EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112335/2021

Held in Glasgow on 16 - 20 May 2022; and 30 May 2022

Employment Judge B Campbell

Members Ms M Watt and Mr D Frew

Mr M McCafferty	**Claimant Represented by: Ms L Neil - Solicitor**
Department for Work and Pensions	**Respondent Represented by: Ms E Campbell - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that:

1. The respondent treated the claimant unfavourably for a reason arising in relation to disability in terms of section 15 of the Equality Act 2010 by (a) not paying him a sum in respect of additional expenses incurred by travelling to and from work by car and (b) not asking him to return to working in his base office in or around June 2021 , and those claims succeed;

2. The respondent victimised the claimant in terms of section 27 of the Equality Act 2010 by not asking him to return to working in his base office in or around June 2021 and that claim succeeds;

3. The other complaints made against the respondent are unsuccessful and are dismissed; and

4. In respect of his successful claims the claimant is entitled to compensation in the sum of:

    a. £2,370.17 in respect of financial loss; and

b. £15,000 for injury to feelings, together with

c. interest on the award for injury to feelings at the rate of 8% per annum from 4 August 2021.

REASONS

Introduction

1. This claim was made by the claimant who continues to work, for the respondent, which is a government department. The claimant works as a Work Coach. He meets the definition of disability in the Equality Act 2010 ('EA') by virtue of a medical condition which was not disputed in this claim. His complaints arise out of events mainly in 2021 and relate primarily to the respondent's treatment of an application he made for financial assistance with the cost of his travel to and from work. There are additional complaints relating to the manner and timing of the respondent allowing or instructing him to attend work at his base office, and the allocation of his workload.

2. The hearing took place virtually on five days as initially allocated. A further day was required to complete evidence and owing to pressure of time, and also taking into account the parties' preferences, notes of submissions were provided shortly after. The tribunal members deliberated on additional days and this judgment is unanimously agreed.

3. The tribunal heard evidence from the claimant and also his trade union representative, Mr Charlie Liddell. The following witnesses for the respondent gave evidence - Eileen Downie, Business Manager; Colin Booth, Work Coach and Andrew Smyth, Work Coach Team Leader.

4. The parties had agreed a joint bundle of documents and numbers in square brackets below correspond to those pages in the bundle. A small number of items were added as the hearing progressed.

5. The hearing dealt with remedy as well as liability and evidence was heard to that effect. The claimant provided an updated schedule of loss.

6. The parties' representatives provided written submissions after the evidence was heard.

7. Each of the witnesses was found to be generally credible. There was not a great deal of conflict in the evidence, and where relevant any issues are discussed below.

Legal issues

It was agreed at the outset of the hearing that the legal issues for the tribunal to determine were as follows:

Time limits

1. Were the discrimination and victimisation complaints made within the time limit in section 123 of EA? The tribunal will decide:

    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 there 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, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide:

        i. Why were the complaints not made to the tribunal in time?

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

Section 15 of EA - discrimination arising out of a reason relating to disability

2. Did the respondent treat the claimant unfavourably by:

a. Refusing to pay the claimant's extra travel costs occasioned by his need to travel to work by car?

b. Not asking the claimant to return to work in the office in June 2021?

3. Did the following thing arise in consequence of the claimant's disability:

a. The need to travel to work by car?

4. Was the unfavourable treatment because of that thing?

5. Was the treatment a proportionate means of achieving a legitimate aim?

The respondent says that the claimant would have normally travelled to work by car in any event and that the claimant always consented to working from home.

6. The tribunal will decide in particular:

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

b. Could something less discriminatory have been done instead;

c. How should the needs of the claimant and the respondent be balanced?

Section 27 of EA - victimisation

7. Did the claimant do a protected act as follows:

a. Ask the respondent for a reasonable adjustment, i.e. to pay the extra cost of his travel to work by car in or around May or June 2021?

b. Bring a claim under the EA against the respondent?

8. Did the respondent do the following things:

a. Not ask the claimant to return to work in the office in June 2021 ?

b. In December 2021, without consultation, tell the claimant to work full time in the office?

c. In December 2021, on his return to the office, provide the claimant with a heavier workload than he previously had?

9. By doing so did it subject the claimant to a detriment?

10. If so, was it because the claimant did a protected act?

Remedy

11. To the extent that any of the complaints are successful, what remedy should be awarded in respect of:

a. Financial compensation; and/or

b. Injury to feelings.

Findings of fact

The tribunal made the following findings based on the evidence before it, and as are relevant to the legal issues to be determined.

8. The claimant is a continuing employee of the respondent. He began his service on 15 February 2021. He works as a Universal Credit Work Coach. The role predominantly involves meeting members of the public by way of an appointment system to advise them on efforts to gain employment and eligibility for state benefits. He lives in the West End of Glasgow and his base office is at Saltcoats in Ayrshire. The distance between the two locations by road is 31 miles.

9. The claimant has the condition gastroparesis, a gastrointestinal condition. This is a disability according to the definition in section 6 EA. He was diagnosed in 2018 and therefore had the condition before starting to work for the respondent.

10. In the job he held before joining the respondent, the claimant qualified for payment of work-related travel costs under the UK government's Access to Work scheme. From October 2020 he was reimbursed for the cost of 10 taxi journeys to or from work per week, i.e. two per day, less the cost of the equivalent journey by bus which he was unable to take. This is the approach taken under the scheme when calculating a payment to an applicant - the cost of the journey by the required method is paid for, but under deduction of the cheapest alternative method of completing that journey.

11. Somewhat ironically the respondent, being the government department which administers the Access to Work scheme, does not participate in the scheme for the benefit of its own employees. However, it has a similar internal policy designed to achieve the same effect. This is titled the 'Travel to Work as a Workplace Adjustment' Policy (the 'Travel to Work policy') [67-71]. The policy recognises that *'There may be times when disabled staff need a workplace adjustment to help them with travel costs to get to and from work.'* The policy recognises that a particular situation where that may occur is where *A disabled member of staff is unable to use public transport to get to work as a direct result of their disability [and] has to use alternative methods of transport which are more expensive.* [1] Suggested adjustments in such cases could include taxi fares, mileage costs, adaptations to a vehicle, or the purchase of a new vehicle in exceptional circumstances.

