Case Number: 1802974/2021

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Hadam v Torque Retail Services Limited

Heard at: Sheffield (by CVP) **On**: 6, 7, 9, 10 and 14 February 2023

Before: Employment Judge A James
Mr P Kent
Mr J Howarth

Representation

For the Claimant: In person, supported by Nicole Milner of Support Through Court on Day 1

For the Respondent: John Robinson, Solicitor

JUDGMENT

(1) The claim of direct disability discrimination (s.13 Equality Act 2010) is not upheld and is dismissed.

(2) The claim of discrimination arising from disability (s.15 Equality Act 2010) is upheld.

(3) The claim of failure to make reasonable adjustments (ss. 20 and 21 Equality Act 2010) is not upheld and is dismissed.

(4) The claim of harassment related to disability (s.26 Equality Act 2010) is not upheld and is dismissed.

(5) The claim of victimisation in relation to the termination of the claimant's assignment with the respondent (s.27 Equality Act 2010) is upheld.

(6) The respondent is ordered to pay to the claimant the total sum of £5005 tax-free, made up of £4,000 for injury to feelings, £329 for loss of earnings, and £676 interest.

REASONS

The issues

1. The agreed issues which the Tribunal had to determine are set out in Annex A.

The proceedings

2. The first claim form was issued on 23 May 2021 against Know How Resourcing, the employment agency through which the claimant was assigned to work for the respondent. There were no issues with Acas Early conciliation in relation to the initial claim against Know How. Acas Early Conciliation commenced on 20 September 2021 in relation to the current respondent and the second claim.

3. A preliminary hearing for case management purposes took place on 14 October 2021 before Employment Judge Jones. The claimant was permitted to amend the claim to add claims of direct discrimination and victimisation. The claimant's application to add the current respondent as a party was allowed. The issues were identified and a further case management preliminary hearing was arranged.

4. A second claim was submitted on 17 October 2021 against the current respondent alone. A second preliminary hearing took place on 18 January 2022. The two claims were consolidated. The final hearing was listed for five days in October 2022. A further preliminary hearing was arranged, the purpose of which was to decide whether the claims against the current respondent were brought within time. The issues were further refined and related case management orders were made.

5. A further preliminary hearing took place on 28 April 2022 before Employment Judge McAvoy Newns. The Employment Judge found that it would be just and equitable to extend the usual three months' time limit and the claim against the respondent was allowed to proceed. Further case management orders were made. The claim against Know How Resourcing has since been withdrawn.

6. The hearing could not proceed in October 2022. The final hearing was rearranged to the current dates.

The hearing

7. The hearing took place over five days. Evidence and submissions on liability were dealt with on the first three days. It was arranged that on the remainder of the third day, the Tribunal would reach its decision and that on the fourth day, the Tribunal would give its decision and reasons. Having done so, the parties were invited to make representations as to whether a not the hearing in relation to remedy should proceed on the Friday, or be adjourned to the Tuesday. Subject to the question of expert evidence, both parties were agreed that the remedy hearing should proceed on the Tuesday. The Tribunal declined to order that expert evidence be obtained, or to adjourn

hearing the remedy issues until such a report had been obtained. The reasons are set out below.

8. The Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard from Adrian Malinowski, Team Leader; and Jason West, Operations Supervisor. There was an agreed hearing bundle of 520 pages, including the index.

9. The Tribunal did not hear direct evidence from Ms Abby Whisker-Pollington. The Tribunal was told that she left the respondent's employment 'some time ago' and 'the respondent's instructions were not to call her as a witness'. There is some implication that Ms Whisker-Pollington may have left 'under a cloud' although no details were provided in relation to her departure and the Tribunal does not seek to imply that there was any fault on either side.

10. After evidence had been concluded, and directions had been made in relation to the sending of written submissions by both parties, there was an application by the respondent to introduce a spreadsheet, some 88 pages long, with a list of individuals whose assignments had been terminated by the respondent. Given the lateness of that disclosure; given that evidence had already been concluded and written submissions made; that there would be a need for further evidence to be given, and an opportunity for further cross examination by the claimant; and the relatively low probative value of the document compared to the emails sent by Ms Whisker-Pollington at the time; the Tribunal did not consider that it was appropriate or necessary to admit the document, in order for a fair hearing to take place and the application to admit it was therefore refused.

