RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mr Y Mahmood
Respondent:	Rotherham Metropolitan Borough Council
Heard at:	Sheffield Employment Tribunal via CVP
Before:	Employment Judge Deeley, Mrs Anderson-Coe and Mr Fields
On:	14 – 20 June, 21 June (in private) and 22 June 2022
Representation	
Claimant:	Mr M Mensah (Counsel)
Respondent:	Mr K Ali (Counsel)

RESERVED JUDGMENT AND REASONS

1. The claimant's complaints relating to the meeting on 16 December 2019 and the letter of 16 December 2019 (recording the outcome of his flexible working request appeal) succeed in respect of his claims of:

   1.1 Discrimination arising from disability;

   1.2 Harassment related to disability; and

   1.3 Harassment by association (in relation to his son's disability, but not in relation to the disabilities of his wife and mother).

   The allegations relating to these successful complaints are set out at:

   (a) Allegation 1 (the factual complaints at paragraphs 1(iii), 1(iv), 1(v) and 1(vi), 5(iv), 5(v), 5(vi) and 5(vii)); and
   (b) Allegation 7 (in its entirety);

of the parties' Amended List of Issues (attached at the Annex to this document).

2. The claimant's complaints:

   2.1 set out at Allegation 4 (flexitime deficit), Allegation 5 (provision of flexible working appeal notes) and Allegation 10 (comments during the 'at risk' meeting on 24 January 2020) of the Amended List of Issues which consisted of: disability-related direct discrimination (relating to the claimant's own disability and those of his son, wife and mother), indirect discrimination, failure to make reasonable adjustments and harassment (relating to the claimant's own disability and those of his son, wife and mother);

   2.2 that his dismissal was an act of disability-related harassment or harassment by association; and

   2.3 of a failure to provide a written statement of employment particulars under s38 of the Employment Act 2002;

   are dismissed upon withdrawal by the claimant with the consent of both parties.

3. The claimant's remaining complaints under the Equality Act 2010 fail and are dismissed, including:

   3.1 the remainder of Allegation 1 (i.e. paragraphs 1(i), 1(ii), 1(iii), 5(i), 5(ii) and 5(iii)); and

   3.2 Allegations 2, 3, 6, 8 and 9 (in their entirety).

4. The claimant's complaint of unfair dismissal under s98 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

1. This claim was case managed at two previous Preliminary Hearings by:

   1.1 Employment Judge Shore - 28 September 2020; and

   1.2 Employment Judge Buckley - 24 March 2021.

2. We considered the following evidence during the hearing:

   2.1 a joint file of documents and the additional documents referred to below;

   2.2 witness statements and oral evidence from:

      2.2.1 the claimant; and

      2.2.2 the respondents' witnesses:

Name	Role at the relevant time
1) Mr Shokat Lal	Assistant Chief Executive
2) Ms Tracy Osman	Head of Service and claimant's line manager
3) Mr Paul Rollinson	HR Consultant
4) Mr Lee Mann	Assistant Director of HR and Organisational Development
5) Mrs Tracey Priestley	HR (Wellbeing Consultant)

3. We also considered the helpful written and oral submissions from both representatives.

Adjustments

4. We asked the parties if there were any adjustments that they wished us to consider. The claimant asked for breaks every 80 minutes. We noted that we would be taking breaks every hour in any event, because this is a video hearing. We reminded the parties that both they and their witnesses could request additional breaks at any time.

CLAIMS AND ISSUES

5. The parties provided a draft list of issues to the Tribunal in July 2021. The list was discussed with the parties at the start of the hearing. The claimant provided an updated list of issues (with the respondent's agreement) which is set out in the Annex to this document. The complaints that have been crossed through are those which the claimant withdrew during the course of this hearing.

6. The claimant's representative stated after the Tribunal's initial discussion with the parties that the claimant wished to withdraw his complaints of:

    6.1 Allegations 4 (flexitime deficit) and Allegation 5 (provision of flexible working appeal notes) of the parties' List of Issues, both of which related to multiple heads of discrimination. Allegation 4 was the claimant's only complaint of indirect disability discrimination, which means that the claimant is no longer pursuing a complaint of indirect discrimination;

    6.2 Failure to provide a written statement of employment particulars.

    These complaints were dismissed on withdrawal with the consent of both parties.

7. The respondent disclosed two further documents and an email at the Tribunal's request during the hearing. The claimant did not object to the inclusion of those documents in the hearing file.

8. The claimant later withdrew his complaint that his dismissal was an act of disability-related harassment or harassment by association. This complaint was also dismissed on withdrawal with the consent of both parties.

RELEVANT LAW

9. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' submissions.

TIME LIMITS

10. The provisions on time limits under the EQA are set out at s123 EQA:

123 Time limits

(1)… proceedings on a complaint within section 120 may not be brought after the end of—

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

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

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

11. The Court of Appeal in *Robertson v Bexley Community Centre* [2003] IRLR 434 stated that it is for the claimant seeking an extension of time to persuade the Tribunal that this should be granted.

12. The Court of Appeal in *Adedeji v University College Hospital Birmingham NHS Trust* [2021] EWCA Civ23 has recently set out the approach that the Employment Tribunal should take in relation to the just and equitable test. The Court of Appeal emphasised that there is no need to go through every factor set out in the s33 Limitation Act 1980 'checklist' recommended in *British Coal Corporation v Keeble* [1997] IRLR 336. Underhill LJ stated at paragraph 38 of his judgment:

> *"The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including……the length of, and the reasons for, the delay."*

13. In addition, the Tribunal must consider the potential prejudice to the parties of any decision on time limits, including the merits of the claim (*Donald v AVC Media*

Enterprises Ltd EAT/00016/14). We also note that in the recent case of *Secretary of State for Justice v Johnson* [2022] EAT1, the EAT applied *Adedeji* and noted that the Employment Tribunal should consider the effect that extending the time limit would have on the respondent's ability to defend the claim where events took place some time ago.

14. Conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (*Hendricks v Metropolitan Police Commissioner* [2003] IRLR 96, CA at paragraphs 51-52).

15. There are additional provisions relating to time limits set out in Schedule 3 to the EQA which relate to omissions in reasonable adjustment claims. The Court of Appeal in *Matuszowicz v Kingston upon Hull City Council* [2009] EWCA Civ 22 considered the interpretation of these provisions in cases relating to a 'non-deliberate' failure to make reasonable adjustments. That case involved a disabled teacher who had difficulties working in the prison sector due to the weight of the prison doors. Mr Matuszowicz claimed that his former employer had failed to make an adjustment of transferring him to suitable alternative work, prior to his transfer to another employer under TUPE on 1 August 2006. The Council argued that the Mr Matuszowicz's claim was submitted out of time on the basis that by August 2005, it had become clear that working in the prison sector was unsuitable because of his disability. The Court of Appeal held that Mr Matuszowicz's claim should be characterised as a continuing omission, rather than a continuing act or a one-off omission (as held by the Tribunal and by the EAT respectively). The Court concluded that the date from which time should be taken to run was therefore 1 August 2006.

DIRECT DISCRIMINATION (S13 EQA)

16. Section 13 of the Equality Act 2010 provides that:

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

17. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

18. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

18.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

18.2 if so, was such less favourable treatment because of the claimant's protected characteristic?

19. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

20. In relation to less favourable treatment, the Tribunal notes that:

20.1 the test for direct discrimination requires an individual to show more than simply different treatment (*Chief Constable of West Yorkshire Policy v Khan* 2001 ECR 1065 HL);

20.2 an employee does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

20.3 the motive and/or beliefs of the parties are relevant to the following extent:

20.3.1 the fact that a claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, *Shamoon*);

20.3.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

20.3.3 for direct discrimination to be established, the claimant's protected characteristic must have had a 'significant influence' on the conduct of which he complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

21. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA).

Comparators

22. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality Act 2010 and see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

23. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

24. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (*Anya v University of Oxford* [2001] IRLR 377).

DISCRIMINATION ARISING FROM DISABILITY (S15 EQA)

25. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

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.

Something arising from disability

26. The EAT in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider "two distinct causative issues" when considering whether the 'something' alleged arose in consequence of B's disability. The EAT set out the issues as follows:

> *"(i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?*
>
> *The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

Proportionate means of achieving a legitimate aim

27. The Tribunal must apply an objective test when considering whether there was a proportionate means of achieving a legitimate aim, having regard to the respondent's

workplace practices and organisation needs (see, for example, the EAT's decision in *City of York Council v Grosset* (UKEAT/0015/16), as approved by the Court of Appeal ([2018] EWCA Civ 1105).

28. We note that the Tribunal must make its own assessment as to whether 'proportionate means' have been used to achieve a legitimate aim.

FAILURE TO MAKE REASONABLE ADJUSTMENTS (S20 AND 21 EQA)

29. The legislation relating to a claim for failure to make reasonable adjustments is set out at sections 20 and 21 of the EQA:

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

…

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…

30. We also note that 'substantial' in the context of 'substantial disadvantage' is defined at s212(1) of the EQA as: *"more than minor or trivial"*.

31. The Tribunal must assess whether the Respondent applied a provision, criterion or practice which placed the Claimant at a substantial disadvantage in comparison to those employees not sharing his disability. If so, the duty to make reasonable adjustments is engaged.

32. The Tribunal must then consider whether a reasonable adjustment might have eliminated or reduced that disadvantage.

33. We note that the duty to consider making reasonable adjustments falls on the employer. There is no onus on a disabled person to suggest adjustments. However, the courts have held that a failure to 'consult' about reasonable adjustments is not in itself a failure to make reasonable adjustments. In *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 644 EAT, Elias J held at paragraph 71: *"[t]he only question is, objectively, whether the employer has complied with his obligations or not"*. The EAT went on to state: *"whilst, as we have emphasised, it will always be good practice for the employer to consult …there is no separate and distinct duty of this kind"*.

34. The burden of proof is on the claimant to establish the existence of the provision, criterion or practice and to show that it placed them at a substantial disadvantage (*Project Management Institute v Latif* [2007] IRLR 579). The claimant must also identify the potential reasonable adjustments sufficiently to enable them to be considered as part of the evidence during the hearing. These are not limited to any adjustments that the claimant brought to the respondent's attention at the relevant time. The respondent must then show, on the balance of probabilities, that the adjustment could not reasonably have been achieved. It is not necessary, at the time, for the claimant to have brought the proposed adjustment to the respondent's attention.

35. The reasonableness of the steps to be taken to avoid the disadvantage is to be determined on an objective basis (*Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160). In order for an adjustment to be "reasonable", it does not have to be shown that the success of the proposed step was guaranteed or certain. It is sufficient that there was a chance that it would be effective. Guidance as to the considerations that are relevant in assessing reasonableness is provided in paragraph 6.28 of the Employment Statutory Code of Practice.

36. The public policy behind the reasonable adjustments legislation is to enable employees to remain in employment, or to have access to employment. The Tribunal has to carry out an objective assessment to consider whether any proposed adjustment would avoid the 'substantial disadvantage' to the employee caused by the PCP (*Royal Bank of Scotland v Ashton* [2011] ICR 632).

37. In *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, the EAT held that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one.

38. In addition, the Tribunal needs to consider the implications of any proposed adjustments on a respondent's wider operation (*Lincolnshire Police v Weaver* [2008] AER 291, decided under the former Disability Discrimination Act 1995).

HARASSMENT

39. The provisions relating to harassment are set out at s26 of the EQA:

26 Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are – …disability;

…

40. There are three elements to the definition of harassment:

40.1 unwanted conduct;

40.2 the specified purpose or effect (as set out in s26 EQA); and

40.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, as updated by reference to the EQA provisions in *Reverend Canon Pemberton v Right Reverend Inwood* [2018] EWCA Civ 564.

41. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).

42. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of a protected characteristic (such as disability), it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of that characteristic. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of that characteristic. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

43. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

44. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important

not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

45. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

46. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.…An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

DISCRIMINATION BY ASSOCIATION - DIRECT DISCRIMINATION AND HARASSMENT

47. The definitions of direct discrimination and harassment do not refer to the protected characteristic of any particular person. A claimant can therefore bring a complaint of direct discrimination and harassment based on the protected characteristics of others – i.e. discrimination by association or associative discrimination. However, the claimant will still need to prove that the other individual's or group's protected characteristic was the reason for the treatment (*Lee v Ashers Baking Company Ltd. and ors* 2018 IRLR 1116 SC).

Burden of proof

48. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof

…

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

…

(6) A reference to the court includes a reference to -

(a) an employment tribunal;

…

49. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

UNFAIR DISMISSAL

Unfair dismissal

50. The right not to be unfairly dismissed is set out in s94 of the Employment Rights Act 1996 ("**ERA**"). The Tribunal must consider whether the respondent is able to establish a fair reason for that dismissal (as defined by s98 of the ERA with emphasis in bold).

Section 94

(1) *An employee has the right not to be unfairly dismissed by his employer…*

Section 98

(1) In determining…whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is…a reason falling within subsection (2) ***or some other substantial reason of a kind such to justify the dismissal of an employee holding the position which the employee held.***

(2) ***A reason falls within this subsection if it –***

…(c) is that the employee was redundant…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case…"

51. The burden of proof is on the respondent to show that they had a potentially fair reason for dismissing the claimant at the time of his dismissal.

52. A respondent can seek to change the label used to describe the facts or beliefs which caused him to dismiss the employee provided that the relevant facts have been adduced (and the employer is not seeking to change them), the matter has been properly investigated and no injustice has been done to the employee. For example, in *Hannan v TNT-IPEC (UK) Ltd [1986] IRLR 165, EAT* (dismissal defended by employer on ground of redundancy held to be fair on the ground of SOSR through business reorganisation, which had not been specifically pleaded), applied in *Burkett v Pendletons (Sweets) Ltd [1992] ICR 407, EAT*.

53. The dismissal of an employee because of a restructure of the business in the interests of efficiency may amount to a dismissal by reason of redundancy. However, whether the statutory definition is or is not satisfied will depend on the facts of the case (e.g. see *Johnson v Nottinghamshire Combined Police Authority [1974] IRLR 20*, *[1974] ICR 170, CA*; *Lesney Products & Co Ltd v Nolan [1977] IRLR 77*, *[1977] ICR 235, CA*; *Dal v Orr [1980] IRLR 413, EAT*; *Murphy v Epsom College [1984] IRLR 271*, *[1985] ICR 80,* CA).

Redundancy

54. Section 98 identifies redundancy as a potentially fair reason for dismissal. Redundancy is defined by s139 of the ERA as follows:

Section 139

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

…(b) the fact that the requirements of that business –

(i) For employees to carry out work of a particular kind…

Have ceased or diminished or are expected to cease or diminish…"

55. If a redundancy situation exists, then the Tribunal must consider the fairness of the redundancy process followed. We note that the ACAS Code on disciplinary and grievance procedures explicitly states that it does not apply to redundancy situations.

56. In *Williams v Compair Maxam Ltd* [1982] IRLR 83, the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). In summary, employers are obliged to consider taking steps to consult with employees regarding their proposals and to mitigate the hardship caused by redundancies including to:

56.1 give as much warning as possible of impending redundancies as possible, in order to enable the employees who may be affected to consider possible alternative solutions and, if necessary, find alternative employment within the business or elsewhere;

56.2 seek to agree objective selection criteria to be applied to the pool of employees at risk of redundancy;

56.3 seek to ensure that the selection is made fairly in accordance with these criteria and to consider any representations the regarding such selection

(having first provided employees with sufficient information about the selection process, for example details of their scores against the criteria);

56.4 consider suitable alternative employment, as an alternative to redundancy dismissals; and

56.5 offer a right of appeal against dismissal.

57. The Tribunal is required to apply a band of reasonable responses test as laid down in *Iceland Frozen Foods Limited v Jones* [1983] ICR 17. It is not for the Tribunal to decide whether the Tribunal would have dismissed the employee, as set out in the *Iceland* case at paragraph 24:

"(i) the starting point should always be the words of Section 98 for themselves;

(ii) in applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(iii) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right cause to adopt, for that of the employer

(iv) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(v) the function of the tribunal as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if a dismissal falls outside the band, it is unfair."

58. We also note that s98(4) requires the Tribunal to take account of the circumstances, including the size and administrative resources of the employer's undertaking, in determining whether the employer acted reasonably or otherwise for the purposes of the unfair dismissal legislation.

*Some other substantial reason ("**SOSR**")*

59. SOSR is a residual category of dismissals which are potentially fair, even though they do not fall within the specific categories set out in s98(2) ERA. In *Harper v National Coal Board* [1980] IRLR 260, the EAT held that if the employer has a fair reason which the employer genuinely believes to be substantial, the case will fall within this category.

60. An employer does not have to show that a reorganisation or rearrangement of working patterns was essential to establish SOSR (e.g. *Hollister v National Farmers' Union 1979 ICR 542, CA*, *Scott and Co v Richardson EAT 0074/04*). Employers must submit evidence to show what the business reasons were and that they were substantial (see, for example, *Banerjee v City and East London Area Health* Authority 1979 IRLR 147 EAT). However, the Tribunal should not make its own assessment of the advantages of the employer's business decision to reorganise. For example, in *Tasneem v Dudley Group of Hospitals NHS Trust* EAT 0232/10, the Trust decided to appoint two new permanent consultants and reduce the number of locum

consultants. The claimant in that case was working as a locum but applied unsuccessfully for a permanent role and was subsequently dismissed. The EAT upheld the Tribunal's decision that he was dismissed for SOSR because the Trust was motivated by legitimate concerns to improve the quality of its service.

61. If the Tribunal finds that the respondent's restructure amounted to SOSR, the respondent will still need to follow a fair process in dismissing the employee. Otherwise, the dismissal will be unfair.

FINDINGS OF FACT

Context

62. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

63. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

> *"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

64. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

65. The claimant was employed by the Council from 18 September 2017 to 21 May 2020 in the role of Programme Lead, as part of the respondent's Change and Innovation team.

66. The Council's staff during the period relevant to the claimant's claim included:

Name	Role at the relevant time
1) Mr Shokat Lal	Assistant Chief Executive and claimant's line manager until August 2018
2) Ms Tracy Osman	Head of Service and claimant's line manager from August 2018

3) Mr Paul Rollinson	HR Consultant
4) Mr Lee Mann	Assistant Director HR and Organisational Development
5) Mrs Tracey Priestley	HR (Wellbeing Consultant)
6) Ms Julie Green	Programme Lead
7) Ms Rebecca Boyle	HR
8) Mr X	Improvement Practitioner (Apprentice), reporting to the claimant

67. The purpose of the Change and Innovation team was to deliver projects to deliver the respondent's transformation and change agenda, which aimed to make significant savings in the respondent's spending whilst improving service delivery. Mr Lal decided on the team's structure and was the line manager for the Programme Lead roles until Ms Osman was appointed as Head of Service in August 2018. The team was originally funded for a three year period.

