EMPLOYMENT TRIBUNALS

Claimant: Mr C D Stuart

Respondent: Group Tyre Wholesale Ltd

Heard at: Watford (hybrid hearing) **On:** 23 to 27 May 2022

Before: Employment Judge George, Mr P Miller and Mrs L Thompson

Representation
Claimant: Mrs R Stuart, the claimant's wife
Respondent: Mr E MacFarlane, consultant

RESERVED JUDGMENT

1. The claimant of disability discrimination is not well founded and is dismissed.

2. The claim of victimisation is not well founded and is dismissed.

3. The claimant of unauthorised deduction from wages is not well founded and is dismissed.

REASONS

1. Following a period of conciliation which took place between 4 July 2019 and 16 August 2019, the claimant presented a claim form on 21 August 2019 by which he complained of disability discrimination, victimisation and unauthorised deduction of wages. The last of these was in respect of an allegation that he should have been paid full pay when absent from work due to sickness but was only paid statutory sick pay and a failure to pay in respect of over time. The respondent defended the claim by a grounds of response entered on 7 November 2019. The claim was case managed at a preliminary hearing conducted by Employment Judge Alliott on 14 February 2020. It was originally scheduled to be heard between 12 and 14 April 2021 but the hearing had to be postponed

because of lack of judicial resource. Due to pressure of work in the tribunal there has been an unfortunate delay in finalising this reserved judgement for which Employment Judge George apologises.

2. The claims arise out of the claimant's employment as a driver/warehouse operative for the respondent, a wholesaler of tyres for motor cars and vans. On the claimant's case, the employment started in June 2016 and on the respondent's case it started on 5 September 2016. The respondent contends that he was an agency worker prior to that date. The date on the contract is in fact 5 September 2016 (page 143 at 144), however nothing turns upon this difference in the evidence and we make no finding about the exact date on which the claimant's continuous employment started. The employment has since ended with the claimant's resignation with effect on 14 March 2022 although the subject matter of these proceedings do not include the resignation.

3. For the purposes of the hearing we had the benefit of a file of documents with consecutively numbered pages to which some additions were made at the outset of the hearing. This took the file to a total of 471 pages. Page numbers in these reasons refer to the pages in that file. Two medical reports and some further documents were added to the bundle at page 93A and following, 393A and following, 389A and pages 438 to 467. Those documents which were referred to in evidence (both oral and witness statement evidence) have been taken into account in reaching our decision.

4. In advance of the final hearing the claimant alleged that there had been a failure on the part of the respondent to disclose relevant documents. The respondent had been ordered to provide van tracker sheets relating to the runs undertaken by the claimant at the preliminary hearing in February (see page 57 paragraph 4.1). It was also noted at that time that the respondent should say if they did not have those documents. On 10 May 2022 the claimant was ordered to make a list of the specific documents he said were missing. His response referred to previous emails rather than specific documents.

5. The respondent proffered an explanation for the failure to comply with the exact wording of Judge Alliott's order, namely that there had been a change in software which had limited what was available to them. Some information about the data disclosed by the respondent bundle was set out in the statement of GO. It was clear that the claimant still felt that he had not been provided with all the documents that he expected to have been available but in the light of Mr McFarlane's instructions that a change in the tracking system meant that by the time they were ordered provided there was a limit to what could be retrieved, it was not proportionate at this late stage to order the production of further documents that the Tribunal could not be sure had been retained. The claimant had the opportunity to cross-examine GAO about whether relevant further data existed that is not in the bundle contrary to the respondent's explanation and about information he said he had from the company providing the tracking device. This opportunity was not taken was not taken.

6. The claimant gave evidence and relied on the following additional witness evidence: Darren Hobbs who, from his own knowledge, was able to adopt in evidence the written statement of Lee Ellis, Philip Crennel (who gave evidence by CVP) and the unsigned written statement of Curtis Harper. Mr Hobbs and Mr Crennel were cross-examined. We decided to give little weight to the statement of Mr Harper because he had not attended to be cross-examined upon it. Although the claimant had produced a witness statement it did not appear to cover all of the allegations made and he therefore confirmed the truth of the summary attached to his claim form (pages 15 to 18), the timeline (pages 19 to 21) and his further and better particulars (pages 62 to 68) in addition to his witness statement at the start of his oral evidence.

7. The respondent called the following witnesses who were all cross-examined upon statements which they adopted in evidence and gave oral evidence in person except where specifically noted: Tony Shilling-the claimant's line manager at the relevant time (by CVP), John Kingman-IT manager; Dave Thorpe-Senior Operations Manager; Gary Oliver-Managing Director and Gavin Richardson-Warehouse Supervisor (by CVP).

The Issues

8. The difficulties encountered by Judge Alliott in clarifying the issues are recorded in section 4 of his record of the preliminary hearing (page 55). He appears to have recorded (paragraph 4.7 and para 4.9) that the claimant was bringing a complaint of victimisation and that the complaint of disability discrimination was under two heads: direct discrimination and discrimination arising in consequence of disability. The claimant had identified two allegedly unlawful acts: being presented with welfare questionnaire in relation to his mental health in January 2019 and being suspended on medical grounds on 10 May 2019 (para 4.8). It was also recorded that the claimant complained of unauthorised deduction from wages and not being allowed to work when he had been certified fit to do so by his doctor.

9. The claimant provided the particulars of his disability discrimination and victimisation claims as ordered (page 62 to 68) and a schedule of loss (page 423). The particulars were in narrative form so when we started the hearing we asked the parties whether the allegations which we were being called upon to consider had been clarified a the list of issues. They had not and, in fairness to the parties, none had been ordered. The record of preliminary hearing stated that the claimant relied upon a mental impairment for the disability discrimination claim (para.4.3 on page 55). The respondent disputed that the claimant had been disabled within the meaning of the Equality Act 2010 (hereafter referred to as the EQA) at the period relevant for the claim which the respondent had taken to be up to but no further than the issue of proceedings on 21 August 2019. Despite that, the respondent's evidence in fact covered some events from the further and better particulars which postdated that period and which it was common ground were issues for the Tribunal to decide.

10. The Tribunal started by pre-reading the witness statements and then case managed the claims to clarify the issues.

11. After discussion with the claimant the victimisation claim was understood to be as follows:

    a. the claimant alleged that the grievance brought by him on 17 April 2019 (page 18 180) was a protected act as was a conversation that he had with MH on 10 May 2019.

    b. All of the alleged detriments which postdated 17 April 2019 were alleged to have been acts of victimisation.

12. Turning to the disability discrimination claim, the following were agreed to be acts complained about within these proceedings, those acts alleged by the claimant to be unlawful acts of detriment for which he sought compensation. All other facts and matters set out in the document at page 62 being relied on as relevant background. The alleged unlawful detriments were:

    a. Asking the claimant about his mental health at a welfare meeting on 30 January 2019 (identified by Judge Alliott);

    b. Acts complained of bullying by TS set out in the further particulars at pages 62 to 66 which were

        i. Delay in the Occupational Health referral;
        ii. Conduct on 3 April 2019;
        iii. Charging the claimant for borrowing a van;
        iv. Not shaking hands with the claimant on 3 June 2019 when this was proposed to “clear the air” between them.

    c. Not permitting the claimant to return to work on 10 May 2019 – essentially, he argued that he had been suspended by the respondent who had used his mental health against him;

    d. Fail to take action in June 2019 on rumours that the claimant had got TS sacked and about intimidating Facebook posts by colleagues which were connected with those rumours;

    e. Requiring him to be fit without the need for any adjustments to his hours or role between 4 July 2019 and 30 September 2019;

    f. Failure to acknowledge the claimant’s application for the post of supervisor or to shortlist or interview him. This dated from about July 2019.

    g. By Mr Thorpe shutting the claimant down and intimidated him on 23 October 2019;

h. Moving the claimant's base to the Potters' Bar depot in March 2020;

i. By Mr Richardson swearing and pushing the claimant on 7 March 2019;

13. The claimant's complaint against the respondent includes what he considered to be their unreasonable and unwarranted interest in his mental health at a time when he needed support for his back injury. On a number of occasions he said that he considered that they had used his mental health against him. It was apparent that his complaint was that the respondent had been motivated by the mental impairment which the claimant argues amounts to a disability in his case and therefore that the relevant disability issue is whether the claimant was, at the relevant time disabled by reason of mental impairment. The way that the case was explained at the hearing did not include reliance upon an alleged physical impairment. This was agreed by the claimant.

14. The claimant described his mental impairment as not having a straightforward diagnosis although he said that he had high levels of anxiety and depression with some suicidal thoughts. He said that he had been told that his presentation was in some respects consistent with borderline personality disorder. But he has not received a diagnosis of this condition. At the preliminary hearing, he also said that he relied upon PTSD. The claimant is blind in one eye and the respondent accepts this. Their position is that he they do not concede that he was disabled at any material time in respect of anything other than his eyesight. This is not the impairment relied on by the claimant for the purposes of this claim.

