



EMPLOYMENT TRIBUNALS

Claimant: Mr D Hadam

Respondents:

1. Liverpool Recruitment Company (UK) Limited
2. Focus Payroll (Services) Limited (in liquidation)
3. 3S Northampton Limited

Heard at: Leeds **on:** 27 June to 1 July 2022

Before: Employment Judge Cox

Members: Ms Y Fisher
Ms S Robinson

Representation:

Claimant:	In person
First and Second Respondents:	Miss Barry, counsel
Third Respondent:	Mr Jenkins, counsel

JUDGMENT

1. By consent, the claim against the Second Respondent is dismissed.
2. All other claims fail and are dismissed.

REASONS

1. The Claimant alleges and the Respondents concede that he is disabled person as a result of mixed anxiety and depressive disorder. He is of Polish nationality.

He has brought various claims under the Equality Act 2010 in relation to events during his three months' employment by the First Respondent, an employment agency, as an electrician's mate on a contract that the Third Respondent had to carry out electrical works at a warehouse. References in these reasons to sections are to sections in the Equality Act.

Background to the claims

2. The Second Respondent was added as a respondent to the claim at a Preliminary Hearing on 4 November 2021, because the First Respondent indicated that the Second Respondent was in fact the Claimant's employer.
3. The nature of the Claimant's claims was clarified at a Preliminary Hearing on 7 February 2022. The Tribunal dealt with various applications the Claimant had made to amend his claims. Some were granted and some were refused. At the end of the Preliminary Hearing, the Tribunal set out the allegations as amended in an Annex to the Order. For details of the claims of harassment, the Annex cross-referred to details that the Claimant had supplied in a document dated 19 October 2021 (which was in the same terms as his details of claim in his claim against the Third Respondent), referred to in these reasons as "the further particulars".
4. During the course of the main Hearing, it emerged that the Second Respondent had gone into creditors voluntary liquidation on 1 June 2022. The First Respondent then conceded that it was the Claimant's employer for the purposes of his claims. The Claimant accepted that that was the case and agreed to the claim against the Second Respondent being dismissed.
5. Towards the end of the first morning of the Hearing, the Claimant made a further application to amend his claims, to add a further allegation against each Respondent that he had been victimised by them when they failed to investigate his complaints that he had been harassed by two individuals named Jason and Curtis. The Respondents resisted his application and the Tribunal refused it. The application had been made very late and long after the statutory time limit for presenting them had passed. There would be prejudice to the Respondents if they had to deal with these new allegations at the Hearing. The relevant witness for the First Respondent had submitted a witness statement on the existing allegations but was not attending to give oral evidence and was not available to give instructions. The Third Respondent would probably need to call an additional witness to deal with the proposed allegation against it. Additional documents might need to be disclosed. These matters could well lead to the postponement of the Hearing or make it impossible to complete the Hearing in the allocated time. It was not in the interests of justice to allow the application.

Outline of the relevant law

6. The Claimant alleged that he had been subjected to harassment related to his disability and nationality, direct discrimination because of his disability and nationality, discrimination because of something arising in consequence of his disability and victimisation.
7. Direct discrimination is defined as where an employer treats an employee less favourably than it treats or would treat others and does so because of disability or nationality (Section 13).
8. Harassment is defined as where an employer subjects an employee to unwanted conduct that relates to disability or nationality with the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee (Section 26). In deciding whether conduct has this effect, the Tribunal must take into account the employee's perceptions, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal confirmed that "violation of dignity" is a strong phrase and should be construed as setting a fairly high threshold for liability. Dignity is not necessarily violated by things said or done that are trivial or transitory, particularly if it should have been clear that any offence was unintended.
9. It is a further form of discrimination for an employer to treat a disabled employee unfavourably because of something arising in consequence of the employee's disability, unless the employer can show that the treatment is a proportionate means of achieving a legitimate aim (Section 15). It is not possible to discriminate in this way if the employer does not know, or could not reasonably be expected to know, that the employee was disabled.
10. Victimisation is defined as where an employer subjects an employee to a detriment (that is, some form of disadvantage in their employment) because the employee has done a "protected act", or the employer believes that the employee has done or may do a "protected act" (Section 27). "Protected acts" include making an allegation that the employer or another person has discriminated in a way that breaches the Equality Act and bringing a claim under the Act.
11. It is unlawful for an employer to discriminate against an employee by subjecting the employee to a detriment, by harassing them or by victimising them (Section 39(2)(d) and (4) and Section 40). An employer is liable for the acts of discrimination committed by its employees in the course of their employment (Section 109(1)). An employer is also liable for the discriminatory acts of its agents done with its authority (Section 109(2)). An agent is someone that the employer authorises to act on its behalf. In this context, the employer is said to be the "principal" of the agent.

12. It is also unlawful for a company to discriminate against, harass or victimise a contract worker, that is, someone who has been supplied by another employer to do work the company has made available (Section 41). In this context, the worker is called a contract worker and the person discriminating is termed the “principal” (so in a different sense to that used in Section 109).