68. The team sat within the respondent's Corporate Centre (i.e. the Assistant Chief Executive's directorate), along with HR, Policy Development & Service Improvement, Neighbourhoods and Risk Management. The respondent's other directorates at that time included:

    68.1 Strategic Resources (Finance, Revenue & Benefits);

    68.2 Housing;

    68.3 Regeneration & Environment (including Transport, Waste and Planning & Development);

    68.4 Adult Services (i.e. Adult Social Care); and

    68.5 Children's Services.

69. The claimant and Mr Lal had a longstanding relationship which pre-dated their employment with the respondent. Details of their friendship included:

    69.1 they had known each other for around 13 years and both lived near to each other's homes in Derby;

    69.2 they worked together on a voluntary basis on a community project before working together at Coventry Council;

    69.3 they worked together at Coventry Council, during which time they frequently car shared and Mr Lal had approved a flexible working request for the claimant related to his disability;

    69.4 they met regularly with former colleagues and had also had dinner at each other house's and met each other's families.

70. When the claimant left Coventry Council he applied for other roles. He asked Mr Lal for help in looking for other roles. Mr Lal encouraged the claimant to apply for the

role of Programme Lead with the respondent and was part of the interview panel that appointed the claimant to that role.

71. There were two Programme Lead roles in the Change and Innovation team during the period relevant to this claim, i.e. the claimant and Ms Green. The remainder of the team consisted of more junior roles including Business Improvement Officers and Improvement Practitioners.

72. We note that there were some difficulties in the relationships between the claimant and his colleagues in the Change and Innovation team prior to Ms Osman's appointment. We note that one colleague raised a grievance (which was not upheld) against the claimant and that colleagues subsequently left the respondent's employment. Three other colleagues raised separate concerns about the claimant's communications with them. Mr Lal dealt with these concerns on an informal basis.

73. Mr Lal informed Ms Osman of the problems within the team when she took over line management of the team in August 2018. Ms Osman tried to improve the relationships within the team and noted that by Christmas 2018 she managed to arrange a team night out.

Claimant's disability and PDRs

74. The claimant disclosed that he was disabled on his application form to the respondent. The claimant described his disability as follows in his grievance investigation meeting:

"My left leg is about 4 inches shorter than the right leg. I have no ankle or ankle joint. Left foot half the size of right foot. No calf muscle."

75. Mr Lal was aware of the claimant's disability because of their friendship outside of work and their previous working relationship at Coventry Council. However, Ms Osman was not made aware of the details of the claimant's disability by Mr Lal or anyone else when she joined the respondent in August 2018.

76. The respondent carried out bi-annual Performance and Development Reviews ("**PDRs**") with its staff. The standard review form included questions which stated:

"Have health, safety and welfare issues been discussed, including a display screen assessment (DSE)?"

"Have you discussed the employee's health and wellbeing and the support available within the Council?"

"Is an individual stress risk assessment needed?"

77. Ms Osman carried out a PDR with the claimant on 23 September 2018, shortly after she joined the respondent. She noted in response to those questions: *"Not discussed – Yassir please advise"*. She also noted in response to the first question *"have you got a DSE form?"*.

78. Ms Osman carried out a further PDR with the claimant on 21 May 2019. She noted: *"We have discussed how you sit at your desk 😊 – please advise have you got a DSE form?"* because she was concerned that he was sitting with one leg across another and slouching at his desk.

79. Ms Osman noted that the respondent had a hot-desking policy, but that if anyone required a particular desk set up then this could be provided as an exemption to the policy. We accept Ms Osman's evidence that the claimant stated he was comfortable sitting like that and did not raise any particular concerns about his work station set up.

Early August 2019 discussions regarding claimant's disability

80. It is not disputed that the claimant filled in an employee feedback survey in the Summer of 2019. Ms Osman wanted to discuss the feedback from that survey with the claimant and with Ms Green, both of whom had line management responsibility for team members.

81. Ms Osman met with the claimant in early August 2019 in a meeting pod at the respondent's office. Neither the claimant nor Ms Osman was able to provide the date of this meeting, although we note it must have taken place before Ms Osman emailed the claimant on 8 August 2019 regarding their discussions.

82. Ms Osman mentioned the employee feedback and survey and noted that one employee had stated that they were disabled. The claimant said *"that's me"* and proceeded to tell Ms Osman in detail about his disability. The claimant summarised the information that he provided to Ms Osman at paragraph 46 of his statement as set out below:

    "• I had been born in Pakistan;

    • When I was born, the doctors noticed that both of my legs showed some minor signs of club foot;

    • My parents took me to a hospital in Islamabad for treatment;

    • My parents could only afford the cost of surgery on one leg, so doctors only operated on my left leg;

    • The doctors in Islamabad removed my left ankle as well as the calf muscle in my left leg. However, there was no need for them to carry out such a procedure. The doctors were therefore negligent;

    • My right leg was simply put in a plaster cast;

    • I subsequently came to England, where I had a number of further surgeries on my left leg (i.e. to repair insofar as possible the damage that was done during my operation in Pakistan);

    • My right leg is now fine, but my left leg has significant problems;

    • I suffer a lot of pain in my left leg and I frequently get pins and needles;

    • The issues with my left leg affect the right side of my back."

83. The claimant also stated that he took Voltarol (an anti-inflammatory) medication to treat his leg and back pain. He states that he took this medication out of his bag and showed it to Ms Osman.

84. Ms Osman states that during that meeting, the claimant was sat with one leg across the other. She states that his trouser leg was already slightly raised because of the

way in which he was sat. She stated that he lifted his trouser leg slightly to demonstrate that his left leg calf muscle had some weakness.

85. The claimant states he did not show Ms Osman his leg. He stated during his oral evidence:

"it's nothing to be proud of…it's not a beautiful sight to show – it's not a trophy that I'm carrying."

86. We have concluded that:

86.1 the claimant was sat with one leg across the other during the meeting, because this was the manner in which he normally sat at his desk whilst he was working;

86.2 the claimant's trouser leg was slightly raised because of the way he was sat;

86.3 the claimant and Ms Osman had a detailed discussion regarding the claimant's difficulties with his leg and the medication that he was taking;

86.4 the claimant did lift his trouser leg slightly to show her his calf muscle.

87. The claimant and Ms Osman agreed that the claimant did not demonstrate the difficulties with his foot to Ms Osman at their August 2019 meeting, although the claimant did say that his left ankle had been removed.

88. The claimant and Ms Osman had previously had a brief discussion about the claimant's footwear. The claimant had commented that he had bought a new pair of boots that he was intending to save, but had had to start wearing them because of the damage his gait caused to his existing boots.

89. Ms Osman noted that the claimant stated that he wanted to make a flexible working request during their discussions in August and September 2019. Ms Osman told him on both occasions that he should put a request in writing to the respondent, as per the respondent's flexible working policy. Ms Osman noted in her email to the claimant of 8 August 2019:

"Potential need for more flexible working – you referenced potential to want compressed hours – please follow up with me once you know what you might need".

90. The claimant did not ask to be referred to occupational health at the meeting in August 2019. Ms Osman did not discuss referring the claimant to occupational health at the meeting in August 2019. Ms Osman's oral evidence on this point was that:

"*I didn't think I had to or needed to – at that point Yassir was not saying that he had any difficulties, he was managing through his own efforts – the only thing thought appropriate to offer was workplace assessment because of his desk".*

91. The claimant did not ask for an occupational health referral in his meetings with Ms Osman in September and early October 2019. Ms Osman did not raise the possibility of an occupational health referral with him during this period. We note that:

91.1 there was no process in place for an individual to self-refer to occupational health without the involvement of their manager. However, the claimant was aware of the process for requesting an occupational health referral

because he had recently made a referral for Mr X, whom he line managed in the Summer of 2019; and

91.2 the claimant believed that he had Ms Osman had a reasonable working relationship during this period. For example, he stated during investigation into his grievance after his employment ended that other team members used 'micro aggressions' towards him (e.g. excluding him from meetings, not acknowledging him when he said good morning" but that:

"Tracy Osman didn't start out like that but in October 2019 onwards she became like that."; and

91.3 the claimant could have asked HR about an occupational health referral if Ms Osman had failed to deal with his request during this period.

92. The claimant has named Mr X as a comparator to his discrimination complaints regarding the timing of his occupational health referral. We accept Ms Osman's oral evidence that Mr X had a significant episode affecting his mental health that led to him being placed on sick leave. She stated that the respondent was informed that Mr X had threatened to take his own life and that he had been taken into police custody for his own protection. Mr X was referred to occupational health as a matter of urgency due to the circumstances.

Claimant's flexible request form - 24 October 2019

93. The claimant emailed Ms Osman on 24 October 2019, attaching his flexible working request form and stating:

"As per our discussion at my last 1-2-1 meeting please find attached a completed flexible working request form".

94. The claimant stated that he would like the change in working pattern to commence from November 2019 and provided details regarding his request:

"I have a lifelong disability which affects driving and also being seated in confined spaces for a long period of time.

This disability severely limits me in using my left leg and foot. This condition has been exacerbated by the long drive of 92 miles per day in to work. I declared this disability on commencing my employment at RMBC; I have also informed my line manager through a range of informal conversations and also formal 1-2-1's.

In the past year I have received several sessions of hydrotherapy from my local hospital to help with strengthening my left leg. I am advised to remaining physically active by my physiotherapist and consequently I attend physical activity sessions in my own time. To manage my condition during work time I try and ensure that I don't remain seated in my desk during work time for too long.

In addition I am a carer to a severely disabled child (8 years old) with a neurological disorder that limits his cognitive and physical abilities. I share the caring responsibilities for my son with my wife; over the past 12 months my wife has been diagnosed with Carpel Tunnel Syndrome directly resulting from manual handling of my son and is due to undergo surgery to treat this condition. My wife is on an urgent waiting list and could be invited for the surgery anytime from November 2019; the

doctors have advised that she will require approximately 3 months recovery time. Consequently, I will be providing additional caring duties for my son whilst my wife is recovering from the surgery.

In addition I have an elderly mother who places additional personal pressures on me both physically and emotionally. I support my mother with hospital visits, medications and doing her weekly shopping.

In line with the Council's Flexible Working policy and also in line with the Council's duty under the Equality Act 2010 to make reasonable adjustments I am requesting the Council to consider my flexible working request to work a 9 day fortnight as a permanent arrangement.

In addition I am requesting that the Council allow regular home working until my wife is fully recovered from her surgery."

95. Ms Osman arranged a meeting with the claimant and Mr Rollinson to discuss the claimant's flexible working request on 4 November 2019. No notes were taken of that meeting by any of the participants.

96. Prior to the meeting, Ms Osman made a number of electronic notes in the form of comments on a word version of the claimant's flexible request form including:

    96.1 *"YM aware of the drive and his disability before accepting the role"*;

    96.2 *"I was aware of the weakness in leg and that YM was getting some physio but also attends Gym"*;

    96.3 *"I have myself commented more than once about how YM sits at his desk – crosses his legs and said this is not ideal for H&S – this was reference don his PDR May 19 I asked about his DSE assessment (also asked in his Sept 18 PDR)"*;

    96.4 In relation to the claimant's request for compressed hours *"I am not sure how this is a reasonable adjustment in relation to his disability – he would make one less journey a fortnight"*;

    96.5 In relation to his request for regular home working during his wife's surgical recovery period *"I am not comfortable with this request. I have limited the team's homeworking to specific circumstances and have advised consistently that you can't work at home to provide childcare. If this is a daily requirement whilst his wife recovers does he mean every day WFH? Current role involves managing a live and dynamic project with meetings taking place daily – how will this be managed. Plus sharing management cover currently"*

    96.6 *"I have serious concerns about YM ability to work these longer days – reviewed working pattern over last 8 months and he has only worked 23 days over 8:12 hours in that period"*

    96.7 *"YM first raised this subject formally back in Aug at his 1:1 – I advised him to put it in writing – he has left it till 24/10 to submit"*

97. We note that the claimant's flexible working request was made prior to the Covid-19 pandemic. It was not disputed that staff in the Change and Innovation team were expected to work from the office and that any days working from home had to be agreed in advance with Ms Osman.

98. The claimant and Ms Osman both gave evidence about the state of the respondent's information technology software and equipment at that time. The claimant used a laptop and recalled that the respondent had installed Skype software by November or December 2019. However, we accept Ms Osman's evidence that the respondent was in fact in the midst of rolling out a programme of Skype in the winter of 2020 because the Skype software would not work without an upgrade to the Outlook software. We also accept Ms Osman's evidence that staff were trained on using Skype and given headsets in early March (including herself despite her impending retirement), in preparation for the potential impact of the Covid-19 pandemic.

Claimant's FWR meeting with Ms Osman and Mr Rollinson – 4 November 2019

99. Ms Osman, supported by Mr Rollinson, met with the claimant on 4 November 2019 to discuss his flexible working request. None of the participants of this meeting took any notes of the meeting.

100. The claimant alleges that during the course of this meeting, Ms Osman said:

100.1 *"You're always at the gym"*; and

100.2 *"You're so fit"*.

101. The claimant alleged that the implication of those statements was that Ms Osman did not believe the extent of his disability or its impact on him. He stated in oral evidence: *"Ms Osman was saying you can't be disabled if I go to the gym…she is suggesting I am not disabled"*.

102. Mr Rollinson had no recollection of such comments. Ms Osman stated in her oral witness evidence that: "*I will have possibly referred to him being at the gym because he made no secret of going to the gym – he would leave early to go to the gym. If I used that language it would have been in the context of using the gym to manage* [his] *condition; to strengthen* [his] *leg or keep* [him] *mobile".*

103. Ms Osman also stated that:

103.1 she did not think that the claimant went to the gym particularly often, compared to other colleagues who went every day;

103.2 she was aware that the claimant had attended physiotherapy or hydrotherapy appointments and went for walks at lunchtime.

104. We concluded that Ms Osman did refer to the claimant going to the gym, but that she did not say *"You're always at the gym" or "You're so fit"*. We note that the claimant said that this comment implied that Ms Osman did not believe he was disabled. However, Ms Osman did grant the claimant's request for compressed hours (which he requested in connection with his disability). If Ms Osman had not believed that the claimant was disabled, then she would not have granted his request. In addition, we note that the claimant did not raise these comments as part of his appeal against the

partial refusal of his flexible working request on 19 November 2019 or during the meeting to discuss his appeal with Mr Lal on 10 December 2019.

105. The claimant also complains that Ms Osman asked him to show his leg and press on his shoe during the meeting. It is not disputed that the claimant rolled up his trouser leg to show his left calf muscle and pressed on his shoe to demonstrate that his ankle joint had been removed. However, it is disputed as to why this happened.

106. The claimant alleges that he carried out these actions at Ms Osman's request in order to show Mr Rollinson. The claimant stated in his oral evidence that there was: *"nothing to be proud of…it's not a beautiful sight, it's not a trophy to show – I was compelled to show it"*. Ms Osman and Mr Rollinson denied that Ms Osman requested that the claimant carried out those actions and states that the claimant did so voluntarily.

107. We have concluded that Ms Osman did not ask the claimant to roll up his trouser leg or press on his shoe for the following key reasons:

107.1 the claimant had already discussed his condition in detail with Ms Osman and showed her his leg during their meeting in August 2019;

107.2 Ms Osman's account is supported by Mrs Priestley's evidence that the claimant showed her his leg and foot on a separate occasions during the later DSE assessment in February 2020. Mrs Priestley did not recount this during the later grievance investigation because she was not asked directly about it, but she did say:

[163] *"Yassir talked about his family, his son has a disability and about his own disability and problem with his foot"*;

107.3 the claimant did not raise this alleged incident as part of his appeal against the partial refusal of his flexible working request on 19 November 2019 or during the meeting with Mr Lal to discuss his appeal on 10 December 2019.

108. The claimant also amended the date of Allegation 1 (paragraph 5(i)) during the course of the hearing to state that he believed that Ms Osman told him she would not allow him to work from home because she did not want to *"open the floodgates"* at the meeting on 4 November 2019 (rather than at the meeting on 10 December 2019). We concluded that Ms Osman did not use that phrase at the meeting on 4 November 2019. We note that the claimant originally stated that Ms Osman used the words *"open the floodgates"* at the appeal meeting on 10 December 2019 (which we consider in more detail later in this Judgment). However, the notes of the meeting on 10 December 2019 show that it was the claimant himself who used the phrase *"open the flood gates"* when he stated:

"One further point about concerns open flood gates for requests for WFH from team members. Any decisions based on the fact of how others may feel is wrong".

109. The claimant did not state that Ms Osman had used the words *"open the floodgates"* previously at the meeting on 10 December 2019. He was explaining that he believed that one of the reasons why Ms Osman had rejected his request to work from home was that other team members may wish to work from home.

110. Ms Osman discussed the claimant's request briefly with Mr Lal after the meeting on 4 November 2019. She then emailed the draft outcome letter to Mr Rollinson and Ms Theresa Caswell (HR Consultant) on 8 November 2019, after telling the claimant of the outcome of his request.

111. Ms Osman then wrote to the claimant in a letter dated 11 November 2019 and stated:

"Firstly in respect of the 9 day fortnight compressed hours I am pleased to confirm that your request has been granted on a temporary basis and will be reviewed on 29th February, subject to the following conditions:

 Approval for this request is directly linked to your own personal exceptional circumstances and the caring responsibilities you currently have.

 Your non-working day will be a Wednesday and I expect you to alternate with your colleague Julie Green so that only one of you is off regularly on a Wednesday.

 If this needs to change to support the business or a specific event that required you to attend on a specific Wednesday then it will be changed as an exception.

…

 You need to have no debit flexitime at the start of the arrangement and you need

to ensure that you are meeting the required hours in each calendar month.

 I have included a review point and left the arrangement as temporary until the review point because I do have concerns that you will be able to make the hours up in the 9 days based on your working hours over the last six months. We discussed this and you have confirmed you understand the commitment and are able to meet the requirements. I will set up a date for the review in February subject to you accepting this offer.

As discussed I will communicate the changes to the team and explain that this is linked to the specific responsibilities you are facing in respect of the care you provide for your mother and also to give some dedicated respite time for your wife in caring for your son who is disabled.

…

In terms of the request for regular homeworking, you clarified that this was likely to be one day a week up to 4 or 5 days per month for the three month period that your wife would be recovering from hand surgery. I have considered this request but regret that I cannot commit to this in advance. I am happy however for you to use your leave at short notice. You currently have 2 days leave left up to end of December which will help to cover the possible requirement when set alongside the compressed hours' arrangement. If your wife's operation is scheduled for the new calendar year then I am happy for you to carry these days forward to provide the extra necessary. I hope you appreciate the reason for this refusal. As a manager you need to provide day to day support and guidance to your direct reports and as a team we are expected to be visible and present to support the service design and project management functions; with the compressed hours you will already be absent one day every fortnight.