15. When considering how the claimant sought to articulate a claims of discrimination arising in consequence of disability, to some extent it was necessary to look at the respondent's explanation for their actions which was that, in relation to the medical suspension, they had taken into account explanations which they said the claimant had made about his mental health and its impact on him given to them on 10 May 2019 and also concerns about what medication he might be on as a result of his mental health conditions. Doing the best we could we recorded those as being the "something" relied on by the claimant as the basis for his claim under section 15 EQA.

16. It was unfortunate that the tribunal was in the position at the outset of the hearing and before hearing any evidence to have to clarify the issues and formulate a list of issues. Neither party attended at the hearing and expressed any confusion about the nature of the claim or the issues they had come to address. The purpose of the clarification by the tribunal was to ensure that we decided all of the issues which the parties considered it to be necessary for us to decide in order to deal with all matters in dispute which were raised as complaints which the tribunal has jurisdiction to deal with the law.

17. The above list of alleged detriments was read back to the parties and agreed by them to amount to all of the core complaints which the claimant wanted the tribunal to decide. As a result of the time taken to clarify the issues, it was not possible to deliver a reasoned judgment within the time allocation and judgment was reserved.

18. Having set out what the issues were agreed to be it is also necessary to record what this claim was not about; the claimant has complaints about treatment which he regards as amounting to bullying in a general sense (unrelated to a protected characteristic under the Equality Act 2010) and about action which he alleges was taken because of his complaint to management about their response to his physical injury (see para.4.4 on page 55). These matters are not within the Tribunal's jurisdiction under the Equality Act 2010 because the physical injury is not relied on as a disability in itself. The claim form does not raise a claim potentially engaging the Tribunal's jurisdiction to consider detriments on grounds of protected disclosure or health & safety issues.

19. We now set out the issues, both factual and legal, taking into account the discussion which is recorded above.

Disability

19.1. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 (hereafter the EQA) at the time of the events the claim is about? The Tribunal will decide:

19.1.1. Did he have a mental impairment: the claimant relies on the mental impairment of anxiety, depression and PTSD with some elements of borderline personality disorder?

19.1.2. Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

19.1.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

19.1.4. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

19.1.5. Were the effects of the impairment long-term? The Tribunal will decide:

19.1.5.1. did they last at least 12 months, or were they likely to last at least 12 months?

19.1.5.2. if not, were they likely to recur?

Direct disability discrimination (Equality Act 2010 section 13)

19.2. Did the respondent do the following things:

19.2.1. Ask the claimant about his mental health at a welfare meeting on 30 January 2019?

19.2.2. Acts complained of bullying by TS set out in the further particulars at pages 62 to 66 which were

19.2.2.1. Delay in the Occupational Health referral

19.2.2.2. Conduct on 3 April 2019

19.2.2.3. Charge the claimant for borrowing a van;

19.2.2.4. Not shaking hands with the claimant on 3 June 2019 when this was proposed to "clear the air" between them.

19.2.3. Not permit the claimant to return to work on 10 May 2019 and place him on medical suspension?

19.2.4. Fail to take action in about June 2019 on rumours that the claimant had got TS sacked or about intimidating Facebook posts by colleagues which were connected with those rumours;

19.2.5. Failure to acknowledge the claimant's application for the post of supervisor or to shortlist or interview him in about July 2019?

19.2.6. Require the claimant to be fit without the need for any adjustments to his hours or role between 4 July 2019 and 30 September 2019?

19.2.7. By Mr Thorpe, shut the claimant down and intimidate him on 23 October 2019;

19.2.8. Move the claimant's base to the Potters' Bar depot in March 2020;

19.2.9. By Mr Richardson, swear and push the claimant on 7 March 2020;

19.3. Was that less favourable treatment?

19.4. If so, was it because of disability?

<u>Discrimination arising from disability (Equality Act 2010 section 15)</u>

19.5. Did the respondent treat the claimant unfavourably by:

19.5.1. The claimant relies upon the same allegedly detrimental treatment as that set out in para.19.2 above.

19.6. Did the following things arise in consequence of the claimant's disability:

19.6.1. explanations which the respondent alleges the claimant had made about his mental health and its impact on him on 10 May 2019 and

19.6.2. concerns about what medication he might be on as a result of his mental health conditions?

19.7. Was the unfavourable treatment because of any of those things?

19.8. Was the treatment a proportionate means of achieving a legitimate aim? The respondent relies on the aim of ensuring the claimant's welfare and that of others (para.24 of the ET3 page 82).

19.9. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Victimisation (Equality Act 2010 section 27)

19.10. Did the claimant do a protected act by

19.10.1. His grievance of 17 April 2019 (page 180)

19.10.2. Statements made in a conversation with Mr Hopper on 10 May 2019.

19.11. Did the respondent do the following things: The claimant relies upon such acts set out in para.19.2 as post date 17 April 2019.

19.12. By doing so, did it subject the claimant to detriment?

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

19.14. Was it because the respondent believed the claimant had done, or might do, a protected act?

Unauthorised deduction from wages

19.15. Had the respondent failed to pay to the claimant the sums due to him under the contract by paying him Statutory Sick Pay rather than full pay between 4 July 2019 and 30 September 2019?

19.16. Had the respondent failed to pay to the claimant 8 hours per calendar month overtime which was payable under his contract?

The law relevant to the issues

20. A person has a disability, for the purposes of the EQA, if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EQA and Goodwin v The Patent Office [1991] I.R.L.R. 540. There is no sliding scale, the effect is either classified as "trivial" or "insubstantial" or not and if it is not trivial then it is substantial: Hutchinson 3G UK Ltd v Edwards UKEAT/0467/13. As it says in paragraph B1 of the Guidance on the definition of disability (2011), this requirement reflects the general understanding that disability is a limitation going beyond the normal differences which exist among people.

21. When considering whether the adverse effects on the claimant's ability to carry out day-to-day activities are substantial the following factors are taken into account (see the Guidance Section B),
    a. The time taken to carry out an activity,
    b. The way in which an activity is carried out,
    c. The cumulative effects of an impairment,
    d. How far a person can reasonably be expected to modify his or her behaviour by the use of a coping or avoidance strategy to prevent or reduce the effects of the impairment,
    e. The effects of treatment
    f. There may be indirect effects, such as that carrying out certain day-to-day activities causes pain or fatigue (See Guidance on definition of disability (2011) paragraph D22).

22. The cumulative effects of related impairments should also be taken into account (see paragraphs B6 and C2 of the Guidance).

23. In the Court of Appeal's decision in All Answers Ltd v W [2021] EWCA Civ 606, their summary of the relevant law is at paras 24 to 26:

> "24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out day to day activities….
>
> 25. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see *Boyle v SCA Packaging Ltd*. [2009] UKHL 37, [2009] ICR 1056, per Lord Hope at paragraph 4, and Lord Rodger at paragraph 42, Baroness Hale at paragraphs 70 to 72 (with whom Lord Neuberger agreed at paragraph 81), Lord Brown at paragraph 77.
>
> 26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in *McDougall v Richmond Adult Community College*: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer

LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

24. Herry v Dudley Metropolitan Council, UKEAT/0069/19/LA, HHJ Eady QC, as she then was, set out legal framework" at paras 29 to 31. Having set out section 6 of EA 2010 at para she stated at paras 30 and 31:

"30. The term "substantial" is defined by Section 212(1) EQA as meaning "more than minor or trivial". It sets therefore, a fairly low threshold for a Claimant who bears the burden of proving that she is a disabled person for the purposes of the EQA (see *Kapadia v London Borough of Lambeth* [2000] IRLR 699 CA). Indeed, there is no real dispute between the parties as to the approach that an ET is to adopt in this respect, as was explained by the EAT (Langstaff J presiding) in *Aderemi v London and South Eastern Railway Ltd* [2013] ICR 591:

"14. It is clear first from the definition in section 6(1) of the Equality Act 2010, that what a tribunal has to consider is on adverse effect, and that it is an adverse effect not upon carrying out normal day-to- day activities but upon his ability to do so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation; unless a matter can be classed as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

25. What the employee is not able to do or is only able to do slowly or less easily is frequently taken into account to decide whether there is disability.

26. The EQA provides that, where an impairment is being treated, then it is to be treated as having a substantial adverse effect if, but for the treatment, it is likely to have that effect (Sch 1 para 5(2)).

27. Recurring effects are covered in paragraph 2(2) of Sch 1 of the EQA where it provides that if in impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

28. The effect of an impairment is “long-term” if it has lasted for at least 12 months or is likely to last for at least 12 months (Sch 1 para 2(1) – which also applies where the effect is likely to last for the rest of the life of the person affected). Likely means “could well happen”: SCA Packaging Ltd v Boyle [2009] I.R.L.R. 54. What the tribunal has to assess is the likely duration of the effect judged at the time the allegedly discriminatory act took place. Likely has the same meaning when considering the effects of treatment and seeking to answer the question whether, but for the treatment, the impairment is likely to have a substantial adverse effect.