The evidence

13. At the Hearing, the Tribunal heard oral evidence from the Claimant. He submitted written evidence in the form of a witness statement and the further particulars.
14. For the First Respondent, the Tribunal heard oral evidence from Mr Billy Salmon, the First Respondent’s Operations Manager, who is responsible for the day-to-day operation of its business. The Tribunal also accepted in evidence a written witness statement from Ms Megan Fitzpatrick, the First Respondent’s Construction Recruitment Manager, who dealt with the various complaints that the Claimant raised during his employment. Although the Tribunal viewed Ms Fitzpatrick’s evidence as less authoritative than it would have been had she been present to be questioned about it, the Tribunal largely accepted her evidence because it was supported by the documentary evidence.
15. For the Third Respondent, the Tribunal heard oral evidence from Mr Adam White, the Site Foreman at the warehouse where the Claimant was working and so in charge of the Claimant, and from Mr Ian Pragnell, Director.
16. There was a hearing file running to nearly 400 pages. The Tribunal considered only the documents to which it was referred by the parties or the witnesses.

Background facts

17. The Tribunal made the following findings on the background facts to the allegations, which are based on the Respondents’ uncontested evidence on these matters.
18. A company referred to in these reasons as “Advanced” operates a warehouse in Sheffield that needed fitting out for its use by ASOS, the online clothes retailer. ASOS began moving its goods into the warehouse during the course of the fitting-out works. Advanced contracted with three contractors to do the necessary work. One was the Third Respondent, which it contracted to do the electrical work. It engaged a second contractor to supply the racking system and a third, HX5, to provide the project management. HX5 employed Jason as Site Supervisor. His job involved site management, checking the quality of work being done by the other two contractors and ensuring that they were following safe systems of work.

19. The Third Respondent had arrangements with two employment agencies, one of which was the First Respondent, for the supply of workers to carry out the electrical work. The First Respondent supplied the Claimant to do the job of Electrician's Mate. At the time, he had completed the theoretical element of his training as an electrician but not the practical element and had little practical experience of the job. He began work at the site on 1 June 2021. From the outset the Claimant was working with Mr Robert Vaughan, a fully-qualified electrician with 25 years' on-site experience, who was one of around five other workers also supplied by the First Respondent. Mr Vaughan gave the Claimant instructions, supervision and support. The other employment agency supplied the Third Respondent with Curtis, who also worked as an electrician's mate.
20. The Third Respondent anticipated that there would be around 12 weeks' electrical work and the assignment details that the First Respondent issued to the Claimant when he began work stated that the approximate duration of the work was "2-3 months".
21. The Claimant and Mr Vaughan initially had a very friendly relationship with each other. They each had experience of depression and anxiety and discussed this. Mr Vaughan gave the Claimant a lift to and from the station at the beginning and end of the working day, took the Claimant to see cars when he was looking to purchase a vehicle, sympathised with him when he suffered a loss in relation to cryptocurrency and took an interest in the Claimant's flat move. They exchanged friendly text messages.
22. To begin with, the Claimant and Mr Vaughan worked well together. Mr Vaughan gave the Claimant help and guidance on how to do the work, sharing the benefit of his experience. After two or three weeks, Mr Vaughan explained to the Claimant that he would not be fully qualified as an electrician until he had obtained an NVQ level 3. That would involve the Claimant's work being certified by an electrician with the necessary qualification to do so. Mr Vaughan had that qualification and offered to certify the Claimant's practical work. The Claimant had not realised that he needed to complete an NVQ level 3 and was disappointed at the news. He did not want to be dependent on Mr Vaughan in this way. He felt that his relationship with Mr Vaughan was developing into a love-hate relationship where two people are very close but one then does something to stab the other in the back. He felt that Mr Vaughan had a negative agenda towards him and was manipulating him. The Tribunal accepts Mr Vaughan's evidence, which was clear and credible, that from around this time the Claimant became more resistant to Mr Vaughan's instructions and suggestions and wanted to do his work his own way.