RESERVED JUDGMENT

You have a right to appeal against this decision and if you wish to do so you must submit a written appeal, addressed to the Assistant Chief Executive, within 7 days of receipt of this letter.

Subject to the above I am suggesting that these changes be effective from 1st December 2019 as this is easier for recording of flexi and leave calculations."

Claimant's appeal against flexible working request outcome – 19 November 2019

112. The claimant appealed against the outcome of his flexible working request by email to Mr Lal on 19 November 2019 and stated:

"…Following the initial request on the 24th October, I was requested by my line manager to attend a subsequent meeting that included HR representative on the 4th November 2019. At this meeting I was asked a number of questions in relation to my original request by both the HR representative and my line manager. At this meeting I shared the full details of my disability and reiterated my caring responsibilities for my son alongside additional pressures to support my wife who is due to undergo surgery for carpel tunnel syndrome (a legally recognised disability). Once again, I restated at the meeting the additional caring responsibilities that I have for my elderly mother who is completely immobile.

I have clearly articulated in my original application form the 'lifelong' disability that has 'long term and adverse' impact on my ability to carry out certain tasks such as driving. I had stated in the application that my condition is 'exacerbated' by the long drive that I have to undertake to come to work. I have requested to work 9 day fortnight on a permanent working pattern, however this request has only been accepted as a temporary arrangement, despite my condition and the condition of my son as a permanent 'lifelong' disability.

Further to the above, I had requested to be allowed to work from home whilst my wife is

recovering from surgery, for which she is on an emergency waiting list. I had requested this arrangement on a temporary basis until and when my wife has recovered from the surgery. I had estimated this arrangement to be approximately 3 months, and would require 4/5 days of homeworking per month. I have stated in my original application and the subsequent meeting that I would prioritise business needs above personal needs whilst utilising the working from home option or the 9 day fortnight.

My appeal against the Council's decision to not approve the above request is on the following grounds:

• No consideration has been given to the 'lifelong' and permanent disability that I or my son has. 9 day fortnight arrangements have only been made on a temporary basis, subject to review.

• No consideration has been given to the specific requirements around my need to support my wife as she recovers from surgery. The letter informing me of the decision states that I should take annual leave to fulfil these responsibilities. This is an unfair decision to my request, as I deem my request to be reasonable and in line with the

councils commitment to supporting staff with families. Based on the recommendation stated in the letter I would have to take 15 days out of the total 29 days annual leave to fulfil this responsibility.

• I am aware of colleagues across the directorate who are allowed to work on the above arrangements, yet similar arrangements are not available for me. Whilst, I accept that each case is considered on its own merit, I believe that my unique and difficult personal circumstances have been explained sufficiently in my application and the subsequent meeting to approve a very reasonable request."

Occupational Health referral

113. Ms Osman's email of 8 November 2019 to Mr Rollinson and Ms Caswell also asked for their advice on a potential DSE assessment and occupational health referral:

"I have shared my decision with Yassir this afternoon. He was not happy about the refusal to allow him homeworking. He said these were a specific set of circumstances that apply only to him and my offer for him to use his leave was not appropriate and he didn't accept my reasoning. He is going to appeal – I explained the circumstances - he asked me if I had discussed this with Shokat and I said yes at a high level as I didn't think that was a problem but am now wondering if he will say that he needs to appeal to another objective director - we will see...

Also we discussed his personal disability which is the main reason for his compressed hours. At first he didn't want the informal meeting with Tracey as we discussed Paul - then when I said it was my duty now to respond to the issues he has raised he said he doesn't want any obvious adjustments he is adamant his colleagues are not made aware of his disability. He then asked if Tracey was professionally trained I said I didn't know but if he was concerned we could refer him to Occupational Health which he has asked me to do. I wouldn't mind your views on this – I am happy to refer him - appreciate the independence factor but what if they want him to have special desk/ chair/ equipment can he then refuse and can we let him?"

114. Mr Rollinson responded later that day, stating:

> *"You are right to take the position that we need to act on identifying the support for Yassir. Given that Yassir has given different comments about Tracey* [Priestley]*, I would ask him to consider just an initial conversation with her and if he needs reassurance about her qualifications to carry out an assessment, I can ask her to provide this information but he should not say no just out of hand. This is why I suggested an initial scoping meeting first so Yassir knows what is on offer.*
>
> *To send Yassir to OH then we would need his agreement and so if he agrees we can make this referral (but I will need to check with them about the services we are asking for here before we start filling in the referral) and they may provide advice on workplace adaptations. We would the go through the report and any recommendations together and if they say that we need a workplace adaptation then we would go through with Yassir about this and on most cases agree what we can put in place."*

115. Ms Osman and the claimant had some further discussions regarding his referral to occupational health and the claimant consent to a referral. Ms Osman submitted a referral form in the early morning on 30 November 2019, which stated:

"Yassir has recently brought the issue of his disability to my attention as part of another matter and I want to know if any workplace adjustments are required

Yassir has recently requested that he work compressed hours due to his disability which leads to some discomfort on his journey to work. This request has been granted but I now want to check if there are any workplace adjustments that are required to accommodate his disability. Until this recent meeting (4 Nov) he had not raised any issues and has always wanted to keep his disability confidential. He has expressed his concerns that his disability remain private and he does not want colleagues made aware. However as his manager I have a duty of care to make sure his workplace arrangement is suitable and not exacerbating his condition. The job is a desk based job however there are ample opportunities for Yassir to move around frequently. He has management responsibilities and also is a project manager with meetings he attends across the main office and sometimes at other sites. I have copied below the text from his application for compressed hours…"

116. We concluded that:

116.1 at the meeting on 4 November 2019, Ms Osman and the claimant discussed possible referrals including a DSE assessment by Mrs Priestly and an occupational health referral;

116.2 there is a dispute as to what was said during the meeting – the claimant states that Ms Osman flatly refused to refer him to occupational health. However, that is not reflected in Ms Osman's email to Mr Rollinson and Ms Caswell shortly after their meeting;

116.3 the key reason for the confusion appears to be Ms Osman's focus on the claimant's work station set up and the claimant's view that an occupational health report would lead to a wider consideration of the support that he may need;

116.4 we find that Ms Osman and the claimant agreed by 19 November 2019 that the claimant would be referred to occupational health because the claimant's appeal against the outcome of his flexible working request on 19 November 2019 did not refer to any refusal by Ms Osman to refer him to occupational health.

117. Following the referral, the claimant attended an occupational health clinic on 8 January 2020 and their initial report was prepared on 9 January 2020. However, the report was not issued at that time because the claimant wished to review and comment on the report before a copy was sent to the respondent. The occupational health report states that it was amended on the 27 January 2020 (which we note was a Thursday) at the claimant's request. We note that the report was sent to the respondent shortly afterwards because Ms Osman discussed the report with the claimant in early February 2020 (as considered in more detail later in this judgment).

Compressed hours arrangements

118. Ms Osman emailed Mr Lal on 20 November 2019 regarding the start date for the claimant's compressed working hours. Mr Lal emailed Ms Osman on 21 November 2019, stating:

"I would suggest that the compressed working hours pattern does <u>not</u> start until I have responded to the appeal and that is deferred till the new year"

119. Ms Osman, Ms Caswell and Ms Boyle (HR Consultant) exchanged emails confirming that Ms Osman would inform the claimant that his compressed hours arrangement would not start until after his appeal had been heard.

Claimant's appeal – emails re background information

120. The respondent's staff also exchanged internal emails about the background to the claimant's flexible working request. Ms Caswell emailed Ms Osman on 22 November 2019 stating:

Tracy, given the content of the appeal and the fact that Yassir has worked here for some 18 + months it would be useful to know if he has a) raised his disability in the context of working hours/pattern previously and b) whether he has applied under the flexible working policy to change his working arrangements either formally or informally and the dates of these requests.

121. Mr Lal responded, stating:

I think it would also be sensible to get his original application and whether anything was flagged there, I certainly cannot recall him raising at the interview and the other challenge I would put down when he applied for this job Yassir already had the disability and knew he would be driving 90 odd miles a day so there is a question I have for him about his responsibility and ownership of his disability.

122. Ms Caswell also stated:

"I agree totally with Shokat in terms of him knowing how far the commute was when he applied for the position but this is something that we can explore at the appeal on this basis of what has changed since he commenced."

Claimant's FWR appeal meeting with Mr Lal and others – 10 December 2019

123. The claimant, Mr Lal, Ms Boyle, Ms Osman and Mr Rollinson attended the appeal meeting on 10 December 2019. Ms Boyle took notes of the meeting. The claimant states that he also took notes of this meeting and that his notes did not match those of Ms Boyle. However, the claimant said that he discarded his note books in late 2020, around 6 months after he brought a Tribunal claim.

124. We note that the claimant was aware of the importance of accurate note-taking. For example, he provided substantial amendments to the notes of the meeting to discuss his grievance in June 2020. The claimant alleged in his witness statement that certain comments were made. However, he has not provided specific comments on the remainder of Ms Boyle's notes of the meeting. We have therefore concluded that the notes taken by Ms Boyle are a broadly accurate record of the meeting. If the claimant believed that there were significant discrepancies between his notes of the

meeting and those provided by Ms Boyle, he would have retained his notebooks in order that he could challenge them.

125. The Tribunal panel asked Mr Lal if he thought it would have been more appropriate for someone else to hear the claimant's appeal, given their longstanding friendship. Mr Lal stated:

"No I didn't because for me that insight or knowledge wasn't designed to hinder anything in any way – I think prior to that my understanding was that the claimant was aware from Ms Osman that I would be hearing this. The claimant knew what I already knew – if he had said that would have preferred me not to hear this, I would have stepped aside. There was another similar matter involving the claimant and I was asked to step aside – I did because they felt I was conflicted – I didn't feel I would be objective in the addressing or dealing of it."

126. The claimant alleges that Mr Lal asked him why he applied for the role in the first place, given his disability. We have concluded that Mr Lal did not make this comment because:

126.1 Mr Lal was aware of the claimant's disability at the time that Mr Lal encouraged the claimant to apply for the role and was part of the interview panel that appointed the claimant;

126.2 the meeting notes record that discussions took place regarding what the claimant meant when he described himself as having a 'lifelong disability' and around the length of his commute. This reflected the discussions that Mr Lal and others had over email on 22 November 2019:

"When you took the job, did you know that it was always going to be challenge to do 92 miles per day?"

127. The claimant also alleged in the list of issues that Mr Lal told him he "needed to manage his own life" at the meeting on 10 December 2019. However, during the claimant's oral evidence, the claimant said that this comment was in fact made at the meeting regarding the outcome of his appeal on 16 December 2019.

128. The claimant's next allegation is that Mr Lal suggested he should buy an automatic car. It is not disputed that there was a discussion about the type of car that the claimant drove. We find that this was a two-way discussion, which included the following statements:

"SL – You state that you have a manual not automatic, do you have any adjustments in vehicle for disability and which foot is affected?

YM – No adjustments. It is my left foot.

SL – Why if your left foot for clutch, why are there no adjustments?

YM – Issue not that can utilise the left leg, issue is lose sensation spending a lot of time in confined space. Adjustment is a good suggestion might go and see what I could get. Often use my wife's automatic more. "

129. The claimant also alleged that Mr Lal suggested that he use either annual leave or unpaid leave to fulfil his caring responsibilities. However, this is not reflected in the notes which record that Mr Lal's only comment regarding leave during the meeting was: *"Did we offer you unpaid leave"?.*

130. Having considered the notes, we concluded that it was Ms Osman who stated that she had discussed other options with the claimant including unpaid leave, parental leave and working reduced hours. In addition, the claimant stated during the meeting that he would be requesting to purchase additional leave.

Claimant's additional FWR appeal meeting with Mr Lal and others and outcome letter – 16 December 2019

131. Mr Lal met with the claimant to deliver the outcome to his flexible working request appeal on 16 December 2019. None of the participants in the meeting made notes during the meeting.

132. During the meeting, Mr Lal handed the claimant a letter which confirmed that:

132.1 the claimant's compressed hours arrangement would remain subject to a review. Mr Lal stated that *"This review is necessary to ensure that service needs are being fulfilled and you are working your contracted hours"*. Mr Lal also stated that the respondent's flexible working policy required arrangements to be reviewed; and

132.2 the claimant would not be granted a set day to work from home, citing the nature of the claimant's work, his line management responsibilities and the demands of the service. However, Mr Lal stated: *"I do however agree that occasional working from home can and will be considered when specific projects or pieces of work need to be completed, this will be on an ad hoc basis and when service needs allow, not in order to care for dependants."*

133. Mr Lal's letter concluded:

"Whilst I have sympathy for the long commute you undertake, you knew how far this was at the point of applying for and accepting the role. As you suggest your condition is deteriorating, that is something that you need to consider going forward.

We also discussed your own responsibility for managing your disability and supporting your family, the obligation of the authority is with regards to the role you occupy and ability to conduct that role.

With regards to support for caring for your wife and son, in line with the Council's commitment to supporting staff with families, I direct you to the 'Parental Leave and Time Off for Dependants' policy, which I attached for your convenience."

134. Mr Lal accepted during his evidence that he should not have stated: *"that is something that you need to consider going forwards"*. Mr Lal said that this may be a 'poor use of words' and said that he should have changed this to *"that is something <u>we</u> need to consider going forwards"*, i.e. both the respondent and the claimant needed to consider going forwards. Mr Lal also stated during cross-examination that:

134.1 *"I don't accept it was related to his disability but I can understand how he would have received that";* and

134.2 "I can see how the comment could be misinterpreted – I should have used a different choice in words in setting this out - which I acknowledge."

135. The claimant also alleged that during the meeting Mr Lal also said to him:

135.1 that the claimant needed to *"manage your own life"*, with respect to his son and wife; and

135.2 that *"it's not the organisation's responsibility"* to look after the claimant's son and wife.

136. Mr Lal denied making either of those comments. Mr Lal said that during the meeting, he and the claimant discussed the claimant's work/life balance but that he did not use the words referred to by the claimant. Mr Lal was unable to recall the words that he did use, but stated that he would not have said *"you need to manage your own life"* to anyone.

137. We asked Mr Lal whether his friendship with the claimant had any impact on the appeal meetings or the wording of the outcome letter. Mr Lal stated:

"Yes I believe it did – I sometimes felt that I was talking to a friend or someone I know very well – I accept the way that I phrased the particular letter could have had some bearing on that."

138. We have concluded that Mr Lal did make both of those comments for the following key reasons:

138.1 Mr Lal's letter stated words to the effect that the claimant needed to 'manage his own life', by stating: *"We also discussed your own responsibility for managing your disability and supporting your family…"*. This was in the context of Mr Lal refusing the claimant's request for regular homeworking and stating in the outcome letter that working from home would be dependent on the needs of the organisation and *"not in order to care for dependants"*;

138.2 Mr Lal made a clear distinction in the outcome letter between the claimant's responsibilities to manage his disability and support his family, versus the respondent's obligations: he referred to the fact that the claimant was aware of the length of the commute when he applied for the role and stated *"…the obligation of the authority is with regards to the role you occupy and ability to conduct that role."* We find that it is highly likely that Mr Lal would have stated *"it's not the organisation's responsibility"* to look after the claimant's family as part of his explanation of the appeal outcome, given the wording of the outcome letter.

139. The claimant stated that Mr Lal's comments made him feel *"offended, humiliated and degraded"*. He said that this was because Mr Lal was suggesting that he could not "manage his life" at a time when the claimant was trying to manage his own pain and deal with his disabled son who needed significant care. The claimant was affronted by these comments and stated in his oral evidence that: *"I wasn't asking*

for help managing my condition – I was managing my life very well considering the circumstances". The claimant also noted that he was the only 'breadwinner' in his family and that he was responsible for financially supporting his family.

Claimant's working arrangements following appeal outcome meeting

140. Ms Osman and the claimant discussed the claimant's working arrangements in a meeting on 19 December 2019. She confirmed in an email on 20 December 2019 that the claimant's compressed working hours arrangement would start on 1 January 2020:

"As discussed at our meeting on 19 December your compressed working hours arrangement will commence from 1st January…As per Shokat's letter there will be a formal review, in line with the Council's policy on 1st July 2020, and a mid-way conversation around end of March; I will book both of these in your diary.

…You will work with Julie to ensure you alternate your non-working day with her.

I will email the team to let them know and explain this is due to your caring responsibilities in connection with your mother and your son."

Respondent's restructure – January 2020

141. Ms Osman decided to leave the respondent and retire on 26 March 2019. Mr Lal was also contemplating leaving the respondent at this time. He applied for a role with another local authority, for which he attended an interview in January 2020. Mr Lal subsequently resigned in February 2020 and left the respondent on 17 May 2020. Ms Osman was not aware of Mr Lal's plans at that time.

142. Ms Osman told Mr Lal of her decision to retire shortly before going on leave for the Christmas period in 2019. Mr Lal and Ms Osman had a phone call over the Christmas period, during which he asked her to *"sort out the structure before you go"*, stating *"what we have is not fit for purpose".* Mr Mann was also party to this call, in his role as HR Director for the respondent. Mr Lal asked Ms Osman to prepare a restructure proposal for his review by 8 January 2020, by which point they would both have returned from leave.

143. We accept that the timing of this restructure proposal was driven by Ms Osman's impending retirement, by the need to 'bank' any costs savings by the end of the respondent's financial year and by the impending discussions around the future funding of the team (whose three year initial funding was due to expire later in 2020).

144. We note that the respondent's normal practice was to consult with affected staff for a minimum of 30 days. In addition, we note that the claimant was due to go on extended leave at the end of February 2020 for three weeks. We note that if Ms Osman were to manage the restructure process then this would need to commence by late January 2020.

145. Mr Lal and Ms Osman had had several previous discussions regarding the structure of the Change and Innovation team. Mr Lal had said to Ms Osman when she joined the respondent in August 2018 that the structure of the team did not work, because the type of work that the team carried out was not that which he had

originally envisaged. Ms Osman persuaded Mr Lal to let her 'get her feet under the table' before proposing any structure changes.

146. Mr Mann had also discussed the proposed restructure with Mr Lal since July 2018 (when Mr Mann joined the respondent) because of his involvement in the Senior Change Board and in his capacity as HR Director. Mr Mann stated that he was not involved in the detail of any restructure proposals because that was a matter for Ms Osman, but he noted that he was involved in discussions because HR support would be required for any restructure

147. We also accept Mr Lal and Ms Osman's evidence that a future restructure was an 'open secret' within the respondent. Ms Osman had previously been approached by several members of the team, who were aware of the possibility of a future restructure because the team's funding was due to run out in 2020. This is reflected in the note that Ms Osman prepared for the informal meeting on 20 January 2020 (quoted later in this judgment).