29. When considering the effect of a mental impairment such as depression the most frequently cited case is J v DLA Piper [2005] I.R.L.R. 608 EAT. Paragraphs 40 & 42 of the judgment of Underhill LJ read,

> “40: Accordingly in our view the correct approach is as follows:
> (1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
> (2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.
> …
> 42: The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven - 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – […] - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression'

> rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long-lived."

30. This passage was applied in Herry v Dudley MBC [2017] ICR 610 EAT paras 55 & 56 where HH Judge David Richardson commented that

> "experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievance, or a refusal to compromise (if there are similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction, but in the end the question whether there is mental impairment is one for the employment tribunal to assess."

31. Employees, such as the claimant, are protected from discrimination by s.39 Equality Act 2010 the material parts of which provides that an employer must not discriminate against one of their employee by dismissing them or subjecting them to a detriment. The claimant alleges that he was the victim of a number of acts of disability discrimination contrary to s.13 EqA which prohibits direct discrimination. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting him to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of disability and does so because of A's disability.

32. All claims under the EQA (including direct discrimination and victimisation) are subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. When deciding whether or not the claimant has been the victim of direct discrimination, the employment tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was disability. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of disability.

33. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the

primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

34. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of disability. The burden of proof provisions may be of assistance, if there are considerations of subconsious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

35. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

36. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of disability, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

37. Section 15 EqA provides 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."

38. Guidance was given on the test under s.15 EQA by the Court of Appeal in City of York Council v Grosset [2018] ICR 1492 CA, where it was said that,

> "On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?" (para.36)

39. To paragraph paras.37 to 39 of the judgement in Grosset, the first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something". The second issue is an objective matter, whether there is a causal link between B's disability and the relevant "something". It is not possible to spell out of section 15(1)(a) a further requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability.

40. It has been confirmed by the EAT in Land Registry v Houghton (UKEAT/0149/14) that the correct approach to justification of discrimination arising from disability is the same as to justification of indirect discrimination, namely the test propounded in Hampson v DES [1989] ICR 179. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.

41. Their potential defences require them first to show that they did not know and could not reasonably have been expected to know that the claimant was disabled (constructive knowledge is discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA). The other potential defence is to show that the detrimental treatment was a proportionate means of achieving a legitimate aim.

42. Victimisation is defined in s.27 to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.

43. The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the Equality Act. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

44. Therefore when deciding whether or not the claimant suffered victimisation the tribunal first needs to decide whether or not he did a protected act (something which is admitted in this case by the respondent). Next the tribunal needs to go on to consider whether he suffered a detriment and finally we should look at the mental element. What, subjectively, was the reason that the respondents acted as they did.

45. Again, a person's subjective reasons for doing an act must be judged from all the surrounding circumstances including direct oral evidence and from such inferences as it is proper to draw from supporting evidence and documentary evidence. For the purposes of a victimisation claim, the doing of a protected act does not have to be the sole or even the principal cause, as long as it was a significant part of the respondent's reason for doing the act complained of. However, dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation for the purposes of s.27 EQA if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable: Martin v Devonshires solicitors [2011] ICR 352, EAT; Page v Lord Chancellor [2021] ICR 912, CA.

46. Section 109(1) EQA provides that anything done by an individual in the course of their employment must be treated as done by the employer. Forbes v LHR Airport Limited [2019] ICR one 558 EAT concerned a complaint of harassment arising out of a Facebook post and the issue was whether that post had been in the course of the employment. The then president commented that it may be very difficult to tell whether there is a sufficient nexus between activity carried out on a personal social media account and a person's employment for the employer to be liable for the act complained of.

> "The words "in the course of employment" are to be understood in their ordinary and natural sense as they would be by the layperson. The layperson would not consider that the sharing of an image on a private non-work-related Facebook page, with a list of friends that largely did not include work colleagues, was an act done in the course of employment.
> …
> There may be circumstances where the sharing of an image on a Facebook page could be found to be an act done in the course of employment. This could include situations where the Facebook pages solely or principally maintained for the purposes of communicating with work colleagues or is routinely used for raising work-related matters. In those circumstances, one can see that an ostensibly private act could be regarded as being sufficiently closely connected to the workplace to render it an act done in the course of employment. Whether or not such an act is seen as such will depend on the facts of the individual case.
>
> The fact that the employer treated the matter as a disciplinary one [in the present case] is not determinative." (Paras.31, 36 and 37 of the judgement of Choudhury J)

Was the claimant disabled?

47. At the preliminary hearing Judge Alliott ordered the claimant to provide a witness statement identifying the impairment relied on for his disability claim. Mrs Stuart wrote on his behalf on 29 July 2020 (page 93A) referring to a letter from Dr Bremmer, consultant psychiatrist (page 93C) which she described as "an honest account of the claimant's "conditions" [which] would serve as an accurate statement by a witness that is more than capable of assessing the patient." This was accepted in lieu of a statement of the impact on him of the impairment relied on. The claimant confirmed that he relied upon the account provided by Dr Bremmer and that any recount it contains of information that he himself had provided to the psychiatrist was true. Incidentally, this approach was also an indication that the claimant intended to rely upon a mental impairment and not on a physical impairment, as he confirmed at the hearing.

48. The letter is dated 29 June 2015 and refers to an appointment on 24 June that year. The claimant was to be reviewed on 15 July 2015. The diagnosis is "cannabis withdrawal" and the narrative explained that the claimant had stopped taking cannabis about 4 ½ weeks previously. His then current prescription medication was a twice-daily dose of quetiapine "taken largely to help him sleep" and to other drugs also apparently to help him sleep.

49. The letter records the claimant providing information that he had experienced the following

    a. some anxiety attacks two or three times a day and "do not seem to be a problem now";

    b. Vivid dreams which sometimes wake him up;

    c. Variable mood which had improved since he stopped taking cannabis. His low periods were described as "not really much of a problem now" which could be managed by him but high moods were described as more of a problem.

    d. Problems sleeping which appear to amount to him only getting a good night sleep on a couple of nights in a week and on other nights only 2 ½ to 3 hours sleep

    e. The claimant was described as having a past history of referrals for low moods a and "a previous mention of a diagnosis of recurrent depression in the record but not much else to substantiate this".

    f. The doctor recorded the claimant having recounted "some features of a rather mild bipolar disorder and problems recently when his mood has gone a little bit too high at times. This diagnosis, however, doesn't ever seem to have been made and it is difficult to be sure of it on one assessment at a time when he is withdrawing from cannabis."

g. He had told Dr Bremmer about problems in previous employment "due to perhaps him being a little bit too jokey or irritating at times";

h. Overall the psychiatrist said that the claimant had been suffering from some problems due to cannabis withdrawal, in particular anxiety features. Coming off cannabis was described as a major step forward and it was said that "he does present with some of the features of hypomanic states which occasionally perhaps go a little bit further and get him into problems. He gets rushing thoughts, increased energy and a sense of restlessness, he is still able to concentrate on films having previously been able to do this when he was a younger child."

50. In their response dated 28 August 2020 (page 94) the respondent pointed out that the statutory guidance excludes conditions such as addiction to drugs except when they are medically prescribed but not the effects from taking drugs or stopping taking them. They therefore accepted that the consequences of cannabis withdrawal and medication taken to alleviate symptoms such as anxiety could amount to a disability if they had a substantial adverse effect on the ability to carry out day-to-day activities which was long term. The information provided by the claimant dated from 3 ½ years before any of the incidents referred to in the claim form at a time when the claimant was not yet in the respondent's employment.

51. They accepted that the reported impact on the claimant's ability to read books was a day to day activity but argued that the tribunal would have to find that this was an impact of the impairment relied on and was still operative at the material time. They point out that no information about the review had been provided and he was reducing medication in 2015 which suggested that the condition at the relevant period did not affect him to the extent that he required regular medical supervision or medication.

52. Overall, the respondent argued that there was limited reference to day-to-day activities, apparently no actual diagnosis of a specific mental impairment, no information about treatment in the relevant period for the purposes of a deduced effects argument, little information to suggest that an impairment has caused a particular impact and no indication that the conditions were long lasting and had endured. It was on that basis that they did not accept that the claimant was disabled by reason of a mental impairment within the meaning of the Act.

53. A letter from the claimant's GP dated 9 January 2019 states that the claimant had been taking a drug intermittently since 2015 at night to help control the pain from a disc prolapse in his neck and sertraline 50 mg daily since 2017 to help with anxiety. The GP said "Mr Stuart copes well despite suffering from these medical problems and he tells that he has not had any sick leave for the past 2 years."

54. It was at about this time that the claimant started going to the kickboxing gym run by Mr Ellis and Mr Hobbs where he received advice on exercise following the neck injury.

55. The claimant was issued with medical certificates covering his period of sickness absence from 3 April 2019. That dated 4 April 2019 (page 385) includes stress as a reason for being unfit for work and that dated 13 May 2019 said that he may be fit for work with amended duties after having been assessed for survival pain/disc disorder but also says "also stressful work environment may affect his mental health as he has history of depression in the past"

56. Mr Hobbs confirmed Mr Ellis's account that the claimant took a sepback from participating in kickboxing for his muscular skeletal injury to heal in March or April 2019 and also that the claimant was very low during his absence from work later that year.