CLAIMS AGAINST THE FIRST RESPONDENT

Harassment claims: general findings

23. The Claimant alleged that on three occasions Mr Vaughan acted in a way that amounted to either harassment related to his disability or nationality or direct discrimination because of his disability or nationality. He also said that this conduct amounted to discrimination because of something arising from his depression and anxiety, namely his difficulty with learning and carrying out tasks quickly.
24. For the purpose of these claims, the Tribunal is prepared to accept that, from his discussions with the Claimant, Mr Vaughan knew that the Claimant had depression and anxiety and that this had more than a minor or trivial effect on his ability to carry out normal day-to-day activities and had lasted for 12 months or more. In other words, the Tribunal accepts that Mr Vaughan knew that the Claimant was a disabled person as a result of depression and anxiety (Section 6).
25. The Tribunal was not satisfied on the evidence it heard that the Claimant has difficulty in learning and carrying out work quickly because of his disability. There was a significant volume of medical evidence in the hearing file but the Tribunal was referred to only a few pages of it and it saw no medical evidence that confirmed that the Claimant had these difficulties. The only evidence that the Claimant gave that related to this was in answers to questions in cross-examination, when he said that he has difficulty in learning when he is in a stressful situation because his anxiety causes him to be unable to think clearly. Mr Vaughan's evidence, which the Claimant did not contest, was that he was perfectly able to learn new tasks and he kept up with Mr Vaughan's own steady and methodical pace of work. The Claimant accepted in cross-examination that the speed of the work was never an issue for him. In any event, even if the Claimant does have difficulty with learning and carrying out work quickly arising from his disability, there was no evidence before the Tribunal, from the Claimant or otherwise, that Mr Vaughan's actions on any of the three days in question were because of, or indeed related in any way to, those matters. The Claimant made no mention of this aspect of his claim in his submissions. These claims under Section 15 therefore failed.
26. The Tribunal heard no evidence, from the Claimant or otherwise, to indicate that Mr Vaughan's actions on any of the three days in question were because of, or related in any way to, the Claimant's Polish nationality. In cross-examination, the Claimant said only that he thought Mr Vaughan must be acting as he was because the Claimant was Polish, as there was no other explanation for his conduct. At the end of the evidence, the Tribunal invited the Claimant to consider whether he wished to withdraw any of his claims in the light of the evidence the Tribunal had heard, although without putting any pressure on him to do so.

Although the Claimant did not say that he was not pursuing his claims of direct nationality discrimination or harassment related to nationality, he did not mention them at all in his written submissions, which were detailed. The Tribunal does not accept that the Claimant established any facts from which the Tribunal could conclude, in the absence of any other explanation, that Mr Vaughan had treated him less favourably because he is Polish or subjected him to unwanted conduct related to his Polish nationality (Section 136). These claims also failed.

27. It therefore remained for the Tribunal to consider only whether the three incidents involved direct disability discrimination or harassment related to disability.
28. For the purposes of the allegations of harassment, the Claimant claimed that on each occasion Mr Vaughan's purpose was to violate his dignity, to embarrass him or punish him for his depression. During the Claimant's cross-examination by the First Respondent, he was referred to references in the medical evidence to him having persecutory delusions, including in two 2018 reports by consultant psychiatrists. The Claimant agreed with this diagnosis and that he often jumped to the wrong conclusions about people, but when it was put to him that he was having delusions about why Mr Vaughan and others were acting as they did, he denied this.
29. The Tribunal was clear that Mr Vaughan had no purpose of violating the Claimant's dignity or creating an intimidating or hostile environment for him in anything he said or did, even on the occasion (referred to under the heading "harassment 3" below) when he lost his patience with the Claimant. His own experience of recurrent episodes of depression and anxiety, for which he had received treatment, made it unlikely that he would be hostile or unsympathetic towards the Claimant's own mental ill-health. Further, he and the Claimant had worked closely together until the time of the third incident, he had supported the Claimant with practical matters outside work and he thought they were friends. The Claimant himself accepted that Mr Vaughan had been very kind to him. From the evidence the Tribunal heard, it is satisfied that Mr Vaughan's conduct towards the Claimant was in general professional, respectful and supportive.
30. As the Tribunal did not accept that Mr Vaughan had the purpose of violating the Claimant's dignity or creating an intimidating or hostile environment for him, it only needed to consider whether that was the effect of his conduct, bearing in mind the Claimant's perception, the other circumstances of the case and whether it was reasonable for Mr Vaughan's conduct to have that effect.

Harassment 1

31. The first allegation related to events on 29 June 2021.
32. What happened on that day is largely undisputed. The Claimant was on a scissor lift trying to thread an electrical cable that was around 25 to 30 metres long

through the metal structure of the warehouse. He had coiled up one end of the cable because he thought that he would be able to thread the cable easier that way. Mr Vaughan was standing on the mezzanine floor in the warehouse. He saw what the Claimant was doing and told him that he needed to uncoil the cable before he tried to thread it through the structure. He shouted so that the Claimant could hear him. In cross-examination, the Claimant first said that Mr Vaughan was “screaming at” him, but he later accepted that he was not shouting at him in an aggressive way, he was just being “a little too loud”. There was no evidence that what Mr Vaughan said to the Claimant or how he said it related in any way, or was because of, the Claimant’s disability. Mr Vaughan was simply giving the Claimant the benefit of his experience that the cable needed to be uncoiled before it was threaded to avoid getting kinks in it.