148. Ms Osman had also discussed this possibility with the claimant in the context of the claimant informing Ms Osman during early 2019 that he was applying for other roles outside of the respondent (e.g. with Ealing Council). In addition, Mr Lal had discussed a potential future restructure with the claimant during conversations that took place outside of work, as part of their ongoing friendship. In that context, we do not accept the claimant's evidence that the restructure proposal 'came out of the blue'.

149. We accept Mr Lal and Ms Osman's evidence that the respondent's directorates were not willing to work with the team in the way that Mr Lal had envisaged when he set up the team. Ms Osman explained that:

149.1 the team were supposed to deliver the respondent's transformation and change agenda, however in reality each of the respondent's internal directorates had taken responsibility for delivering their own programmes;

149.2 Ms Green was fully engaged in running the Customer Service programme. However, there were not enough programmes for either the claimant or Ms Osman to run at that time – they should have been responsible for running projects;

149.3 as a result, Ms Osman had to find work for both herself and the claimant do and they supported other directorates with those directorates' projects. However, the Corporate Centre should not have been funding them to carry out that work;

149.4 Ms Osman recognised that there was a need for more Business Improvement Officers (**BIO**) to carry out the 'on the ground' work of working out how services were being delivered, rather than managing projects. She saw the restructure as an opportunity to free up funding to gain an additional BIO for the team by removing one of the higher paid Programme Lead roles; and

149.5 Ms Osman initially considered removing the Head of Service role from the structure as well. However, the respondent's Chief Executive (Sharon Kemp) wished to retain the role in the structure.

150. Ms Osman used the existing structure charts and information that she had prepared as a briefing note for Mr Lal in August 2019 as a starting point for her restructure proposal. We accept her evidence that the proposal was relatively straightforward because it only affected the two Programme Leads, i.e. Ms Green and the claimant, and would only lead to one potential redundancy.

Consultation meetings – January 2020

151. Ms Osman held an informal meeting with the whole team and separately with the claimant and Ms Green on 20 January 2020 to tell them that:

151.1 she was going to retire; and

151.2 she would be making a restructure proposal in the next week.

152. The notes that Ms Osman prepared for the team meeting stated:

"I am aware that there were some concerns about the team being disbanded by the summer - I can tell you that is far from the truth and it is unfortunate that this message was shared. However we were always going to look at the structure based on where we are now, the challenges we face and the programme and projects that are in the pipeline. You have all seen the programme of projects and we know there is a demand for business analysts that exceeds our supply therefore I am looking again at the structure and the budget to see what room we have to boost our business analyst capacity whilst creating a structure more fit for purpose moving forwards."

153. Ms Osman also noted for her discussion with Ms Green and with the claimant that any restructure was likely to affect the 'management layers'. She stated that:

"Sharon [the respondent's Chief Executive] *has rightly pointed out that it is management heavy and it doesn't mirror the corporate ratio of manager to staff. I had started to look at this last autumn as the funding for the team was expiring and so I have resurrected the proposals and will be talking to Shokat and HR about them over the next couple of days."*

154. Ms Osman held a first formal consultation meeting with the claimant and Ms Green a few days later on 24 January 2020. Ms Caswell (HR Consultant) attended the meeting, along with union representatives from Unison and the GMB. The claimant was not a member of either union, but he did meet with the Unison representative around that time on an informal basis regarding the restructure.

155. Ms Osman explained the restructure proposal to the claimant and Ms Green during the meeting on 24 January 2020. The background section of the proposal stated:

"The Change and Innovation team was created in August 2017 based on the Council's vision for the scale and type of support required to deliver the anticipated significant change programme. At that the time the structure was based on a need to deliver programmes, with Programme Leads, and to provide business analysis skills to ensure that services were redesigned reflecting innovative solutions to

improve efficiency whilst delivering an improved customer experience. The funding set aside for the team was not revenue based rather a fixed pot envisaged to cover the structure costs for up to 3 years reflecting the need for an injection of skills and capacity for a fixed period. It was always anticipated that the need for the service would change over time as the transformation programmes were completed and services would then take responsibility for their own continuous improvement.

In practice the function that the team has provided has not mirrored the original vision in that Directorates have taken responsibility for delivering their own programmes. This aligns to the responsibility for the financial savings targets that emerged from the Business Cases signed off August 2018. The requirements that the organisation has for support in respect of change and innovation are not being met by the current structure and configuration of resources and skills..."

156. The restructure proposal stated that the respondent's view was that:

156.1 there were a shortage of Business Improvement Officers and Improvement Practitioners to carry out the business analysis work; and

156.2 there was 'spare capacity' amongst the two Programme Leads *"which is being deployed to support other activities not necessarily commensurate with the grades of the current post-holders"*.

157. The proposed restructure was that from 1 April 2020:

157.1 the respondent would remove one of the Programme Lead roles;

157.2 that all team members would report directly into the Head of Service; and

157.3 the respondent would create one further Business Improvement Officer role. That role would be ringfenced for the redundant Programme Lead (if they wished to apply for it) with two years' salary protection.

158. During the meeting on 24 January 2020, Ms Green queried whether the directorates running their own programmes was costing them more money. Ms Osman responded that it was not costing them more money because they were using their own teams and the meeting notes record that she stated:

"In last 8 months, got going with Customer Services and digital programme. One programme lead role looking after this programme. Other role we've been trying to find valuable worthwhile work to make role cost effective and adding value within RMBC. Need less programme leads and need more business improvement officers."

159. The claimant alleged that Ms Osman stated that one of the Programme Leads had 'not been particularly busy'. We find that what Ms Osman said was slightly different – Ms Osman was not disputing that the claimant's projects (referred to in the meeting notes) were of value to the respondent. The difficulty was that the claimant had been supporting those projects on behalf of other directorates, rather than managing the projects himself.

160. Ms Osman sent the claimant and Ms Green a copy of the restructure proposal and the three job role profiles by email later on 24 January 2020.

161. Ms Osman then held a further consultation meeting on 27 January 2020 which the claimant attended along with a Unison representative. Ms Green did not attend that meeting. The claimant asked what would happen to Ms Osman's role as Head of Service. Ms Osman explained that it would be advertised shortly and that Mr Lal may appoint a 'caretaker' manager in the meantime.

162. Ms Osman also offered the claimant and Ms Green the option of attending individual consultation meetings. Neither of them took up that option, but both provided detailed feedback on the restructure proposals in writing.

Consultation feedback – February 2020

163. Ms Osman responded to written feedback from the claimant, Ms Green and from the wider team in writing.

164. Ms Green's feedback focussed on potential difficulties caused by the change in management responsibilities. For example, she noted that the Head of Service may have difficulties dealing with the day to day management of all of the team. Ms Osman stated that the respondent's normal practice is for all managers to have at least 6 direct reports and that the Programme Lead would still assist with team management when required.

165. The claimant's feedback focussed on the type of work that the Programme Leads carried out, the future of the projects that he had been involved in and the removal of line management responsibilities from the Programme Leads. Ms Osman responded stating that the focus of the work for the team for the next 18 months will be delivering the Customer Service and Digital programme. She stated:

"The Cabinet and [Senior Leadership Team] *have committed to the Customer Service and Digital programme and to making the savings. This is where the priority is. The work undertaken in R&E over the last few months whilst valuable to the service is not a Big Hearts Big Changes priority rather it is a priority for R&E and you and I were directed to support them until the end of the financial year at which point they, i.e. R&E would need to decide how they would deliver their numerous projects moving forwards and fund these appropriately. Therefore, this restructure is not a reflection of individuals but a review of the work being undertaken and addresses the top-heavy management structure. it is also a response to the need to create additional business improvement officer roles to support the programme of work.*

166. Ms Osman also stated that:

"This is not a reflection on the contribution of individuals rather it is a statement of the facts in this case relating to the way the work has been allocated… The fact that Julie has been undertaking this work is immaterial. A robust interview process with independent panel members will assess who best demonstrates the required knowledge, skills and experience to fulfil this role and you will be able to use the examples shown below [i.e. the examples given by the claimant of the projects he was involved in] *to reinforce your experience during the process."*

167. The claimant's written feedback also alleged that Ms Osman was biased against him because of his request for reasonable adjustments. He stated:

"I disclosed a disability and requested reasonable adjustments to be made in October/November 2019, which is approximately 6/8 weeks prior to the decision being made to commence a formal consultation regarding possible redundancy through which I believe there is a clear bias against me. Prior to the decision being made to potentially make me redundant I requested reasonable adjustments which was refused, yet I have to date not had a rationale as to why. My role does not require me to be in Rotherham every day of the week and in fact able bodied colleagues are often working from home in similar role yet my request to work from home one day a week to alleviate the significant pain I suffer was refused. Subsequently the organisation has launched a consultation to look at making me redundant."

168. Ms Osman responded stating:

"In your email dated 20th February 2020 you have raised these issues and I have responded to this separately on Friday 21st February 2020. In the email I have covered off each individual point you raise regarding your disability and reasonable adjustments in detail, including a detailed rationale so I do not propose to address further in the consultation feedback. As for your comments regarding a link between your disclosure of a disability and this restructure I reject this fully; there is no relationship between the two. Conversations have been taking place around the structure of the team since Spring 2019. The timing and need to undertake this review now has been driven by the work priorities set by Cabinet and SLT, which were not clear originally when the team was created but are now signed off, and also my imminent departure…"

DSE AND STRESS RISK ASSESSMENT

169. The Occupational Health report was finalised on Thursday 27 January 2020 and a copy provided to the respondent by early February 2020. The Occupational Physician noted in the report:

"In regards to work, I understand that he requested to work compressed hours. He also requested to work from home on a temporary basis for a number of days a month. He said that this was to enable him to reduce the amount of driving he undertook when commuting to work as this aggravated his leg problem. He was also hoping that this would aid in supporting his wife who is the primary care for his son. I, however, understand that his request for home working has been rejected.

Opinion and recommendations

Following my assessment, I believe Mr Mahmood is fit to undertake his full duties at work. I note that you have suggested a workplace assessment which you have requested is handled sensitively as Mr Mahmood does not wish his condition to become public knowledge. I agree that a workstation assessment would be helpful in determining the adjustments he requires to his workstation. This may include an adjustable desk to allow for flexibility with his sitting and standing as well as a footrest…

In regards to his request to work from home for some days a month, it is likely that he would benefit from this as it will reduce the need to drive which will enable him to rest his leg. Ultimately it is for the organisation to determine whether this adjustment is reasonable and the extent to which it is achievable.

170. We note that the reasons provided by occupational health for working from home differ from those set out in the claimant's flexible working request. In the claimant's flexible working request, he requested compressed hours in order to reduce the number of journeys that he was making to work. However, his request to work from home was for a period of 1-3 months in relation to his son's care whilst his wife was recovering from surgery.

171. Ms Osman and the claimant met in early February 2020 to discuss the occupational health report. The claimant agreed that that Ms Osman could contact Mrs Priestley to arrange a DSE assessment. Ms Osman emailed Mrs Priestley on 11 February 2020, setting out extracts from the occupational health report and asked her to arrange the assessment. Mrs Priestley offered to meet the claimant on 13 February, but this was postponed at the claimant's request to 21 February 2020.

172. The claimant also requested to work from home on 14 February 2020 and Ms Osman agreed to that request.

173. In the meantime, Ms Osman emailed a letter to the claimant on Thursday 13 February 2020 which summarised their discussion, together with a copy of the stress risk assessment form. We were not provided with a copy of the letter of 13 February 2020 in the hearing file, although we have seen the emails that the claimant and Ms Osman exchanged regarding the letter dated 20 and Friday 21 February 2020.

174. The claimant emailed Ms Osman on Thursday 20 February 2020, complaining that the respondent had not considered the recommendation that he should work from home for a number of days per month and his request to work from home one day per week:

"Whilst we discussed the occupational health report and the subsequent recommendations made in that report, I would like to clarify that I do not believe reasonable adjustments have been explored. You state that I must request working from home when I have a specific issue however I believe this puts me at a disadvantage as the whole point of a reasonable adjustment is to prevent me having issues. Once I am in pain working from home does not automatically cure the pain as the pain takes time to then settle. My request to have a day a week working from home would mean that I was better able to manage my condition. I agree that it is ultimately a decision for the council as to whether you consider an adjustment to be reasonable, however I have still not been given a reason as to why it is unreasonable for an office worker to work from home on a set day a week.

As suggested by you in your letter of response, working on an ad hoc basis I would find it difficult to randomly work from home as I would need a plan in advance to ensure I was focusing on the administrative work and that I did not have any meetings planned on a working from home day. I am an office worker who spends most of the day working at a computer, I have access to the relevant systems on my laptop from home so I fail to see why it is an unreasonable adjustment to allow me to have a day a week from home. It is also an accepted practice for my able bodied colleagues to work from home on a regular basis and they do so more regularly than I have been allowed. Furthermore on the few occasions that I have been allowed to work from home I am left feeling like a shirker having to email you to confirm I am working and when I am moving away from

my laptop, this I believe is unique only to me and not the practice that is followed with my colleagues who work from home on a regular basis.

As it was stated to me during the appeal for my flexible working request; I did know that I was disabled when I applied for the job but I was hopeful that as a public sector employer you may be a supportive employer who would be willing to make reasonable adjustments. However, instead since have disclosed my health problems I find myself facing potential redundancy and losing my livelihood."

175. Ms Osman responded to the claimant on 21 February 2020 and stated:

"I am not sure I fully understand your point. You have told me that the pain you are experiencing with your leg has recently deteriorated hence the referral to Occupational Health. This only came to light when you made a formal request for flexible working on 24 October 2019. In response, I suggested a referral to Occupational Health and a workplace assessment to be carried out by Tracey Priestley, when we met to discuss your request on 4 November 2019. You refused this initially as you did not want people to know about your health issues, despite me reassuring you that this would be confidential.

Following the conclusion of your flexible working request on 10 December 2019 and as a result of our duty of care towards you, an occupational health referral was made which you then agreed to attend.

When you made your formal flexible working request you asked for compressed hours as a reasonable adjustment to help manage your condition and this was granted. Since then you have been working compressed hours for almost two months and therefore have already benefitted from an extra travel-free day every other week. You now appear to be saying that working from home doesn't necessarily help your condition as you state "Once I am in pain working from home does not automatically cure the pain".

Originally you linked the need for homeworking, for a set number of days per month, to you having to provide care for your son whilst your wife was recuperating from an operation and not to help manage the pain with your leg. You specifically requested the compressed hours as a means of coping with your own health condition and this was granted. I have attached your flexible working request and highlighted the relevant section below…

……..

When we discussed the option to work from home following the Occupational Health Report, directly in relation to your leg pain I said that if the pain had got to the point where driving became difficult AND where you had enough work that could be done from home AND you were able to rearrange appointments then I would agree to it on request and subject to the office cover. On the first occasion you requested this {Friday 14th February 2020) I agreed to it. My understanding is that the workplace adjustments we are looking to make to ensure your workstation meet your needs should reduce pain resulting from your attendance at the workplace and undertaking your role. The way you choose to travel to the workplace is your prerogative and this was the point made at your appeal and which you yourself have referenced below. There are other travel options that you may wish to consider to relieve the pain of driving and this is something you may wish to explore..."

176. Mrs Priestley spent two hours with the claimant on 21 February 2022, during which time she discussed the stress risk assessment form with him and undertook the DSE assessment. Mrs Priestley was unable to complete the form due to work pressures before the claimant then went on leave from 27 February 2020. However, she emailed him to let him know that during his leave she would:

    176.1 speak to Ms Osman about ensuring that there was a height adjustable desk that the claimant could use when he returned from his holiday; and

    176.2 complete the stress risk assessment form and provided a copy to the claimant for his comments. They arranged to discuss the form on the claimant's return from leave in mid-March 2020.

177. The claimant replied to Mrs Priestley on 26 February 2020, stating:

"Thanks for taking your time out and listening last Friday! I really valued our conversation and felt some burden being lifted from me as someone was able to listen to me on how I felt."

178. The claimant included some notes of their discussion including:

"• I shared with you that there were some personal challenges that I was facing around my own disability, my sons disability which has been exacerbated by the recent surgery my wife has had to undergo. I shared with you that I felt unsupported by my manager, as I had asked for some temporary flexibility around this situation.

• I shared with you the biggest stress trigger for me over the past two years has been the way I've been treated by some of my team members…"

Ms Green's compressed hours arrangements and the team's working from home arrangements

179. Ms Green requested and was granted a similar compressed hours arrangement to that which the claimant requested during 2018. Her compressed hours arrangement was confirmed in letter of 25/9/18, subject to a 3 month review on 31 January 2019. We accept Ms Osman's evidence that Ms Green's arrangement continued subject to 6 monthly reviews throughout 2019 and 2020. Ms Green originally made her request so that she could assist with the care of her father, who suffered from medical conditions including emphysema. After Ms Green's father's death, she informed Ms Osman that she wished to continue with her compressed hours arrangement to support her mother who was struggling after her father's death.

180. From 1 January 2020, Ms Green and the claimant alternated taking Wednesdays off as part of their compressed hours arrangements under which both of them worked a nine day fortnight.

181. The claimant also raised concerns with Ms Osman in his email of 20 February 2020 that his non-disabled colleagues were able to work from home on a regular basis, whilst he was not permitted to do so:

"It is also an accepted practice for my able bodied colleagues to work from home on a regular basis and they do so more regularly than I have been allowed."

182. Ms Osman responded in her email of 21 February 2020 and stated:

You should not assume that your colleagues are able-bodied as you may not be privy to their medical conditions. If you are referring specifically to your directly comparable colleague [i.e. Ms Green]*, then I believe the number of days you have both been allowed to work from home is broadly comparable. If however you are referring to the Business Improvement officers and Improvement Practitioners then the reason they have been allowed to work from home has been discussed more than once with you and also in team meetings so I do not propose to go over that again in detail.*

Suffice to say and in summary they are allowed to work from home when they have several process maps to produce that require concentration, space and which need to be done within a relatively short timescale. They are not regularly allowed to work from home and in each instance the request is considered against the criteria and based on service needs. Importantly they do not have managerial responsibility for anybody and as has been explained to you several times this is a factor in your situation. The number of days working from home across these 5 officers is less than 20 (an average of 4 days per person in 18 months). You have been allowed to work from home on two occasions in the same period.

183. The claimant stated in his evidence that he believed that Ms Osman operated a 'quota' for the number of days that team members were permitted to work from home. We do not accept that assertion. We accept Ms Osman's evidence that working from home was permitted in the circumstances set out in her email of 21 February 2020.

