EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102550/2020

Held on 17, March and 3 May 2022

Employment Judge Hendry
Members L Brown
J McCaig

Mr F MacKay	**Claimant** **In Person**
Royal Mail Group Ltd	**Respondent** **Represented by:** **Ms N Moscardini - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is as follows:

1. The claims made for direct discrimination (S.13 Equality Act 2010) not being well founded do not succeed and are dismissed;

2. The claims for harassment (S.26 Equality Act 2010) not being well founded do not succeed and are dismissed;

3. The claims for discrimination arising from disability (S.15 Equality Act 2010) not being well founded do not succeed and are dismissed;

4. The claims for indirect discrimination (S.19 Equality Act 2010) not being well founded do not succeed and are dismissed.

5. The claims for a failure to make reasonable adjustments in terms of s20 Equality Act 2010 not being well founded do not succeed and are dismissed.

6. Further the Tribunal finds the claims made are time barred and that it is not just and equitable in the circumstances to extend the time limits.

REASONS

1. The claimant in his ET1 contended that he had been discriminated against by his employers on the grounds of his disability. He made claims for direct discrimination, harassment, discrimination arising from disability, indirect discrimination and a failure to make reasonable adjustments.

2. Parties had been unable to agree a final List of Issues. The Tribunal had the benefit of a draft List of Issues prepared by the respondent's solicitors which contained comments made by the claimant which we had regard to when considering the submissions and evidence. The respondent company denied that there had been disability discrimination and also argued they had no knowledge of the claimant's disability at the relevant times and that in addition any claims were time barred. The claimant argued that the claims were connected and on time and if not the Tribunal should exercise it's equitable power and allow the claims late.

Strike Out Application

3. At the outset of the hearing the solicitor acting for the respondent asked for the claims to be struck out on the basis that despite being asked to do so the claimant had not set out even a *prima facie* case of discrimination. The claimant opposed the application. It is unfortunate that the question of strike out was not raised much earlier in the process especially given the deficiencies in the claimant's pled case discussed at case management meetings. We noted that the claimant had no prior notice of the application.

While we sympathised with the argument being made on balance the Tribunal decided to reject the application. While there were deficiencies in the pleadings we were conscious that the claimant was a party litigant and had no opportunity to prepare for such an application. We did not believe that discharging the hearing and arranging a strike out hearing was in all the circumstances in accordance with the overriding objective. The witnesses had been assembled and we preferred to proceed and hear the evidence. Accordingly, we rejected the application.

Evidence

4. The Tribunal had reference to a Joint Bundle of Documents prepared by parties. That bundle was added to in the course of the hearing when, of consent, the final amended copy of interview notes between the claimant and the respondent's Manager Steven MacKenzie were lodged (JB100).

5. The claimant was not represented and it had been agreed prior to the hearing that he would prepare a witness statement to assist him giving his evidence. He prepared a witness statement but supplemented it's terms orally at the invitation of the Tribunal. The other witnesses were not required to prepare witness statements.

6. The Tribunal heard evidence from the claimant on his own behalf and from the following witnesses for the respondent:

- Ms Nicola Lyall, Customer Delivery Manager
- Mr Charles Alway, RMG Operations Manager
- Mr Richard Gilbaine, RMG People Case Manager
- Derek Christie, Efficiency and Utilisation Manager
- Steven MacKenzie, RMG Operations Production Leader
- Gary Watson, Senior Performance Coach
- Simon Walker Independent Casework Manager

7. The Tribunal had previously issued a Judgment in relation to whether or not the claimant was disabled in terms of the Equality Act. The Judgment had found that the claimant was a disabled person from 2016 onwards covering the periods with which the merits hearing was concerned. That Judgment did not deal with the issue of the respondent's knowledge of that disability.

Issues

8. There was no final agreement on the draft list of issues but we replicate the main legal issues with the claimant's responses in italics where appropriate. The various principal claims being made were tolerably clear to the Tribunal.

Preliminary Issues Knowledge of disability

In respect of each of the claimant's five disability discrimination claims, did the Respondent know, or could reasonably have been expected to know, that the claimant had a disability at all material times?

1. Jurisdiction

The respondent contends that the claimant's claims of discrimination have been presented out of time and the Tribunal does not have jurisdiction to consider them. The claimant contends that they form a continuing course of conduct. The issues to be determined at the full hearing are:
Were claims in respect of any of the alleged acts of discrimination brought more than 3 months from the date on which they occurred?
If so, did they amount to continuing acts such that the date of the last act established was within time? Were there gaps of more than three months between the alleged acts?
Would it be just and equitable to extend the time limits for bringing such claims?

2. Direct Discrimination Section 13 Equality Act 2010

The less favourable treatment complained of by the claimant is:

The respondent failing to protect the claimant from detrimental harm to a known disability on 1/6/18, 10/6/18, 2/4/19, April 2019 – January 2020, and 28/8/19 (as set out below). This is in comparison with either someone who has a different disability to the claimant or none at all.

On 1 June 2018, there is a data breach involving the claimant's protected characteristic of disability by letter sent to the claimant on 1 June 2018 from Ms MacAskill. No reasonable steps taken by the respondent to prevent medical detriment to the claimant's known disabilities. Treatment is less favourable in comparison with either someone who has a different disability to the claimant or none at all. Within this letter Mr MacKay's stress/anxiety and depression condition is mentioned and targeted directly by Ms Macaskill.

On the 10 June 2018 Mr Mackay was harassed via email correspondence from Ms MacAskill regarding a joint training exercise between Royal Mail and the CWU. No reasonable steps were taken by the respondent to prevent medical detriment to the claimant's known disabilities. Treatment is less favourable in comparison to either someone who has a different disability to the claimant or none at all.

On 2 April 2019 Mr Mackay was harassed via an unsolicited email from Ms MacAskill. No reasonable steps were taken by the respondent to prevent medical detriment to the claimant's known disabilities. Treatment is less favourably in comparison with either someone who has a different disability to the claimant or none at all.

In April 2019, the claimant was harassed in remarks made via email and publicly displayed in a report prepared by Ms MacAskill. No reasonable steps taken by the respondent to prevent medical detriment to the claimant's known disabilities. Treatment less favourable in comparison with either someone who has a different disability or none at all. Mr Mackay repeatedly asked for the report to be removed and this occurred until 2020.

On 28 August 2019, Mr Mackay submits a grievance relating to non-investigation of 4-part complaint which is ignored.

Did the alleged treatment complained of (as listed above) occur and if so, did it constitute less favourable treatment?

If so, was the reason for that less favourable treatment the Claimant's disability?

Who is the Claimant's comparator (actual or hypothetical)?

Hypothetical.

Was the claimant treated less favourably than the comparator was or would have been treated?

The claimant contends that the Respondent knew the Claimant was a vulnerable member of staff for nearly 10 years, since 2009. Any other member of staff would be protected from harm from a risk that would exacerbate their disability.

When did the less favourable treatment occur?

1/6/18, 10/6/18, 2/4/19, April 2019 – January 2020, 28/8/19.

Do the alleged acts of discrimination form part of a series of continuing acts of discrimination?

Does the ET have jurisdiction to hear the complaint?

3. Harassment (s26 Equality Act 2010)

Harassment is unwanted conduct relating to the claimant's disability. The claimant considers that the following alleged conduct was harassment:-

The claimant disclosed to his line manager, Nicola Lyall, on 10 April 2018 that he had stress and was to undergo possible surgery for his heart conditions. Ms Lyall disclosed this information relating to his health to another employee of the respondent, Lesley Anne MacAskill, without his knowledge or consent.

Ms MacAskill wrote to the claimant by letter on 1 June 2018, in which she referred to the claimant's stress and

heart conditions in a malicious manner. Ms MacAskill's letter in its entirety was incorrect, defamatory and aggressive.

Ms MacAskill referring to his health in her letter of 1 June 2018 breached GDPR by processing information in a way that breached GDPR.

The respondent refused to investigate the claimant's complaint against Ms MacAskill regarding the letter dated 1 June 2018 within the 4-part complaint.

The claimant received aggressive emails from Ms MacAskill on 10 June 2018 relating to the claimant's attendance at a Royal Mail training exercise.

Ms MacAskill sent the claimant an aggressive harassing email on 2 April 2019 regarding his and his colleagues' change of contractual start times at Beauly Sub Postal Delivery Office which exacerbated his stress.

In 2019, Ms MacAskill prepared a report for the CWU Highland Amal Annual General Meeting in which she referred to bullying that she considered she had been subjected to, and which the claimant believed was directed at him.