33. The Claimant’s evidence was that he told Mr Vaughan after this that he was having a bad day due to his depression and that Mr Vaughan needed to be patient with him. Mr Vaughan’s evidence was that the Claimant did not say this to him on this day, although he accepted that the Claimant did say this to him later, on 14 July 2021 after the incident referred to in these reasons as harassment 2. The Tribunal prefers the evidence of Mr Vaughan on this point, which was clear and definite. The Claimant’s evidence, on the other hand, was not consistent. In his witness statement he said that on this occasion Mr Vaughan said that he did not give a shit about the Claimant’s depression. In his further particulars he did not mention that comment.
34. The Claimant says that Mr Vaughan then “micromanaged” him for the rest of the day. He gave no details of what Mr Vaughan said or did to micromanage him and so the Tribunal was unable to make any findings on what his conduct was. In any event, the Claimant’s working relationship with Mr Vaughan involved Mr Vaughan giving him instructions on how to do the job. The Tribunal heard no evidence to indicate that Mr Vaughan’s actions, whatever they were, related to or were because of the Claimant’s disability.
35. The Tribunal finds that the Claimant has exaggerated in his evidence the effect that Mr Vaughan’s instructions had on him. He said that he felt very patronised and intensely embarrassed. The Tribunal accepts that he felt patronised, but that was because he resented Mr Vaughan telling him what to do and felt that there was nothing wrong with what he was doing. Even if the Claimant’s perception had been that Mr Vaughan’s instructions were serious enough to violate his dignity, the Tribunal does not accept that it was reasonable for them to have that effect. The circumstances were that it was part of Mr Vaughan’s job to give the Claimant instructions and advice. It was not reasonable for the effect of his actions to be anything more than helping the Claimant do his job.
36. This allegation fails.

Harassment 2

37. The Claimant's second allegation related to events on 14 July 2021.
38. Again, there was little dispute about what happened on that day. The Claimant was fixing a socket to the wall and Mr Vaughan suggested that he should break off the small plastic clips from the back box of the socket outlet. The Claimant did not think that that was the right thing to do. He spent five minutes trying to fit the box without breaking the clips. He finally appreciated that breaking off the clips was unavoidable and did so. At this, Mr Vaughan, who had been observing him, said something along the lines of "It's not for nothing that I told you to break those clips off". In his further particulars the Claimant said that Mr Vaughan had been standing behind him and observing him try to fit the socket, but during cross-examination he said that he could not remember whether Mr Vaughan was standing behind him all the time.
39. The Claimant's evidence was that Mr Vaughan made his comment in a rude tone of voice. The Tribunal prefers the evidence of Mr Vaughan that the comment was delivered in a light-hearted and good-humoured way and as a throwaway comment. He had not wanted to offend the Claimant, who he still regarded as a friend at this point, by criticising what he was doing and had waited for him to try doing it his way.
40. There was no evidence before the Tribunal that Mr Vaughan's comment was made because of, or related in any way to, the Claimant's disability. The Tribunal finds that it was said because Mr Vaughan wanted to register with the Claimant in some way that he should have listened to him.
41. The Tribunal finds that the Claimant has exaggerated in his evidence the effect that this one comment had on him. In his further particulars he said that he felt patronised and embarrassed, depressed and wounded. In cross-examination, he accepted that maybe Mr Vaughan's comment had been fair, but it was unnecessary and "a bit patronising". The Tribunal accepts that the Claimant was embarrassed, but that was because he had resisted Mr Vaughan's suggestion and then had had to accept that he should have followed it. Even if the Claimant's perception had been that Mr Vaughan's comment was serious enough to violate his dignity, the Tribunal does not accept that it was reasonable for it to have that effect. The circumstances were that Mr Vaughan had been working alongside the Claimant for several weeks, helping him to learn the trade, and giving him practical assistance outside work. It was not reasonable for this comment to be anything more than Mr Vaughan voicing the reality, which was that the Claimant should have listened to him.
42. After this incident the Claimant told Mr Vaughan that he was having a bad day with depression and that Mr Vaughan needed to be patient with him. Whilst not

believing that he had said anything wrong, Mr Vaughan accepted that the Claimant had been upset by his comment and realised that they now needed to work separately or, as Mr Vaughan put it, take a time out.

43. This allegation fails.

Harassment 3

44. The Claimant's third allegation related to what happened on 15 July 2021.

45. The Claimant recorded his dialogue with Mr Vaughan on that day using his mobile 'phone, without Mr Vaughan's knowledge. The Tribunal was supplied with an agreed transcript of what was said but also listened to the recording itself, which gave the Tribunal further information relevant to the question of whether Mr Vaughan's comments amounted to harassment.

46. At the beginning of the working day, the Claimant and Mr Vaughan had a brief discussion about what jobs the Claimant would be doing and they agreed they would be working on tasks which put them at opposite ends of the warehouse. In the area where the Claimant was to be working there were some pallets with boxes on them containing ASOS goods, whereas the area where Mr Vaughan was working was relatively, although not entirely, clear of pallets. Mr Vaughan took a blue scissor lift for his work and the Claimant took an orange scissor lift, which was wider than the blue one.

47. Around 10 minutes later the Claimant asked Mr Vaughan whether he could swap the orange lift for his blue one because there would not be enough room for the orange lift in the area where he was going to be working. Mr Vaughan said that it would take him a long time to bring the blue lift from the other end of the warehouse and asked the Claimant whether he could not just move a pallet to get to the cabinet he was to be working on. The Claimant said "alright".

48. Half an hour later the Claimant drove up to Mr Vaughan from the other end of the warehouse on his orange scissor lift and renewed his request to swap lifts. His tone of voice was assertive throughout. The transcript records their conversation like this:

C: Rob, do you want to swap the scissor lift?

RV: why?