12. The wording of the Travel to Work policy is limited in a way which became evident in this claim. When giving guidance on how to calculate a sum to pay an employee for travel to work costs, it says 'you *should firstly consider how the disabled member of staff previously travelled to work.'* The policy goes on to say that this should be used as the basis for calculating 'normal' travel to work costs. The amount which can be paid under the policy is the 'additional' cost of the new method of travel. As such the policy generally mirrors the rules of the Access to Work scheme. However, the policy does not explicitly cater for a new employee who may require adjustments, only an existing employee who is forced to change the way they travel owing to a disability.

13. The policy also clarifies that if the normal method of travel to work involves no cost, then there will be no deduction. This includes where the employee was entitled to free transport such as a free bus pass before needing the adjustment. Again that approach mirrors the Access to Work scheme.

14. The policy suggests that an application for costs should normally be made using an occupational health report, or via a doctor or other specialist. It provides for an interim adjustment to be made while an application is being considered, and/or a short-term arrangement, or the payment of public transport or other travel costs.

15. In conjunction with his application to join the respondent, the claimant underwent an occupational health assessment in October 2020 and a report was produced [120-121]. It explained the nature of the claimant's condition and the effect on his normal day to day activities and functioning. In the section headed 'Management Advice' the author stated that he was fit for the role (of Work Coach) but that there was a *'requirement to have Access to Work due to his underlying health condition'.* He would also need easy access to a toilet at work and regular breaks.

16. The claimant had wished to apply for a role with the respondent in or around Glasgow but had missed the cut-off date in relation to such vacancies. At the time he went to apply, there were roles advertised in the South and West of Scotland. The claimant submitted his application via an online portal and was initially considered for a role in Dumfries. That was not his first choice as it was one of the furthest away offices with vacancies at the time. It was offered to him subject to pre-employment checks being carried out. He discussed with an employee of the respondent named Lesley Dunlop the logistics of him travelling to and from that location. He emailed her on 20 January 2021 to provide details of a train service which would leave Glasgow Central station at 7.09am and arrive in Dumfries at 8.59am. He said that he recognised the timing may or may not work for the respondent. He also said he was willing and able to commute by driving, with the journey taking 1 hour and 30 minutes, i.e. 20 minutes quicker [130].

17. At some point around January 2021 the claimant had a conversation with Ms Eileen Downie, Business Manager, who was helping out with the respondent's recruitment drive. The issue of travel expenses was raised. Ms Downie said that any decisions would be taken by his line manager at local level and not her. She said there were no guarantees that he would receive payment of them.

18. The claimant did not take up the Dumfries role as he wished to explore whether there were any vacancies in Kilbirnie or Kilmarnock, which were closer to his home. He made this clear in an email to Ms Dunlop and also asked who he should speak to about *'having my travel costs met through the access to work fund.* ' Through Ms Downie he became aware of a vacancy for the same role but in Saltcoats, which was easier to reach. After further conversations he was offered that position which he took up with a starting date of 15 February 2021 .

19. The claimant started work with the respondent as part of an intake involving a number of newly recruited Work Coaches. At the time the effects of the Covid-19 pandemic were such that the office was not operating as normal. Some face-to-face appointments with the public were taking place but the office capacity was heavily restricted. The majority of appointments were taking place by telephone. The claimant and his fellow new recruits underwent some in-person training for a week from 22 February 2021 and then they all reverted to home working, remaining in contact with each other via telephone and Teams virtual meetings. During the week of his training, the claimant raised the question of payment of his travel expenses with a manager, Colin Mumford. Following that week of training and with the claimant reverting to home working, he did not immediately follow this up.

20. Mr Colin Booth took over as the claimant's manager. Mr Mumford had been covering for him due to a Covid-19 related absence. In May 2021 the claimant again raised his request for payment of travelling costs. Mr Booth suggested there should not be an issue with the expenses being covered, although there was not a detailed discussion and Mr Booth did not know the relevant values which would apply to any calculation. He explained that the expenses should

be paid via a computer system or app used by the respondent referred to as SOP. The SOP system allows for claims to be made under the reference 'Access to Work', even though it is not officially that scheme which is being accessed. In his evidence Mr Booth was fairly certain that he had given no guarantees to the claimant, whereas the claimant took what he said to be closer to a commitment. We find that Mr Booth did indicate in principle that the claimant should be able to be covered for some expenses, but did not have the information to make a clear assessment, either in principle or for any given amount or period.

21. A 'Workplace Adjustment Passport' was partially completed by the claimant [137-141]. The document is designed to gather in one place relevant information about an employee's health conditions or limitations and any adjustments they reasonably require, so that should they move within the organisation or change managers, those required would have a readily accessible guide to accommodating the individual. Ms Downie had asked Ms Dunlop to send the template to the claimant in January 2021. It was filled in and signed off by the claimant on 29 January 2021, two weeks before he started. It was not added to or signed by anyone from the respondent.

22. Mr Andrew Smyth took over as the claimant's line manager in June 2021. Near the beginning of that month he held a Teams call with the claimant In the course of that he said that he would pick up the claimant's request for travel expenses and would need to seek guidance from a separate department named HR Casework, who provide HR advice to managers.

23. Two of the claimant's colleagues who started on the same day as him were Hugh McAllister and Yvonne Grayson. Mr McAllister returned to working in the office on or around 2 June 2021. Ms Grayson returned to the office around the middle of that month, having been on holiday for the first half of the month. Their line manager was Ms Susan Agnew. Three other colleagues starting around the same time as the claimant returned at various points in June. The claimant remained working at home. Other Work Coaches had their return to the office delayed. The office was not operating at full capacity due to Covid-related protocols.