57. A medical summary of the claimant's conditions was provided on request by his GP on 31 July 2019 (page 390) when he said that "after having discussions with the patient, I am unable to divulge medical information about the patient's mental health in this report." He went on to detail information about neck and shoulder pain and sciatica and recommended adjustments to the claimant's work duties to accommodate these: avoid lifting heavy objects, avoid working shift longer than eight hours per day and should have a one hour break in the middle of the shift. It was said that his back pain was likely to be exacerbated by lifting heavy objects.

58. There is some correspondence between the claimant and the respondent from August 2019 referring to a chiropractor's report (page 392 is the report itself) and discussions about seeing the musculoskeletal team. He had previously had an MRI scan of his neck in October 2016 (page 387).

59. The document introduced at page 393A is an initial assessment and care plan dated 1 November 2021, well outside the relevant time period. The claimant had apparently self-referred when feeling suicidal on 20 September 2021 and the document refers to the history of depression and anxiety. Although we can infer that this history predates the 20 September 2021 self-referral we do not know when the history dates from. Part of the factual matrix of the disputed claims includes the claimant saying on 10 May 2019 that he had suicidal thoughts. In the section relating relevant history at page 393 B there is a reference to "counselling when younger up till age 34"; to 18 sessions of cognitive behavioural therapy in 2013 and a referral for 6 sessions of psychotherapy.

60. In addition to confirming in oral evidence that the information provided to the doctor in 2016 was true he confirmed that the information provided to the doctor in the 2021 report (page 393A) was true. His evidence is therefore that the history in the first page of the top of page 393B is true and it amounts to a history of intermittent medical intervention because of mental health problems over a period of years prior to 2018. However it

does not give any details of the impact on the claimant of the mental health problems or of that medical intervention, of the period over which problems were experienced and the breadth and depth of those problems. Medication is referred to in the 2021 report at page 393C and the respondent makes a valid point about the list that the claimant has apparently informed the agency to whom he was referred at this point to receiving medication for anxiety and depressive symptoms including amitriptyline which his GP in the more contemporaneous documents said had been prescribed for neck pain.

61. We give limited weight to the 2021 report which is of limited help because it recounts how the claimant was in2021 and not how he was in 2018 to 2019. The clinician appears to have gone through the historical notes and recorded that there was a historical diagnosis of recurrent depression. That may be reliable but we do not know how far back it goes and recall that the 2016 report originally relied on stated that there was not much to substantiate that reference. We note that there is a reference to sertraline being prescribed as far back as 2014 and it is probable that would have been for depression but the dosage the period of the prescription and the symptoms for which it was prescribed are not detailed. However the GP letter of 9 January 2019 says that he has taken 50 mg daily since 2017.

62. The challenge for the claimant in proving that at the relevant time he was disabled by reason of the mental health condition is that he has provided very little detail about the impact on him of that condition. The 2016 report included reference to problems at work due perhaps being jokey and irritating and an impact on ability to read books and little else about adverse impact. The claimant told us that he does not like talking about his mental health condition; that doing so exacerbates the effect of it and we take that reticence into account. However we cannot imagine what he might have said had he not been reticent and make findings that he has experienced particular impacts which she has not told us about. He did tell us that he manages his moods by keeping to a routine and, in particular, by exercising at the kickboxing studio where he has started to take classes. During the time period May to October 2019 when he was first suspended and then later signed off work because (according to the respondent,) they could not provide him with adjusted June duties he was not following a routine and was not as busy. He described experiencing significant detrimental effect on his mental health. During the first period when he was unable to attend work he asked his teenage son to stay at home so that he would not be on his own because he was worried about his own safety.

63. The historic letter to his then GP (page 93C) reports on how the claimant presented in 2015 when he was withdrawing from cannabis use. Addiction to illegal substances is precluded from the definition of disability but the effects of those conditions are not. However we consider that the impact on him of cannabis withdrawal would not be expected to be long term and it is difficult to distinguish in this report between the effects the claimant described to Dr Bremmer of withdrawal

and any effects of an underlying condition. Dr Bremmer himself said as much and was anticipating a review.

64. Matters that can affect an individual's ability to carry out day-to-day activities include problems sleeping (which are mentioned in the evidence), low mood (which the claimant said he was able to get out of by mowing the lawn) but also the highs. The history section on page 93 D supports the inference that there had been a diagnosis of recurrent depression prior to 2015.

65. The respondent argued that the claimant practice of kickboxing should be taken into account in considering coping strategies as explained in the guidance on the definition of disability (2011) in particular in particular at paragraphs B7 to B10. They specifically referred to the example following para B9 which reads as follows:

> "in order to manage her mental health condition, a woman who experiences panic attacks finds that she can manage daily tasks, such as going to work, if she can avoid the stress of travelling in the rush hour.
> In determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life."

66. The claimant uses the control he has learned through practice of martial arts to restrain him if he feels that his mood is becoming more volatile in situations he would otherwise find challenging. He gave evidence of that in relation to the incident on 23 October 2019 when he described controlling his response to the behaviour he alleges against Mr Thorpe.

67. Against the background of this piecemeal evidence of treatment and medication, very limited evidence of impact on day-to-day activities (some difficulties with concentration which meant he was unable to read books) the tribunal sought clarification from the claimant in oral evidence about what he is unable to do or is only able to do with difficulty. In answer to the question about how he would say his mental health affects his life he said,

> "on a day-to-day basis I try to carry on as best I can. My wife and children have seen my struggles. I am not the easiest person to live with: at the best time I consider myself honourable, the best person you could know; at the worst time I can be a right pain in the backside. I don't read much because of my concentration levels although I did complete a course on furlough. I was proud of myself."

68. He explained that sertraline helped because "in a sense it blanks me out". He said that as a person he had some days highs and some days loads and the medication flatlined him "so that I'm a normal person".

69. We were struck by that last comment. It is if the claimant regards himself as having to hide his mental health problems because of the fear of stigma and weakness. He did not give evidence about then recent sleep problems. He did not provide any quantitative information to show how much of a problem the concentration difficulties or mood imbalance was at the relevant time.

70. The contemporaneous GP's evidence refers to physical conditions and not mental conditions with the exception of one reference to stress being part of the reason for unfitness for work in the April 2019 MED3 and the reference in the January 2019 letter to medication for anxiety. The May 2019 MED3 warns that the work environment may affect his mental health as he has a history of depression. This is suggestive that there has been a diagnosis of anxiety and a history of depression but the claimant deliberately chose not to reveal information about his mental health during this period to the employer.

71. The claimant's strongest point is that the January 2019 letter shows evidence of the diagnosis of anxiety and medication the impact of which we need to ignore when considering the impact on the claimant's ability to carry out day-to-day activities. However it is still for the claimant to show that the mental condition whether anxiety or recurrent depression had a more than trivial adverse impact on him that either was long term in the past and likely to recur or had been long term always likely to be long term at the relevant point in time.

72. His evidence about the impact of the medication was that it balanced out his mood however it is not possible to say how the high and low moods adversely affected his ability to carry out day-to-day activities. The 2015 evidence is clouded by the difficulty of distinguishing between the impact of cannabis withdrawal (which is not a long-term condition in the claimant's case) and the impact of any underlying mental health condition. Given that, we give limited weight to the information about impact on day-to-day conditions abilities contained in it. There is some evidence of highs experienced by the claimant causing behaviour that challenges workplace relationships but that is not enough without more to support a conclusion that the claimant has mental health problems which cause a more than trivial impact on forming and maintaining relationships or that that was long term. Therefore the evidence we have about the impact of the medication does not assist since we are not satisfied that the claimant experiences effect of the mental health condition that would adversely affect his ability to form and maintain relationships in a way that is more than trivial without it.

73. Taking into account the claimant's evidence at its highest we do not think he has done sufficient to satisfy us on the balance of probabilities that his ability to carry out day-to-day activities was adversely affected by a mental impairment in a more than trivial way over a sufficient period of time that it can be said to have been long term. It is not that we disbelieve what he said about but he has not done enough for us to conclude that the legal definition of disability dissatisfied in this case for the period in question namely January 2019 to March 2020.

Findings of fact relevant to the other issues

74. We set out below the findings of fact which it is necessary us to make in order to reach conclusions on the issues that we have been asked to decide. We do not set out all of the evidence we have heard in order that

this judgement should not be unnecessarily long but only our principle findings of fact.