C; because er it is better for me to use this one you see. I don't want to move their stuff because I'd rather just use this lift. [This is a reference to the Claimant needing to pallets of ASOS stock in order for the Claimant to have more room to manoeuvre the lift.]

RV: [inaudible]

C; sorry?

RV: [inaudible]

C: we can swap

RV: [inaudible]

C: it is easier for me to manoeuvre this lift whilst I am there you know, I don't want to be going up and down you know, they have got all their stuff set in the right place, I don't want to move their stuff because its awkward, I just want to do my job and fuck off. It's easier for me.

C; it's just I have got the lift here you know so we can put your stuff here and I can take this and its done.

RV: I don't want to use that one though

C; why, why not?

RV: because I am used to this one. I am on this one.

C: really?

RV: all my tools are on this one

C: I already had this lift down there. It is not a big deal for you to just use this lift

RV: why? Why is it a big deal for you?

C: because it's not much room down there.

RV: just move the pallet out of the way

C: but it is their stuff, this is not our stuff

RV: you have already arranged with that woman [an ASOS worker], you have already chosen your job what do you want to do?

C: but it is awkward for me to just move their stuff around

RV: what? move one pallet?

C: no no, it is few pallets, it's few pallets and I also need to go back and forth and move around between those other pallets. It is just easier for me to...

RV: you have organised your job over there already, you sorted your job out over there this morning didn't you? You told me what you were going to do this morning so you have done the hard work

C: well I already had this lift ready

RV: I already had all my tools on this lift from yesterday didn't I?

C: well it's not a big deal you can put the tools down, here, it doesn't take longer than 5 minutes, you know 1 minute

RV: you keep telling me how you are worth a lot more money than you are getting [This is a reference to comments that the Claimant had previously made to Mr Vaughan about having been paid a higher rate of pay in a previous job and his feeling that the money he was receiving for his work with the First Respondent was not enough.]

C: sorry?

RV: you keep telling me how you are worth a lot more money than you are being paid

C: alright

C: but if you can't use the lift then you are not worth a lot more money are you? You keep telling me how much money you are worth and that it's shit money and stuff like that, but you're not are you? You are not capable of using the scissor lift.

C: there is one thing we need to get straight you see
RV: yes?
C: I feel like sometimes you are losing patience when you are working with me. See, I am suffering with depression and anxiety.
RV: I don't give a fuck about that, I'm suffering with depression and anxiety
C: I require people to be patient with me
RV: you are not a special case, we are all struggling with that shit mate
C: this is a legal requirement and if you don't like it...
RV: so you don't think I'm suffering with mental health
C: if you don't like it, then I will talk to Adam [Mr White] or formally
RV: then go talk to Adam then and tell him why you want the scissor lift
C: no that is a separate thing, that is a separate thing
RV: you go talk to Adam and tell him why you want the scissor lift. If you think you are the only one getting care with mental health issues, then you are fucking wrong mate. Ashley is on anti-depressants. I regularly need fucking CBT [cognitive behavioural therapy, used to treat depression] so you are not the only one mate, you are not a special case
C: I am being really patient with all these people and I am being nice with everybody
RV: I know you are but you are being silly about not moving one pallet and putting it in there on that scissor lift. You keep telling me how you're worth a lot more money, well prove it then. Prove that you are worth a lot more money and do your job properly. You are on decent money, there is no reason for you to need this scissor lift, which is almost as big as that, that's just twice as light you need to move one pallet and that's it to get in.
C: no, this is not only one pallet. No man, I can use the small lift and it's easier
RV: ok, well go tell Adam that you can't do your job

49. Within 3 minutes of the end of this conversation, the Claimant spoke to Mr Ashley Wild, another electrician's mate working on the site, and asked him if he could take his blue scissor lift. Mr Wild readily agreed to give the Claimant his lift. The Claimant said: "cheers mate". The Claimant spoke to Mr White and said that he and Mr Vaughan had had an argument and he would prefer not to work with him anymore. Mr White was surprised by the Claimant's request, but agreed to it as he wanted to have a happy workforce.

50. From the recording, it is apparent that the Claimant and Mr Vaughan were calm and respectful with each other for the first two minutes of their dialogue, even though the Claimant had repeatedly maintained, assertively and without any audible distress, that Mr Vaughan should swap lifts with him because it would be easier for him to use the blue lift. Mr Vaughan could not see why he should swap lifts and thought that the Claimant could manage with the one he had if he was prepared to make the effort to move a pallet. By the time Mr Vaughan made comments about the Claimant not being worth the money he thought he was, his

tone indicated that he had lost his patience with the Claimant. This was the first time that he had been anything less than calm. The Tribunal accepts Mr Vaughan's evidence that he had lost patience with the Claimant not only because of his insistence that they should swap lifts but also because the Claimant had not done any work that day and it was already almost an hour into the working day.