On 15 April 2019, the claimant submitted to the respondent a bullying and harassment complaint relating to the following four acts of harassment by Ms MacAskill: i) the letter of 1 June 2018; ii) the email correspondence on 10 June 2018; iii) the email of 2 April 2019 and iv) the report prepared for the CWU AGM in 2019. The respondent initially refused to investigate the claimant's four part bullying and harassment complaint.

On 15 July 2019, the claimant attended a fact-finding meeting with manager Neil Allan in relation to his four-part complaint regarding Ms MacAskill however the respondent did not complete this investigation and refused to respond to 3 emails asking for clarity on the case.

On 28 August 2019, the claimant submitted a grievance in relation to the respondent's failure to complete the investigation of his four part harassment complaint. The respondent ignored the claimant's grievance.

In April 2020, Mr Alway issued an upheld decision in relation to the claimant's grievance. The respondent did not take any action following the conclusion of Mr Alway's investigation.

On 13 August 2020, the claimant attended a telephone conference call with Ms MacAskill during which Ms MacAskill accused the claimant of making vexatious complaints about her to the respondent.

The claimant submitted a bullying and harassment complaint to the respondent regarding the conference call on 13 August 2020. The respondent investigated the complaint and no action was taken on the findings of the investigation by the respondent.

Did the respondent carry out the conduct referred to above?

If so, was it unwanted conduct relating to the claimant's disability and did that conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

When did the conduct occur?

1/6/18, 10/6/18, 2/4/19, April 2019 – January 2020, 28/8/19.

Do the alleged acts of harassment form part of a series of continuing acts of harassment? If so, when was the last in that series?

The claimant contends that the acts span nearly 3 years from June 2018 until February 2021.

Does the ET have jurisdiction to hear the complaint?

4. Discrimination arising from Disability (s15 Equality Act 2010)

Did the respondent treat the claimant unfavourably by reason of*, as alleged by the claimant, the respondent offering no reasonable adjustments by refusing to allow any requests by the claimant's GP for an OH referral on 11 June 2018 and 29 November 2018.*

Did the respondent treat the claimant unfavourably by reason of*, as alleged by the claimant, the respondent offering no reasonable adjustments or proportional response to stop harassment which results in exacerbation of the claimant's disabilities.*

Did the respondent treat the claimant unfavourably by reason of, *as alleged by the claimant, the respondent on 14/8/2019 and 24/8/2019 giving the claimant no access to risk assessment and workplace modifications when aware of the claimant's exacerbated stress condition. The respondent were notified via GP Fit Notes.*

If so, was this because of something arising from the claimant's disability?

Did the alleged treatment occur, if so, when?

11/6/18 and 29/11/18, 1/6/18, 10/6/18, 2/4/19, April 2019 – January 2020, 28/8/19, 14/8/19 and 24/8/19.

Was the treatment objectively justified as a proportionate means of achieving a legitimate aim?

5. Indirect Discrimination (s19 Equality Act 2010)

Did the respondent discriminate against the claimant by applying to the claimant a provision, criteria or practice which was discriminatory in relation to the claimant's disability?

The provision, criteria or practice is alleged to be the respondent's failure to provide the claimant access to the respondent's grievance procedure which would be available to an employee who does not have the claimant's disability.

A PCP exists to allow any perpetrated targeted harassment by Ms Macaskill towards the claimant to occur unchallenged, regardless of medical detriment suffered.

PCP exists to allow repeated targeted harassment (not one off act) by Ms Macaskill towards the claimant and anyone else. And for this to occur repeatedly unchallenged regardless of medical detriment suffered which is known to RMG. This PCP means that the claimant and his disabilities will not be able to access policy to remedy the situation and stop said harassment and any exacerbation to his disabilities by Ms Macaskill. This would not apply within RMG to another employee with a disability harassed by someone other than Ms Macaskill.

PCP exists in repeated failure to comply with conduct policy in regards to Ms Macaskill's harassment of the claimant and his multiple complaints about her.

PCP exists in not supplying minutes to Mr Mackay on multiple occasions post meetings with RMG management.

PCP exists RMG repeatedly ignoring (not one off act) GP medical fit notes requesting OH referral's and workplace adjustments.

PCP exists in RMG repeatedly ignoring (not one off act) not taking into account and acting upon upheld decisions from ICO and own management that are in favour of the claimant.

Any data breach is only to be reported and logged if cases are upheld contrary to its own policy on data protection and privacy policies. If cases as per the claimant's are unreasonably delayed then there is a disadvantage to the claimant risking further breaches.

PCP exists in RMG shutting down grievances if a manager (Neil Allan) decides they do not wish to complete the exercise, contrary to RMG grievance policy.

Did the PCP put or would put those who share the claimant's disability at the particular disadvantage?

Did the PCP put or would put the claimant at that disadvantage?

If so, can the respondent show it to be a proportionate means of achieving a legitimate aim?

6. Failure to comply with duty to make Reasonable Adjustments (s20-21 Equality Act 2010)

Did the respondent's provisions, criteria or practices put him at a substantial disadvantage in comparison with persons who are not disabled? The provisions, criteria or practices alleged by the claimant are:

The respondent's failure to provide a safe working environment to the claimant;

The respondent's failure to refer him to Occupational Health;

The respondent's failure to carry out risk assessments;

The respondent's failure to regularly update the claimant in relation to his formal internal complaints;

The respondent's failure to give any consideration to the findings of the Information Commissioner's Office and the outcome of Mr Alway's investigation.

The respondent's failure to conduct grievances in a timely manner that conforms with RMG policy. This in relation to the claimant's formal internal complaints.

If so, did the respondent take reasonable steps to avoid that disadvantage?

Who is the comparator?

Hypothetical.

When did the alleged failure(s) occur?

11/6/18, 29/11/18, 14/8/19, 24/9/19,21/5/19,30/4/20.

Do the alleged failures form part of a series of continuing acts? If so, when was the last in that series?

Yes, 30/4/2020.

Does the ET have jurisdiction to hear the complaint?

Facts

Background

9. The claimant is a 48 year old man who lives in Inverness. He works as an Operational Postal Grade worker (OPG) for the respondent, the Royal Mail Group Ltd (RMG) latterly within the Beauly Sub Postal Delivery Office. He had previously worked in the RMG office in Inverness. That is a large "hub" office where the bulk of the workforce and administration is located for the Highlands.

10. The claimant was an active trade unionist. He was a member of the Communication Workers Union (CWU). He had been a CWU representative for some years. He was the Area Health and Safety Representative covering the Highlands. He had also acted as Area Delivery Representative for Inverness before leaving to work in Beauly. He had remained as the Area Health and Safety representative for the CWU and became a branch representative for the Beauly depot.

11. Ms Lesley Ann MacAskill (LAM) was employed by RMG as an Operational Postal Grade worker based at the Inverness Mail Centre. She was elected to the position of CWU Area Delivery Representative (known as ‘‘Area Delivery Rep CWU Highland Amal’’). The role was filled by her from March 2018 onwards. This was an important and busy role which meant that she had to work closely with management particularly over staffing requirements.

12. The claimant believed that the relationship he had with LAM deteriorated quickly following her taking over the Area Delivery role. He believed that she had become hostile to him and did not understand why. He formed the view that if he openly disagreed with her then she would allege that she was being bullied by him.

13. From about March 2018 onwards the claimant was very stressed and anxious. He faced a number of health related difficulties in addition to a long term underlying anxiety condition. It had become clear that he had a number of serious cardiovascular problems which for some time had not been fully diagnosed and required investigatory tests and treatment.

14. The claimant’s move to the depot in Beauly had caused some friction with the employees there, one of whom, an agency worker, had hoped to fill the vacancy that the claimant ultimately filled through being transferred. There was also resentment that the claimant in his Trade Union role was allowed considerable time off from his duties as an OPG to carry out sanctioned union work. At or about this time a member of the claimant’s family was diagnosed with a behavioural condition which caused the claimant considerable concern and stress over and above his other problems.

15. The claimant's Line Manager was Nicola Lyall (NL). He had a good relationship with her. NL was an experienced Manager who had known the claimant for some years. She was unaware that the relationship between Mr MacKay and LAM had become fraught. As part of her normal duties she would have meetings with LAM who was the Area Delivery Rep to discuss resourcing issues in various offices. Because of their respective duties they would not routinely meet each other in person.