24. Mr Smyth consciously took the decision not to ask the claimant to attend work in the office at this time. His reason for doing so involved a combination of factors, namely his concern for the claimant's health in the context of the ongoing Covid-19 pandemic, the large distance the claimant had to travel by comparison to other colleagues and the fact that his application for expenses had not yet been determined, and therefore that the claimant did not know if he would be meeting all or only some of his commuting costs. At this time the Saltcoats office was still only operating at around 50% of its desk capacity, and so decisions had to be taken about which Work Coaches would return, when, and for how many days per week. To a degree some priority was given to Work Coaches reporting to Ms Agnew as they supported younger jobseekers who were given in person appointments with more priority.

25. The claimant was generally keen to be working in the office and had made that known. He believed that doing so at such an early point in his role would allow him access to more support from managers and peers, and also to build relationships with colleagues. He agreed to continue working from home whilst the expenses claim was being determined, but expected that to involve only a short further period of a few weeks. He did not consider that his condition placed him at any higher risk in relation to Covid-19 than any other employee.

26. On 22 July 2021 the claimant went into the Saltcoats office to work for two weeks. This was specifically to cover for colleagues on annual leave. He said he was happy to continue working in the office but was asked to return to home working.

27. Mr Smyth sought further advice from HR Casework and had a discussion with them on 3 August 2021. His query and the discussion were summarised by the individual Mr Smyth spoke to and the summary was emailed by him to the claimant the following day. Mr Smyth said he was not sure how it would impact the claimant going forward, but he was copying it to Susan Agnew as his line manager or site manager.

28. The note from HR Casework said that Mr Smyth wished to discuss the case following advice previously given. The employee had informed him that he would be driving to work by car and was unable to take public transport due to his health conditions, and was now requesting to be reimbursed for the cost of driving to and from work in comparison to the cost of bus travel. Mr Smyth was recorded as having reviewed the Travel to Work policy and not believing that the claimant was entitled to these costs, but wished further guidance. The 'summary of discussion' section of the note said that based on the information provided they had discussed that as the claimant's normal method of transport would be by car, he would not be eligible to receive payment for any costs related to that journey now. If the claimant's condition were to change and he could no longer drive, the situation could be reviewed again.

29. The claimant indicated his unhappiness at the indication that he would receive no support for travelling costs. He told Mr Smyth that he had been assured when joining that his travelling costs would be covered. Mr Smyth replied to say that his understanding of the respondent's policy was that only costs additional to normal travelling costs could be paid as a reasonable adjustment, although he remained open to looking at different adjustments such as a move to another office closer to his home. The claimant was not interested in exploring whether he could be moved to another office.

30. On 15 September 2021 the claimant prepared a written grievance [200-202], He attached his grievance letter to an email addressed to Mr Smyth and Ms Agnew the following day. He explained that the letter was not addressed to Mr Smyth by name as he assumed that it would be dealt with by someone else, given that it was Mr Smyth's decision he was complaining about. However, the respondent has a policy of allowing a decision maker to consider a grievance about a decision they had taken. Were the complaint more serious, for example about the manager's conduct, then it would be referred to someone else to consider.

31. Also in that email, the claimant confirmed that he had taken advice from his trade union, PCS, and would be contacting ACAS to begin a period of Early

Conciliation with a view to protecting his right to make a claim. He still hoped that the issue could be resolved internally however.

32. A meeting was arranged to hear the claimant's grievance on 11 October 2021. In attendance were the claimant, his chosen union representative Charlie Liddell, and Mr Smyth who considered it competent for him to deal with the grievance. Notes were taken in the meeting by Mr Smyth which were turned into a typed document provided in the bundle [205-207]. He had wished to secure a minute-taker but had just returned from holiday and had not managed to do so. He did not want to put off the meeting. The claimant and Mr Liddell were content to proceed. Owing to these circumstances the note is not a complete account of everything said, but summarises the key matters raised and things said by each individual. As such it is accepted as a suitably accurate summary of the discussion in relation to what it covers.

33. The claimant recalled some matters which were discussed in the meeting but not captured in the note. Mr Smyth accepted in evidence that they had been raised. This included that Mr Smyth had admitted to applying his personal view of whether the claimant should receive any payment rather than applying the spirit of the policy. He agreed to remove any personal views going forward.

34. The focus of the discussion was how the respondent should view the claimant's 'normal' journey to work. Consideration was also given to the recommendations of the occupational health report of 27 October 2020. Mr Smyth recognised that it had suggested the claimant be offered Access to Work, but also knew that the respondent did not provide that to its own employees. He noted that reasonable adjustments were to be considered. Mr Liddell put forward the claimant's case on what his normal work commute would be by saying that, but for his disability, he would have travelled by car to Buchanan Street bus station in Glasgow, then taken a bus from there to Saltcoats, repeating the journey in reverse at the end of each day to arrive home. Based on that, he should be granted the amount of the extra cost of driving to and from work. The claimant added that this would be comparable to how his Access to Work payments had been calculated in his previous job. Mr Smyth undertook to consider the point, also noting that the claimant had

said during the recruitment process that he had been prepared to drive to work (this was in connection with the Dumfries role).

35. The claimant raised as a separate complaint that he considered he had been discriminated against because 5 colleagues who started at the same time as him had been asked to return to working in the office earlier than he had. He believed he was at a disadvantage by not having access to additional support when home working. Mr Smyth responded to say that he believed it was more supportive to the claimant to have him continuing to work from home whilst the issue of his expenses was resolved, as was his willingness to consider a transfer to a closer office. The claimant responded to say that he now felt settled in the Saltcoats office and that a move may negatively affect his mental health.

36. Mr Smyth confirmed that if it was decided the claimant should be paid some expenses, payment would be backdated. The meeting was then brought to a close.

37. Giving thought to the matters raised in the grievance meeting, Mr Smyth sent an email to the claimant two days later with some questions designed to clarify the claimant's position. This included precisely what the claimant had said about his ability to travel to the Dumfries role. The claimant replied with answers later that day. He said that he had explained that the Dumfries role was not ideal for him, but had asked for more time to consider it He had thought about the option to travel by train but concluded that it would not work due to the 'timings' - i.e. he would arrive too late - and also because he did not believe he would be guaranteed to be able to use a toilet on every journey. He said that the option of taking a bus or train to Saltcoats was unsuitable for the same reasons, whereas if driving he could pull over and stop at various points. He closed by saying that he felt *'the sheer depth and list of questions I find to be intrusive and demoralising. It is affecting my mental health.* ' He did not believe that he should still have to provide this information as he thought it had been covered before. The tribunal considers that the claimant was genuine in describing how he felt at this point. Equally, Mr Smyth was trying to establish clarity for himself on a sensitive subject.