Programme Lead role interviews – Wednesday 26 February 2020

184. The claimant and Ms Green both indicated that they wished to apply for the role of Programme Lead. Ms Osman provided them with the job description as part of the redundancy consultation process. She also liaised with HR to prepare standard questions for the interview process, based on the competencies for the job description. These included five key questions with example additional 'probe questions' regarding:

184.1 the personal qualities and skills required for the Programme Lead role and examples of how the candidate had demonstrated these;

184.2 the methodology and examples of the service design of projects and improving a business process; and

184.3 managing team morale.

185. Ms Osman emailed Mr Lal and Ms Caswell on 23 February 2020, questioning whether or not she should be part of the interview panel because the claimant's recent feedback email raised concerns that she may be 'biased':

"Yassir's feedback touches on my bias and links it again to his disability - I don't propose to respond further to this unless you tell me otherwise but I am worried that he will raise a grievance pre or post interview if I am on the panel citing his alleged maltreatment following disclosure of his disability. Is it worth reconsidering the interview panel?

Currently Lee and Helen and me as chair- whilst it might be considered as pandering would it be the sensible decision to avoid further delay and action?"

186. Ms Osman discussed the issue with Mr Lal and concluded that she was able to proceed. She stated in her oral evidence: *"I was certain for myself that I would not allow that to influence me. The panel was a panel of 3 people, the scoring was arrived at as a consensus."*

187. The claimant and Ms Osman exchanged further emails on 25 February 2020 regarding arrangements for Ms Osman to provide the outcome of the interviews to the claimant because he was on holiday for two weeks from the day after the interviews. The claimant also emailed Ms Osman later that day stating:

"Sorry Tracy, I also meant to say that I would be expecting detailed written feedback, as is the normal custom and practice in our team, in relation to a decision irrespective of the outcome as I would like to improve my interview techniques."

188. Ms Osman responded stating:

"We don't give written feedback on interviews just verbal that is our normal custom and practice…We will issue the outcome letter to your home address and will also attach a copy to an email to your private email address, which you have confirmed below to allow you to pick this up whilst away."

189. The claimant and Ms Green's interviews were held on the afternoon of Wednesday 26 February 2020. The interview panel consisted of Ms Osman, Mr Mann and Helen Barker (Head of Customer Services).

190. The claimant's interviewed was scheduled to start at 1.45pm. He arrived early for his interview and entered the room. Ms Osman asked the claimant to wait outside whilst the panel finished their preparations. Ms Osman went to collect the claimant at 1.45pm. The claimant commented that Ms Osman was 'smartly dressed' because she was wearing a suit for the Board meeting that she had attended that morning.

191. The claimant walked into the room. Ms Osman and Mr Mann said that the claimant commented on Mr Mann's appearance. Ms Osman thought that the claimant called Mr Mann a 'scrote' and Mr Mann stated that the claimant called him either a 'scrote' or a 'scruff' and stated that made him feel better about his own appearance. The claimant denied making any comment and stated that he did not know what the word 'scrote' meant. We concluded that the claimant had commented on Mr Mann's appearance, as a follow up to his comment on Ms Osman wearing a suit, but that he suggested Mr Mann was a 'scruff'. In any event, we accept Mr Mann's evidence that he put the claimant's comment down to nerves and that this did not impact on the panel's view of the claimant during the interview.

192. The parties disputed the length of the claimant's interview. The claimant stated that it lasted around 45 minutes to an hour. Ms Osman and Mr Mann stated that it lasted around 20 minutes, in contrast to Ms Green's interview which they stated lasted around 50 minutes. In any event, we note that the notes of the interview included in the hearing file suggest that the panel asked all of the questions in the template form.

193. Ms Osman and Mr Mann both gave evidence that the claimant's interview performance was poor:

193.1 Ms Osman stated that the claimant did not appear to have prepared and his answers lacked depth. Mr Mann agreed and stated that it was the worst interview that he had attended for 10 years. For example, the interview feedback provided to the claimant stated:

*"**Q1 – What personal qualities and skills do you think will be most important for the Programme Lead role to ensure successful delivery? Can you provide specific examples where you have demonstrated these?***

No references to personal qualities. Discussed need to capture and present information. Very little reference to the job profile and did not demonstrate how he had those specific skills."

193.2 Ms Osman and Mr Mann both stated that the claimant gave several examples that related to his previous work at Coventry, rather than referring to examples of his work with the respondent. This was evidenced by the interview notes. For example the interview feedback stated:

"Q2 - Describe the challenges associated with a small team supporting a wide range of projects and specifically what approach will you take to managing workload, priorities and stakeholder expectations?

No mention of team he manages here at Rotherham. References to the team at Rotherham touched on poor behaviours but were described as if he had no responsibility for this even after being prompted. No mention of capacity or managing priorities. No mention of managing stakeholders."

…

Q5 - Can you give us an example where you have challenged or influenced a range of stakeholders when transforming services? What were the issues and how did you overcome them?

Example provided pre-dated Rotherham experience and he didn't explain how he personally influenced or negotiated. The second Waste example from Rotherham – talked about getting involved but not how he went about it."

Q6 – Can you tell us about a specific example when you have re-engineered a process to make performance improvements, customer experience improvements and delivered cashable savings for a service?

Historical example of FOI – didn't mention RMBC process and how this could have helped.

Prompted for RMBC example and he mentioned fly tipping in which his role was to negotiate the improvement between two heads – the improvement was designed elsewhere. Both examples did identify some of the benefits but no mention of customer benefits."

193.3 in addition, the claimant did not provide any examples of how he led his own team at the respondent in response to the question "How do you lead the team and manage team morale?". This was also evidenced by the

interview notes which recorded that the claimant stated he had *"not been able to utilise whilst in Rotherham"*.

194. The claimant disagreed and stated that he provided full answers to all of the questions. However, the claimant did not take notes during the interview itself. He did not provide any witness evidence to suggest that the respondent's interview notes were incorrect or that the scores awarded to him should have been higher than they were.

195. The interview panel conducted a joint scoring of both candidates and the agreed interview scores were as set out below (a lower numerical score represented a better interview performance). The respondent's scoring system was as follows:

195.1 1 point – excellent;

195.2 2 points – very good;

195.3 3 points – good;

195.4 4 points – area for development; and

195.5 5 points – unsatisfactory.

	Claimant	**Ms Green**
Q1	5	3
Q2	4	3
Q3	4	2
Q4	5	3
Q5	4	3
Q6	4	2
Total	**26**	**16**

196. Ms Osman stated that she was 'not blown away' by Ms Green's performance and this was reflected in her scores of 2 or 3 for the answers, but that the panel concluded that Ms Green was a much better candidate than the claimant. The panel therefore decided to appoint Ms Green to the role.

197. We note that the claimant has alleged that the timing of the interviews and the announcement of the decision at around 5.24pm on the same day indicated that the outcome of the interviews were pre-determined. However, we have concluded that this was not the case because:

197.1 the claimant and Ms Green were the only candidates to be interviewed that day;

197.2 they were scored against standard questions with a pre-agreed scoring system;

197.3 the emails suggest that the panel always intended to reach a decision on which candidate to appoint by the end of the day;

197.4 the interview process started with the claimant's interview at 1.45pm. Even if both interviews lasted around 50 minutes each and a decision were reached by 5.20pm that day, that would still have left over 1.5 hours for the panel to discuss the candidates' scores and reach a decision.

198. The claimant also stated that during interview he asked for detailed written feedback and that Ms Osman appeared 'nervous' and looked to Mr Mann for a response. Mr Mann stated that the claimant did request feedback and that the panel confirmed a summary feedback form would be provided. We note the claimant had already asked for feedback in his interview of 25 February 2020. In any event, a summary feedback form containing the claimant's scores and the panel's collated notes on his responses was provided to him before Ms Osman's retirement.

199. Ms Osman emailed the claimant on the evening of the interview to confirm that he was unsuccessful:

"*Thank you for attending the interview today.*

As requested, and confirmed at today's interview, I am contacting you by email as you advised this was your personal preference as opposed to a telephone call.

The panel decision is that you have not been successful with your application for the post of Programme Lead in the new structure.

I will prepare some written feedback as requested and email this to you over the next day or so."

200. Ms Osman also emailed a letter to the claimant on 27 February 2020 providing notice of termination of his employment and information regarding the respondent's redeployment pool. The letter stated:

Unfortunately, during the recruitment process for the restructure, you did not secure a new post therefore I am sorry to confirm that, your employment will terminate on the grounds of redundancy on 21st May 2020. Your last date of employment with the Council will be this date if no further employment opportunities arise during this period. This period includes your statutory notice entitlement.

Whilst you are formally 'at risk' of redundancy, there will be attempts made to secure you an alternative post within the Council. You will be put into a 'pool' of people looking for alternative jobs, which affords you priority access to apply for internal Council posts at or below your current grade, as advertised on the intranet. It is noted that you will be on annual leave for an extended period commencing 27th February and returning 17th March 2020, during this period the HR Consultancy team will monitor vacancies for suitable roles whilst you are on annual leave…"

Events from 27 February 2020 onwards

201. The claimant then went on holiday for two weeks from Thursday 27 February 2020 to attend a family wedding in Asia. The claimant was due to return to work on 17 March 2020. However, his son had potential Covid symptoms and he was told to work from home. The Covid lockdown started on 23 March 2020 and all of the respondent's staff were told to work from home. The claimant continued to work from home until his employment ended on 21 May 2020.

202. Ms Osman retired on 26 March 2020 and line management responsibility for the claimant was taken over by another Head of Service for the remaining period of his employment. We accept Ms Osman's evidence that the work previously performed by the claimant would have been performed by employees in the respondent's other directorates, subject to their own resourcing constraints.

Suitable alternative employment

203. The claimant confirmed that he did not wish to be slotted into the Business Improvement Officer role with 2 years' protected salary. We accept that this would have amounted to a demotion for the claimant because the role was on a lower band and did not have any management responsibilities. The claimant did not identify any other vacancies that he wished to apply for during his notice period.

204. The claimant and Ms Green both questioned as to whether one of them could be slotted into the Head of Service role on Ms Osman's retirement as part of their consultation feedback. However, we concluded that this was not a suitable alternative role because it involved:

204.1 a significant increase in seniority – the Head of Service role was several bands above the Programme Lead role. This was reflect in the difference in salary between the Head of Service role (around £67,000), compared to that of the Programme Lead roles (around £40,000);

204.2 the Head of Service role involved very different duties and responsibilities to the Programme Lead roles. For example, the Head of Service:

204.2.1 was responsible for setting up the Programme office and establishing the methodology for the projects that they were to deliver;

204.2.2 steered the team's approach to deliver the scale of savings required;

204.2.3 liaised with the respondent's Chief Executive and Directors, as clients of the team's services; and

204.2.4 had overall management responsibility for the whole team.

205. The Head of Service role continued to be covered on an interim basis by the respondent's Head of Policy until the start of 2022. During the Covid pandemic, the Change and Innovation team were used as additional capacity to assist with other tasks, such as supporting the respondent's community hub. In addition, the respondent decided to wait until a replacement was found for Mr Lal as Assistant Chief Executive, whose appointment was made in January 2021, so that they could decide whether to retain the Head of Service role going forwards.

Claimant's grievance – 11 May 2020

206. The claimant raised a grievance on 11 May 2020, shortly before his employment ended on 21 May 2020. The claimant's grievance contained many of the allegations that have formed part of his Tribunal claim, including the following allegation regarding his appeal outcome letter of 16 December 2019:

"The rejection letter stated the following 'you knew how far this was (i.e. the Commute) at the point of applying for and accepting this role. As you suggest your condition is deteriorating, that is something you need to consider going forward. This letter from the Council clearly suggests that as a disabled person I should have not applied to work for Rotherham Council; it also suggests that I should leave the Council's employment because of my disability."

207. The claimant did not raise any complaints regarding handling of grievance process or its outcome as part of his Tribunal claim and we make no findings of fact in relation to that grievance.

Claimant's termination – 21 May 2020

208. The claimant's employment terminated on 21 May 2020. He did not appeal against his termination of employment.

209. We note for completeness that Mr Lal's employment ended on 17 May 2020, shortly before that of the claimant.

Time limits – claimant's evidence

210. Some of the claimant's complaints may have been submitted outside of the Tribunal's normal time limits. The claimant did not set out in his witness statement why he did not submit his claim at an earlier stage. However, he stated in response to supplementary questions from his representative at the start of his evidence:

"I didn't know anything about time limits until the respondent raised this. Two years ago it was a very difficult time – I was dealing with my dying mother, disabled child, wife suffering from disability and trying to manage own disability.

I requested flexible working and reasonable adjustments – I continued to reiterate my requests throughout period.

Emotionally it was the most difficult time for anybody – I was suffering from depression, anxiety, consistent grinding down by the respondent, harassment, the comments, the resistance, barriers placed against me. I just wanted to get a flexible working arrangement in place, I did not want to formalise this – I had no intention of getting to this point. I pursued my flexible working request well into new year of 2020 – the appeal happened December 2019, I hoped that Ms Osman and Mr Lal would understand and approve it.

Christmas came and my mother was hospitalised with severe congestive heart failure over Christmas period. New Year came – I went to see occupational health in early January. I was still hoping that the respondent would approve my flexible working request – my focus was on trying to care for my son, worry around my mother's life, try and deal with my own pain that I was suffering from. My instinct was to protect my son – he could not look after himself whatsoever – my focus was on looking after my family.

I went on annual leave in February 2020, came back on 16 March, and returned to work on 17 March. Covid hit. My son and mother classed as vulnerable – we had just travelled from Asia, it was a massive worry because no one knew how Covid could affect us…

My dismissal on 21 May 2020 was the straw that broke the camel's back – I believe my dismissal and the discrimination that I faced was linked to my disability.

I did not know anything about time limits and what they mean and how they relate to this claim. I did not seek legal advice until May 2020."

211. The claimant also confirmed during oral evidence:

211.1 he was not a member of a trade union and had not received advice from a trade union. The claimant stated that he had brief discussions with a union representative about the restructure, but not about his discrimination claims and that he had not been advised about time limits;

211.2 he did not receive legal advice until May 2020, which we note was contrary to Mrs Priestley's evidence regarding their discussions in February 2020. However, Mrs Priestley's evidence was not put to the claimant during cross-examination.

Disability status and respondent's knowledge

212. The respondent accepted that the claimant, his son and his late mother all had conditions which satisfied the definition of disability under s6 of the Equality Act 2010 (the "**EQA**") at the times material to this claim.

213. The respondent disputed that the claimant's wife's condition of carpal tunnel syndrome ("**CTS**") amounted to a disability under s6 of the EQA. We concluded that the claimant's wife's condition did amount to a disability at relevant times (i.e. from Summer 2019 to 21 May 2020), having considered the claimant's evidence, because:

213.1 both of the claimant's wife's hands were affected by CTS;

213.2 she was unable to undertake basic tasks using her fingers or hands, particularly those that required repetitive movement (e.g. helping their son to get dressed, basic household chores such as hoovering and ironing)

213.3 the claimant's wife's symptoms worsened in the Summer of 2019 and she was originally scheduled to have surgery in December 2019 on her left wrist, which was later postponed to January 2020;

213.4 the surgery on her right wrist did not take place because Covid hit. In the meantime, her symptoms of her right wrist improved because the claimant was working from home and was able to take a much greater role in the day to day physical care of his son.

214. We concluded therefore at that time that the claimant's wife's CTS:

214.1 had a substantial (defined in the EQA as 'more than minor or trivial') impact on her ability to carry out normal day to day activities; and

214.2 viewed at the relevant times, her CTS was likely to last more than 12 months.

215. However, we have concluded that the respondent did not have knowledge or constructive knowledge of the claimant's wife's CTS at the relevant times because:

215.1 the respondent was not aware of the condition until the claimant told Ms Osman in the Summer of 2019 and later provided some detail about his

wife's condition in his flexible working request and at the meetings discussing his request;

215.2 the claimant suggested that his wife would recover from surgery after a 1-3 month period, following which she would be able to carry out her normal caring duties for their son. He did not inform the respondent that she would need further surgery on her right wrist.

APPLICATION OF THE LAW TO THE FACTS

216. We will now apply the law to our findings of fact.

4 November 2019 – meeting to discuss the flexible working request

Allegation 1 (paragraph 5(i)) and Allegation 2 (paragraphs 9(i)-(iii) and 12(i)-(iii))

217. We concluded that:

217.1 Ms Osman did not comment state at the meeting with the claimant (also attended by Mr Rollinson) on 4 November 2019: *"You're always at the gym"* or *"You're so fit"*; and

217.2 Ms Osman did not ask the claimant to roll up his trouser leg to expose his left leg or to press on his shoe to show that a large portion of his foot was missing;

for the reasons set out at paragraphs 99 to 107 of this Judgment.

218. The claimant also amended the date of Allegation 1 (paragraph 5(i)) during the course of the hearing to state that he believed that Ms Osman told him she would not allow him to work from home because she did not want to *"open the floodgates"* at the meeting on 4 November 2019 (rather than at the meeting on 10 December 2019). We concluded that Ms Osman did not use that phrase at the meeting on 4 November 2019 for the reasons set out at paragraphs 108 and 109 of this Judgment.

10 November 2019 – meeting to discuss the claimant's appeal regarding his flexible working request

Allegation 1 (paragraphs 1(i) and (ii) and 5(ii) and (iii)) and Allegation 6 (paragraphs 50(i)-(iii), 56(i)-(iii) and 60),

219. We concluded that at the meeting on 10 November 2019, Mr Lal:

219.1 did not ask the claimant why he had applied for the role in the first place, given his disability;

219.2 did not say that it was up to the claimant to manage his own life (the claimant stated in oral evidence that this comment was actually made to at the appeal outcome meeting on 16 December 2019, not on 10 December 2019); and/or

219.3 did not suggest that the claimant use his annual leave to fulfil his caring responsibilities; and

219.4 did not suggest that the claimant take unpaid leave to fulfil his caring responsibilities;

for the reasons set out at paragraphs 123 to 130 of this Judgment.

220. In relation to the allegation regarding automatic cars we note that there were discussions regarding the type of car that the claimant drove. However, even if we are incorrect in our finding then we concluded that this discussion did not amount to direct disability discrimination or disability-related harassment because:

220.1 *Direct discrimination*: we concluded that this discussion did not amount to less favourable treatment. This is because the notes record that the claimant responded positively to the discussion and stated that an automatic car *"is a good suggestion might go and see what I could get. Often use my wife's automatic more."*

220.2 *Harassment:* we concluded that this discussion did not amount to unwanted conduct. It was part of a general discussion of the claimant's appeal relating to his flexible working request, as part of which the claimant had raised the difficulties that he faced with driving to work.

16 December 2019 – appeal outcome meeting and outcome letter

Allegation 1 (paragraphs 1(iii)-(vi) and 5(iv) to (vii)) and Allegation 7 (paragraphs 64(i)-(iii), 68 (i)-(iii) and 71(i)-(iii)

221. We concluded that the reference in the outcome letter to the respondent's Parental Leave and Time Off for Dependants' policy was entirely appropriate, given the context of the claimant's flexible working request. The following comment does not form part of the 16 December Conduct:

"With regards to support for caring for your wife and son, in line with the Council's commitment to supporting staff with families, I direct you to the 'Parental Leave and Time Off for Dependants' policy, which I attached for your convenience."