16. On or about the 24 May 2018 NL decided to take the opportunity of having a resourcing meeting with LAM who happened to be in the office that day to finalise the details of an ill health retirement for a CWU member. In the course of this meeting Mr MacKay was mentioned as NL was aware that he was currently having tests for his cardiovascular conditions and had mentioned to her that he was awaiting an operation. She was aware that this would likely to lead to a week's recuperation and impact the staffing in Beauly. She mentioned to LAM the claimant was awaiting tests for an operation and might be absent from work in the near future. She commented on the claimant looking particularly stressed.

17. The claimant would have separate meetings with NL to discuss resourcing as the Beauly "Rep" and as part of the resourcing of that depot.

Letter 1 June 2018

18. The claimant received a special delivery letter on 1 June 2018 from LAM. It was unexpected. It was sent to the claimant's home address. This was unusual. He found this unsettling. LAM had written the letter in her capacity as Area Delivery Rep giving her designation as ''Area Delivery Rep CWU Highland Amal''. The letter began:

> *"It saddens me to write this letter, but you have left me with no choice. Further to your actions over the last 3 months, I am writing to request that you stop undermining me in my position as area delivery rep. The actions you have taken to date are unacceptable …"*.

19. LAM listed a number of alleged incidents. LAM believed that the claimant had undermined her and that his behaviour had been *"aggressive, threatening and patronising"*. She mentioned a health retirement case that the claimant had been dealing with and claimed that she had not been told about it by the claimant who had previously been dealing with it and that this put her in a difficult position when the member contacted her about progress. At point 11 of the letter she wrote:

> *"11. Two members of RM management have independently approached me about your conduct and demeanour. One said that you had come into the office on the 19/3/18 extremely "wired" and hostile, appearing very agitated and they were concerned that you were under too much stress. I am told they voiced concerns about your stress levels to you and that you agreed you were under considerable stress. The other complained about you "copying in the world" on emails and asked me to confirm who they should be discussing IR issues with, as you were contacting them directly about issues for discussion with the ADR and that you were clearly unaware of the conversations that they and I were having on these issues."*

20. The reference to IR was to ill health retirals. The letter indicated that the list of complaints was not exhaustive. LAM wrote that she had ''serious and justifiable concerns'' about the claimant's conduct. She continued:

> *"I want to be very clear that I consider that you have been bullying me and undermining me since I last took over the ADR in February, and am now requesting that you stop. I could explain the effect this is having on both my personal and my work life, but I won't, I believe you would enjoy hearing this. Your behaviour is in breach of CWU national rule 4.2.1, you are not treating me with courtesy or respect and it not only undermines me but is damaging to the credibility of the Highland Amal branch with RM management, and our members, which is contrary to the interests of the CWU. This is something I suspect you are doing purposefully to either try and force a branch merger that you wish with Grampian Amal, but that our branch members have clearly voted against, or to try and force me out and retake the ADR position yourself. I do not believe you are acting in line with the best interests of our members and branch.*
>
> *If you have any legitimate concerns, I will of course aim to resolve them; however, I will no longer accept your attempts to undermine me within our branch to reps and officials, to our members, to reps in*

neighbouring branches, to divisional reps and to Royal Mail management. Your behaviour is unacceptable, and I will not hesitate to report any such behaviour in future through the appropriate channels. I would request that moving forward you behave in a professional courteous manner towards myself and others in branch, and remind yourself of your and others roles, and conduct yourself in line with these roles, as laid out by the CWU. Subject to you adhering to my request to stop undermining my position and bullying me, I am prepared to draw a line under what has happened. However should it continue to a point where I believe I need to make a complaint to CWU HQ I will be including what has gone on in the past and is documented here.

If you wish to discuss this letter, please don't hesitate to contact me and I will arrange a meeting. Please note that the contents of this letter are confidential and are intended for you only. Disclosing, copying or distributing the contents of this communication would be considered further bullying and reported accordingly."

21. The claimant was very upset at the contents of the letter. He believed that the allegations were baseless. He believed that the letter itself was an attempt to bully him. He was also very concerned at the thought that his medical conditions might have been discussed between a Manager and LAM. He had only discussed his current personal circumstances with LN his line manager. He wondered whether it had been disclosed that his family member had been diagnosed with a behavioural condition. These matters preyed on his mind. He assumed that at least one of the Managers referred to was likely to be NL. He was also concerned that there had been a breach of data protection policy. He believed that LAM would use this information against him.

22. On 6 June the claimant called NL in the late afternoon. She was surprised to see the number appear on her mobile telephone as she knew that he was on annual leave. She took the call. The claimant explained that he had received a letter from LAM that day and made reference to a dispute in the local CWU branch. He indicated that LAM had made a statement in the letter that he had been hostile and aggressive towards her. NL could not immediately recall the matter. She said that if he had been aggressive to her then she would have taken it up with him or with her Line Manager. The claimant also said that LAM had asked that he should keep the terms of the letter confidential

and he believed that to be the actions of a bully and compared it to a child who was abused by an adult and the adult telling the child not to say anything. NL found this suggestion bizarre. The claimant asked NL to keep matters between themselves which she agreed to do. The call lasted 38 minutes. NL was concerned at the terms of the call and later made notes of calls (JB106).

23. The claimant emailed LN (JB p110) on the 6 June. He quoted only part of the LAM letter namely the part relating to him being "*wired and hostile*". The claimant stated that they had not met in the office on the date given. He said they had met on 10 April when he had discussed matters of a personal nature. He said that he had not discussed matters of a personal nature with any other Manager. He asked NL to verify whether or not she had made the statement about being wired and hostile. He wrote *"Given the stress of my medical condition at the moment I am very concerned that information is being discussed to other parties about my consent"*.

24. NL telephoned Mr MacKay on the 7 June advising him that she had given the matter some thought and that had spoken to LAM about shortfalls in resourcing including Beauly when she was there for an ill health retirement case. The staff problems in Beauly were touched on and LAM told that things had settled down. There was a discussion about how stressful the CWU Area roles were and that the claimant might have to take time off in the future depending on the results of the tests he was undergoing. He told her that the letter was received on a Saturday when he was at home and had stressed him and his family. He took the disclosure of his personal information seriously and was going to take her and LAM to court.

25. NL accepted that she had discussed possible resourcing shortfalls (which were part of her responsibility) and the possible future sick leave of the claimant who was currently undergoing tests. She mentioned that one of the female members of staff had been aggressive and hostile towards him and not vice versa. This was a reference to the problems he had encountered after moving to Beauly.

26. The claimant obtained a Fit Note from his GP on 11 June. It recorded that he had been assessed in relation to cardiovascular symptoms and commented *"Adjust work pattern to physical health/symptoms. Needs Occupational Health assessment*".

27. The claimant emailed his managers on 16 June (JB p113) and asked for a meeting at which a colleague George Ross, a CWU representative from Aberdeen could be present. He made reference to the Fit Note:

> *"For the record and to be clear, the GP line I submitted to Niki on Thursday does not mean that I am presently not working. I am on full contract hours and fulfilling my union duties also in full.*
> *It recommends OH assessment to address the unnecessary source of additional stress being presented to myself. RM are my employer and I am duty bound to advise them of my present situation and any possible amendments to my role if that is decided with Occupational Health. I don't envisage this if my request for non direct contact with the individual is respected.*
> *In addition to this I will submit a copy of the fit for work note to the CWU as it is also their responsibility to remove the source of stress, in this case a union representative, and address any perceived issues".*

28. NL did not see any difficulty in keeping the claimant and LAM apart when at work. They worked in different offices. There was no work related reason for them to meet. She believed that she could keep an eye on the matter. In the event the claimant did not meet LAM face to face at work from that point onwards but remained concerned and anxious that he might encounter her in the course of his duties. He did not express the later concern to his employers and did not seek an Occupational Health referral.

29. On 11 June a second difficulty arose between the claimant and LAM. It related to a joint RMG/CWU training session to be held on the 11 June 2018. LAM was assisting with the organisation of the event. LAM emailed on 6 June:

> *"Can you confirm why you are unable to attend the training session on Monday 11/6/18? The dates of these are not available by preference, to Royal Mail or the CWU, with changes only having been made where there have been clashes with annual leave, and the 19th is already a very busy session.*

Further it is preferred that Union Reps attend training with the Manager they work with wherever possible and Niki Lyall is due to attend on the 11th as per invite. As such, both myself and Julia Meleady an agreement it would be beneficial to have you also attend on the 11th, if possible.
If it is an issue with organising release for this date, don't hesitate to let me know and I can arrange it for you" (JB p115).