38. Mr Smyth went back to HR Casework on 18 October 2021 to discuss the situation further. They provided a summary of their advice [212]. They recorded that Mr Smyth had explained the claimant's way of looking at what would be his normal commute, but for his disability. The note goes on to say:

> *"We discussed that it is the employee's choice which would be his preferred method of travel and that if when the employee has worked for other departments the travel costs have been covered by Access to Work then it is in line with the Equality Act that DWP provide the same for its staff as as a department we do not have access to Access to Work funding and it is the duty of the department to provide the reasonable adjustments identified in occupational health assist referrals from PAM."*

39. This advice should have been sufficient to lead Mr Smyth to conclude that the claimant should be paid at least something towards the cost of travelling to and from work by car. By this point the claimant had been in his role nine months, having attempted to have the matter settled before he joined.

40. However, the note records that Mr Smyth had decided to ask the claimant to undergo a further occupational health assessment and that this could involve consideration of a blended working pattern, i.e. a combination of office and home based working. This appears from the note to be an attempt to save money for the respondent. It appears also to have been recognised however that by only working certain days the claimant would not notionally have been able to take advantage of any discounted weekly or monthly travel rates. It is unclear to the tribunal what sufficiently useful purpose would have been served by a further occupational health referral. The feasibility and suitability of a blended working pattern were matters the respondent should have been able to consider itself, with any input from the claimant that was necessary.

41. The claimant began a period of absence from work through illness on 25 October 2021. He returned to work on 29 November 2021. A note was kept of occasions when Mr Smyth or Ms Agnew were in contact with him [214-216]. The absence was at least in part due to the claimant feeling tired, mentally low and distracted by the difficulty and length of time involved in having his

expenses claim dealt with. A fit note obtained from his GP cited work related stress.

42. On 26 October 2021 Mr Smyth sent a text message to the claimant to say that he was now in a position to confirm that the claimant's application for travel expenses would be granted, subject to calculation of the correct amount.

43. At some point during his absence, Mr Smyth took the decision to remove the claimant's caseload of clients and allocate them to other Work Coaches. He did so because he expected the claimant to be absent for longer than he in fact was. He did not want the standard of service to clients to suffer. It is normal that an absent Work Coach's colleagues would between them cover their workload for a short period, but not on a longer-term basis.

44. As a result, when the claimant returned at the end of November 2021 he was allocated a new caseload. This coincided with two other Work Coaches leaving their roles. Part of their combined caseload was given to the claimant to deal with. The number of cases he was given was not atypical but the circumstances of many of his new clients were different to those of his former clients, meaning that their appointments tended to exceed their 10-minute allocation more frequently. This caused the claimant to struggle and resulted in stress for him.

45. On 15 November 2021 the claimant submitted his claim to the employment tribunal. He had considered doing so earlier but wished to offer the respondent a reasonable opportunity to resolve his claim for expenses and other concerns internally.

46. On 2 December 2021 the respondent's Area Director Ms Margarita Morrison sent an open letter to all colleagues in relation to working from home. She said that it had been agreed that colleagues in back office and corporate roles could continue working from home, or under a blended working pattern. Colleagues required to deliver face to face services in job centres were excluded from that direction. Therefore, by default they were now being required to work in their offices if they were not doing so already. That approach was confirmed by Ms Downie in an all-staff email the next day. Mr

Smyth informed the claimant in a meeting that the instruction would apply to him and so he would need to work 5 days per week in the office with immediate effect. At the beginning of December the claimant and Mr Smyth had discussed the claimant moving to a hybrid pattern of 2 days in the office and 3 at home, or vice versa. Both seemed to consider it would be workable. At this time the claimant was undergoing medical tests and Mr Smyth thought a hybrid pattern would accommodate better any time the claimant would need off for appointments. Mr Smyth understood that the instruction from Ms Morrison would be subject to review at a later date, but the claimant appeared not to have been told that if so.

47. Mr Smyth held a return to work meeting with the claimant on 23 December 2021 . He had been absent himself for an earlier part of that month and hence could not arrange it for an earlier date. At the meeting he confirmed that he would not be issuing a warning to the claimant under the respondent's absence management rules. He recorded that by this time the claimant had completed a self-assessment document and they had reserved time at a point in the future to jointly create a stress risk assessment plan and complete a Workplace Adjustment Passport. The tribunal notes at this point that the claimant had completed the relevant parts of the second document back in January 2021. Mr Smyth also recorded that the claimant agreed to have a further meeting with occupational health. Importantly, he also repeated that the claimant's grievance would be upheld, in that he had decided the claimant was eligible to be paid any additional travelling expenses. He was not able to say at that point what the amount would be or how it would be calculated. As the claimant had raised concerns about his caseload, Mr Smyth agreed to take one particularly demanding client away from him.

48. On 10 March 2022 Mr Smyth sent a written grievance outcome letter to the claimant [224-225]. It stated that the grievance was being upheld, which was to say that the claimant would receive a payment in respect of his commuting costs. In doing so Mr Smyth accepted that the claimant would normally have used public transport to get to and from work, but because of his disability he could not do so and had to drive.

49. Mr Smyth confirmed that the claimant would receive cover for his costs dating back to the beginning of his employment on 15 February 2021 . The letter set out a computation of the amount to be paid. It calculated the cost of the daily commute by car to be £15.50 based on a mileage rate of 25 pence per mile and the distance driven being 62 miles. It calculated the comparative cost by public transport to be £13.10. This factored in both the cost of getting to and from the Glasgow bus station, and the bus journey between Glasgow and Saltcoats. Comparison figures were calculated for one day, a four-day week and a four-week period.