222. For the avoidance of doubt, we concluded that the comment set out above directing the claimant to the Parental Leave and Time Off for Dependants' policy did not amount to either:

222.1 Less favourable treatment for the purposes of any direct disability discrimination by association complaint; or

222.2 Unwanted conduct for the purposes of any disability-related harassment complaint;

because this formed part of the discussion of options that the respondent had put forwards at the meeting for the claimant's consideration.

223. Mr Lal also stated in the outcome letter of 16 December 2019:

"Whilst I have sympathy for the long commute you undertake, you knew how far this was at the point of applying for and accepting the role. As you suggest your condition is deteriorating, that is something that you need to consider going forward.

We also discussed your own responsibility for managing your disability and supporting your family, the obligation of the authority is with regards to the role you occupy and ability to conduct that role."

224. We concluded that at the meeting on 16 December 2019, Mr Lal:

224.1 did state that, with regard to the claimant's son and wife, he needed to *"manage your own life"*; and

224.2 did state that, with regard to looking after the claimant's son and wife, *"it's not the organisation's responsibility"*.

for the reasons set out at paragraphs 131 to 137 of this Judgment.

225. We have considered the comments set out at paragraph 223 above (regarding the claimant's commute, his deteriorating condition and his responsibility versus the authority's obligations) together with Mr Lal's comments in the outcome letter of 16 December 2019. We will refer to the comments made at the meeting on 16 December 2019 and the outcome letter as follows:

225.1 **Comment A** (outcome letter): *"Whilst I have sympathy for the long commute you undertake, you knew how far this was at the point of applying for and accepting the role."*

225.2 **Comment B** (outcome letter): *"As you suggest your condition is deteriorating, that is something that you need to consider going forward."*

225.3 **Comment C** (outcome letter): *"We discussed your own responsibility for managing your disability, supporting your family, the obligation of the authority is with regards to the role that you occupy and ability to conduct that role"*.

225.4 **Comment D** (during the meeting): *"manage your own life"*;

225.5 **Comment E** (during the meeting): *"it's not the organisation's responsibility"*;

We will refer to these comments collectively as the "**16 December Conduct**".

226. We note that the claimant claims that the 16 December Conduct amount to variously:

226.1 discrimination arising from disability (Comments A and B);

226.2 direct disability discrimination or harassment (Comments A, B, C (save for the reference to *"supporting your family"*) and D);

226.3 direct disability discrimination by association or harassment by association (Comments C (save for the reference to *"managing your own disability"*), D and E).

227. The context of these complaints is that they relate to the way in which Mr Lal delivered the outcome to the appeal against the partial refusal of the claimant's flexible working request. The claimant did not raise any complaints regarding the first page of the outcome letter, which explained the outcome of his appeal and the rationale for that outcome. However, the comments that the claimant complains that Mr Lal made during the meeting on 16 December 2019 and on the second page of the outcome letter go further than an explanation of that outcome.

228. We note that Mr Lal and the claimant had a longstanding friendship, as described in paragraph 69 of this Judgment. However:

228.1 Mr Lal held a far more senior role than the claimant within the respondent – he was the claimant's line manager's line manager and sat on the respondent's Executive Board;

228.2 Mr Lal was acting in a formal capacity to determine the claimant's flexible working request appeal; and

228.3 Mr Lal accepted that he could have decided not to hear the claimant's appeal, in light of their friendship, but chose not to do so;

228.4 Mr Lal accepted that their friendship had an impact on the way that he spoke during the appeal and in the phrasing of the outcome letter, stating that he sometimes felt that he was *"talking to a friend or someone I know very well"*;

228.5 Mr Lal accepted that the wording of the part of the letter that the claimant complained of may have contained a *"poor use of words"* and that he could see how the comment about *"that is something you need to consider going forwards"* could be 'misinterpreted'.

Discrimination arising from disability (Comments A and B)

Unfavourable treatment?

229. We concluded Comments A and B did amount to unfavourable treatment of the claimant. The claimant stated that Mr Lal's comments made him feel *"offended, humiliated and degraded"*. He said that this was because Mr Lal was suggesting that he could not "manage his life" at a time when the claimant was trying to manage his own pain and deal with his disabled son who needed significant care. The claimant was affronted by this comment because he believed that he was managing his condition and his life very well, considering his circumstances at that time.

Was the treatment because of something arising in consequence of the claimant's disability?

230. We concluded that the 16 December Conduct was because of something arising on consequence of the claimant's disability, i.e. the deteriorating condition of his leg. This led to the claimant requesting a permanent change to his working hours, such that he would work compressed hours (consisting of a nine day fortnight).

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

231. The respondent relied on aim of being able to constructively engage with an employee on all of the circumstances of their employment and/or to discuss the application of the respondent's policies to the claimant. We accept that is a legitimate aim. However, we concluded that the treatment was not a proportionate means of achieving that aim because Mr Lal could have delivered the appeal outcome to the claimant without making the comments during the meeting on 16 December 2019 or the comments in the letter of which the claimant has complained. Mr Lal did not need to make those comments, either during the meeting or in the letter, in order to deliver the appeal outcome or explain his rationale for that outcome.

Time limits

232. We will consider the issue of time limits in relation to the 16 December Conduct later in this Judgment.

Disability-related Harassment or Direct Disability Discrimination (Comments A, B, C and D)

233. We will first consider whether these comments amount to disability-related harassment.

Unwanted conduct?

234. We concluded that Comments A, B, C and D each amounted to unwanted conduct because the claimant stated that Mr Lal's comments made him feel *"offended, humiliated and degraded"*. We concluded that:

234.1 Comment A suggested that the claimant's commute was 'his problem' because he knew how far the commute was when he applied for the role. This comment took no account of the fact that the claimant's leg pain had increased recently;

234.2 Comment B implied that the claimant needed to consider his role 'going forwards'. Mr Lal's evidence was that he could see how that comment could be 'misinterpreted' and may be a 'poor choice of words';

234.3 Comment C drew a distinction between the claimant's responsibility for 'managing your disability' and the respondent's obligations in relation to his role – this suggested that the claimant's current difficulties were for him to resolve; and

234.4 Comment D suggested that the claimant could not "manage his life" at a time when the claimant was trying to manage his own pain and deal with his disabled son who needed significant care.

235. We note that the comments were made against the backdrop of the claimant's flexible working appeal. However, as stated above, Mr Lal could have delivered the appeal outcome to the claimant without making the additional comments that form the 16 December Conduct.

Effect of violating dignity or creating the proscribed environment?

236. The claimant's Counsel conceded during closing submissions that the claimant was not seeking to argue that the respondent had the purpose of violating the claimant's dignity or creating the proscribed environment for the claimant. We therefore considered the question of whether the Comments had the effect of violating the claimant's dignity or creating the proscribed environment.

237. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:

"while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct…it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…if, for example, the tribunal believes that the

claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question."

238. The EAT in *Dhaliwal* also stated that:

"Not every…adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended".

239. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

"…although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding….An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace."

240. The claimant stated that Mr Lal's comments made him feel *"offended, humiliated and degraded"*. He said that this was because Mr Lal was suggesting that he could not "manage his life" at a time when the claimant was trying to manage his own pain and deal with his disabled son who needed significant care. The claimant was affronted by this comment because he believed that he was managing his condition and his life very well, considering his circumstances at that time.

241. We have set out the context of the 16 December Conduct at paragraphs 227 and 228 above. We note that the 16 December Conduct was a 'one-off' in the sense that Mr Lal did not repeat the comments that he made at the meeting or in the letter to the claimant again. However, the claimant continued to feel concerned about the manner in which Mr Lal dealt with his appeal outcome, as evidenced by the fact that he raised the wording of the 16 December outcome letter as part of his grievance on 11 May 2020. The claimant stated in his grievance that: *"This letter from the Council clearly suggests that as a disabled person I should have not applied to work for Rotherham Council; it also suggests that I should leave the Council's employment because of my disability."*

Reasonable to have that effect?

242. We concluded that it was reasonable for the comments to have the effect of violating the claimant's dignity or creating the proscribed environment. Mr Lal himself accepted that some of the wording of the letter may have contained a *"poor use of words"* and that he could see how the comment about *"that is something you need to consider going forwards"* could be 'misinterpreted'. He also accepted that the way that he spoke during the appeal and in the phrasing of the outcome letter, stating that

he sometimes felt that he was *"talking to a friend or someone I know very well"*, which did not with the disparity in their seniority and the formal nature of the appeal process.

Because of the claimant's disability?

243. We concluded that there was a clear link between the comments and the claimant's disability because:

243.1 the context of the claimant's flexible working request were the difficulties that he faced, part of which related to the deterioration of his medical condition;

243.2 Mr Lal stated that the claimant needed to 'manage your life' and stated in the letter *"We also discussed your own responsibility for managing your disability…"*.

Direct discrimination

244. We have concluded that the Comments amounted to disability-related harassment. We therefore do not need to reach a conclusion on direct disability discrimination because a claimant cannot succeed under both heads of claim in relation to the same factual complaint.

Harassment and direct discrimination by association (Comments C, D and E)

245. We will first consider whether these comments amount to disability-related harassment by association.

Unwanted conduct?

246. We concluded that Comments C, D and E each amounted to unwanted conduct because the claimant stated that Mr Lal's comments made him feel *"offended, humiliated and degraded"*. We concluded that:

246.1 Comment C drew a distinction between the claimant's responsibility for 'supporting your family' and the respondent's obligations in relation to his role – this suggested that the claimant's current difficulties were for him to resolve;

246.2 Comment D suggested that the claimant could not "manage his life" at a time when the claimant was trying to manage his own pain and deal with his disabled son who needed significant care, against the backdrop of his wife's health difficulties; and

246.3 Comment E added to the implication that it was for the claimant to manage his own domestic difficulties when Mr Lal stated *"it's not the organisation's responsibility"* to look after the claimant's son and wife.

247. We note that the comments were made against the backdrop of the claimant's flexible working appeal. However, as stated above, Mr Lal could have delivered the appeal outcome to the claimant without making the additional comments that form the 16 December Conduct.

Effect of violating dignity or creating the proscribed environment?

248. We have already noted the guidance set out by the EAT in the cases of *Dhaliwal* and *Weeks*.

249. We have concluded that Comments C, D and E had the effect of violating the claimant's dignity or creating the proscribed environment for the claimant because Mr Lal suggested that the claimant was unable to 'manage his life' at a time when the claimant faced significant domestic difficulties. The comments were made in the context set out at paragraph 241 above.

Reasonable to have the effect?

250. We concluded that it was reasonable for these comments to have that effect on the claimant. Mr Lal himself accepted that some of the wording of the letter may have contained a *"poor use of words"* and that he could see how the comment about *"that is something you need to consider going forwards"* could be 'misinterpreted'. He also accepted that the way that he spoke during the appeal and in the phrasing of the outcome letter, stating that he sometimes felt that he was *"talking to a friend or someone I know very well"*, which did not with the disparity in their seniority and the formal nature of the appeal process.

Because of the claimant's family members' disabilities?

251. We concluded that there was a clear link between comments C, D and E and the claimant's son's disability because part of the reason for the claimant's flexible working request was the claimant's request to work from home in order to care for his son, during his wife's recovery from surgery. We concluded that Mr Lal stated in the appeal outcome meeting on 16 December that *"it's not the organisation's responsibility"* to look after the claimant's family. He also stated in the outcome letter that: "*We also discussed your own responsibility for…supporting your family, the obligation of the authority is with regards to the role you occupy and ability to conduct that role."*

252. We concluded that these comments were not linked to the claimant's mother's disability, because her medical condition did not impact on the claimant's ability to work from the respondent's office. In addition, we found that the respondent did not have knowledge that the claimant's wife's CTS amounted to a disability at this time.

Direct discrimination by association

253. We have concluded that the Comments amounted to disability-related harassment by association. We therefore do not need to reach a conclusion on direct disability discrimination by association because a claimant cannot succeed under both heads of claim in relation to the same factual complaint.

Time limits

254. We will consider the issue of time limits in relation to the 16 December Conduct later in this Judgment.

RESERVED JUDGMENT

Partial rejection of the claimant's flexible working request and/or a refusal to extend the amount of time the claimant was permitted to work from home

(Allegation 3, (Failure to make reasonable adjustments and harassment paragraphs 19(i) and (ii))

255. We explained in our findings of fact that the claimant's flexible working request was granted in part:

255.1 the respondent agreed to the claimant's request to work compressed hours, consisting of a nine day fortnight with alternate Wednesdays as the claimant's day off. This arrangement was subject to a review period. The claimant stated in his appeal that his compressed hours working should have been made permanent, but the respondent confirmed that it would be subject to a three month review;

255.2 in response to the claimant's request to work up from home on a specified number of days per month during his wife's recovery from carpal tunnel syndrome surgery, the respondent refused to agree a specific arrangement. However, Mr Lal agreed that the claimant could request to work from home on an ad hoc basis. We note that Ms Osman permitted the claimant to work from home on one occasion when he requested this (14 February 2020).

Disability-related Harassment

Unwanted conduct?

256. We concluded that the partial refusal of the claimant's flexible working request amounted to unwanted conduct because the respondent declined part of the claimant's request.

Effect of violating dignity or creating the proscribed environment?

257. We concluded that the partial refusal of the claimant's flexible working request did not violate his dignity or create the proscribed environment for the following key reasons:

257.1 the claimant was upset by the respondent's decision to review his compressed hours arrangement, but this was in part because he believed (mistakenly) that his colleague Ms Green had been granted compressed hours on a permanent basis. The claimant did not explain why he had this perception, even after he was referred to Ms Green's letter confirming her compressed hours arrangement during his evidence in these proceedings;

257.2 the respondent's flexible working policy provides for a review period for all flexible working requests;

257.3 it was reasonable for the respondent to explore with the claimant what arrangement he was requesting, when he asked to work from home on additional days during his wife's recovery period to provide care for his son before and after the school day. The claimant's flexible working request that he submitted on 24 October 2019 lacked sufficient detail of this part of his request for the respondent to consider it fully;

257.4 Mr Lal stated that the claimant would not be granted a set day to work from home, citing the nature of the claimant's work, his line management responsibilities and the demands of the service. However, Mr Lal stated: *"I do however agree that occasional working from home can and will be considered when specific projects or pieces of work need to be completed"*;

257.5 the claimant suggested in witness evidence that Ms Osman had a 'quota' of two days for were permitted to work from home. However, there was no evidence of such quote and we noted that more junior members of the team were permitted to work from home more often. In addition, the claimant's only ad hoc request to work from home after his flexible working request on 14 February 2020 was granted.

Because of the claimant's disability?

258. In any event, we concluded that the conduct here was not linked to the claimant's disability because:

258.1 **Compressed hours arrangement** – the claimant was granted compressed hours and his only concern at the appeal stage was that this arrangement was subject to a review. However, the respondent's policy was to review all flexible working arrangements, including Ms Green's compressed hours arrangement.

258.2 **Additional working from home during wife's recovery period** – the claimant accepted during cross-examination that he would have made the same request if he himself were not disabled. This was because that part of the claimant's flexible working request related to his son's caring arrangements whilst his wife was recovering from surgery.

Failure to make reasonable adjustments

Provision, criterion or practice ("PCP")

259. There was no dispute that the respondent applied a PCP to the claimant of requiring him to be office based or primarily office based.

Substantial disadvantage?

260. There was also no challenge made to the claimant's evidence that he was placed at a substantial disadvantage compared to non-disabled persons because he suffered pain in his left leg (or the exacerbation of such pain) because of his commute to work.

Time period of reasonable adjustments

261. I asked both representatives during their oral submissions what the time period should be for the claimant's reasonable adjustments complaints. The claimant's representative stated that the time period should be:

261.1 Compressed hours arrangement – 24 October 2019 to 15 January 2020; and

261.2 Additional working from home – 21 May 2020 (i.e. the date on which the claimant's employment terminated), on the basis that the claimant worked

from home from 27 February 2020 onwards due to the Covid-19 pandemic restrictions, rather than any adjustment made.

262. The respondent contended that the time period should be 24 October 2019 to 1 January 2020 for both of the adjustments that the claimant complained should have been made because:

262.1 the claimant's compressed hours arrangement started on 1 January 2020; and

262.2 the claimant contended that he should have been allowed additional working from home from 1 January 2020.

263. We concluded that the correct time period for each suggested adjustment of which the claimant complains was:

263.1 compressed hours arrangement – 24 October 2019 to 1 January 2020 (i.e. when the claimant's arrangement started); and

263.2 additional working from home –Thursday 27 January 2020 (i.e. the date of the occupational health report which suggested that the claimant would benefit from working from home one day per week) to the end of Wednesday 26 February 2020 (i.e. the last date when the claimant was required to work in the office).

264. The claimant did not explain why he believed that the date by which his compressed hours adjustment should have been made was 15 January 2020, given that his compressed hours arrangement actually started on 1 January 2020.

265. In relation to additional working from home, the claimant did not suggest that he needed additional working from home because of his own disability until this was raised during the occupational health assessment in January 2020. The occupational health report was finalised on 27 January 2020 and a copy was provided to the respondent shortly afterwards. This report stated that:

"In regards to his request to work from home for some days a month, it is likely that he would benefit from this as it will reduce the need to drive which will enable him to rest his leg. Ultimately it is for the organisation to determine whether this adjustment is reasonable and the extent to which it is achievable."

266. The claimant stated in his flexible working request on 24 October 2019 that he needed additional working from home during his wife's surgery recovery period to care for his disabled son (rather than due to his own disability).

267. The claimant stated that the substantial disadvantage that he faced was leg pain caused or exacerbated by his commute. The claimant therefore did not face any substantial disadvantage from Thursday 27 February 2020 onwards – he has not pleaded that the uncertainty of having to request working from home on an ad hoc basis placed him at a substantial disadvantage compared to non-disabled persons.

Did the respondent fail to make reasonable adjustments during the relevant periods?

