23 December 2020. The claim was presented 2.33 months out of time.

b. We have noted Mr Doona's explanation for the delay which is set out in paragraphs 98 and 99 of his witness statement. Essentially, he regarded presenting the claim to the Tribunal as a remedy of last resort. Early conciliation ran from 31 December 2020 until 11 February 2021. Thereafter, Mr Doona was free to present his claim to the Tribunal and yet he waited another three weeks before doing so.

c. Given his postgraduate degree and his interest in employment law and, in particular, discrimination law, Mr Doona was not ignorant of his rights and could reasonably be expected to have submitted his claim in time.

d. We are also mindful of the guidance in **Lupetti** and agree with Ms Millns that the claim is not strong. Mr Doona has conflated format and accuracy. His complaint is about the format of his pension statement which she says is different to a standard statement issued to members of the pension scheme as per the example provided to the Tribunal [182]. We agree that the format of the statements provided to Mr Doona is different to that which is given to other members of the pension scheme. However, given that the PCP relied upon is format and not content and the perceived disadvantage is linked to accuracy of data it cannot be said that there is any disadvantage based on the format.

The duty to make reasonable adjustments

131. In respect of the claim that Nissan did not issue pension statements to disabled employees who were members of DIS we find that the claim is out of time and it would be just and equitable to extend time for the following reasons:

a. The earliest date when Nissan ceased sending Mr Doona pension statements was 25 July 1998 (when he joined DIS) or 2014 (when it was decided that statements would not be sent to DIS members, divorcee employees and senior executives). If the former date is correct, Mr Doona should have presented his claim to the Tribunal no later than 24 October 1998. If the latter date is correct, he should have presented his claim within three months less one day of the date in 2014.

b. We have noted Mr Doona's explanation for the delay which is set out in paragraphs 98 and 99 of his witness statement. Essentially, he regarded presenting the claim to the Tribunal as a remedy of last resort. Early conciliation ran from 31 December 2020 until 11 February 2021. Thereafter, Mr Doona was free to present his claim to the Tribunal and yet he waited another three weeks before doing so. We are mindful of the decision in **Abertawe Bro Morgannwg University Local Health Board** which provides that there is no

requirement that the Tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation for the delay from the claimant. Mr Doona has provided an explanation.

c. We are also mindful of the guidance in **Lupetti** and accept that Mr Doona has a strong claim for the following reasons:

i. Nissan accepts that it applied the PCP in not issuing a Pension Statement to disabled employees who were members of DIS.

ii. Guided by paragraph 6.16 of the EHRC Code, we do not agree with Ms Millns that the appropriate comparator is the same as that which applies to the claim for indirect discrimination. In our view, the pool for comparison should be wider and comprise non-disabled workers at large employed by Nissan rather than the limited group of employees outwith the DIS such as divorcing couples and senior executives as applied to the claim for indirect discrimination.

iii. Nissan knew that Mr Doona was disabled. Knowledge of his disability is not in dispute.

iv. It is self-evident that Mr Doona suffered substantial disadvantage because he did not have annual pension statements. He was unable to challenge the accuracy of his Pension Benefits. Nissan could reasonably be expected to have known that Mr Doona would have been placed at a substantial disadvantage especially as there was no evidence to suggest that the decision in 2014 not to issue annual statements and the requirement for members of DIS to request pension statements was ever communicated to Mr Doona.

v. Issuing an annual pension statement to Mr Doona is a step that could have been taken to avoid the disadvantage. It was reasonable for Nissan to do this, albeit placing them at some inconvenience and modest cost. Issuing an annual statement would not have been impracticable and certainly not an insurmountable obstacle. Nissan clearly failed to take that step.

132. For the reasons given above, Mr Doona's claim that Nissan breached its duty to make reasonable adjustments by failing to send him annual pension statements is well founded and this claim is upheld.

133. In respect of the claim for failure to provide information on job vacancies, Mr Doona's claim is out of time and it would not be just and equitable to extend time for same the reasons given above regarding his claim for direct and indirect discrimination.

134. In respect of the claim that Nissan failed to give him information regarding the share scheme, we find that it is out of time and it would not be just and equitable to extend time for the same reasons as Mr Doona's claim for indirect discrimination.

135. In respect of the claim that Nissan issued a pension statement to Mr Doona in a different format to those employees who were not in the DIS, we find that it is out of time and it would not be just and equitable to extend time for the same reasons as Mr Doona's claim for indirect discrimination.

136. In respect of the claim that Nissan failed to give him information regarding the share scheme, we find that it is out of time and it would not be just and equitable to extend time for the same reasons as Mr Doona's claim for indirect discrimination.