50. The claimant was given the right to appeal against Mr Smyth's decision and did sq. There was no copy of any grounds of appeal in the hearing bundle. The claimant took issue with the basis of calculation of the cost of both journeys which had to be compared - the normal expense and the additional expense. He considered that his mileage by car should be calculated at 45p per mile rather than 25p. In doing so he referenced a policy of the respondent titled 'Travel by Own Vehicle Policy' [230-235]. That policy provides that the higher rate can be paid in certain circumstances and that payments will not be taxed. He also believed that the monthly cost of a bus ticket should have been £44 rather than £135 as Mr Smyth had determined. Both figures corresponded to rates applicable based on different numbers of travel zones covered.

51. His appeal was decided by Ms Fiona Crawford. She sent a letter to the claimant with appendices dated 22 April 2022 [264-272]. Her decision was not to uphold the appeal, and therefore to agree that Mr Smyth's calculation of the claimant's payment was correct. She did not agree that anything other than the basic mileage rate of 25p should apply to his commute by car. She did not see that the Travel by Own Vehicle policy applied to the claimant's circumstances. For example, it allowed the higher mileage rate to be applied where an employee was travelling between two properties of the respondent in the course of their duties, but that was viewed as different from commuting from home to one's normal workplace. Even then, the higher rate was normally only applied for the first 1,000 miles in a tax year before dropping

down to the basic rate. She agreed with Mr Smyth over which monthly bus ticket was required. The claimant had relied on a cheaper ticket which covered too few zones to have allowed him to commute between Glasgow and Saltcoats. Mr Smyth had referred to the cost of the correct ticket in his calculation. The claimant now accepts this point.

52. The issuing of Ms Crawford's letter represented the conclusion of the internal grievance process available to the claimant.

53. The claimant applied for a free bus pass on 29 April 2022. The effect of this is that he would be able to travel by bus to and from work for free were it not ruled unviable because of his disability. He already possessed a blue badge entitling him to free parking in certain areas. He believed that he satisfied the requirement in more than one way. Those included that he was in receipt of a qualifying benefit, he already had a blue badge and had submitted a supporting letter from his Community Psychiatric Nurse.

54. At the time of the hearing of this claim, no payment had been made to the claimant for his expenses. This was said to be because the existence of the tribunal claim made it impossible or imprudent for the respondent to go ahead and pay anything to him. In effect the respondent decided to wait for the tribunal's judgment

Relevant law

55. Courtesy of the EA, individuals with certain protected characteristics are entitled to a remedy if they are discriminated against or otherwise unjustly treated in certain ways. Disability is a protected characteristic.

56. Section 15 EA reads as follows:

"15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

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

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

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

57. Effectively the test for this type of discrimination consists of two steps. First, did a claimant's disability cause 'something' to arise, and secondly if so, was the claimant detrimentally treated because of that something - ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14.*** There is no need for a claimant to identify a comparator or prove that someone else would have been treated more favourably. An employer accused of such discrimination must have knowledge (actual or constructive) of the disability being relied on at the time of the alleged act.

58. There is no statutory definition of unfavourable treatment, although numerous cases have considered the meaning of the term and guidance is provided by the Equality and Human Rights Commission in its codes of practice.

59. If an employer wishes to argue that unfavourable treatment was objectively justified it must show that it was proportionate, and thus appropriate and reasonably necessary. The needs of the business may have to be balanced against the impact on the individual. If there was a less detrimental way to achieve the same business objective that may point to the employer's steps not being proportionate

60. Section 27 EA states:

"27 *Victimisation*

(1) A person (A) victimises another person (B) if A subjects B to a detriment because —

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

fa) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

Discussion and decision

Time bar issues

61. The claimant began ACAS early conciliation on 20 September 2021. As such, any complaints arising before 21 June 2021 are out of time, unless part of a continuing act which extended until after that date.

62. Considering the complaints made, we find that only one complaint before us is out of time, namely the decision of Mr Smyth not to invite the claimant back to work in the Saltcoats office at the beginning of June 2021.

63. In the circumstances we have decided to exercise the power available to us to determine that claim on its merits, on the basis of what we think is just and equitable. In taking this decision we note in particular that the act in question

occurred on or around 2 June 2021 when Mr Smyth consciously decided to request the claimant to go on working from home whilst others were being given the opportunity to return. Viewed as such, the complaint is only out of time by around three weeks. At that time the claimant had not yet contacted his trade union for advice. He sought advice shortly before his grievance hearing on 14 September 2021 and it is likely therefore that he would not have had the benefit of advice while the complaint could still have been made in time. He was still hopeful of his expenses claim being resolved positively and without much more delay. He wanted things to be agreed informally and at a local level rather than by escalating a dispute, which for a new employee in his circumstances would have been reasonable.

64. We therefore find that the claimant's relatively short delay in raising the matter as a complaint would have been excusable in the circumstances and would have caused the respondent little prejudice in terms of its ability to reply to it.

Section 15 of EA - complaints of discrimination arising out of a reason relating to disability

Unfavourable treatment

65. We find that the respondent treated the claimant unfavourably by refusing to pay his additional travel costs associated with commuting by car. The evidence is clear that it has not paid him any amount at all to date. The reason initially was that a decision had not been made as to whether he was eligible, which then became an issue over how much he should be paid, and then latterly the respondent appears to have opted to suspend the process and simply wait for the claimant's claim to be determined by the tribunal.

66. In terms of the date of that act, we find that it occurred on 4 August 2021 when Mr Smyth emailed the claimant, copying the advice he received from HR Casework to the effect that the claimant would not be eligible for a payment under the Travel to Work policy. Up until that point the application was under consideration, but by that email it was effectively being refused. This can be viewed as a positive act in the sense of a decision not to grant the claimant's application, or an omission in the sense that the respondent ought to have

confirmed to the claimant on this date that his application would be successful, but didn't. In either case the complaint is within time.