51. Immediately after Mr Vaughan lost his patience, the Claimant made his comment about suffering with depression and anxiety. The Tribunal agrees with Mr Vaughan's evidence that this comment came from nowhere, in the sense that it could not have been anticipated from the tone and content of the argument that the two men were having that the Claimant's mental health would be an issue. The Tribunal finds that when Mr Vaughan said, "I don't give a fuck about that, I'm suffering with depression and anxiety" and made the comments that followed, he was not saying that he did not care that the Claimant was mentally ill. He was saying that the Claimant's mental illness was not relevant to their dispute about who should have which lift and that the Claimant was not alone in having mental ill-health. The Claimant's evidence was that he told Mr Vaughan that he did not want to ask the operatives if he could move the pallets because that would put him in an awkward situation that he did not want to face because of his anxiety. The recording and transcript make clear that he did not say this.
52. The Tribunal does not accept that the Claimant's perceptions was that Mr Vaughan's comments had violated his dignity or created a hostile environment for him. The Claimant's evidence was that this argument with Mr Vaughan had made him very anxious. By the time the Claimant made his comment about being nice to everybody, which was less than a minute after he had raised his depression and anxiety, Mr Vaughan's tone of voice was once again calm. The Claimant did not turn away from Mr Vaughan in distress but continued to argue with him, in a calm and assertive tone, about whether he would need to move more than one pallet in order to have room to use the orange lift. Within three minutes the Claimant was asking Mr Wild to swap lifts, in a calm tone with no audible sign of being upset. During cross-examination, the Claimant said that he felt that Mr Vaughan's comment about him not being worth the money was "a little bit unnecessary".
53. Even if the Claimant's perception was that Mr Vaughan's comments had created a hostile environment for him, it was not reasonable for Mr Vaughan's comments to have such a serious effect. The Claimant knew that Mr Vaughan had suffered from mental ill-health himself. He knew that Mr Vaughan had repeatedly made clear that he was not prepared to swap lifts. In cross-examination, the Claimant accepted that Mr Vaughan was entitled to say that he wanted to carry on using the lift he was already on. It was not reasonable for Mr Vaughan's momentary loss of patience, which was entirely predictable, to have the effect of creating a hostile environment for the Claimant.

54. If anybody was creating an uncomfortable environment for these two men, it was the Claimant, by insisting that Mr Vaughan swap lifts. Mr Vaughan's evidence was that, with hindsight, he believes that the Claimant intended to provoke him into saying something inappropriate to use against him and had recorded their conversations on 15 July for that reason. The Tribunal agrees that it is more likely than not that that was the Claimant's intention. The Claimant confirmed during cross-examination that by this time he was already considering bringing a claim to the Tribunal. The Claimant knew that Mr Vaughan had already refused to swap lifts, yet he travelled the length of the warehouse to repeat his request and in doing so passed his colleague Mr Wild, who was also using a blue lift. He could have asked Mr Wild to swap but did not. As soon as Mr Vaughan lost patience with the Claimant, as was predictable that he would, the Claimant mentioned his depression and anxiety and how he needed people to be patient with him.

55. This allegation fails.

Victimisation 1

56. The Claimant alleged that Ms Fitzpatrick failed to investigate or act upon his complaints about Mr Vaughan's behaviour and did so because the Claimant had alleged that Mr Vaughan had discriminated against him because of his disability.

57. The Claimant wrote four emails to Ms Fitzpatrick on 15 July 2021 complaining about Mr Vaughan discriminating against him in relation to the incidents referred to as harassment 1 and harassment 3 above. On 27 July he sent her a further email mentioning harassment 2. These were effectively all alleging that he had been subjected to harassment related to his disability by Mr Vaughan and amounted to protected acts.

58. On receiving the Claimant's first email of 15 July, Ms Fitzpatrick emailed him back and asked him to call her during his break to speak to her about it. She said that she would look into it. She planned to speak to Mr Vaughan about the Claimant's complaint but before she could do so she received a call from Mr White telling her that Mr Vaughan had not turned up for work and asking her to look into where he was.

59. After his argument with the Claimant on 15 July, Mr Vaughan was very upset. He had been suffering for some time from physical ill-health that a succession of specialists had been unable to diagnose, leading him to be anxious and low. His argument with the Claimant exacerbated his low mood and he felt unable to continue with the job. At around 9.30am on 16 July he texted Ms Fitzpatrick to tell her that he was resigning because he was struggling with his health.

60. Ms Fitzpatrick 'phoned the Claimant and explained that Mr Vaughan had resigned and would not be returning so the Claimant did not have to work with

him anymore. The Claimant said words to the effect that he was content with that.

61. Nevertheless, in his email of 27 July the Claimant asked Ms Fitzpatrick whether she had spoken to Mr Vaughan about his previous complaint and asked her to speak to him and ask him to apologise. On 2 August Ms Fitzpatrick replied by email and explained that she had been off work very unwell with COVID. She pointed out that she had spoken to the Claimant on the 'phone at length about his complaints and she had spoken to the site about the adjustments they had made (presumably a reference to Mr White's agreement that the Claimant would not need to work with Mr Vaughan anymore). She went on: "I have not spoken to Robert again since he has left." The Claimant emailed her again on 3 August and said his "expectations" were as set out in his email of 27 July and he would appreciate it if she could do something about this. In her reply on 6 August, Ms Fitzpatrick said that she believed she had done her upmost best to help him. She repeated what she had already said and added: "as you can appreciate, I am no longer in contact with Robert and he is no longer working for us".
62. The Tribunal accepts Ms Fitzpatrick's evidence, which is fully supported by the email correspondence between herself and the Claimant, that the reason she did nothing further about his complaints about Mr Vaughan was not because he had complained of discrimination. It was because she felt that there was nothing she could do or needed to do to deal with the Claimant's complaints. Mr Vaughan was no longer the company's employee and the Claimant no longer had to work with him. She was in any event reluctant to contact Mr Vaughan because she knew he was not well.
63. This allegation fails.