30. The claimant responded that the 11 June was not suitable without any further explanation.

31. LAM then responded by email (JB114):

"I am aware you wish to attend the training on 19/6/18, but this was not what I asked. On request by the OM's office, I was quite clearly asking ***why*** *you are unavailable for the 11/6 18 date you were invited on….*

Also as I have already stated these dates were not available by preference, but by invitation, invitation on the same date as your Manager which has benefits to us as reps moving forward.
Your CWU colleagues who were able to attend the date invited gave a reason on notifying that they would be unable to attend, an alternative date was arranged without issue. It would have been courteous for you to have given a reason in your first reply whether it be annual leave, CW commitments, personal commitments etc an alternative date would have been agreed for you also without problem. Instead, however, you have chosen to be discourteous and deliberately difficult by refusing to give an answer and in doing so creating several unnecessary conversations as to whether you would be permitted to attend outwith your invitation and on an already overbooked date. You should be aware that on this occasion, we have decided to permit your attendance on the training scheduled for the 19th, however, making an issue of this was completely unnecessary and should there be a repeat of this, your attendance on any future training event would not be permitted outside of your invitation date. Again, I am compelled to draw your attention to CWU national rule 4.2.1."

32. The claimant believed that LAM's behaviour amounted to bullying and harassment and that she was holding herself out as a Manager or someone in authority over him. He did not feel he should have to account to her or provide her with any information as to why he did not want to attend on that date. He believed that it was not up to her to decide who attended the training

or to threaten to ban him from future training. In the event he attended the second day's training by agreement with management without any difficulty.

33. The claimant tried to meet management over the following weeks to discuss his concerns but became frustrated at their inability to arrange a meeting with him.

34. On 24 July 2018 the claimant raised a grievance (stage 1 grievance (JB117/120)) and gave as it's basis *"non consented disclosure by management of medical information relating to my medical condition and that of x's medical condition.* (The reference to X was to his other family member). *Disclosure has been made to a third party. The said information has subsequently been used in a malicious manner against myself. The written evidence of this disclosure is dated 1/6/18.*"

He also, at a later stage, complained about emails sent by LAM about the training exercise. The claimant did not give the respondent the full terms of the June 2018 letter he had received from LAM in the grievance but simply a redacted copy.

35. There were difficulties in arranging meetings for various reasons. Managers were busy and the claimant wanted the attendance of George Ross a full time Official who was based in Aberdeen and this required coordinating diaries. Eventually a meeting with the claimant and his preferred trade union representative was arranged. However, Gary Glass, a Manager who was due to take the meeting emailed the claimant on 23 August 2018 (JB 121) indicating that because of a hospital appointment on 28 August he was not able to take part the scheduled meeting with the claimant and George Ross as trade union representative to discuss the grievance. The claimant found this frustrating and stressful.

36. The claimant emailed a senior manager Steve MacKenzie on 28 September asking about an OH referral. Mr MacKenzie indicated that this request would

have to be done through NL his line manager. The claimant then did not contact NL about a further Occupational Health referral and none was arranged.

37. The grievance meeting took place on 25 September 2018. The meeting was minuted and the claimant later reviewed the minutes and made comments (highlighted JB100). It was recorded that Mr MacKenzie *"noted that the grievance was around a breach of the GDPR Regulations"*. He thanked the claimant for the additional information around GDPR in the stage 1 grievance form. He noted that the disclosure was made to a third party and that the breach of GDPR, involved disclosure of personal details related to his medical condition and that of a family member's medical condition without his consent. It had he asserted then been used in a malicious document (LAM's letter) sent to himself.

38. Mr MacKenzie took the focus of the grievance to be effectively what NL had told LAM about the claimant's medical condition(s). Mr MacKenzie interviewed LAM on 1 October (JB135). He interviewed Nicola Lyall on 5 October (JB137).

39. In the course of the grievance the claimant raised the problems around the training exercise and his interactions with LAM as a further example of bullying. Mr MacKenzie had emailed on 10 October indicating that it wasn't connected to the alleged GDPR issue and that it would more properly be pursued through the CWU process. His position was that it was trade union business and a dispute between two officials.

40. Mr MacKenzie interviewed NL again on 17 October. The meeting was minuted (JB146/147). Mr MacKenzie prepared a report which he sent to the claimant on 7 November 2018 (JB151-155). He noted (JB 153): *"From this first meeting I clarified 3 important points: (i) the grievance was specifically about an alleged breach of personal data by Nicola Lyall, in discussion with Lesley Ann MacAskill; (ii) the grievance specifically did* ***not*** *include Lesley*

Ann MacAskill. Any issues with Lesley Ann MacAskill were being addressed through the CWU procedures; (iii) the delays already generated within the case were causing distress to Fergus MacKay."

41. He later recorded that when he approached NL she *was "completely open and advised that she was already aware of a grievance which had been made against her, as Gary Glass had advised he had been allocated the case. She explained that she had suspected a grievance might be made against her following a phone call from Fergus MacKay in early June. She had therefore decided to note down her discussions with Fergus MacKay and Lesley Ann MacAskill while still fresh in her mind.''*

42. Mr Mackenzie retrieved the notes that had been provided to Gary Glass. He considered the nature of the information in them. LAM had referred to *"wired and hostile appearing very agitated*". It seemed to Mr MacKenzie that they were symptoms rather than the specifics of any particular medical condition. His view was that no malice on the part of NL and that these matters had arisen in the context of a resourcing discussion. He concluded that the specifics of any medical condition had not been discussed. His position was that it was not clear how any GDPR breach could have arisen.

43. Mr MacKenzie had also reinterviewed LAM on 29 October. That meeting was minuted (JB157). He also reinterviewed NL on the 12 November (JB160). He did so because LAM had indicated that NL had mentioned that the claimant was undergoing tests. NL indicated that she didn't think she had mentioned this and that the claimant had not known the results of any tests when she had spoken to LAM.

44. The claimant was dissatisfied with the outcome. He believed that more might have been disclosed.

45. The claimant was taken to hospital in late November with chest pain. A *''welcome back meeting*" took place with him on 24 November with NL. The conversation was minuted (JB161). A standard question was asked: *"Are*

there any other issues or concerns (in or outside work) that may be affecting your health and/or attendance that I should be made aware of". The claimant indicated that he would contact her if he wanted to discuss any issues. He was made aware of the respondent's helpline/counselling services "First Class Support". The claimant indicated that he was feeling fully fit to return to work and his own CWU duties. He was told that if he required a health referral or any assistance to contact her. The claimant submitted a Fit Note from his GP dated 29 November which suggested that the claimant 'may' benefit from Occupational Health referral. The Fit Note referred to physical health and stress.

46. The claimant later did try and contact the helpline but was unable to get through. He did not report this to the respondent's managers.

47. At the end of 2018 as part of her CWU role LAM prepared a report for her first year in post (JB163-166). A copy of it was pinned to a notice board reserved for CWU notifications in the mail office in Inverness. The claimant became aware of this. He found the contents upsetting because the report had said "*Challenges had come from within their own branch''* which she then went on to record as follows:

> *"I was very lucky not to have personally suffering any bullying at school. I was 38 years old before I experienced bullying first hand in its full ugly glory and this bullying has been from within our branch. It has become very apparent in the last year that we have a very small number of people (around 1% of our now hitting 500 strong membership!) in our branch engaged in a campaign of vitriol against the new branch reps and officials who are trying to drive positive change.''*

48. She later noted that that being a ''rep'' was not "easy at times" and could be a "thankless task'' and recorded *"It is a sad state of affairs when we lose good reps down to the unacceptable behaviour a small minority within our own branch and something this branch must consider and take a hard line on moving forward if it is to continue to receive and retain dedicated volunteers*''.

49. The claimant believed that these comments were directed at him. He considered this evidence of further bullying. He thought that anyone in the Inverness depot seeing the report would know that he was being referred to. He found the terms of the report upsetting.

Grievance Appeal

50. The claimant did not accept Mr MacKenzie's refusal to uphold his grievance. He appealed and that appeal was passed to Derek Christie to deal with. An appeal hearing took place on 31 January 2018. It was minuted (JB167 to 169). The minutes recorded *"Mr Christie asked what the medical condition was that had been disclosed to the third party. Mr MacKay replied that it was the mention within the letter of a description of him being wired and hostile and mentioning he was under too much stress which itself is a recognised medical condition. Mr Christie asked was there anything else mentioned in the letter regarding any other medical condition. The claimant indicated no. The claimant and his representative were asked what they saw as a resolution to the case. Mr Ross indicated that it should be some form of penalty awarded to the Line Manager possibly dismissal.*''

51. At the meeting Mr MacKay was offered workplace mediation and he declined the offer. Mr MacKay indicated that he had felt bullied both by a third party and his Line Manager (LN).