268. We concluded that the respondent did not fail to make reasonable adjustments during the relevant period for the following key reasons:

268.1 the claimant's compressed hours arrangement was granted. The claimant objected to the fact that his compressed hours arrangement was subject to review. However, the claimant did not plead that the review process itself placed him at a substantial disadvantage compared to non-disabled persons; and

268.2 the claimant has also not pleaded that the uncertainty about when he could work from home exacerbated his leg pain as part of any substantial disadvantage that he faced;

268.3 we note that the respondent is under a duty to make reasonable adjustments for disabled employees, regardless of whether the employee themselves has requested such adjustments. However, the respondent had discussed adjustments for the claimant as part of his flexible working request and referred him for an occupational health appointment. The claimant did not suggest that he needed to work from home on a regular basis due to his leg pain until this was suggested in the occupational health report produced on 27 January 2020;

268.4 we accepted Ms Osman's evidence that the claimant had line management and internal client responsibilities which meant that the needed to be present in the office for the majority of his working time;

268.5 we note that the following events occurred from Thursday 27 January to Thursday 27 February 2020:

268.5.1 the claimant was scheduled to work for three full (i.e. five day) working weeks during this period;

268.5.2 the occupational health report was finalised on Thursday 27 January 2020. The report stated that the claimant would benefit from being permitted to work 'some days' from home and did not specify the number of days that they advised the claimant worked from home (either on a weekly or monthly basis);

268.5.3 Ms Osman and the claimant met to discuss the report shortly before Thursday 13 February 2020 (when Ms Osman emailed a summary of their meeting to the claimant);

268.5.4 the claimant requested and was granted one day's working from home on Friday 14 February 2020. He did not request to work from home on any other dates during this period;

268.5.5 the claimant could have requested to work from home on additional days, as stated in Mr Lal's appeal outcome letter, subject to business needs during the period from 27 January to 27 February 2020;

268.5.6 the claimant had two non-working days during this period, because of his compressed hours arrangement;

268.5.7 the claimant's email to Ms Osman of Thursday 20 February 2020 referred to his request to work from home *"one day a week to*

alleviate the significant pain I suffered", presumably at the meeting that took place shortly before 13 February 2020;

268.5.8 the respondent was consulting with the claimant regarding the restructure, as part of which they held consultation feedback meetings and interviews for the Programme Lead role during the week starting on Monday 24 February 2020; and

268.5.9 the claimant was due to go on leave from Thursday 27 February 2020 for two weeks. His interview for the Programme Lead role took place on Wednesday 26 February 2020, which was his final working day when he had to attend the respondent's office.

Refusing/failing to refer the claimant to occupational health (Summer 2019 to 30 November 2019)

(Allegation 8 – all paragraphs)

269. We found that the claimant did not raise any matters which would have warranted a referral to occupational health from Summer 2019 up to the point when he submitted his flexible working request on 24 October 2019.

270. We concluded that it was reasonable for the respondent to meet with the claimant to discuss the concerns relating to his health before making any occupational health referral and we found that this discussion took place on 4 November 2019. There then appeared to be some confusion between the parties as to whether or not the claimant had consented to an occupational health referral. We concluded that the claimant and Ms Osman agreed that he would be referred to occupational health by 19 November 2019, because the claimant did not refer to this issue in his flexible working appeal to Mr Lal on that date. We also note that Ms Osman completed the occupational health referral form on 30 November 2019.

Direct disability discrimination

271. We found that the claimant was not treated less favourably than Mr X. Mr X's circumstances were materially different to those of the claimant. Mr X was in a crisis situation where his mental health had deteriorated rapidly and to an extreme extent, placing him at significant risk of harm. By way of contrast, the claimant's evidence was that his condition had deteriorated but he did not suggest that this was as sudden or as extreme as Mr X's mental health crisis.

272. We also concluded that a hypothetical comparator who was not disabled would have been treated in a similar manner to the claimant. The claimant did not provide any evidence to suggest that a hypothetical non-disabled comparator would have been referred to occupational health more quickly than he was after 24 October 2019.

273. We have therefore concluded that the claimant was not treated less favourably than Mr X and/or a hypothetical comparator and his complaint of direct discrimination fails.

Disability-related Harassment

274. We concluded that the respondent's conduct in relation to the claimant's referral to occupational health did not amount to 'unwanted conduct' for the purposes of his harassment complaint. There was no evidence that the respondent refused to refer him to occupational health. We concluded that the claimant was referred to occupational health, following some discussions between him and Ms Osman during the period 24 October to 30 November 2019.

275. The claimant's harassment complaint therefore fails.

COMPLAINTS RELATED TO THE CLAIMANT'S DISMISSAL

(Allegation 9 – all paragraphs except paragraphs 100-103 (which were withdrawn during the hearing)

276. The claimant is pursuing the following complaints relating to his dismissal:

276.1 Unfair dismissal;

276.2 Direct disability discrimination and discrimination by association; and

276.3 Discrimination arising from disability.

Unfair dismissal

Respondent's amendment application

277. The respondent pleaded that the reason for the claimant's dismissal was redundancy. The initial list of issues at the first preliminary hearing (recorded by Employment Judge Shore) also stated that the respondent was relying on some other substantial reason ("**SOSR**") as an alternative reason for the claimant's dismissal. However, the respondent did not apply to amend its response to include this alternative pleading.

278. The parties' agreed list of issues for this hearing stated under the heading 'ordinary unfair dismissal':

"82 What was the reason or principal reason for the claimant's dismissal? The respondent says the reason was redundancy or SOSR?

…

"86 If the reason for the claimant's dismissal was SOSR,…The respondent says the reason was a substantial reason capable of justifying dismissal, namely a reorganisation."

279. We raised the fact that the respondent had not pleaded SOSR with the parties after the evidence was concluded. The respondent's representative applied during submissions to amend the response to include SOSR as an alternative reason for dismissal. The claimant's representative objected, but was unable to provide a satisfactory explanation of the prejudice that he stated the claimant would face if the amendment application was permitted, given that the parties had conducted a hearing based on an agreed list of issues which referred to SOSR as an alternative reason for the claimant's dismissal.

280. We considered the factors set out in *Selkent Bus Co Ltd t/a Stagecoach v Moore* [1996] IRLR 661 EAT and concluded that it would be in the interests of justice to permit the respondent to amend its response to include SOSR as an alternative reason for the claimant's dismissal. Our key reasons for this conclusion included:

280.1 this was a 're-labelling' exercise – no new facts were pleaded;

280.2 the claimant had not suffered any prejudice because the parties had proceeded on the basis that SOSR would be pleaded in the alternative to redundancy as a reason for dismissal since the first preliminary hearing of this claim; and

280.3 although the respondent's application was at the latest possible stage in the hearing, the potential hardship caused to the respondent by refusing the application was significant.

Reason for dismissal

281. The Tribunal must first determine the reason or principal reason for the claimant's dismissal. The respondent stated that the reason was redundancy (i.e. the reduction in the number of Programme Lead roles from two to one) or, in the alternative, reorganisation. The claimant stated that the restructure was a 'device to facilitate his removal', following his flexible working request and the comments relating to his disability.

282. Our key findings of fact included:

282.1 the respondent had been considering a restructure of the team for at least 18 months before it started. For example, Mr Lal spoke to Ms Osman about the need for a restructure when she joined the respondent in August 2018. Mr Lal also asked Ms Osman to provide information on the existing team so that senior management could discuss a potential restructure in August 2019 (copies of which were provided to the Tribunal). These discussions took place before the claimant made his flexible working request on 24 October 2019;

282.2 we concluded that the timing of the restructure proposals was driven by Ms Osman's announcement of her decision to retire in December 2019, not by the claimant's flexible working request and appeal;

282.3 there was no reduction in the total number of staff in the team – we note that a new Business Improvement Officer role was introduced and that this role was offered to the claimant (which he rejected);

282.4 we accepted Ms Osman's evidence that there was sufficient transformation work for two Programme Leads to perform, but the difficulty was an internal political one – i.e. whether the respondent's individual Directorates would be willing to fund that work;

282.5 we also accepted Ms Osman's evidence that she asked other Directorates if they would be willing to fund a short term extension of the claimant's role, but they were not willing to do so;

282.6 Ms Osman retired from the respondent before the claimant was made redundant, however she confirmed that it was likely that the work that the claimant was performing would (potentially at some point in the future, if not at the time) be performed by other staff who were based within the other Directorates;

282.7 both Ms Osman and Mr Lal had resigned from their employment with the respondent before the claimant's interview for the Programme Lead had taken place and both left the respondent before the claimant was made redundant. In the circumstances, there was no reason for them to go to such lengths to 'facilitate the claimant's removal' when they themselves knew that they would be leaving the respondent.

Consultation process

283. We concluded that the respondent followed a reasonable process in dismissing the claimant including:

283.1 Ms Osman held two initial consultation meetings with the claimant, Ms Green and union officials to discuss the proposals;

283.2 the claimant and Ms Green were offered the opportunity to attend individual consultation meetings, but both refused. Instead they both provided detailed written feedback to the proposals, which Ms Osman considered and responded to in writing in detail;

283.3 the respondent considered the claimant's application for the single Programme Lead role properly because they invited him to attend an interview, conducted by a panel of three interviewers. Ms Osman considered stepping down from the interview panel due to the claimant's allegations in his emails in February 2020, however she decided to continue because she felt able to take an objective view of the interview. In any event, the scoring for the role was based on all three panel members' views of the claimant;

283.4 the interview process for the Programme Lead role was not 'pre-determined'. The respondent prepared standard competency-based questions for the role, based on the Programme Lead job description and with HR input. The claimant and Ms Green were asked the same interview questions and scored against their responses;

283.5 the claimant performed significantly worse at interview than Ms Green, as evidenced by their respective scores and feedback. Ms Osman's evidence was that Ms Green was not an 'outstanding' candidate, but that she performed much better than the claimant;

283.6 the claimant was offered the role of Business Information Officer (with two years' salary protection), which he chose to reject because it was a more junior role. (This did not affect his redundancy pay);

283.7 we accepted Ms Osman's evidence that the Head of Service role was not a suitable alternative role for the claimant, although he could have applied for that role if it were vacant; and

283.8 the claimant did not identify any other suitable roles during his notice period.

284. Although the respondent treated this as a redundancy process, a similar process would have been followed if the restructure were treated as a SOSR reorganisation instead of a redundancy situation. This would have included the same key elements that the respondent provided as part of the redundancy process, in summary:

284.1 discussion of and consultation on the respondent's proposals;

284.2 an opportunity for the claimant and Ms Green to apply for the Programme Lead role; and

284.3 consideration of alternatives to dismissal.

285. The claimant's complaint of unfair dismissal is therefore dismissed.

Discrimination complaints

Direct disability discrimination and discrimination by association

286. We concluded that the claimant was not treated less favourably than a hypothetical comparator who was either (i) not disabled or (ii) did not have family members who were disabled. We concluded that the reason for the claimant's dismissal was the respondent's restructure. A hypothetical comparator who performed poorly at interview compared to Ms Green, who did not accept the role of Business Information Officer and who did not identify any other suitable roles would also have been dismissed. We concluded that the claimant's disability and the disabilities of his family members did not contribute to the claimant's dismissal.

Discrimination arising from disability

287. We accept that the claimant's need for reasonable adjustments was 'something arising' in consequence of his disability. However, he was not dismissed because of any need for reasonable adjustments. We concluded that the reason for the claimant's dismissal was the respondent's restructure. He was dismissed because he performed poorly at interview compared to Ms Green, he did not accept the role of Business Information Officer and did he not identify any other suitable roles would also have been dismissed.

288. In addition, we note that the respondent did agree to one of the adjustments that the claimant was seeking (i.e. his compressed working hours arrangement). Paragraphs 259 to 268 of this Judgment sets out our findings in respect of the claimant's reasonable adjustments complaint.

TIME LIMITS – 16 December Conduct

289. We have concluded that the claimant's complaints of harassment, harassment by association and discrimination arising from disability succeeded in relation to:

289.1 Mr Lal's comments to the claimant at the meeting on 16 December 2019; and

289.2 Mr Lal's letter of 16 December 2019, recording the outcome of the claimant's flexible working appeal, which was given to the claimant at the meeting on 16 December 2019;

(which we have already defined as the "**16 December Conduct**" earlier in this Judgment).

290. The remainder of the claimant's complaints of discrimination have failed. We therefore need to consider the provisions of s123 EQA which deal with time limits under the EQA. This requires us to consider whether it is 'just and equitable' to extend the primary time limit for the claimant to present his claim.

291. The primary time limit for the claimant's complaints relating to the 16 December Conduct expired on 15 March 2020. The claimant contacted ACAS on 21 May 2020 and early claim conciliation ended on 21 June 2020. The claimant then presented his claim to the Tribunal on 19 July 2020, i.e. within one month of the end of the early claim conciliation period.

292. We note that:

292.1 there is no presumption that the Tribunal will extend time limits and the burden of persuading the Tribunal is on the claimant;

292.2 in terms of the claimant's evidence, we need to consider:

292.2.1 why the claimant did not present his claim in time; and

292.2.2 once the primary time limit expired, why he did not present his claim earlier than he did;

292.3 there is no set 'checklist' of factors for determining these issues, instead the Tribunal must consider all relevant factors (see *Adeji*);

292.4 the Tribunal must balance the potential prejudice to the claimant in refusing to extend the time limits against the potential prejudice to the respondent in extending the time limits.

293. The claimant gave oral evidence at the start of this hearing, during which he stated that he was not aware of the time limits that applied to the presentation of Employment Tribunal claims. We accepted the claimant's evidence that:

293.1 he was experiencing some very difficult personal circumstances during this period. He stated that his mother was hospitalised with severe congestive heart failure during the Christmas 2019 period. His wife had surgery due to carpal tunnel syndrome during January 2020 which meant that he had to assist her during her recovery and also take on a much greater share of the practical day to day care for their disabled son;

293.2 the claimant attempted to resolve his concerns regarding his working arrangements during the period up to mid-March 2020. He stated: *"I just wanted to get a flexible working request in place, I did not want to formalise this – I had no intention of getting to this point".* For example, the claimant attended an occupational health appointment in January 2020 and commented on their report, he discussed his working arrangements with

Ms Osman (for example, at their meeting in early February 2020 and their emails of 20 and 21 February 2020) and he attended workplace assessments (including a stress risk assessment) with Mrs Priestley in late February 2020. The assessment were not finalised or discussed until mid-March 2020 due to the claimant's leave;

293.3 the claimant was placed at risk of redundancy in January 2020 and underwent a period of redundancy consultation during February 2020, following which he unsuccessfully applied for the Programme Lead role and was interviewed on 26 February 2020. The claimant was aware throughout the redundancy process that if he did not succeed in his application, there was a real risk that he would lose his job;

293.4 the claimant travelled to Pakistan for a family wedding on 27 February 2020 (i.e. the day after his unsuccessful interview) and did not return until 17 March 2020. This was at the start of the Covid-19 pandemic in the UK. The claimant's son and mother were classed as particularly 'vulnerable' to exposure from Covid-19 and the claimant's son was experiencing symptoms which were similar to those caused by Covid-19. The claimant described this time and the initial UK lockdown period as a 'massive worry';

293.5 the claimant was told not to return to the office following his leave, due to his son's symptoms. The UK was then placed in lockdown on 23 March 2020 and all of the respondent's employees were told to work from home. The claimant continued working but did not return to the respondent's office before his employment terminated;

293.6 the claimant submitted a detailed grievance to the respondent, including his complaints relating to the 16 December Conduct, on 11 May 2020;

293.7 the claimant sought legal advice from an insurance company in May 2020 but he did not have any legal representation;

293.8 the claimant was not a member of any trade union and that the union representative that he met with during the redundancy consultation (who attended the consultation meetings at the respondent's request) did not advise him of time limits;

293.9 the claimant contacted ACAS on 21 May 2020. He then drafted his claim form himself and presented it to the Tribunal on 19 July 2020;

294. We note that the respondent's representative has pointed out in his submissions the things that the claimant was able to do during this period:

"*Between January-May 2020* [the claimant] *was capable of engaging in a grievance process, attending an OH appointment, lengthy correspondence with* [Ms Osman]*, a family holiday abroad, meeting TU representative Mr Rashid on 24/1/20, attending consultations meetings, interviewing for Programme Lead role, looking for alternative work, fulfilling his work duties, and taking legal advice from Solicitors. In such circumstances there is absolutely no good reason he could not have presented his claims in time."*

295. However, we note that Mrs Priestley's evidence that the claimant was 'building a case' in February 2020 and had told her that he was 'seeing a solicitor' was not put to the claimant directly during cross-examination.

296. We have also considered the potential prejudice to the respondent if time limits were to be extended:

296.1 the respondent has not suggested that the cogency of the evidence has been affected by the claimant's delay in presenting his claim. We note that the liability hearing of this claim took place around two and a half years after the 16 December Conduct, however the delay caused by the claimant's initial presentation of this claim formed a much smaller part of this delay. The remainder of the delay was due to the time taken in managing this claim and the unfortunate postponement of the November 2021 final hearing due to the Tribunal's resources;

296.2 part of the 16 December Conduct relates to written comments made by Mr Lal in the flexible working appeal outcome letter of 16 December 2019 which are a matter of written record;

296.3 the claimant's grievance of 11 May 2020 included his complaints regarding the 16 December Conduct. The respondent carried out a detailed grievance investigation during June and July 2020 (including interviews with Mr Lal and Ms Osman both of whose employment with the respondent had already ended). We were provided with detailed notes of the grievance interviews as part of the hearing file;

296.4 all of the witnesses to the 16 December Conduct that the respondent wished to call were able to attend this hearing and provide evidence.

297. We have concluded that it would be just and equitable to extend the time limit for the claimant to present his claim to 19 July 2020 for the following key reasons:

297.1 we note that ignorance of time limits is not (of itself) a reason for extending time limits;

297.2 we accepted the claimant's account of the events that took place both from 16 December 2019 to 15 March 2020 and from 15 March 2020 until he presented his claim during which he explained why he did not present his claim at an earlier time;

297.3 it is clear from the claimant's account that he was subject to a significant amount of domestic and work challenges during the period up to 15 March 2020, many of which continued beyond 15 March 2020;

297.4 the claimant obtained legal advice in May 2020 and contacted ACAS on 21 May 2020. He then brought his claim within one month of the end of the early claim conciliation period;

297.5 the claimant complained in his claim form of a series of events which he alleged were discrimination including his dismissal on 21 May 2020. albeit that we have concluded that only the 16 December Conduct amounted to discrimination;

297.6 the prejudice to the respondent of extending time limits is outweighed by the potential prejudice to the claimant in this case because:

297.6.1 the cogency of the respondent's evidence was not affected by the claimant's delay. This is particularly the case given that the respondent investigated the 16 December Conduct in detail as part of the grievance investigation in June and July 2020. In addition, the respondent was able to call the witnesses that it wished at this hearing;

297.6.2 if we decided not to extend the time limits, the claimant would be deprive of any remedy for the 16 December Conduct which we have found to be both harassment (relating to the claimant's disability and relating to his son's disability) and discrimination arising from disability.

CONCLUSIONS

298. The claimant's complaints relating to the meeting on 16 December 2019 and the letter of 16 December 2019 (recording the outcome of his flexible working request appeal) succeed in respect of his claims of:

298.1 Discrimination arising from disability;

298.2 Harassment related to disability; and

298.3 Harassment by association (in relation to his son's disability, but not in relation to the disabilities of his wife and mother).