75. We think it probable that some sort of conversation along the lines of that alleged by Mr Shilling in his para.3 took place towards the end of December 2018. At the time, Mr Shilling was Operations Manager at the respondent's site in Aylesbury. The claimant in his role as warehouse/delivery driver was responsible for loading tyres onto his van for delivery to customers and then driving around a designated route. An essential element of his role, therefore, was driving. Mr Shilling gave evidence that towards the end of December 2018 the claimant informed him that he had "a split personality disorder" whereupon Mr Shilling asked the claimant whether he was taking any medication, seeking to find out whether or not it would affect his driving. The reason we think it likely that a conversation along these lines took place is that, on 9 January 2019, the claimant's GP provided the letter at page 163 setting out the medication that the claimant was currently taking and reassuring the addressee that the claimant did not experience any drowsiness during the day as a result of taking the medication. That seems to us to have been likely to have been obtained in order to answer the question Mr Shilling says that he asked.

76. The claimant experienced an accident at work as detailed in the accident at work form on page 164. He said that he was loading scrap and there was not enough room so he had hurt his shoulder and neck. Although the claimant immediately returned to his normal duties, he did not immediately recover and on 17 January 2019 left work early, with permission, in order to visit the urgent care unit.

77. The claimant asked Mr Shilling to refer him to occupational health because of the injury on 21 January 2019 and the latter agreed, saying that he would need to speak to Deminos, the respondent's HR function. A number of the claimant's complaints relate to what he clearly regards as under management and targeting of him by Mr Shilling following this injury. So he complains (see further and better particulars at page 62) that on 24 January 2019 he was given a poor vehicle for his round which he considered to be unsafe but he did not alert Mr Shilling to this because he thought he was becoming a target. There are also some complaints about the actions of SO during this period. We do not need to make detailed findings about what happened because what is clear is that the claimant himself connected these alleged detriments with making complaints about his injury or the management of it and not with his alleged disability of a mental health problem.

78. A meeting took place on 30 January 2019 which became the subject of a later grievance. An agenda for the meeting is at page 165 and Mr Shilling was following a script from Deminos. The claimant's complaint about this meeting is that he thought it would be about his physical condition and he was aggrieved that the respondent appeared to be interested in his mental health. It appears from page 165 that the respondent did ask questions about the claimant's mental health and was told that he had PTSD, borderline personality disorder and recurring depression but that

the OH referral was sought not because his mental health but because of the neck/shoulder injury. These questions are the basis of the claimant's allegation of disability discrimination within his grievance (see allegation 3 at page 264).

79. The claimant was also aggrieved that he was not invited to have a companion at the meeting but it was not the kind of meeting where there is a statutory right to a companion. Our comment on this is that if the respondent has grounds to ask about an employee's mental health then they need to be able to do so. As we are persuaded that the conversation between the claimant and Mr Shilling in December 2018 involved the claimant telling his manager something about being told that there were similarities between his condition and borderline personality disorder, that he was on medication and the role involved driving we think there was grounds to ask for some further information as the respondent was responsible for the actions of the claimant as their driver.

80. There was a delay in the claimant obtaining an appointment with the occupational health professional. According to the claimant, Mr Shilling ignored his attempts to pursue the referral on 15, 18 and 19 February 2019 and his chronology covers allegations over the period February to April which in general terms amount to an allegation that Mr Shilling's manner in conversations about the occupational health referral was argumentative, that he ignored the claimant when the latter attempted to pursue it and charged the claimant for use of the van for a personal trip (see page 170).

81. There is then an allegation that on 27 February 2019 Mr Shilling directed the order in which the claimant should deliver to his clients and overruled his opinion and was abrupt when the claimant sought to discuss why he had not been paid for the day on which he had to attend hospital. Further the claimant alleges that the following day he had attempted to discuss what he described as that disagreement and Mr Shilling was intimidating and refused to shake hands with him.

82. The dispute between the parties about whether the claimant's account of these events is credible or not is no longer relevant to our decision on the issues because the claimant's disability discrimination claim fails for other reasons and they predate the grievance so cannot have been unlawful victimisation. It remains relevant to credibility generally. We note that if we accept the evidence of Mr Crennel there was a bullying culture which involved management threatening employees with disciplinary action and changing their roots as a matter of course which suggests that, to the extent that the allegations made out against Mr Shilling, they were not targeted at the claimant. As we set out in para.101 below, TS accepted that he had been negative at a later meeting and gave reasons for that. We find that he was willing to accept when he had been at fault. In general, we think that the acts the claimant complains of were part of normal day to day life in this particular workplace and TS was not targeting him. However, TS did not seem always to have acted in accordance with good management practice.

83. The claimant's reasonable pursuit of an appointment with occupational health because he was working when in considerable pain came to a head on 3 April 2019. He asked TS about the referral and the latter "exploded with rage", said that he was going to be fired because of the claimant and followed the claimant around the depot. TS denies this and says that the claimant went to sit in his car. The claimant says that he went to discuss the matter with JS in the private office and then that Mr Shilling came in, locked the door behind him, and behaved in an intimidating way (see also para.2 of the grievance on page 187).

84. The claimant was signed off work as unfit. As he put it "I asked the GP to sign me off because I didn't feel like going to work. I didn't want to be at work… I didn't even want to be at home because of the way I was made to feel in my workplace". He describes himself as physically shaking and despite his martial arts training as never having been in that situation before and it was so intimidating to be asked to go into the office by JS and for Mr Shilling then to come in.

85. There is conflicting evidence about whether the door to the office was locked. The claimant and SO (page 215 in the notes of the investigation meeting with JK) said that it was and Mr Shilling said that it was not. Mr Oliver said that it was standard practice to lock the door but not all witnesses agreed with this. We think it is not appropriate for an employer to lock a door; there should be other ways to ensure privacy and there is a risk that the employee should feel intimidated or threatened by being confined in that way we think it is probable that the door was locked. We find that the claimant's description of what he felt on the occasion was, overall, accurate.

86. The claimant sent a written grievance to Mr Oliver dated 17 April 2019 (page 180). In it, he complained that it was three months since he had had an accident about work and complained that when he was granted an investigatory meeting he was questioned about his mental health and medication with not a word about the accident or the injury he had sustained. He complained about the delay in contacting Occupational Health, Mr Shilling's conduct on 3 April 2019 (allegation 2) and, at allegation 3 he complained "I feel I have been discriminated against due to my mental health issues" and complains about being asked questions about that and about rumours being spread. Finally, he complains that he had had his competence questioned and being made to feel uncomfortable because of the "hostile atmosphere".

87. The appointment with occupational health eventually took place on 25 April 2019 and the claimant was told about this meeting by letter (page 184 – undated).

88. The occupational health report is dated 30 April 2019 (page 389 and 389A). The claimant was assessed as being fit to work with conditions.

89. The grievance meeting was conducted on 2 May 2019 by JK who followed the script at page 187. The notes of the hearing are on page 191. The claimant was accompanied by his union representative.

After that meeting Mr Kingsman carried out the interviews he sets out in para.4 of this statement. He interviewed all of the relevant individuals. Our view is that he carried out a reasonable and thorough investigation and came to conclusions which were genuinely held on the basis of his view of the information and explanations he had received. He recommended that a facilitated meeting between the claimant and TS be arranged which was arranged for 16 May 2019 (see letter of 10 May 2019 at page 225).

90. It is apparent from the notes of the grievance interview with TS that he felt that the working relationship between him and the claimant was strained and said that he was "scared to talk to him recently".

91. The claimant was given the outcome of his grievance on 4 June 2019 (page 263). JK partly upheld the allegation that the OH referral had not been arranged in a timely manner. Although he concluded that there was no intention on the part of TS to create the toxic atmosphere alleged by the claimant in relation to the incident 3 April 2019, JK partly upheld the complaint about that date because he accepted that TS had raised his voice which "could have come across as aggressive". The complaint of discrimination was rejected on the basis that when the claimant was told that he would be asked about his mental health in an occupational health assessment that was intended to reassure. And JK sought to find a way forward by way of the facilitated discussion that had by that time already taken place.

92. On 10 May 2019, there was a conversation between the claimant and MH on 10 May 2019. The claimant's version of events is that he was asked how he was feeling by MH to which he explained that he was having suicidal thoughts; MH passed this information onto Mr Shilling. MH was acting as an intermediary to TS because of the strained relationship between the claimant and TS. Mr Shilling then consulted Deminos and emailed the senior members of the management team (page 226) to inform them of the situation and so that there would be a record of what he did saying,

> I was worried that Chris would not only put himself in danger but also an innocent member of the public, my concerns were he could drive his van into someone or something."

93. Before the claimant went out on his second run on that date it was apparent that he did not want to be around Mr Shilling or SO. TS decided that the claimant should not carry out the second run because he was concerned that the claimant might act upon his suicidal thoughts and about the potential consequences for the claimant and for others. He added to that in oral evidence when asked why the claimant was not given administration of warehouse duties that there was a risk to the claimant and his work colleagues were he to work in the warehouse.

94. The claimant's clearly stated view is that he feels safer at work when busy and following normal routine. The respondent had to balance the claimant's interests against the objective risks to the claimant and others. The claimant's judgment may have been valid from the perspective of his

self-knowledge but we consider that when faced with the circumstances on 10 May 2019, the respondent's managers reasonably considered that they could not take that risk.