52. By March 2019 the claimant was becoming increasingly concerned at delays in dealing with his appeal and had contacted the respondent's HR support team.

53. On 1 March 2019 Mr Christie indicated that he would be interviewing some more people on his return from annual leave and that it had taken longer to deal with the matter than he had initially hoped (JB178).

54. Mr MacKay emailed Mr Christie on 2 April about the protracted delay (JB179). He said that information had been used by LAM against himself in a 'malicious' document' He wrote: ''*It then poses a high risk of detriment to the individual (which it has through exacerbating my condition)''* He said that the breach should have been reported to the ICO *''This was not done and I have against my will, advise people of my medical condition, so they are given the truth and not a skewed version of the problem from a malicious third party.''*

55. Mr Christie spoke to LAM on 24 April. Notes were taken (JB182-185). Mr Christie asked LAM why she had written to FM. She indicated that it related to CWU issues. She denied that she had made reference to any medical ailments. She said that she did not have the type of relationship with NL that would lead to gossip. She indicated that she had written to the claimant as it was a *"cease and desist letter to stop him bullying her"*. Mr Christie contacted NL and interviewed her by telephone (JB186-189). She explained that LAM had wrongly interpreted what she had said and that she had mentioned that a female member of staff was being aggressive to the claimant. She confirmed that she had mentioned the claimant getting tests done at the meeting with LAM.

56. The claimant in the meantime contacted the ICO and received a letter on the 21 May from a case worker Ms Nazmah Ahmed (JB 190-191) about the alleged GDPR breaches which had been investigated by them. Ms Ahmed had written:

> *"The information regarding you was shared with LAM in her capacity of area union representative. The limited information was shared to make LAM aware of a likely future absence which would affect area resourcing, and which needed to be considered by both management and the local union representative. This processing appears to be compliant with the legislation we oversee … however after further investigation Royal Mail stated that it was not expected that LAM would discuss the information outside of performing that role or that she would use the information to contact you directly in your personal dealings.*
>
> *It would appear as though LAM should not have used your personal data in this way and this further processing constitutes a breach of legislation which we oversee (it should be noted that it was a breach of personal data relating to "limited information"*.

57. Mr Christie prepared a report dated 5 June 2019. (JB195). He rejected the appeal. He stated that LN had been genuinely concerned about the claimant's heath at the time. His position being that the specifics of any condition had not been discussed.

GDPR complaint

58. The claimant asked the respondent's HR services to reinvestigate his complaint in the light of the letter from the IOC (JB p203). They explained that while they were aware of the GDPR complaint it was not the subject matter of the grievance and the GWPR issue had been escalated to a senior manager Craig Anderson (JBp201/202).The claimant believed it was interconnected with his grievance and had not been properly dealt with.

59. The claimant was advised on the 19 June that the respondent would investigate the complaint being made (JBp199). The claimant completed a second grievance (HI form) and submitted details of his complaint (JB p209-211). He referred to the initial grievance and appeal. He complained about delays in investigating his grievance. He believed that the respondent had not applied their policies properly nor had they complied with timescales set out in their policies. He wrote that the actions of the individual (LAM) had resulted in *''great detriment''* to him and to *''De-motivation, loss of self-confidence and self-esteem''*. He said that he had continued to be bullied. He raised the findings of the ICO over the GDPR issue. He wanted an independent manager appointed who was not part of Highland Amal.

60. The claimant submitted a Fit Note dated 14 August 2019 to his employers. It gave as his condition ''Anxiety'' and suggested amended duties to keep the claimant away from large groups of people in the workplace. A Fit Note in similar terms was submitted on the 24 September 2019.

61. Mr Ross emailed Neil Allan who had met Mr Ross on the 15 August to discuss the claimant's grievance (JBp206). He complained that the grievance should not be left to ''fester''. The claimant emailed Mr Allan on the 23 August chasing the matter (JBp207).

62. In January 2020 the claimant had asked for LAM's report to be taken down and was in correspondence about this with management (JBp213).

63. Mr Charles Alway was asked to investigate the claimant's grievance. He met the claimant on the 31 January to ascertain the scope of the issues and then on the 24 April 2020 as part of his investigation. The meetings were minuted. He prepared a report which upheld the claimant's grievance in respect to the GDPR breach. He found (JBp220) that LAM had used medical information disclosed at an operational meeting to further her dispute with the claimant and that she had breached GDPR guidelines in doing so.

Conference Call Incident

64. The claimant took part in a conference call on the 13 August 2020 with LAM, a full time CWU officer and some other employees who were members of the CWU. The call was arranged by the CWU. In the course of the call LAM asserted that any complaints made by the claimant about her were vexatious. The claimant believed that this was defamatory and implied he had lied when making the other complaints to the respondent including the upheld complaint about the GDPR breach. The claimant set out his position in a detailed letter (JBp229) and submitted it as an additional complaint. He believed that her actions were a form of bullying and that the respondent should apply their 'zero tolerance policy' on bullying to the situation.

65. The respondent's appointed Gary Watson a Performance Coach based in the borders to investigate the matter. He wrote to the claimant on the 7 and October (JBp239/246-247). He arranged to meet the claimant to discuss his complaint on the 14 October 2020. Before doing so he wrote to the claimant

on the 7 October confirming the arrangements. He reminded the claimant that help was available through the Bullying and Harassment Helpline and from the respondent's welfare helpline.

66. The claimant attended the meeting accompanied by Mr Ross his representative. The meeting was minuted and minutes adjusted between the claimant and Mr Watson. The changes were minor and the original notes produced (JBp255-261). The claimant advised Mr Watson that LAM's actions had made it impossible for him to attend future conference calls. He felt that he was not being protected from bullying either by the CWU or the respondent.

67. Mr Watson tried to contact those involved in the call including the Union Regional Secretary Craig Anderson. He refused to be interviewed. Most of the others involved would not cooperate except Robert McIlwraith and LAM. Mr McIlwraith was interviewed by Mr Watson and notes made (JBp269). He alleged that the claimant had ''launched into an aggressive torrent of abuse and accusations'' against LAM. LAM was interviewed at length (JB 277-284). She claimed to have been calm and polite. She said that the claimant had said she was a security risk. She confirmed she had used the word vexatious explaining that she had been referring to what she regarded as 2 years of baseless complaints being made by the claimant against her.

68. Mr Watson considered the evidence he had and prepared a report (JB309-314) He set out the process he had followed and the evidence he had considered. He concluded that the complaint should not be upheld. He concluded:

Appeal

69. The claimant appealed the outcome by email dated 30 December 2020 (JBp315).

70. The appeal was passed to Simon Walker a Caseworker. He met the claimant and Mr Ross on the 2 February. The claimant submitted a statement setting out his position. The meeting was minuted and the minutes later amended and agreed (JBp322-327). He argued that the GDPR complaint had been upheld and that LAM was not entitled to refer to his complaints as vexatious.

71. Mr Walker went back over the history of the dispute. He interviewed Gary Watson and Alan Rankin who had been involved in a connected investigation. He examined the investigation and conclusions of Mr Watson. He prepared a detailed report (JBp330-334) dated 19 February 2021. He looked at Bullying and Harassment and whether the correct process had been followed, whether there was any new evidence that would materially have affected the outcome of the earlier decision and whether the decision was in some way inherently unfair.

72. Mr Walker concluded that the claimant had become ‘‘sensitised’’ to the actions of LAM and that her response that he was vexatious was a reasonable response in the circumstances. He did not believe the complaint was made in bad faith by the claimant. He supported the earlier suggestion made that the claimant and LAM should be offered independent mediation.

73. The claimant obtained a medical report from his GP dated 8 February 2021 (JBp335). It gave a history of his depression and anxiety and said that from August 2019 he had reported severe anxiety arising from interactions at work.

74. The claimant felt that he had been the victim of bullying and that it had not been addressed by the RMG.

Submissions

Respondent’s Submissions

75. The respondent's solicitor provided the Tribunal with detailed submissions which we summarise. She began by setting out the various claims and referring to the list of issues she indicated that the Tribunal should not vary or add to that list.