137. In respect of Mr Doona's claim that Nissan failed to take reasonable steps to rectify the concern of incorrect calculations, we do not accept that this is a valid PCP.

REMEDY

Injury to feelings

138. Mr Doona has claimed Injury to feelings. He claims £36,500 plus an uplift of £9125 for failure to follow the ACAS code. In his schedule of loss he says that he has suffered mentally and physically during and after the grievance procedure. He says that Nissan was aware that he was in constant pain because of his back problem and they were also conscious of his concerns with anxiety and high blood pressure. He alleges that the grievance procedure was conducted in a way that caused anxiety, distress, and panic attacks and he is having to undergo counselling to help him with these. Mr Doona says that he became upset when he received the response to the grievance because it contained remarks which he believes were untrue and made him feel as though he were fabricating the whole thing. He says that having worked with three of the people involved with his grievance and appeal who he believed to be his friends; it was very upsetting that they acted as they did during the grievance procedure. He says that he trusted them to be fair with him throughout the process, but he believed that they were not. He says that because they knew about his physical and mental health problems was bad enough but this was compounded by his appeal taking 93 days instead of 35 days as provided for in his terms and conditions of employment which he believes added to his suffering. He goes on to say that he has suffered further anxiety and stress because he had to wait for important pension documents. The documents that he should have received were either delayed, not issued at all or were in a format which made them hard for him to read. He says that after all of this, he felt unable to return to Nissan as a contractor via NAC. He believes that the way he was treated was unforgivable particularly from people who he called his friends.

139. Awards to compensate for non-pecuniary loss are available. Injury to feelings awards are available where a tribunal has upheld a complaint of discrimination (EQA, section 119(4)). The award of injury to feelings is intended to compensate a claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. Tribunals have a broad discretion about what level of award to make. The matters compensated for by an injury to feelings award encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress depression (**Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102**).

140. In **Vento** the Court of Appeal identified three broad bands of compensation for injury to feelings and gave the following guidance (however, see below for revised figures):

a. 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. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

b. 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.

c. 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. Within each band there is considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable, and just compensation in the particular circumstances of the case.

141. The boundaries of the bands have been revised in several subsequent cases, culminating in the decision in **De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879**, which held that the 10% uplift in **Simmons v Castle [2012] EWCA Civ 1288** should apply to awards for injury to feelings.

142. Following this, the Presidents of the Employment Tribunals in England & Wales and Scotland issued 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings and Psychiatric Injury Following De Souza v Vinci Construction (UK) Ltd'. This Guidance, the fifth addendum of which was released on 28 March 2022 taking into account changes in the RPI All Items Index released on 23 March 2022, updated the bands as follows for any claims on or after 6 April 2022:

a. Upper Band: £29,600 to £49,300 (the most serious cases).

b. Middle Band: £9,900 to £29,600 (cases that do not merit an award in the upper band).

c. Lower Band: £990 to £9,900 (less serious cases).

The 'most exceptional cases' are capable of exceeding the maximum of £49,300

143. We accept that it would be justified to award Mr Doona **£7,500** for injury to feelings. What he is proposing in his schedule of loss is an award in the top band and we are not satisfied that we have seen any evidence to support such a conclusion. Furthermore, we do not accept that we would be justified in applying an uplift of 25%. The grievance procedure was followed in that he lodged a grievance, attended a grievance hearing and exercised his rights of appeal.

Interest

144. A Tribunal is able to award interest on awards of compensation made in discrimination claims brought under EQA, section 124(2)(b), to compensate for the fact that compensation has been awarded after the relevant loss has been suffered. The Tribunal may award interest on the discriminatory awards for past financial loss and injury to feelings, amongst other things. Interest is calculated as simple interest.

145. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation. The date of the discrimination complained may start on 20 November 1998 or at an indeterminate date in 2014 and ends on 2 June 2022. We believe a date in 2014 would be appropriate to use given Mr Craven's evidence which was that was the time when it was decided to stop issuing the statements. In the absence of an actual date in 2014, the most equitable thing would be to take 1 June 2014 as the midpoint of the year giving. 2558 days. The applicable interest rate is 8%. The calculation is: 2558 x 0.08 x 1/365 x 7500 = **£4,204.93**

Total award for disability discrimination

146. The total award is: **£11,704.93**.

Recommendation

147. The Tribunal has the discretion to recommend that a respondent take specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate on the complainant.

The Tribunal recommends that the Nissan issues an annual pension statement to Mr Doona as soon as reasonably practicable after the end of the applicable financial year and no later than 31 May in the year in question.

_____

Employment Judge Green

_____

Date 2 June 2022