95. As good contemporaneous evidence of TS's position we consider the notes of the facilitated meeting which took place on 16 May 2019 and, in particular, the exchange from the middle of page 249 to the end of page 250. These were not unreasonable concerns for TS to have. We accept TS and JK's evidence about the incident on 10 May 2019 and do not consider that they had exaggerated or disproportionate concerns in all the circumstances. We are quite satisfied that TS's entire rationale was the protection of the claimant, the wider public and the claimant's co-workers because of what the claimant had reported and the nature of the job he did and not because of a stereotypical view of people with mental health problems.

96. It appears to have been GO who made the decision that claimant should go home and JK's evidence was that it was GO who decided that the claimant should be suspended although the letter of suspension came from him (page 232).

> "the decision to suspend you has been taken as a precaution to ensure your safety and that of others following concerns regarding your health and wellbeing. Please rest assured that the suspension is not in any way a disciplinary action but is a protective measure for both yourself and the company. You will remain on full pay for the suspension period, which we hope will not be lengthy. In addition, all of the normal terms and conditions in your contract of employment will continue to apply."

97. However, he was also asked not to contact fellow workers. The claimant linked the suspension with disciplinary action and we can understand how this came across to the claimant as being a punishment. It is argued to have been detriment on two bases first because he linked it with disciplinary action and secondly because his preferred way of self-management of his mood was to be at work.

98. Suspension was lifted in the mediated meeting on 16 May 2019 by JK who appears to have assessed the claimant as calmer and unlikely to be a threat to himself and others based upon his demeanour in that meeting. We were initially surprised that this judgment had apparently been made without medical evidence. It was only a short period after the statements made by the claimant to Mr Hopper. However, the claimant was due to go on holiday and the thinking appears to be that the claimant was rather better in the meeting; the relationship with TS was being addressed – at that point the respondent's managers had some hopes that they would try to work together – and that, following a further 2 weeks' rest, it was then better for the claimant to return to work. We concluded that, in fact, JK showed himself to be responsive to the information presented to him.

99. The respondent made comprehensive request to GP about the claimant's health conditions (page 253) on 16 May 2019. The response on 31 July 2019 (page 390) we have already referred to. It was in that that the GP

stated that they were unable to divulge medical information about the claimant's mental health.

100. The claimant returned to work following his annual leave on 3 June 2019. According to JK there was some confusion over what was meant to happen that day because the relevant staff in the warehouse had not been told about his return (para 13 of JK's statement). There was a meeting between JK, TS and the claimant on that day in which TS refused to shake hands with the claimant. According to JK (para 13 to 15 of his statement) he, JK, had been encouraging both parties to work on making the relationship better but took the view that TS had taken the claimant's grievance personally and was reluctant to engage with the claimant.

101. When asked about that in his oral evidence TS accepted that he was quite negative. He said that nothing appeared to have changed and a lot was said about the original reasons for the dispute were, from his perception, the claimant being aggrieved because he had not been able to use the van to get home when he was to be going on annual leave. TS said that he was not the sort of person who shook people's hands but did want to move forward. However he was very apprehensive because he had been accused of bullying and harassment and part of him was thinking "what is going to happen when I need the van back, [will the claimant say] 'Are you going to get me home?' That will be the question [from the claimant]". He came across to us as apprehensive that he would feel under pressure to give the claimant special treatment. He was open in his evidence when he conceded that he would have come across as negative, much as JK described.

102. TS himself was suspended on 5 June 2019 for an unrelated matter and resigned after a few days' suspension.

103. After TS's resignation, MH acted as warehouse manager. Within a couple of months he had also left R's employment. The claimant was suspected of having been responsible at least in part for TS's suspension. Pages 321 to 327 are screenshots of Facebook pages forwarded by the claimant to GO on 18 June 2019. Among expressions of support for TS as a manager were comments which suggest that the individual posting believed the claimant to be responsible and was angry about that. There was one post which said "snitches get stitches". This was a nasty and vicious remark.

104. There was some concerned correspondence between Mrs Stuart and the occupational health technician who has been engaged by the respondent to carry out the assessment with regard to the physical injury. In that she expressed concerns about the impact on the claimant's welfare and mindset about all victimisation she says he has to face. The claimant's email to GO was forwarded to MH who seems to have carried out an investigation into the comments (see page 337). We did not hear from MH himself but the claimant accepted that he was vaguely aware of the investigation. He volunteered in oral evidence that he had seen an occasion when one of the individuals involved in the exchange had

obviously been in a meeting and was shouting about having been given a warning of some kind.

105. The claimant said that what he wanted this Tribunal to look at was the Facebook posts themselves and the way that the management had dealt with it. He describes that as brushing it under the carpet and said that they had reacted when the occupational health advisor had passed the information onto management "I felt like if I approached senior management it would have been…" And then shrugged.

106. We accept that there was general knowledge on the part of the workforce about the fact of the grievance but we have no basis for a conclusion that they had knowledge of the nature of it. The timescale is such that TS was suspended two days after the claimant's return to work on the day after the grievance outcome. The wording of the posts does support a conclusion that SL's comment was directed to the claimant and accused him of being two-faced and of lying, using foul language. A subsequent post by FM included the nasty and threatening comment "snitches get stitches". FM was interviewed by MH during the investigation (page 337)

107. The claimant put in an appeal against the grievance outcome having been granted an extension of the deadline to do so which was heard by GO on 27 June 2019 (p page 341).

108. The claimant's back pain caused him to visit his GP on 4 July 2019 and he was certified that he may be fit for work with amended duties, altered hours and workplace adaptations (page 451). The MED3 contains the following comment

> "Mr Stuart has been referred to the musculoskeletal team for MRI scan, but is highly likely to have lumbar disc prolapse causing his symptoms. His current work is exacerbated symptoms. I have advised him to take diazepam and Co-codamol when his symptoms flare, but that he is not allowed to drive within four hours of taking this medication. Please would you allow Mr Stuart to avoid heavy lifting or large objects and to work no more than 8 hours a day and to be allowed an hour's break in the middle of his shift."

109. The structure of the morning and afternoon runs should have enabled the drivers to take an hour's lunch break but it was not uncommon that traffic and unexpected delays meant that this could not be taken at a fixed time.

110. This note dated 4 July 2019 is the first of a series of medical notes up until 30 August 2019. The OH assessment April 2019 said that he was suffering from a condition "that is exacerbated from sitting for long periods of time. Discussed regular driving breaks, no more than an hour and ½ driving without a break to walk around and stretch."

111. The report from his GP dated 31 July 2019 stated that he was taking his medication at night and that the workplace adaptations, as set out in the last MED3 were that "the patient should avoid lifting heavy objects. He should avoid working shifts longer than eight hours/day and should be allowed one hour break in the middle of the shift. His back pain is likely to be exacerbated by lifting heavy objects."

112. As previously explained the claimant was strongly of the view that, for the benefit of his mental health, he needed to be at work. According to him, he had been allocated a van that would cause a problem because the seat was rocking when breaking and something was digging into his back so had visited the GP on 4 July after work. His complaint is that JK signed him off work on SSP after his morning run, we infer on the basis that the respondent said they were unable to accommodate the adjustments. The claimant alleged that he had obtained a new MED3 note without any adjustments but the revised note at page 452 dated 16 July 2019 still says that he may be fit for work with adjustments although it does not specify that he should work no more than eight hours a day with an hour's break, it still says he should avoid heavy lifting and long working hours.

113. In our view, based on what we have told been told about the role and what it entailed as a whole, we do not see that the claimant would have been fit to do the duties of driving job even with a significant change to the length of the day or the number of deliveries to comply with the adjustments. Not all of the tyres supplied by the respondent are for domestic motor cars. Even those were estimated by the claimant those to weigh about 10 Kg average weight and that was not dissimilar to the weight put to him by Mr MacFarlane. The driver's role includes unloading the load. The claimant argued that he could ask for assistance from the customers when delivering if he had help reloading at the depot because he was very keen to stay in work. He said that he had suggested other duties and on 17 July 2019 was back at work turning tyres. He had also suggested doing an e-learning course.

114. After he returned to work tyre-turning (presumably on the basis of the amended MED3 on page 452) the respondent received the GP's letter dated 31 July 2019. From the respondent's point of view, this letter reintroduces the specific conditions on the first MED3. The claimant argues that the respondent used the GP report of 31 July 2019 to sign him off. We think that it was not unreasonable of the respondent to react that way given the terms of the GP's report and their duty of care to the claimant. The MED3 dated 1 August 2019 restates the workplace adjustments which are recommended to stay in place for one month.

115. We take on board the claimant's argument that he could have continued with the driving with customer's assistance but, for the purposes of the claims before us the issue is not whether the claimant's need for workplace adjustments due to his back injury could have been managed some other way but whether it was victimisation to manage it in the way that the respondent did. The claimant does not rely within these proceedings on a physical impairment of back pain and there is no complaint of a breach of the duty to make reasonable adjustments based on the back injury.