76. The solicitor made reference to the respondent's knowledge of the claimant's disability and the question of time bar. She reminded the Tribunal that the claimant bore the initial burden of proof. It was the respondent's position that the claimant had failed demonstrate facts from which the Tribunal could infer discrimination. (***Madarassy v. Nomura Internation Plc*** [2007 IRLR 246] CA). It was not sufficient she submitted for the Tribunal to draw an inference based on an "intuitive hunch" without finding some primary fact to back it up (***Chapman & Another v. Simon*** [1994 IRLR 124]. In considering whether the primary facts found by the Tribunal were sufficient to amount to a *prima facie* case the Tribunal should assume the respondent has no adequate explanation for those facts (***Igen Ltd v. Wong*** [2005] EWCA Civ 142). The respondent's submission was that even if the Tribunal were to accept everything that has been set out by the claimant the claim would still fail.

77. The claimant himself said on a number of occasions, and in his witness statement that all staff were treated the same. There was simply no comparator or PCP established. The inadequacy of any grievance or other process did not in Ms Moscardini's view assist the claimant. There was no evidence that any of the respondent's staff involved in the matter were aware that the claimant was disabled or treated him differently because of that disability.

78. The respondent's solicitor then referred to the evidence urging the Tribunal to find that the respondent's witnesses were candid, credible and reliable. The claimant was not she said a reliable witness. He had been disingenuous in his cross examination of Mr Mackenzie suggesting that the letter from the ICO was contrary to Mr Mackenzie's decision although the letter does not

suggest that Ms Lyall had breached GDPR did not run contrary to his decision.

79. Turning to the question of the respondent's knowledge of disability there was she said no direct evidence that the respondent's staff were actually aware that the claimant was disabled or that the various managers involved in the grievance and appeal processes knew. An employer must also know of or have constructive knowledge of an alleged substantial disadvantage. The claimant stated in his Better and Further Particulars that he has a long-standing stress/anxiety depression condition which the respondent had been aware since 2009 and also he had a heart conditions. NL was also aware of the Occupational Health Report in 2009 but referred to the e-mail on 16 June 2018 from the claimant indicating he was working his full contracted hours. His absences demonstrated that he was only ever absent from work with stress back in 2009 not absent from stress or depression from that period onwards. He had asked his line manager NL for his rota to be changed from two days delivery time and three days release time for trade union work to a six week rotation and she had agreed to this with him in the first half of 2018. The claimant in his evidence had indicated that this had assisted his stress levels. The claimant did not contact NL again asking for any further adjustments. At the return to work on 26 November 2018 with NL the claimant indicated that he was fully fit to return to work. We should also bear in mind that the claimant's actual time at work was limited because of his trade union duties.

80. The solicitor then considered the question of direct discrimination. The claimant has not provided any evidence whatsoever that he has been treated differently from a comparator or given any evidence about how someone without his medical condition would have been treated differently. Ms Moscardini then took the Tribunal through the history of the various grievances and appeals.

81. Ms Moscardini then looked at the claim for harassment. She pointed to the statutory definition contained in s.26 arguing that this required any

harassment to be related to a relevant protected characteristic. Although the test ‘‘related to’’ is wider than the test for direct discrimination there was no evidence to support such a claim here. The Tribunal has to make a finding on evidence before it and cannot make a clear and distinct finding that any conduct related to the protected characteristic (***Tees, Esk & Wear Rallies Foundation Trust v. Aslam*** UKEAT/0039/19). The claimant had characterised a whole series of matters as harassment and there was simply no basis for that belief. In particular NL had been consistent in her evidence throughout and indicated that she had a good working relationship with the claimant and this was not challenged. Ms Moscardini then dealt with the evidence involving LAM commenting on her various actions in some detail. She noted the respondent’s Richard Gilbane told the Tribunal that when the claimant re-submitted his bullying and harassment complaint against LAM in June 2019 advice was taken from the team leader and HR before concluding that as the claimant’s complaints related to CWU matters the only outstanding complaint to address was the breach of GDPR by LAM. Mr Gilbane believed the recommendation to deal with the grievance came as a result of the ICO’s recommendation that there had been a breach on the GDPR.

82. The solicitor touched on third party harassment under s.109(1) of the Equality Act. There was no evidence that LAM harassed the claimant because of his disability. She was in any event, in the interactions complained of, acting as an agent for the CWU. The claimant and LAM were both based at different delivery offices and there was no need for them to interact except for union business.

83. The solicitor turned to discrimination under s.15 as an alleged failure to offer reasonable adjustments namely a request by the claimant’s G.P. for an OH referral on 11 June 2018 and 29 November 2018. The respondent’s position was that matters complained of were in any event a proportionate means of achieving a legitimate end.

84. The claim was also for indirect discrimination. The respondent's solicitor submitted that the claimant could not be discriminated against because the respondents did not agree to look into historic complaints on the basis that the complaints related to CWU matters. This claim was misconceived. There was no PCP. The Tribunal should have regard to the case of ***Nottingham City Transport Ltd v. Harvey*** UKEAT/0032/12. In that case the Judge held that there still has to be something that can qualify as a practice. Practice requires some element of repetition in simply dealing with a matter unsatisfactorily does not amount to a practice. A sort of argument being deployed by the respondent was also referred to by Lady Justice Simler in the case of ***Ishola v. Transport***. The solicitor made reference to the alleged failure to make reasonable adjustments. The allegations made by the claimant are there was a failure to provide a safe working environment, refer him to Occupational Health, carry out risk assessment, update the claimant in relation to formal internal complaints and give consideration to the findings of the Information Commissioner's Office and the outcome of Mr Alway's investigation.

85. These matters, she said, were factually denied. LN felt that an Occupational Health referral was unnecessary. The claimant did not ask NL for Occupational Health referral after the return to work meeting. The claimant hasn't explained why the failure to carry out risk assessments placed him at a substantial disadvantage. There was the same difficulty with his allegation that the failure to update him regularly caused him substantial disadvantage.

86. Finally, Ms Moscardini turned to the issue of time-bar. Where the employer's breach is a failure to act, the time begins to run from the end of the period in which the employer might reasonably be expected to comply with the relevant duty and that period should be assessed from the employer's point of view. The time starts to run when an employer makes a decision not to make an adjustment and act inconsistent with making an adjustment. His alleged failures occurred from June to November 2018 and in September 2019 and the claim was not raised until May 2020. The failures do not form part of a series of continuing acts she said.

87. Ms Moscardini then turned to consider s.15 and s.13 of the Equality Act and then s.26 looking at the question of continuing acts. She made reference to the case of ***Commissioner of Police of the Metropolis v. Hendricks*** [2003] ICR 530. It could not, she argued, be just and equitable to extend the time limit. There was no presumption that the time limit should be extended and it's grant is the exception rather than the rule (***Robertson v. Bexley Community Centre t/a Leisurelink*** [2003] IRLR 434 CA. She ended her submissions by indicating that the Tribunal was faced with considering an internal workplace dispute the claimant has tried to present as a case of disability discrimination.

Claimant's Submissions

88. The claimant's final written submissions were somewhat difficult to summarise running as they did over 70 pages. Understandably perhaps in the circumstances of this case the claimant went over the evidence in considerable detail beginning his submissions with the suggestion that the respondent "deliberately allowed persistent harassment" of him "over a prolonged period of time". He was at pains to point out that the respondents were aware of his various health conditions they should therefore been aware that he was disabled. He pointed to the Occupational Health Report in April 2010 which had indicated that if there were any further problems with his stress condition he should be referred to OH. He indicated that the whole matter had had a considerable impact both on himself and his family. He spent some time looking at what information the respondent and their manager should have had, what action they should have taken and so forth. He reminded the Tribunal about his evidence in relation to ''First Class Counselling'' the service operated by the respondent namely that he attempted on a number of occasions to contact the service through the contact number provided to him. He simply received a recorded message that this service was not in use. There was a failure as he saw it of the respondent's duty of care towards him and the manager's evidence did not reflect the reality of how poor and how inconsistent a service this was. The respondents had wholly failed in his submission to identify his work stressors.

89. Mr Mackay then turned to the matter of jurisdiction and whether there was a continuing thread between the various incidents and situations in which he was involved. His position was that the repeated the acts of a similar nature spanned from June 2018 to March 2021.

90. Mr Mackay considered direct discrimination. He believed that he was directly discriminated against by LAM who "targeted" his condition. She engaged in unwanted conduct related to the protected characteristic. He turned to look at harassment. He told the Tribunal to look at LAM's actions which were harassment in terms of the Equality Act. He made reference to the e-mail sent by LAM on 2 April 2019 and the failure as he saw it of the respondent to follow up breach of their policies on bullying and harassment.