67. Given that even the respondent itself came to accept that the claimant was entitled to payment, there is no other conclusion which can be sensibly reached other than the claimant was treated unfavourably by having to wait over a year for an outcome. We recognise that the claimant's case may not have been easy to consider under the Travel to Work policy given that there was more than one way of looking at what was his 'normal' commute. We also accept that things were busier with the respondent in the spring and summer of 2021 , with the presence and consequences of the Covid- 19 pandemic and the large number of new recruits being accommodated. However, a step back and some common sense should have led the respondent to consider the spirit and purpose of both its Travel to Work policy and the Equality Act itself. They are the administrators of the Access to Work scheme and although their own employees are not eligible to use it, the Travel to Work policy was viewed as its equivalent. We note that the policy also suggested that interim payments could be made. That was not considered.

68. We also find that by not asking the claimant to return to working from the Saltcoats office in June 2021 he was treated unfavourably. We accept his view that, as a new member of staff, there was value in being around colleagues generally, and in particular that he would form relationships and be able to seek assistance more easily. This was especially so as he saw people who joined at the same time as he did being brought back. The test of whether this is unfavourable involves considering whether the claimant viewed it as unreasonable and whether he was reasonably entitled to do so. We find that those requirements are met. It does not matter whether another given employee was working from home at the same time, and if so whether they considered it unfavourable to have to do so. This is not a legal test- involving a comparator. Nor can the fact that the treatment is unfavourable be elided by reference to the alternative also involving what the respondent saw as unfavourable treatment, in the sense that in attending work would involve the claimant incurring travel costs which he could not be sure would be

covered by the respondent. At the time the claimant was prepared to drive to work even though he knew he might not be reimbursed for his travel costs, whether in full or at all. He was optimistic about recovering them in light of his experience of how the Access to Work scheme operated, and he knew that any positive decision would be backdated.

Was *unfavourable treatment because of something relating to disability?*

69. The 'something' relating to disability in this case has been identified as the claimant's need to travel to and from work by car.

70. We consider it clear that the unfavourable treatment in the form of not paying his additional travelling costs arose because of the claimant's need to commute by car. That was the whole nature of the payment he was claiming.

71. As we have found, the decision not to bring the claimant back into the office to work in June 2021 was for a combination of reasons. One of those was because he had to drive to work by car, because he would not have had a claim for additional travel expenses outstanding otherwise. There need only be a loose connection between the treatment said to be unfavourable and the thing relating to disability being founded upon - ***Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15.*** As such it does not matter that other factors also combined to play a part in the unfavourable result. We therefore find that this unfavourable treatment was also the result of something relating to his disability.

Justification - is the unfavourable treatment a proportionate means of achieving a legitimate aim?

72. Under section 15 an employer has the opportunity to avoid liability for what would otherwise be unlawful discrimination if it can show that the treatment was a proportionate means of achieving a legitimate aim.

73. We do not find that the unfavourable refusal to pay the claimant's additional travel costs could be justified in this way. There appears to be no legitimate aim, other than possibly saving money. Mr Smyth said in evidence that he was not motivated to save the respondent money when dealing with the

application, and that there was no suggestion of the respondent not having the funds to pay the claimant, and so there is no basis to rely on that motive.

74. In any event the respondent's response could not be viewed as a proportionate means of achieving a legitimate aim, particularly given the overall length of the delay, the fact that no interim payments were made to the claimant and also that, even after a complete response had been given to him, payment was further delayed until his employment tribunal claim was decided.

75. However, we do accept that the unfavourable treatment of the claimant by way of declining to invite him back to the office in June 2021 was justified. We find that the respondent had a legitimate aim of allowing staff to return to work within the constraints of the still limited office capacity which existed at the time. We accept Mr Smyth's evidence as to the combination of reasons for that decision, and the surrounding circumstances. The thing relating to the claimant's disability - his need to drive to work - was only one aspect of that. Other considerations at play were unrelated, such as the fact that the claimant lived further away from the office, was perceived as being at a greater risk to his health and was not from Ms Agnew's team which was being given priority because of their younger clientele. Not all other Work Coaches were brought back in June because there was not capacity in the office to do so. The respondent treated the claimant proportionately in relation to the above aim by reasonably assessing factors other than his need to drive to work. At the time the expenses application was expected to be resolved within a short further timescale and the negative aspects of being remote from colleagues were not so great that it was reasonable for the respondent to have them continue a few weeks more.

Section 27 of EA - victimisation

Protected acts

76. It is a matter of undisputed fact that the claimant carried out both of the protected acts he relies on in his claim.

77. The first of those was to make a request for a reasonable adjustment as a person with a disability under the EA, which we find that he did on 29 January 2021 when he signed his Workplace Adjustment Passport in which he said that travelling via public transport would be unrealistic because of his condition, that travel by car would be his chosen mode of transport and that payment of his mileage would be beneficial. We note that the list of issues envisaged that the request would be found to have been made in May or June 2021 , but on the evidence it is clear to us that it was made earlier.

78. The second protected act was the submission of his claim to the employment tribunal on 5 November 2021 .

Alleged detriments

79. The **first alleged detriment** is the decision not to ask the clamant to return to work in the office in June 2021. This is deemed to be a detriment to the claimant for the same reasons as it is found to constitute unfavourable treatment of him under his section 15 claim. Judicial guidance confirms that there is little or no value in treating the legal concepts of a detriment and unfavourable treatment any differently in this context - see for example ***Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65.***

80. The **second detriment** suggested is the instruction by Mr Smyth that the claimant should attend work from on or around 2 December 2021 without consultation or notice. We recognise the apparent inconsistency in the claimant complaining about not being brought back to work in June 2021 , only to complain that he was asked to return six months later. However, the circumstances were not identical. His mental health had suffered significantly in the meantime, not least because of the respondent's inaction, and he had been absent for over a month immediately before. The matter of payment of his travel costs had dragged on and had still not been resolved. There was no prior warning or discussion about the change. No steps were taken to explore whether the claimant's particular circumstances warranted exploration of whether he could work to a hybrid pattern combining some days in the office

and the remainder working at home. We therefore find that this decision, given its timing, the manner in which it was implemented and the claimant's changed circumstances, was detrimental to the claimant.