116. We accept the respondent's evidence that they were relying on and following the medical advice and reasonably concluded that there were no duties available and no adjustments that could be made that would

enable them to comply with the terms of that advice. That was the whole reason why they told the claimant that he had to remain on sick leave until he was fit without adjustments.

117. The claimant's application for the assistant manager's position is at page 362 and is dated 17 July 2019. He was asked for a copy of his current CV which he provided the same day. This was to be passed over to DT who had not formally started at that point in time. It was known that he would start but he formally joined in September 2019 as senior operations manager.

118. At the time the claimant's CV was passed to DT the respondent had appointed a new operations manager as TS's successor but they had not yet started work so the process of recruiting the assistant operation manager was put on hold. until the new operations manager started. MH was acting up into TS' role but was described by DT as not being suitable to be operations manager for Aylesbury from. We were told that eventually the assistant manager role had been recruited to, despite what it says in DT's para 2, but DT was unable to assist with why the claimant had not been told when the assistant manager process had been reactivated because he, DT, left the incoming operations manager to deal with filling the vacancy. That individual has subsequently left the company.

119. The way this allegation was framed in the claimant's further particulars was that he had applied for the supervisor's role but on two occasions was not acknowledged, shortlisted or interviewed. Other than the correspondence referred to above, we have not heard evidence of dates or seen other documentary evidence of any other occasion when the claimant applied for a supervisory role. In oral evidence the claimant referred only to supervisor being appointed after the assistant manager post recruitment was put on hold and him not being informed when the process was reactivated. This is a different allegation and our finding on this is that the allegation on the face of the pleadings has not been made out. In any event, we accept that the person responsible for this was the incoming operations manger and there is no basis for a finding that this was victimisation because of the claimant's grievance.

120. In the meantime, the claimant had contacted ACAS and presented the claim form on 21 August 2019.

121. In his further particulars (page 62 at 66) the claimant complains that on 23 October 2019 he went to see JK to discuss some things and that while he was trying to explain them he was spoken over by JK, DT escorted them both into GO's office and the claimant was shut down in an intimidating manner when he tried to explain himself. Mr Kingman's account is in his paragraph 22 when he says that they have been discussing matters in the sales office when the claimant started to talk about personal matters and JK suggested that they go into the corridor. Privacy. He accepted that he had raised his voice but said he had done so in response to the claimant in order to gain control of the conversation. Both he and DT denied being threat towards the claimant.

122. Mr Thorpe's account is in his para 3 where he describes the claimant as talking over him and not listening to reason. His recollection was that the claimant said that DT should get out of his space and Mr Thorpe's himself had said something to the effect "I'm not in your space, you're in mine". He denied the claimant's accusation that he had threatened him with action by Deminos, the HR advisers.

123. JK's oral evidence was that claimant was seated and then DT moved toward him. Although he denied that DT had been threatening toward the claimant, his account of where people were as the incident played out was generally consistent with that the claimant and different to that of Mr Thorpe. We think it probable that Mr Thorpe did behave in a somewhat overbearing way. Our view is that the claimant was sensitised to this behaviour. We see nothing from which to infer that this was because of the claimant's grievance, however.

124. The claimant relies on a comment he says was made by DW, the then operations manager, on 4 November 2019 to the effect that the company wanted him out and were looking to find a reason to dismiss him or push him to the point where he resigned. We are not satisfied that the comment was made. On the basis of the evidence before us even if it were made it certainly did not represent the respondent's view. On balance the respondent were trying to manage the claimant correctly. They are a small to medium sized company with approximately 100 employees. Management of the claimant was not perfect but it seems to us that any failings were not intentional. Mr Kingman in particular came across as having a balanced approach and impressed us as a witness and as a manager. It came across very strongly that the respondent genuinely believed the claimant to be a good worker. In any event we are satisfied that any failings on the part of the respondent's managers were not because of the claimant's grievance.

125. Although the claimant's refers in his further particulars (page 66) to actions of MP on 13 January 2020 he accepted at the hearing that this is not relied on as an allegation within the claim that all as background.

126. In March 2020 Mr Thorpe told the claimant that his run was being moved to Potters Bar depot. The prospect of this move is referred to in the minutes of the facilitated meeting on 16 May 2019 (see page 248) so it is not the case that the claimant had short notice that there was to be a review of the drivers' runs. He said that there were rumours that the respondent wanted him out of the Aylesbury depot but we have seen nothing to substantiate that. We do not consider this to have been a disadvantage to the claimant as it was a long planned move because the Potters Bar depot was opening and it was nothing to do with the grievance. Although the claimant points to the coincidence of being told he was to move to Potters bar after the preliminary hearing in the present claim, that was, we find, no more than a coincidence.

127. The claimant complains that GR swore at him when he asked for assistance to help with an un-familiar daily run on 7 March 2020, shouted

at him and threatened to have him investigated for gross misconduct. If this happened as alleged by the claimant it was clearly inappropriate but it was not suggested to Mr Richardson that he had known about the grievance raised against TS the previous year or about the employment tribunal claim at the time of this incident. This seemed to be something that in reality was the source of a general complaint by the claimant and not something that the claimant argued had been done to him because he has asserted his rights under the Equality Act 2010.

128. The findings we make in relation to the claim for overtime are as follows. According to the schedule of loss at page 423 the claim is for an average of eight hours per week over time between September 2016 and December 2018 and then from January 2019 to the date of the claim 21 August 2019. The contract provides that in order to be paid, overtime must be authorised. The claimant alleges, in round terms, that a lunchbreak was deducted but that in reality he was unable to take it and therefore has calculated his claim on the basis that for every working day in that period he was paid an hour less than he should.

129. TS's evidence to the tribunal was, in essence that he would authorise over time after the event. When the timesheets came back to him at the end of the week if he was satisfied (by cross checking with the vehicle's tracking device) that the driver had been unable to take a break he would authorise the lunchbreak to be paid. It was common ground between the parties that if the driver was unable to take a lunchbreak they should be paid for it. An important question for us in deciding this claim is therefore whether we accept TS's evidence that in general he did retrospectively authorise over time in order to be fair to the drivers.

130. The claimant's detailed evidence covered from the January payslip (dated 27 January 2019) at page 396 up to page 429 which covers 2019 with the exception of the month of November. His calculation is also based on a start time of 5:45 AM which was earlier than the contracted time as it was convenient for the claimant. He accepted in evidence that choosing to take an earlier start time did not entitle him to be paid.

131. As we have set out above, the claimant criticised the respondent's failure to provide all tracking data as ordered in the preliminary hearing on 14 February 2020. The question for us is whether to infer from the claimant's position about the likely existence of other documentation that the picture presented by the documents in the bundle is inaccurate or whether to accept TS's explanation of how he sought to achieve fairness for the drivers.

132. The doubt that the claimant seeks to throw on the respondent's evidence about the absence of the tracking data is insufficient in our view to make their evidence about the hours he worked unreliable. There isn't any documentary evidence to support the claimant's oral testimony that he worked hours for which he was entitled to be paid in excess of those set out in the respondent records.

133. Where it is possible to read across from the pay date tracking date it appears to be consistent with TS's explanation of what he did. We are not prepared to infer from the absence of further data that information has been hidden such that the claimant has made out his case on this point. We accept GO's explanation that there has been a change in the tracking system which made additional data irrecoverable. We accept TS's evidence that he did, for each pay period, amend the hours to be paid where there was evidence which satisfied him that the driver had been unable to take a break.

Conclusions on the issues

Disability discrimination

134. For reasons we set out in paragraphs 47 to 73 above, we have concluded that the claimant was not disabled within the meaning of the Equality Act 2010. For that reason, his claims of direct disability discrimination and discrimination arising in consequence of disability fail and are dismissed. We do not need to go on to reach alternate conclusions on the issues set out in paragraphs 19.1 to 19.9 above.

Victimisation

135. The claimant relies on his grievance of 17 April 2019 and a conversation with Mr Hopper on 10 May 2019. The grievance (page 180 at 181) includes an allegation that the claimant has been discriminated against due to his mental health and we accept that this amounts to an allegation that the respondent has acted contrary to the Equality Act 2010. The grievance was a protected act.

136. The conversation the claimant refers to is when he told Mr Hopper about his mental health conditions, specifically that he told Mr Hopper that he had suicidal thoughts. There is nothing in the claimant's account of this conversation which suggests that he went as far as doing anything in connection with the Equality Act 2010 in the course of it, for example, by asserting that he had been discriminated against or mistreated because of his mental health or that he asserted that he was disabled and therefore protected under the Act. The evidence is that the claimant said that he had suicidal thoughts. This is not only the claimant's evidence but it is reflected in TS's statement (para.9) and the email he sent to management to explain his decision to stand the claimant down from the afternoon run (page 226).

137. This conversation with Mr Hopper does not, therefore, amount to a protected act within the meaning of s.27(1) of the EQA.