91. A further incident of harassment was, he claimed, LAM failing to recognise the breach of the GDPR and describing his complaints as "vexatious". Mr Mackay then took the Tribunal through the various grievances. The claimant gave as his comparator a hypothetical comparator namely somebody with a hip condition (severe enough to be classed as a disability) whose was made to use a piece of defective equipment supplied by the employer which had the effect of exacerbating hip condition. In the same way he was made to use the various grievance policies and procedures which exacerbated his condition. He wrote:

> "*This could clearly be classed as direct discrimination as the employer has deliberately stood by knowingly watching the boy's condition deteriorate due to not taking reasonable steps to prevent injury and harm, not putting in place appropriate preventative and protective measures.*"

92. The claimant then returned to the issue of harassment under s.26 of the Equality Act indicating there was a foreseeable risk of harm to him in the way he was treated. Harassment received by him from LAM was "attempts to intimidate him was malicious and insulting". He examined the evidence before the various managers that investigated his grievances and dealt with his appeals and the inconsistencies in their treatment of evidence particularly

that of NL's evidence. He made reference to the report which was displayed within RMG premises and which he believed was malicious, defamatory and unsubstantiated.

93. The claimant made reference to s.50 of the Equality Act referring to the case of ***City of York Council v. Grossit*** (Court of Appeal 2018). The respondent had treated the claimant unfavourably as the data breach in June 2018 contained specific information relating to Mr Mackay's known conditions which was then used as a weapon of harassment against him by LAM. Mr Mackay then turned to the issue of various delays taking the Tribunal through the history of these. He then turned to indirect discrimination indicating that in his view there was a PCP which existed (to allow repeated targeted harassment (not one off act) by LAM towards him which remained unchallenged. The respondent was he submitted responsible for LAM. She was an employee. He made reference to various cases dealing with vicarious liability. An employer has a duty to reasonably and promptly afford an opportunity to employ and address of any grievance they may have. The case of ***Wiggins Borough Council v. Davies*** [1979] ICR 411 indicated that there was an implied duty in contract of employment that the employer would provide reasonable support to ensure that the employee can carry out his or her duties without harassment or disruption.

94. The claimant submitted that there was also a failure to make reasonable adjustments under s.20 of the Equality Act. The PCP put him at a substantial disadvantage. He referred to the case of ***Mrs S Hill v. Lloyds Bank Plc***. Mr Mackay also made reference to the case of ***Tarbert v. Sainsburys Supermarket*** [2006]. The advice contained therein that an employer would be wise to consult a disabled person in order to be acquainted with all the necessary factors that might constitute adjustments. This the claimant indicated also applied to risk assessments.

95. Mr Mackay turned to third party harassment and to the breach of the GDPR. The managers had passed responsibility to the CWU. The case the

respondents referred to of ***Nailer v. Unite*** [2018] was quite different on its facts. The claimant's position was that RMG had the power through their own policies to stop what was occurring ''on their watch'' and deliberately chose not to. The respondent should easily have seen the potential for a significant injury to Mr Mackay's mental health and impact on his heart condition. There was a failure to make the necessary OH referral. In doing so they disregarded their own policies and procedures.

Witnesses

96. We found the claimant to be an able and intelligent person who generally had a good command of detail and who was clearly and vividly focussed on every twist and turn of these events. We did not, however, find him a credible witness in some important regards. In saying this we recognise that the claimant was suffering considerable stress and ill health which considerably affected his perception of events and made it very difficult for him to view events objectively.

97. We found NL to be a straightforward and direct witness. We found her to be both generally credible and reliable. She showed no antipathy whatsoever towards the claimant and we gained the impression that they previously had a good working relationship before the difficulties first arose in 2018 and throughout the period leading up to the hearing. We can understand that at the time she met LAM she had no idea that there were problems between LAM and the claimant or that a routine meeting with LAM might become the subject of a grievance or indeed what was being discussed used by LAM to her own advantage. We agree with Mr Mackenzie's finding that the discussion she had with LAM was not meant to be malicious or to retail gossip and took place as part of a routine discussion over resourcing. In hindsight it may have gone further than it should have in discussing the claimant's health and the fact he appeared stressed.

98. We found the respondent's other witnesses to be credible and reliable witnesses who gave their evidence in a clear and professional manner. We

would record our gratitude to Mr Christie who persevered giving evidence despite being clearly unwell with Covid. We would also refer to the report prepared by Mr Walker which we found to be both careful and insightful.

Discussion and Decision

99. The Tribunal had regard to the guidance contained in the Statutory Code of Practice.

100. The claimant made various claims under the following statutory protections:

> "***13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
>
> *……..*
>
> ***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.*
>
> *……*
>
> ***26 Harassment***
>
> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

……

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

……..

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…….."

Discussion and Observations on the Evidence

General Observations

101. The Tribunal had the task of considering a large volume of documents, evidence and submissions. It had been pointed out to the claimant during case management that he had to address the reason why the respondent's managers acted as they did when asserting that their motivation was

discriminatory and related to his disability. It had been explained that unreasonable behaviour on the part of the respondent's managers was on its own not enough to demonstrate a particular form of discrimination. Despite this the claimant's position remained effectively that because certain matters upset him (more than someone who did not have a stress/anxiety condition) that the actions he complained about must amount to disability discrimination of some sort.

102. There was no evidence before us that the respondent's managers actions were in any way motivated by disability discrimination. They did not treat him the way they did because of his disability.

103. The claimant is correct that an employer should provide support to employees though a grievance process. The delays in this case risked the claimant being entitled to argue that there had been a breach of the implied duty of trust and confidence but that does not assist him in a claim for discrimination. The remedy for a repudiatory breach, unpalatable though it probably would have been, was to resign and claim constructive dismissal.

104. There were delays particularly at the end of 2019 and early 2020 and the respondent cannot avoid criticism in this regard but they were faced with unusual circumstances. The claimant was not satisfied with the initial outcome of his first grievance lodged at the end of July 2018 and concluded on the 23 August of that year. He appealed that outcome and in effect in the following months added to the grievance whilst appealing outcomes and latterly asking for the GDPR issue to be re-opened. This was not a straightforward grievance which was in some way ignored by the respondent. Reasonable investigations took place at every stage and reasoned decisions recorded in outcome reports but there were delays in the overall process.

105. It was apparent from the evidence that the respondent's managers did not regard him as being disabled. To an extent they were lulled into a false sense of security as his attendance remained good. He was also given considerable time off his duties to attend to trade union work and so there was no concern

that he required any adjustments to that aspect of his working environment. The claimant did not ‘‘present’’ as disabled. He managed to keep a good attendance record despite his health problems. However with the benefit of hindsight obtaining an Occupational Health Report at various points as suggested by his GP might not have led to any particular workplace adjustments but would have highlighted to HR and senior managers that the claimant needed these matters resolved for the good of his mental health.

106. There was also a marked reluctance by RMG managers to interfere in what was regarded as internal trade union matters despite the two protagonists being employees and having work related disputes. We noted with some considerable surprise that all but one of those involved in the disputed telephone call agreed to cooperate. This despite being employees who could have been instructed to cooperate with the investigation irrespective of the fact that it was CWU business (about RMG) that was being discussed. The same sort of reluctance appears to have been in play over the report, put up in RMG premises.

107. We also considered that a referral to mediation at a much earlier stage might possibly have had some success. As it was LN the line manager was content at an early stage to recognise that apart from CWU business they were unlikely to have any contact.

108. In order to prove direct discrimination the claimant would have to demonstrate facts from which the Tribunal could infer discrimination. There really was nothing that the claimant could rely on and it was noteworthy that he made no attempt to attribute discriminatory motives to managers in his witness statement nor did he do so in cross examination. Of course we recognise that the different statutory wrongs have differing tests which we will go on to discuss.

109. We do not want to say that the claimant had no basis for some complaint but objectively they were often considerably overstated. We accept that he was genuinely upset by the actions of LAM and that he believed that his grievances should have been dealt with more promptly but the impression we

had was that he would not have been satisfied with any outcome other than his full exoneration and the disciplining of LAM and LN.

110. We did not find the allegations of bullying were objectively supported by the evidence both written and oral that we heard. We accept that there was a basis for some criticism of LAM for sending her recorded delivery letter to the claimant's home address. This seemed unjustified and appears heavy handed. The terms of the letter itself were ill advised. She had clearly incorrectly picked up some matters LN had mentioned such as believing the claimant had been aggressive to LN when no such allegation had been made but we struggled with the characterisation of the letter or indeed her later behaviour as bullying. There was no evidence that she was using the fact that the claimant seemed under stress at the time to take the opportunity of deliberately discomfiting him although that how he felt. There are often two sides to every story and certainly Mr McIlwraith has a wholly different version of what happened during the call than the claimant has.