Victimisation 2

64. The Claimant alleged that the First Respondent failed to offer him any more work because of his emails of 15 and 27 July complaining about Mr Vaughan and a further email he sent to Ms Fitzpatrick on 3 September, this time complaining about harassment by Jason, which he asked her to forward to the Third Respondent. This third complaint, like the earlier emails of 15 and 27 July, was a protected act.
65. There was no evidence before the Tribunal that anybody employed by the First Respondent decided not to give the Claimant any more work. The Tribunal accepted Mr Salmon's evidence, which was clear and straightforward, that the company's normal practice is to advertise vacancies that they need to fill on their own website, jobboard websites and social media. There was only one vacancy advertised by the First Respondent for which the Claimant applied, which was for an electrician's mate in Leeds, advertised on the Totaljobs website. The Claimant sent in his application on 2 February, but the First Respondent had already filled

the vacancy the previous day with an individual who had telephoned the company with a speculative enquiry about the possibility of work. The documentary evidence produced by the First Respondent confirmed that it sent the client this person's details on 1 February and he started work on 2 February.

66. The reason why the First Respondent did not offer the Claimant this job was therefore not because he had complained of discrimination but because the job had already been filled by the time he applied for it.

67. The First Respondent's recruitment team operate active jobsheets, on which they record vacancies to be filled. There was mention on these sheets of vacancies in York in October 2021 for electricians and electrician's mates. The Tribunal accepts Mr Salmon's evidence that this job never went ahead and the First Respondent never placed anyone on this site.

68. This allegation fails.

CLAIMS AGAINST THE THIRD RESPONDENT

69. At the Preliminary Hearing on 7 February the Tribunal discussed with the Claimant the difficulties he might have with establishing that the First or Third Respondents could be liable for any acts of discrimination that might have been committed by Curtis or Jason, given that the Claimant accepted that these individuals were not employed by his employer (the First Respondent) or the principal in relation to his work as a contract worker (the Third Respondent). The Tribunal understood that the Claimant was not pursuing these allegations and so did not record them in the Annex to its Order. It did not, however, ask the Claimant whether he was formally withdrawing them. At the main Hearing, the Claimant said that he wanted to pursue these allegations and so the Tribunal considered them.

Harassment by Curtis

70. The Claimant alleged that he had been harassed by Curtis on 11 August 2021 by conduct related to his nationality. As already mentioned, Curtis was an electrician's mate and had been supplied to work for the Third Respondent by a different agency. As a contract worker, the Claimant was protected from harassment by anyone who was the employee or agent of the Third Respondent.

71. Curtis was not the Third Respondent's employee, so it could not be liable as his employer for any harassment he committed. There was no evidence before the Tribunal to indicate that Curtis was the Third Respondent's agent either. Indeed, it was inherently unlikely that an electrical contractor would appoint an electrician's mate who was employed by an employment agency to act on its behalf in any capacity. The Third Respondent could not therefore be liable as the principal of Curtis acting as its agent.

72. This allegation fails.

Harassment by Jason

73. The Claimant alleged that he had been harassed by Jason on 12, 16 and 18 August. He based this on an assertion that Jason was acting as the Third Respondent's agent. There was no evidence before the Tribunal that Jason had been appointed to act in any capacity for the Third Respondent. Indeed, Mr Pragnell's evidence was that the relationship between the Third Respondent and Jason was somewhat hostile because they had had "run ins" about the work being done on site. Jason was acting as a site manager, working for HX5, an entirely separate contractor working under a contract with Advanced to manage the warehouse project. He had dealings with the Third Respondent's agency workers, including the Claimant, but only because he was responsible, as part of his job with HX5, for ensuring safe working practices and checking that the quality of the work being done on site was up to the required standard.

74. This allegation fails.

Victimisation: general findings

75. In his allegations of victimisation by the Third Respondent, the Claimant relied on the same three protected acts as in the claim of victimisation 2 against the First Respondent, that is, his emails of 15 and 27 July complaining about Mr Vaughan and his email of 3 September complaining about Jason. The Tribunal finds that those involved in the alleged victimisation within the Third Respondent, namely Mr White and Mr Ian Pragnell, did not know about the Claimant's allegations of discrimination until after the alleged acts of victimisation had happened.

76. After the incident referred to above as harassment 3, the Claimant told Mr White that he had had an argument with Mr Vaughan and did not want to work with him anymore, but nothing more. When Mr Vaughan did not turn up for work on 16 July, Mr White 'phoned Ms Fitzpatrick to discuss this with her and she briefly mentioned that the Claimant had made a complaint about Mr Vaughan, but nothing more.