138. The alleged detriments which postdate the protected act are the following:

a. TS not shaking hands with the claimant on 3 June 2019 when this was proposed to "clear the air" between them.

b. TS not permitting the claimant to return to work on 10 May 2019 and place him on medical suspension?

c. The respondent failing to take action in about June 2019 on rumours that the claimant had got TS sacked or about intimidating Facebook posts by colleagues which were connected with those rumours;

d. The alleged failure to acknowledge the claimant's application for the post of supervisor or to shortlist or interview him in about July 2019?

e. The requirement that the claimant be fit without the need for any adjustments to his hours or role between 4 July 2019 and 30 September 2019?

f. The allegation that Mr Thorpe shut the claimant down and intimidated him on 23 October 2019;

g. The decision to move the claimant's base to the Potters' Bar depot in March 2020;

h. The allegation that Mr Richardson, swore and pushed the claimant on 7 March 2020;

139. Mr Stuart alleges that TS targeted him in terms of the van he was allocated and other matters. As we have said, we do not need to make detailed findings about those matters which occurred before the grievance in place. However, we are mindful about the comments by PC about the practices generally so, if we had to do so we are inclined to think that the claimant was not singled out by TS (as set out in para.82 above). Besides, the events which pre-date the grievance cannot have been because of it.

140. In respect of the complaints about TS's behaviour after the grievance, those alleged detriments which can logically be argued to have been acts of victimization, the focus is on TS's behaviour on 3 & 4 June 2019 before his own suspension on 5 June. This amounted to a refusal to shake hands and displaying negativity when urged to work with the claimant. We have considered what inferences to draw about when was in TS's mind when considering his behaviour towards the claimant on 3 June 2019.

141. There is opinion evidence from JK that TS took the claimant's grievance against him personally. TS may well have done, that is consistent with him being fed up with what he considered to be a "constant bombardment" of requests for help and accusations that he, TS, was not supporting the claimant. We accept TS was probably abrupt and rude. He certainly tried to distance himself from the claimant, which might have seemed like he was ignoring the latter.

142. On balance, we are satisfied that the overwhelming majority of factors which influenced TS to react and act towards the claimant as he did were factors other than that aspect of the grievance which complains that TS's enquiries about the claimant's mental health were discrimination. In his oral evidence he listed a number of demands made on him by the claimant. We do not judge whether those demands were reasonable or not but they appear to have been frequent, persistent and dating from well before the grievance. Some, such as the request for the referral to OH to be actioned were perfectly justified.

143. The respondent's evidence was that TS had other personal matters which were weighing on his mind at the time. He himself said that, in hindsight, he thought that he might have been signed off work with stress had he sought medical advice at that time and we accept that evidence. Only one aspect of the grievance concerns the allegation that when TS asked the claimant about his mental health on 30 January 2019 that was disability discrimination.

144. Taking all that into account, including that there does not appear to have been a notable change in behaviour by TS towards the claimant after the grievance, we are persuaded that the protected act was not any part of the reason why TS acted as he did. This is not any way to condone TS's behaviour in rejecting the attempts to rebuild the relationship with the claimant because, in doing so, he behaved as no reasonable manager ought.

145. In relation to TS's decision that the claimant should not carry out the afternoon run on 10 May 2019 and the subsequent decision by GO that the claimant should be suspended which was put into effect by a letter of JK we refer to our findings in paras.92 to 97 above. We are satisfied that TS's entire rationale was the protection of the claimant, the wider public and the claimant's co-workers because of what the claimant had reported to MH. Despite the poor drafting of the suspension letter, which should not have prevented the claimant from contacting fellow workers since it was a medical and not disciplinary suspension, we are also satisfied that GO and JK acted purely because of concerns of safety. The allegation that this, though detrimental, was an act of victimization is not made out.

146. The respondent argues that they should not be regarded as responsible for the actions of FM or SL when they made the Facebook posts on the basis that they were not acting in the course of their of their employment within the meaning of s.109(1) of the Equality Act 2010 at the time. Mr MacFarlane relied on the case of Forbes v LHR Airport Limited [2019] ICR 1558 EAT (see para.46 above).

147. So far as we can see from the evidence before us there was no connection between the Facebook posts and the employment of FM and SL. There is nothing to suggest that these were posts on a group site rather than individual posts. We do not have evidence about when the images were posted or whether the individuals were at work – the times are not on the screenshots. There is no suggestion that any equipment of the employer was used. In all the circumstances we do not think there is

sufficient evidence to show that FM and SL were acting in the course of their employment in the posts that they were making.

148. The other aspect that the claimant wanted us to look into was what the management did about it. Contrary to what he says is clear that they did investigate these posts. Page 337 shows an investigation meeting of FM although we have no evidence of any penalty that may have been given. The claimant volunteered in oral evidence that SL had been given a warning. Although the respondent did not volunteer evidence about any action taken and do not appear to have told the claimant what they did, it is a reasonable inference that the warning was connected with these posts. That certainly appears to be the claimant's understanding. We understand from GO para.9 that the manager who conducted the investigation with FM left the respondent's employment shortly afterwards for an unrelated matter.

149. Although the respondent did not lead oral evidence about what they did they clearly did not ignore it and we reject the claimant's accusation that they did. There seems to have been a state of flux in the middle management at the respondent at the relevant time and we think it likely that any lack of formal communication to the claimant about the actions results from that. He had not made a direct complaint about. On balance we find that the claimant's allegation that the respondent failed to take action about the Facebook posts is not made out.

150. Our findings about the claimant's application for the supervisor's position is set out in paras.117 to 119 above. For reasons we set out in those paragraphs, we find that, initially the application was put on hold awaiting the arrival of the permanent replacement for TS and that, although the claimant was not informed when the selection process was reactivated by that new manager, there is no basis to infer that his reasons for not doing so had anything to do with the claimant's grievance, particularly given the large number of personnel changes at around that time.

151. The chronology of the claimant's absence from work and the details of the MED3 certificates available to the respondent in the period 4 July 2019 to 30 September 2019 are set out in paras.112 to 116. For reasons which we set out in detail in those paragraphs, we accept the respondent's evidence that they were relying on and following the medical advice and reasonably concluded that there were no duties available and no adjustments that could be made that would enable them to comply with the terms of that advice. That was the whole reason why they told the claimant that he had to remain on sick leave until he was fit without adjustments.

152. Consequently, although the claimant has shown that he was subjected to this detriment, we have made a positive finding that the reason for the respondents action had nothing to do with the protected act.

153. We have accepted that DT probably did behave in a somewhat overbearing way toward the claimant on 23 October 2019 which the claimant regarded as being threatening. Our view is that the claimant

was sensitized towards DT's behaviour. Taking the incident as a whole, however, although the respondent managers probably did not behave entirely respectfully, we see nothing from which to infer that their behaviour was because of the claimant's grievance.

154. The claimant was told that his run was being moved to the Potters Bar depot in about March 2020. However, as we set out in para.126 above, this was a move which had been expected since the previous May when the claimant was told that the opening of the Potters Bar depot meant that there was to be a review of the drivers' runs. The claimant was not, in the event, moved. Merely being told of that was not, we consider, something that the reasonable employee could regard themselves as disadvantaged by. It was not a detriment. In any event, there was no connection with the claimant's grievance.

155. The final alleged act of victimization is the allegation that GR swore and pushed the claimant on 7 March 2020. As we say at para.127, when GR was asked in evidence about this incident, it was not suggested that he had done because of the claimant's grievance against TS the previous April. In reality, the claimant's complaint against GR was a general complaint about poor conduct which is not actionable under the EQA or something which the Tribunal has jurisdiction to consider. We do not see evidence from which it might be inferred that GR's handling of the claimant on 7 March 2020 was because of the protected act.

156. For all those reasons, the victimization claim is not well founded and is dismissed.

Unauthorised deduction from wages

157. The unauthorized deduction from wages claim has two elements. First, the claimant claims a shortfall in pay caused by being on SSP until 30 September 2019. The absence until 30 September 2019 was covered by the MED3 at page 454 which said that he may be fit for work with altered hours amended duties and workplace adaptations. During that period he was unfit for his full role and the respondent did not have work to allocate to him which complied with the adjustments that the GP said were necessary to avoid exacerbating his back pain.

158. He was therefore not fit for the work which was available and that is why he was paid SSP rather than full pay. We accept JK's evidence that the respondent allocated the claimant a driving pattern in line with the limitations on his driving when the work became available but that the fixed run he had been allocated in mid-2019 did not accommodate the GP's recommendations (para 17 JK statement).

159. In those circumstances, the claimant was paid all that due to him in this period under his contract.

160. The second part of the unauthorized deduction from wages claim concerns the allegation that the claimant was entitled to be paid overtime for working through what should have been his lunch break but which he

was unable to take. Our findings in relation to this point are set out in paras. 128 to 133. For reasons which we set out there, we reject the allegation that the respondent, in the period covered by the claim for unauthorized deduction from wages (up to the presentation of the claim), had paid to the claimant less than was payable under his contract in any pay period.

161. The unauthorized deduction from wages claim is not well founded and is dismissed.

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Employment Judge George

Date: 30 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3 October 2022

FOR EMPLOYMENT TRIBUNALS