81. The **third act said to be a detriment** was the provision of a more demanding caseload on the claimant's return to work from his absence at the end of November 2021. The claimant's existing caseload was removed and allocated to others in October 2021 after he went off ill. He inherited the caseload of one or more different departing Work Coaches when he returned. As a result he was supporting different clients, many of whom were in different circumstances, particularly in relation to the effect of their health on their ability to find work. His evidence was that he found that work more demanding and time-consuming. As a result his appointments more frequently overran and it was more difficult to take breaks. The respondent countered by saying that the number of cases the claimant had allocated to him was within a normal range and that clients on the health journey, as they were described, did not always take more time than others able more actively to look for work. We accept the claimant's evidence which was more specific to his own experience, whereas the evidence of the respondent's witnesses was more general. This therefore amounted to a detriment in the statutory sense.

Causation

82. We next considered whether each of the proven detriments occurred because of the claimant carrying out either or both of the protected acts. We recognise that there need not have been conscious intent on the part of the respondent to cause a detriment, and also that it is not simply a case of considering whether, but for the protected act, the detriment would not have occurred. The connection between the two elements must be clearer such that the protected act is the real reason for the detriment.

83. We find that the first detriment in June 2021 did occur because of the protected act of requesting a reasonable adjustment. This is for essentially similar reasons to our conclusion that this was unfavourable to him because of something related to his disability under section 15. That is to say, a

sufficiently large part the reason for Mr Smyth electing not to ask the claimant to return to the office at that time was the consequence of his request for a reasonable adjustment as a person with a disability. We recognise that Mr Smyth had in mind a number of reasons why the claimant was not brought back, but the unresolved expenses claim was a sufficiently material part of the reason as a whole, which became a more significant factor as time moved on and more staff returned.

84. The second detriment is not found to have occurred because of either protected act. Mr Smyth told the claimant he needed to return to working in the office full time because he understood all staff were now required to do that, by virtue of the message issued by Ms Morrison. That was the real reason. At this point Mr Smyth had already decided that the claimant would receive payment of his additional travel costs, albeit that the amount had not been calculated. The matter was closer to resolution in Mr Smyth's mind. There was no evidence that the claimant's act of making the application, or his decision to raise a tribunal claim, contributed to Mr Smyth's direction to the claimant to return to the office.

85. We also find that the third detriment did not occur because of either protected act We find that the reason why the claimant was given a more challenging caseload was simply a matter of the respondent adapting to the circumstances of the claimant's absence. Whether the claimant agrees with the respondent's judgment in removing his caseload after such a short period of absence or not, the decision was taken because Mr Smyth believed his absence would be long term. Even if that did not transpire, it was the reason for his decision. Similarly, the allocation of the claimant's new caseload was a result of that decision, the fact of his return to work sooner than anticipated and the departure of other Work Coaches leaving clients to be allocated. It was not unusual for the respondent to move some of those cases to the claimant. Therefore, whilst we accept that the unfamiliar and in some respects more challenging new set of clients he was given represented a detriment at that time, we cannot see that this was caused because of the act of applying for travel costs in January of that year or of raising his tribunal claim.

Technically the removal of the claimant's caseload occurred before the claim was presented. But even if the claim was anticipated in the sense that the claimant had entered Early Conciliation before that date, we do not see a causal link.

86. The respondent submits that it took all reasonable steps to prevent any acts of victimisation, so that it should escape liability under the terms of section 109(4) EA. We do not find that this defence is made out on the evidence before us. Whilst it is true that the claimant incurred less personal expense by working from home in July 2021 and thereafter, some or all of which he may not have recovered from the respondent, there were other steps which could have been taken to allow him to work at the Saltcoats office. For instance, the respondent could have given him an interim payment to cover his travel costs without prejudice to the final outcome of his application. This could have been for five days per week or fewer, based on discussion between the claimant and a manager as to what was the most suitable balance of office and home-based working and taking into account the restricted number of work stations.

Remedy

87. Given our findings above, the tribunal calculates remedy as follows:

Financial compensation

88. It was agreed that the claimant had travelled to and from work using his vehicle on 105 days between his commencement date and 16 May 2022, the last date claimed for. It was also agreed that his journey was 31 miles each way.

89. The respondent operates two mileage rates, each for different circumstances under its existing policies, namely 25p and 45p per mile. Those have been chosen to conform to various HMRC and similar rules. The tribunal was conscious however that the respondent's fundamental obligation towards the claimant in this situation was to make a reasonable adjustment for him under section 20 EA. The respondent accepted that it was under a duty to avoid any disadvantage to the claimant by being required to travel to work by car. A

disabled person must not be required to pay any of the cost of removing the disadvantage. Nor does a disabled person have the right to be put in a better position than a person without a disability as a result of the adjustment.

90. The tribunal therefore sees the task of deciding on financial compensation to be an exercise in ensuring that the claimant was no worse off financially from having to drive to work instead of using public transport, but without going so far as to give him an additional monetary benefit from doing so. That was the extent of the respondent's duty towards him and that is what it was likely to do. Taking into account that any allowance would have to cover fuel and contribute other running costs such as vehicle tax, servicing and repairs and possibly insurance, we consider that a mileage rate of **35 pence per mile** is appropriate. In reaching this decision we do not consider that it is our role to prescribe any allowance for an indeterminate future period, but rather ascertain with the evidence before us the outcome the respondent should have reached by the time the claim was heard by us.

91. The daily cost of travel based on the above is £21.70 - i.e. 35 pence x 62 miles. Multiplying that figure by the 105 days in which the claimant travelled to and from work produces a figure of £2,278.50.

92. The question of the cost of 'normal' travel to work has to be decided, as we accepted that any such figure would be deductible from the above.amount, as it would under the Access to Work scheme had that applied. The respondent argues that the cost of bus travel should be deducted, as should any additional cost of travelling between the claimant's home and the Glasgow bus station at the beginning and end of each working day. The claimant argues that he was eligible for a free bus pass, and that under the Access to Work scheme his normal journey cost would therefore be treated as zero, being the cheapest way of making the journey. Having given this consideration and bearing in mind that the respondent's fundamental approach was to mirror the Access to Work scheme, we find that the claimant's position is the one the respondent would and should have followed had it acted consistently with its own policy. We appreciate that the respondent did not know to begin with whether the claimant would be eligible

for a free pass, but we also note from the evidence that Mr Smyth assured the claimant that any decision in his favour would be backdated to the beginning of his employment.