77. The Claimant first emailed Ms Fitzpatrick on 23 August saying that he "had a little issue at work with health and safety manager, he is a subcontractor to 3S I think". He said this individual might be harassing him. Ms Fitzpatrick spoke to Joe Pragnell, contracts manager and her contact at the Third Respondent, to tell him that the Claimant had made a complaint and on 24 August she told the Claimant that the Third Respondent would be looking into it. She also asked the Claimant whether he knew the individual's name. There was no reason why Mr White would have been told about the content of Ms Fitzpatrick's call to Mr Pragnell, given that the complaint was not about an employee of the Third Respondent or

anyone for whom Mr White was responsible. There was also no evidence before the Tribunal to indicate that Joe Pragnell talked to his father about this conversation. Mr Pragnell confirmed in his evidence, which the Tribunal accepted, that he did not.

78. On 6 September at 10.18 Ms Fitzpatrick sent Joe Pragnell an email forwarding the Claimant's emails of 23 August and 3 September complaining about Jason. Mr Pragnell was not in the office at this time, he was abroad. He was not back in the office until 7 September and may not have read this email even then. There was nothing in the evidence the Tribunal heard to indicate that he ever discussed the content of it with Mr White. The Tribunal accepts Mr Ian Pragnell's evidence that he did not discuss it with him either. The first that Mr Ian Pragnell knew about the Claimant's complaints of discrimination was when the Claimant emailed the Third Respondent direct about them all on 20 September 2021.
79. Since the people alleged to have victimised the Claimant did not know about his complaints of discrimination until after the alleged acts of victimisation had occurred, these allegations fail on that basis. The Tribunal makes the following additional findings on the actual reasons for those acts.

Victimisation 1

80. The Claimant alleged that, because of his complaints of discrimination, on 6 September 2021 Mr White told him that the job at the warehouse might be finishing at the end of the week, even though the work was in fact continuing for several more weeks, to try to get the Claimant to apply for work elsewhere.
81. The Tribunal accepts Mr White's evidence that sometime in August he told the Claimant and his colleagues that there might be more electrical work at the site because there was talk of constructing another mezzanine floor and offices. That work never materialised, at least during the Third Respondent's involvement with the project. As a result, the work was coming to an end, as originally predicted, after 3 months. Mr White wanted to give the Claimant and his colleagues a week or so's notice of this to be fair to them, so that they could start to look for other work. After discussing this with Mr Ian Pragnell and on his instructions, he spoke to the Claimant and his colleagues to tell them the news. Mr White's evidence was clear and definite: he had this conversation at the beginning of the working day on 6 September, by 7.15am at the latest. The Claimant in cross-examination initially agreed that the conversation with Mr White had occurred at the beginning of the working day but then changed his evidence to say that he could not remember when it happened. The Tribunal accepts Mr White's evidence that the conversation happened by 7.15am. At this time, Ms Fitzpatrick's email forwarding the Claimant's complaints about Jason had not yet been sent.
82. The Tribunal finds that the reason why Mr White told the Claimant that the work was likely to be ending in the following week was because it was. Mr White's

evidence to that effect was fully supported by the active jobsheets and invoices produced by the Third Respondent that showed that the number of hours worked by their workers at the site and the number of workers there was reducing significantly from the end of August. Others of the Claimant's colleagues were leaving, aware that the work was coming to an end. In the week ending 22 August, 236 hours were worked by five workers. In the week ending 19 September only 69 hours were worked by two workers. Only one worker remained in the week ending 26 September and Mr White himself did not return to the site after that week. The Claimant asserted during cross-examination that the work continued but was performed by workers supplied by another agency, but he provided no evidence to support that assertion.

83. This allegation fails.

Victimisation 2

84. The Claimant texted Mr White on 7 September saying that he would be starting another job on 8 September. When he arrived at the site of the new job, it emerged that there was in fact no work available so he 'phoned Mr White to ask whether he could return to the warehouse job. Mr White told him that he could not return because there was no more work. The Claimant alleged that Mr White told him this because he knew about the allegations of discrimination he had made.

85. Mr White was the only person involved in this 'phone conversation with the Claimant and, as set out above, the Tribunal finds that he did not know about the Claimant's allegations. In any event, the Tribunal finds, on the basis of Mr White's evidence and the documentary evidence that supports it, that Mr White told the Claimant that he could not return because the job was running down and there was no more work available.

86. The Claimant said that there was an occasion when Mr White allowed Mr Wild to return to work. The Tribunal accepts Mr White's evidence that that situation had been wholly different. Mr Wild was returning to work after a period of sickness absence, not at a time when the work on the site to which he was assigned was due to end very shortly, and, unlike the Claimant, he had not resigned to go to another job.

87. This allegation fails.

Case Nos. 1804356/2021 and 1805472/2021

Employment Judge Cox
Date: 7 July 2022

Judgment and Reasons sent to the
parties on:
Date: 8 July 2022