The allegations relating to these successful complaints are set out at:

(c) Allegation 1 (the factual complaints at paragraphs 1(iii), 1(iv), 1(v) and 1(vi), 5(iv), 5(v), 5(vi) and 5(vii)); and
(d) Allegation 7 (in its entirety);

of the parties' Amended List of Issues (attached at the Annex to this document).

5. The claimant's remaining complaints have either been dismissed on withdrawal or fail and are dismissed (as identified at the start of this Judgment).

Employment Judge Deeley

28 September 2022

RESERVED JUDGMENT

Annex – Parties' list of issues (as amended by claimant's Counsel, following withdrawal of various complaints during the hearing, with the respondent's consent)

IN THE SHEFFIELD EMPLOYMENT TRIBUNAL **Claim No. 1803889/2020**

Mr. Yassir Mahmood Claimant

-v-

Rotherham Metropolitan Borough Council

Respondent

AGREED LIST OF ISSUES

Allegation 1

Paragraphs 3-4 of the original Claim

Paragraphs 8-36 of the FBPs

Paragraph 19.1 of the CMO

Allegation 1 is comprised of thirteen separate claims: Six claims of direct discrimination and seven claims of harassment. The claims arising from allegation 1 are claims of associative discrimination (i.e. they are not related to the claimant's disability but to the disabilities of his son, wife and elderly mother).

Direct disability discrimination (associative discrimination)

1. Did the respondent treat the claimant less favourably than it treated (or would have treated) a hypothetical comparator by:

   (i) Suggesting that the claimant use his annual leave to fulfil his caring responsibilities during the meeting on 10 December 2019;

   (ii) Suggesting that the claimant take unpaid leave to fulfil his caring responsibilities during the meeting on 10 December 2019;

(iii) Stating that, with regard to the claimant's son and wife, he needed to *"manage your own life"* during the meeting on 16 December 2019;

(iv) Stating that, with regard to looking after the claimant's son and wife, *"it's not the organisation's responsibility"* during the meeting on 16 December 2019;

(v) Stating, *"We discussed your own responsibility for… supporting your family, the obligation of the authority is with to the role that you occupy and ability to conduct that role"* in the letter of 16 December 2019;

(vi) Stating, "*With regards to support for caring for your wife and son, in line with the Council's commitment to supporting staff with families, I direct you to the Parental Leave and Time Off for Dependants policy, which I attached for your convenience"* in the letter of 16 December 2019.

2. The respondent contends that the correct hypothetical comparator is somebody who put in a similar flexible working request to the claimant, on the basis of caring for family members, who were not disabled.

3. If the claimant was treated less favourably as alleged, what was the reason for the less favourable treatment?

4. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, that the claimant has a disabled son and/or wife and/or mother?

Harassment related to the protected characteristic of disability (associative discrimination)

5. Did the respondent subject the claimant to the following conduct:

(i) Ms Osman telling the claimant that she would not allow the claimant to work from home because she did not want to *"open the floodgates"*;

(ii) Mr Lal suggesting that the claimant use his annual leave to fulfil his caring responsibilities during the meeting on 10 December 2019;

(iii) Mr Lal suggesting that the claimant take unpaid leave to fulfil his caring responsibilities during the meeting on 10 December 2019;

(iv) Mr Lal stating that, with regard to the claimant's son and wife, he needed to

"manage your own life" during the meeting on 16 December 2019;

(v) Mr Lal stating that, with regard to the claimant's son and wife, *"it's not the organisation's responsibility"* during the meeting on 16 December 2019;

(vi) Mr Lal stating that, *"We discussed your own responsibility for… supporting your family, the obligation of the authority is with to the role that you occupy and ability to conduct that role"* in his letter of 16 December 2019;

(vii) Mr Lal stating that, "*With regards to support for caring for your wife and son, in line with the Council's commitment to supporting staff with families, I direct you to the Parental Leave and Time Off for Dependants policy, which I attached for your convenience"* in his letter of 16 December 2019.

6. If yes, was that conduct unwanted?

7. If yes, was the conduct related to the disabilities of the claimant's son and/or wife and/or mother?

8. If yes, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).

Allegation 2 is comprised of six separate claims: Three claims of direct disability discrimination and three claims of disability related harassment.

Direct disability discrimination

9. Did the respondent treat the claimant less favourably than it treated (or would have treated) a hypothetical comparator by:

(i) Ms Osman commenting that *"You're always at the gym"* and that *"You're so fit"* when the claimant was trying to explain how his disability affected him during the meeting on 4 November 2019.

(ii) Ms Osman asking the claimant to roll up his trouser leg to expose his left leg during the meeting on 4 November 2019;

(iii) Ms Osman asking the claimant to press on his shoe to show that a large portion of his foot was missing during the meeting on 4 November 2019.

10. If yes, what was the reason for the less favourable treatment?

11. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the claimant's disability?

Harassment related to the protected characteristic of disability

12. Did the respondent subject the claimant to the following conduct:

    (i) Ms Osman commenting that *"You're always at the gym"* and that *"You're so fit"* when the claimant was trying to explain how his disability affected him during the meeting on 4 November 2019.

    (ii) Ms Osman asking the claimant to roll up his trouser leg to expose his left leg during the meeting on 4 November 2019;

    (iii) Ms Osman asking the claimant to press on his shoe to show that a large portion of his foot was missing during the meeting on 4 November 2019.

13. If yes, was that conduct unwanted?

14. If yes, was the conduct related to the claimant's disability?

15. If yes, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).

Allegation 3 is comprised of two separate claims: One claim of failure to make reasonable adjustments and one claim of disability related harassment.

Failure to make reasonable adjustments

16. Did the respondent apply the following PCP to the claimant: A requirement that he should be office based, or primarily office based?

17. If yes, did that PCP place the claimant at a substantial disadvantage in comparison to his non-disabled persons because the commute to work did not cause them to suffer pain and/or exacerbate existing pain?

18. If yes, did the respondent fail to make reasonable adjustments to the claimant's role by rejecting his flexible working request and/or by refusing to extend the amount of time that he was allowed to work from home?

Harassment related to the protected characteristic of disability

19. Did the respondent subject the claimant to the following conduct:

(i) Rejecting or partially rejecting his flexible working request?

(ii) Refusing to extend the amount of time that he was allowed to work from home?

20. If yes, was that conduct unwanted?

21. If yes, was the conduct related to the claimant's disability?

22. If yes, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).

~~Allegation 4 is comprised of four separate claims: One claim of indirect disability~~ discrimination, one claim of failure to make reasonable adjustments, and two claims ~~of disability related harassment~~.

~~Indirect disability discrimination~~

23. ~~Did the respondent apply the following PCP to the claimant: A requirement that he reduce his flexitime deficit to two hours in order for his flexible working request to be implemented?~~

24. ~~If yes, did the respondent apply (or would it have applied) the PCP to non-disabled persons?~~

25. ~~If yes, did the PCP put (or would it have put) those who share the claimant's disability at a particular disadvantage in comparison to non-disabled persons, because they would suffer pain (or an exacerbation of existing pain) while commuting to and from work?~~

26. ~~Did the claimant suffer from that same disadvantage?~~

27. ~~If yes, can the respondent show that the PCP was a proportionate means of achieving a legitimate aim. The respondent relies on the following legitimate aim: that employees should not have a significant flexitime debt.~~

~~Failure to make reasonable adjustments~~

28. ~~Did the respondent apply the following PCP to the claimant: A requirement that he reduce his flexitime deficit to two hours in order for his flexible working request to be implemented?~~

29. ~~If yes, did the PCP placed the claimant at a substantial disadvantage in comparison to non-disabled persons because it caused him to suffer pain (or an exacerbation of existing pain) while commuting to and from work? Did the respondent know, or should it have reasonably known, that the claimant was likely to be placed at such a disadvantage?~~

30. ~~If yes, by failing to dispense with the PCP, did the respondent fail to make a reasonable adjustment?~~

~~Disability related harassment~~

31. ~~Did the respondent refuse to implement the claimant's partially approved flexible working request until such time as he had reduced his flexitime deficit to two hours?~~

32. ~~If yes, was that conduct unwanted?~~

33. ~~If yes, was the conduct related to the claimant's disability?~~

34. ~~If yes, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).~~

~~Disability related harassment (associative discrimination)~~

35. ~~Did the respondent refuse to implement the claimant's partially approved flexible working request until such time as he had reduced his flexitime deficit to two hours?~~

36. ~~If yes, was that conduct unwanted?~~

37. ~~If yes, was the conduct related to the disabilities of the claimant's son and/or his wife and/or his elderly mother~~

38. ~~If yes, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).~~

Allegation 5 is comprised of three separate claims: One claim of direct disability discrimination and two claims of harassment.

Direct disability discrimination

39. On 10 December 2019, the claimant attended an appeal meeting in respect of his flexible working request. Did the respondent treat the claimant less favourably than it treated (or would have treated) a hypothetical comparator by refusing to provide him with a copy of Ms Boyle's notes?

40. If yes, what was the reason for the less favourable treatment?

41. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the claimant's disability?

Disability related harassment

42. On 10 December 2019, the claimant attended an appeal meeting in respect of his flexible working request. Did Ms Boyle refuse to disclose a copy of her notes from that meeting to the claimant?

43. If yes, was that conduct unwanted?

44. If yes, was the conduct related to the claimant's disability?

45. If yes, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).

Disability related harassment (associative discrimination)

46. On 10 December 2019, the claimant attended an appeal meeting in respect of his flexible working request. Did Ms Boyle refuse to disclose a copy of her notes from that meeting to the claimant?

47. If yes, was that conduct unwanted?

48. If yes, was the conduct related to the disabilities of the claimant's son and/or his wife and/or his elderly mother?

49. ~~If yes, did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).~~

Allegation 6 is comprised of four separate claims: Two claims of direct discrimination and two claims of harassment.

Direct disability discrimination

50. During the appeal meeting on 10 December 2019, did Mr Lal treat the claimant less favourably than he treated (or would have treated) a hypothetical comparator by:

    (i) Asking why he had applied for the role in the first place, given his disability;

    (ii) Saying that it was up to him to manage his own life;

    (iii) Suggesting that he should buy an automatic car.

51. If yes, what was the reason for the less favourable treatment?

52. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the claimant's disability?

Direct disability discrimination (associative discrimination)

53. During the appeal meeting on 10 December 2019, did Mr Lal treat the claimant less favourably than he treated (or would have treated) a hypothetical comparator by telling him that he had to manage his own life?

54. If yes, what was the reason for the less favourable treatment?

55. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the disabilities of the claimant's son and/or his wife and/or his elderly mother?

Disability related harassment

56. During the appeal meeting on 10 December 2019, did Mr Lal:

(i) Ask the claimant why he had applied for the role in the first place, given his disability?

(ii) Say that it was up to the claimant to manage his own life?

(iii) Suggest that the claimant should buy an automatic car?

57. If yes, were those comments unwanted?

58. If yes, were the comments related to the claimant's disability?

59. If yes, did the comments have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).

Disability related harassment (associative discrimination)

60. During the appeal meeting on 10 December 2019, did Mr Lal tell the claimant that he had to manage his own life?

61. If yes, was that comment unwanted?

62. If yes, was the comment related to the disabilities of the claimant's son and/or his wife and/or his elderly mother?

63. If yes, did the comment have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).

Allegation 7 is comprised of eight separate claims: Three claims of direct discrimination, two claims of discrimination arising from disability, and three claims of harassment.

Direct disability discrimination

64. In his letter of 16 December 2019, did Mr Lal treat the claimant less favourably than he treated (or would have treated) a hypothetical comparator by:

(i) Stating that he knew how far the commute was at the point of applying for and accepting the role?

(ii) Stating that he needed to consider his role going forward?

65. If yes, what was the reason for the less favourable treatment?

66. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the claimant's disability?

Discrimination arising from disability

67. As a consequence of the claimant's disability, did his commute to work become more difficult? (i.e. because it caused him to suffer pain or exacerbated existing pain).

68. If yes, in his letter of 16 December 2019, did Mr Lal treat the claimant unfavourably by:

(i) Stating that he knew how far the commute was at the point of applying for and accepting the role?

(ii) Stating that he needed to consider his role going forward?

69. If yes, did Mr Lal discriminate against the claimant because of something arising in consequence of his disability?

70. Can the respondent show that the treatment complained of was a proportionate means of achieving a legitimate aim? The respondent relies on the following legitimate aim: being able to constructively engage with an employee on all the circumstances of their employment and/or discuss the application of the respondent's policies to the claimant.

Disability related harassment

71. In his letter of 16 December 2019, did Mr Lal make the following comments?

(i) Stating that he knew how far the commute was at the point of applying for and accepting the role?

(ii) Stating that he needed to consider his role going forward?

(iii) Stating, "*We also discussed your own responsibility for managing your disability…the obligation of the authority is with regard to the role that you occupy and ability to conduct that role"*

72. If yes, were those comments unwanted?

73. If yes, were the comments related to the claimant's disability?

74. If yes, did the comments have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).

Allegation 8 is comprised of two separate claims: One claim of direct discrimination and one claim of harassment.

Direct disability discrimination

75. Did the respondent treat the claimant less favourably than it treated (or would have treated) RG and/or a hypothetical comparator by refusing and/or failing to refer him to occupational health from the summer of 2019 until 30 November 2019?

76. If yes, what was the reason for the less favourable treatment?

77. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the claimant's disability?

Disability related harassment

78. Did the respondent refuse and/or fail to refer the claimant to occupational health from the summer of 2019 until 30 November 2019?

79. If yes, was that refusal and/or failure unwanted?

80. If yes, was that refusal and/or failure related to the claimant's disability?

81. If yes, did that refusal and/or failure have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s.
26(1)(b)(ii) EqA 2020).

Allegation 9 is comprised of six separate claims: A claim of unfair dismissal, two claims of direct discrimination, one claim of discrimination arising from disability, and two claims of harassment.

Ordinary unfair dismissal

82. What was the reason or principal reason for the claimant's dismissal? The respondent says the reason was redundancy or SOSR?

83. Did a genuine redundancy situation exist?

84. Was the redundancy exercise a sham designed to facilitate the claimant's dismissal?

85. If the reason for the claimant's dismissal was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

    (i) Did the respondent adequately warn and consult with the claimant?

    (ii) Did the respondent adopt a reasonable selection decision, including its approach to a selection pool?

    (iii) Did the respondent take reasonable steps to find the claimant suitable alternative employment?

    (iv) Did the respondent fail to consider the claimant's application for the Programme Lead role properly or at all?

    (v) Was the outcome of the claimant's interview for the Programme Lead role predetermined?

    (vi) Was the claimant's dismissal was pre-determined?

    (vii) Was the claimant's dismissal within the reasonable range of responses?

86. If the reasons for the claimant's dismissal was SOSR, what was the reason or principal reason for his dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely a reorganisation.

87. Did the respondent act reasonably in all the circumstances in treating that reason as a sufficient reason to dismiss the claimant.

Direct disability discrimination

88. Did the respondent treat the claimant less favourably than it treated (or would have treated) a hypothetical comparator by dismissing him?

89. If yes, what was the reason for the less favourable treatment?

90. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the claimant's disability?

Direct disability discrimination (associative discrimination)

91. Did the respondent treat the claimant less favourably than it treated (or would have treated) a hypothetical comparator by dismissing him?

92. If yes, what was the reason for the less favourable treatment?

93. Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the disabilities of the claimant's son and/or wife and/or elderly mother?

Discrimination arising from disability

94. Did the claimant's need for reasonable adjustments arise in consequence of his disability?

95. If yes, did the respondent dismiss the claimant because of his need for reasonable adjustments?

~~Disability related harassment~~

96. ~~Did the respondent dismiss the claimant?~~

97. ~~If yes, was the claimant's dismissal unwanted?~~

98. ~~If yes, was the claimant's dismissal related to his disability?~~

99. ~~If yes, did the claimant's dismissal have the purpose or effect of violating his dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).~~

~~Disability related harassment (associative discrimination)~~

100. ~~Did the respondent dismiss the claimant?~~

101. ~~If yes, was the claimant's dismissal unwanted?~~

102. ~~If yes, was the claimant's dismissal related to the disabilities of his son and/or his wife and/or his elderly mother.~~

103. ~~If yes, did the claimant's dismissal have the purpose or effect of violating his dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).~~

~~Allegation 10 is comprised of two separate claims: One claim of direct discrimination and one claim of harassment.~~

~~Direct disability discrimination~~

104. ~~During the 'at risk' meeting on 24 January 2020, did Ms Osman treat the claimant less favourably than she treated (or would have treated) a hypothetical comparator by saying that he had not been particularly busy?~~

105. ~~If yes, what was the reason for the less favourable treatment?~~

106. ~~Was the reason for the less favourable treatment, whether in full or in part, and whether consciously or subconsciously, the claimant's disability?~~

~~Disability related harassment~~

107. ~~During the 'at risk' meeting on 24 January 2020, did Ms Osman say to the claimant that he had not been particularly busy?~~

108. ~~If yes, was that comment unwanted?~~

109. ~~If yes, was that comment related to the claimant's disability?~~

110. ~~If yes, did that comment have the purpose or effect of violating the claimant's dignity and/or creating an adverse environment for him? (as defined by s. 26(1)(b)(ii) EqA 2020).~~

111. ~~Was the claimant provided with a written statement of particulars of employment no less than two months after the date on which his employment with the respondent commenced?~~

Time Limits

112. Given the date on which the claim form was presented and the dates of Early Conciliation, any complaint about something that happened before 22 February 2020 may not have been brought in time.

113. Were the discrimination complaints made within the time limit in section 123 of the EqA 2010? The tribunal will decide:

(i) Was the claim made to the tribunal within three months (plus Early Conciliation extension) of the act to which the complaint relates?

(ii) If not, was there conduct extending over a period?

(iii) If so, was the claim made to the tribunal within three months (plus Early Conciliation extension) of that period?

(iv) If not, were the claims made within a further period that the tribunal thinks just and equitable? The tribunal will decide:

(a) Why the complaints were not made to the tribunal in time?

(b) In any event, is it just and equitable in all the circumstances to extend time?

Remedy

114. If the claimant succeeds with some or all of his claims, what remedy is he entitled to?

115. The claimant claims:

(a) a declaration that the respondent has unlawfully discriminated against him on the grounds of his disability;

(b) a recommendation that the respondent takes such action as the tribunal considers practicable to prevent such treatment in the future;

(c) compensation for:

(i) failure to provide a written statement of particulars of employment no less two months after the date on which his employment with the respondent commenced;

(ii) loss of earnings due to his dismissal (including pension losses);

(iii) injury to feelings;

(iv) personal injury;

(v) aggravated damages.