93. We also wish to make clear that we considered there was adequate evidence before us in the hearing, unchallenged by the respondent, to suggest that a free bus pass would be issued. We note that the claimant sought to admit into evidence that he had received a pass after the hearing had concluded. We do not make our findings based on the fact that the pass was provided to him, but on the evidence we had available at the hearing which suggested this was the probable outcome of his application.

94. We have also noted that the claimant applied for the free bus pass relatively recently. The respondent invites us to find that this points to his motivation being to maximise the value of his monetary claim rather than to use the pass for its intended purpose. Again we take the view that the respondent's primary approach was, or should have been, to follow the Access to Work scheme. As such we find that it was within the claimant's right to apply for the pass as a means for establishing that he was eligible for it, even if he did not immediately intend to use it to travel to work.

95. The claimant also sought to be compensated for the loss of his pay as a result of his absence from work between 24 October and 30 November 2021 . Under the terms of his contract he, like any similar employee of the respondent, was paid his full salary for the first month of absence and then half pay thereafter. He therefore lost out on half of his pay for approximately 10 days. His net pay for October was £1,746.40 and for November it was £1 ,654.73.

96. We have considered the evidence which was before us. The claimant's absence was stated to be because of work related stress, as evidenced by the fit note he obtained, although we note also that he was suffering from some flu-like symptoms at least initially also. Those may or may not have ben related to his stress. The claimant explained at some length in his absence management meeting with Mr Smyth on 23 December 2021 that he believed the main cause of his absence, both at all and in terms of its duration, was the

culmination of events relating to his claim for travel expenses leading to his grievance and its incomplete outcome. It was not challenged as such and Mr Smyth summarised the claimant's position in this way as was minuted. The claimant's evidence to the tribunal was consistent with this. We therefore find that the primary if not the sole cause of his absence was the unfavourable treatment on 4 August 2021 in the form of refusal to pay any of his travel costs, and the consequences of that decision. We find that this was the effective cause of his absence in October and November 2021 . Owing to the length of the absence the claimant began receiving less pay after a month. The difference was £91.67. This was a direct consequence of becoming too ill to work.

97. Taking all of the above into consideration the tribunal considers that it is appropriate to award compensation to the claimant of **£91.67.**

Injury to feelings

98. The claimant seeks an award of compensation for injury to feelings within the middle band of awards under the ***Vento*** principles. Currently the middle band ranges between £9,100 and £27,400. The claimant has specified a figure of £20,000 in his schedule of loss. The respondent argues that no award can be properly attributable to injury to feelings in this case, but if that is not correct then a figure in the region of £1 ,000 would be appropriate.

99. . We have considered the relevant evidence in this claim. We come back to the fact that the respondent is the public body which administers the Access to Work scheme, albeit not for its own employees by virtue of an internal accounting convention. It was well placed to deal with a request for reasonable adjustments like the one the claimant made, in terms of resources, experience and its own profile as an employer and a publicly funded provider of assistance to members of the public wishing to work. We again recognise that the claimant's recruitment was part of an unusually large exercise to increase the number of Work Coaches within its workforce, and that around the time of his recruitment there were challenges and at times disruption brought about by the pandemic and other factors. However, and despite those

matters, the respondent failed the claimant. It had adequate material by the time of his starting date by way of an OH report and his Workplace Adjustment Passport to have either determined his claim or at least to have put a more satisfactory interim arrangement in place. Whilst the requirement to work from home in the initial months of his employment took some urgency out of the situation, there was really no reason why it had not been fully determined by May 2021 so that the claimant was on an equal footing with colleagues as regards returning to the office from June 2021 onwards, subject to any wider rules in place to recognise the limited working space available. It initially appeared that this would happen, but the matter was allowed to drift and then rendered more complicated than it needed to be by Mr Smyth's revisiting of the matter with HR Casework on a number of occasions, which in turn prompted the claimant's grievance and his appeal against the decision taken. The consequence of this was further stress and anxiety on his part, prolonged separation from colleagues and the largely unnecessary frustration and, at times, indignity of having to repeatedly explain sensitive matters. Although a decision was reached in principle that the claimant would be entitled to reimbursement of his additional travel costs, it took a number of further months before a meaningful answer was provided. By the evidence of its own witnesses the respondent effectively paused the process so that the tribunal could determine the claim.

100. We have outlined above the complaints of discrimination which are upheld and why. We find that the circumstances of this case fit most appropriately within the middle Vento band. That is to say, applying the guidance of the Court of Appeal in ***Vento v Chief Constable of*** West ***Yorkshire Police (No 2) [2003] IRLR 102,*** we find that the respondent's conduct was sufficiently serious that it went beyond a minor breach, but was not of the most serious type. In particular we were mindful of the factors in the preceding paragraph. The overall effect took place over a number of months, and so could not be described as an isolated incident. However, this was not the result of a cynical or calculated act on the respondent's part. Although no expert medical evidence was produced specifically to deal with the effect of the respondent's failures on the claimant's health, this is not an absolute requirement and there

was sufficient evidence from the claimant himself, largely accepted, about the way he had been impacted.

101. Noting that the applicable financial limits of the middle band are £9,100 and £27,400, and bearing the above in mind, we find that an award of £15,000 for injury to feelings is appropriate in this case. This is less than the claimant seeks, but then again not all of the complaints were proven to the full extent claimed.

102. Interest will be due on the injury to feelings award. We have found the date of the respondent's act or omission to be 4 August 2021. Calculating interest at the statutory rate of 8% per annum to the date of this judgment produces a figure of **£1,176.99.** This is based on a daily interest figure of £3.29 and a period of 358 days. The figure will increase by £3.29 for each day after 27 July 2022 the award remains unpaid. This is part of the tribunal's award.

Employment Judge: Brian Campbell
Date of Judgement: 25 July 2022
Entered in register: 27 July 2022
and copied to parties