111. The claimant was not wholly blameless in these matters and the spat over the training dates does not show him in a good light. The initial correspondence from LAM was not inflammatory yet the claimant's response was to provide no explanation whatsoever why the date chosen was unsuitable. Even a response that it was unsuitable for personal reasons would have sufficed. Later the use by her of the word vexatious was given far more significance by him than it should have merited. The third complaint related to the CWU report that she authored. Again, we struggled to recognise this as possible bullying and harassment or part of some campaign of such.

112. The claimant was unable to identify a PCP both prior to the hearing and in his evidence. His position in evidence was that there was a policy allowing the processing of personal information and that the Conduct Code was not being applied to LAM. There was really no basis for this just the claimant's dissatisfaction with individual decisions taken by different managers dealing with his grievances and making decisions that he disagreed with. There was

no ‘golden thread’ connecting these different complaints in our view and no obvious course of conduct or policy being to discriminate against him. He was also unable to identify any actual adjustments that should have been made other than suggesting Occupational Health referrals and Risk Assessments despite it being pointed out to him that these were means to an end perhaps to identify an adjustment but not one in themselves. Any adjustments in relation to LAM and the problems he perceived with her behaviour or about or around delays in the process were, in addition, time barred by the start of these proceedings on 12 May 2020. The delays complained about principally occurred in 2019/2020 The final appeal having commenced on the 2 February and the decision issued on the 19 February having been dealt with quickly.

113. We had areas of concern that we feel we should record. While we understand Ms Lyall’s decision not to refer the claimant to Occupational Health it was a missed opportunity at the start of these events. A mistake not corrected by Mr Mackenzie when the claimant appealed directly to him for a referral. The terms of the Fit Notes supplied by the claimant’s GP on two separate occasions (11 June and 29 November 2018) suggested a referral would be beneficial but were not acted upon.

114. If one had occurred earlier it might have alerted the respondent’s managers to the stress that he claimant was undergoing and how ultra- sensitive he had become to additional workplace stress and perceived unfairness. This might have led to more effort being made to conclude the various appeals and grievances. Taking the claimant’s word that he did not need a referral if he could be kept apart from LAM was a decision made against a background of the claimant’s health problems being known, having appearing stressed and very agitated in his telephone call with NL over the terms of the letter from LAM and the letter itself which said that two RMG managers had described him as looking ‘wired and hostile’. Not to mention the other cardio vascular problems he was experiencing.

115. The decision to leave an assessment of LAM's actions to the CWU to deal with was another missed opportunity both to reassure the claimant his concerns were being treated properly and to make it clear to LAM that being a trade union official did not mean she was in some way immune from scrutiny for her actions. We were surprised when NL told us about a display of poor behaviour from LAM which she initially intended rebuking her for and then simply let lie. It might be suggested that if the allegations had related to harassment on the ground of race or sex and then a more speedy and robust approach might have been taken.

116. The claimant complained that there was a series of bullying incidents involving LAM. He failed to convince managers that this was the case. LAM's behaviour should be looked at in the round. I am not overly surprised that this was their general stance. The letter from LAM may have contained a breach of the GDPR but it seems a minor and rather technical one. If as the claimant suggested she was determined to make his life miserable because she knew he was suffering from stress she could have made her complaints formal (as he did) and if so minded generate more of them or at least mirror his complaints. She did not for example complain about his behaviour over the training issue either to the CWU or RMG.

117. The use of the word vexatious by her prompted another grievance from the claimant although there was little or no basis for that other than a rather technical argument that as her letter had been found in a minor way to have breached GDPR she had no right to use the word vexatious and by doing so was bullying him in some way.

Claims

Direct Discrimination

118. In such a claim the question for the Tribunal is what are the grounds for the treatment complained of (**Amnesty International v Ahmed (2009) ICR 1450**). Sometimes a discriminatory motive is apparent from the act itself or the context. The claimant struggled because the actions of his employers of which he complains, may have felt unfair to him (although the principal

complaint was they did not agree with his position) or in some way unreasonable, but there was no evidence that they related to his protected disability namely disability. In saying this we accept that focus is on the grounds for the treatment complained of and not the alleged discriminator's motive.

119. Although the question of his disability status was determined at a previous hearing and not without some difficulty there was no doubt that while his managers understood he had various heart conditions and was experiencing stress they did not regard him as being disabled because he remained at work and had a good attendance record. That might have been a rather simplistic view for them to adopt but there was no evidence that they treated the claimant the way they did because of his disability or that it was a factor in their decision making. Their focus was on the complaints he had made and reiterated and on the various stages of the grievance and appeal processes.

120. It was clear to us that the claimant had made a number of allegations which were not easily or quickly dealt with and to which he added as events developed and in addition he appealed outcomes he disagreed with. The one matter that we were clear on was that he was not treated the way he was because of or on the grounds of his disability nor do we accept that he established any substantial disadvantage through the length of the process which although not ideal did not cause any relapse or exacerbation of his condition.

Discrimination arising from disability

121. For this type of discrimination to arise, a disabled person must have been treated 'unfavourably'. In other words put to some disadvantage. The unfavourable treatment must be because of something that arises in consequence of the disability. There must be a connection between whatever led to the unfavourable treatment and the disability. In this case there was no

discernable connection between the claimant's disability and for example the delays that occurred in dealing with his grievances/appeals.

Harassment

122. We had particular regard to the Guidance we referred to earlier. Harassment is when someone engages in unwanted conduct which is **related** (our emphasis) to a relevant protected characteristic and which has the purpose or the effect of violating the person's dignity or creating an intimidating or hostile environment. Unwanted covers a wide range of behaviors. Unwanted means essentially the same as 'unwelcome' or 'uninvited'. Harassment is not entirely subjective and it had to be reasonable for the person to take offence in the circumstances (**Driskel v Peninsula Business Services (200) IRLR**).

123. It is perhaps unfortunate that LAM she did not give evidence but it seems clear to us that there was no evidence that she was aware that the claimant was disabled or that her actions related in some way to his disability. It seems more likely to have been related to the fact that she had replaced him in his former role and they had fallen out. Neither the context nor the language used by her assists the claimant. It seems from what we have heard that LAM is perceived as someone who is combative and outspoken by nature and it is unfortunate that her behaviour impacted so badly on the claimant.

Indirect Discrimination/Adjustments

124. The claimant as unable to formulate either a cogent PCP or comparator and without these elements establish indirect discrimination. He was unable to show substantial disadvantage simply asserting that delays exacerbated his stress. It was noteworthy that he was content to allow the process of appeals and grievances to grind on without having any absences through stress or without lodging a grievance about delays. The adjustments he sought concentrated on OH referrals rather than on the practical steps he believed would remove any substantial disadvantage. These claims were not well founded.

Equitable Extension

125. In the case of **Robertson V Bexley Community Council,** which parties referred us to, the claimant brought a claim for discrimination, but it was out of time. The Tribunal extended the time limit of three months and the employers appealed The Court of Appeal in England held that a tribunal has a very wide discretion in whether to extend time for a complaint discrimination to be started and is entitled to consider anything that it considers relevant to the matter. In this case the delays are significant. Even if the events founded upon amounted to statutory wrongs, which we do not find, they were time barred in our view. For example, the last act of alleged harassment carried out by LAM was the use of the work vexatious at a meeting in October 2021.

126. The claimant was able throughout the long history of this matter to keep up a good attendance at work, enter into lengthy correspondence, deal with grievances and appeals and consult his Trade Union colleague Gorge Ross. He believed he was being badly treated and harassed from the outset. He could have raised proceedings in time after each event had he chosen to do so. He has more than a layman's knowledge of employment matters and access to information on employee rights through the CWU and his own experience. We would not have exercised the discretion open to us to allow the claims to proceed out of time.

Conclusion

127. This is a case where the claimant, no doubt because of his stress and depressive condition lost any sense of proportion in judging events. An example was that he suggested to one manager that NL should be sacked for her actions in discussing his likely future absence at the resourcing meeting.

128. This entire case has been lengthy and no doubt costly. It would perhaps be of assistance if in the future one person could keep an overview of an employee's grievances (and appeals) and be able to liaise with the line manager about the impact of both alleged bullying and the grievance/appeal process itself to ensure that matters were kept constantly under review. That is usually the role of HR in our experience but in this case the HR involvement appeared episodic.

Employment Judge **Hendry**

Date of Judgement **25th May 2022**

Date Sent to Parties **26th May 2022**