The Tribunal's decision on expert evidence

11. The claimant requested the Tribunal make appropriate directions in relation to the obtaining of a psychiatric report, to support his claims in relation to remedy. For the following reasons, the Tribunal declined to do so.

12. In *Morgan v Abertawe Bro Morgannwg University Health Board [2020] ICR 1043*, HHJ Auerbach considered the threshold test for it to be appropriate, in principle, to admit expert evidence in relation to a given issue. At paragraph 20 onwards he stated:

> *20 … [C]ounsel before me agreed, rightly, that the position under the CPR is clear. Rule 35.1 states: "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings." The "reasonably required" formulation is also repeated, I observe, in paragraph 1 of Practice Direction 35 - Experts and Assessors (21 December 2017).*
>
> *21 I also observe that the Civil Procedure 2019 commentary cites a number of authorities which have addressed particular, specific problems and scenarios, but the "reasonably required" test is a constant mantra. References, for example, to what is, "Necessary to ensure fairness" or "Necessary to resolve the proceedings justly" do not, in my view, signify a different test, but merely express in different words, or flesh out, the same test.*
>
> *22 The authorities also, unsurprisingly, indicate that whether expert evidence is "reasonably required" should be approached consistently with the overriding objective. However, that is not a separate or additional test.*

It merely informs the overall assessment of whether expert evidence is reasonably required. In my judgment, the starting point is to consider such matters as the degree to which the issue in question inherently turns on expert evidence, the likely significance of the contribution that expert evidence may make, and/or the importance of the issue itself in the context of the overall issues in the case. If the overall contribution of expert evidence by reference to such criteria would be low or marginal, then that might be outweighed by the cost, time, and/or complication that would be involved in obtaining it, when judging whether it is reasonably required. However, if the contribution of expert evidence would, on any view, be appreciably significant, then such considerations ought not ordinarily to tip the balance against allowing it to be adduced.

23 As the authorities establish, in some areas not otherwise covered by express provision in the Employment Tribunals Rules of Procedure 2013, there are good reasons for employment tribunals to follow their own distinctive approach from that taken by the CPR. However, in this particular area, both counsel agreed before me that the tribunal was right to take the CPR approach as its guide. I see no good reason why an employment tribunal should not also apply the "reasonably required" test, informed by the overriding objective in the form in which it appears in the tribunal's own rules. That is consistent with the approach already designated in the additional rules, which specifically apply in equal value cases (where the need for expert evidence is generally taken as a given). In addition, the fact that the test is what is reasonably required enables tribunals to determine this question in a way that is sensitive to the distinct characteristics of this jurisdiction, both procedurally and as to the types of issue that typically give rise to consideration by tribunals of the need for expert evidence. …

26 I add that, when considering the first of my above two questions, the starting point should be to identify and, as necessary, clarify with precision, the particular issue or issues in the case in relation to which expert evidence is sought to be adduced. That will give the tribunal the essential foundation it needs in order to decide, first, whether expert evidence should be permitted; and, if it is, it will provide a clear point of reference for instructions and/or questions to the expert(s). In disability discrimination claims, for example (although not in this case), there may, at the liability stage, be multiple issues in relation to both the definition of disability and the types of discrimination claimed. In such a case, the tribunal would need clearly to address which particular issues, if any, expert evidence is to be permitted to cover.

13. Bearing in mind these helpful guidelines, the first task for the Tribunal *is to identify the particular issue or issues in relation to which expert evidence is sought*. There appears to the Tribunal to be two issues upon which expert evidence from a consultant psychiatrist could be relevant. The first is the extent to which the claims of discrimination which the Tribunal has upheld, caused an exacerbation of the claimant's existing psychiatric conditions. The second, is the extent to which any such exacerbation has impacted on the claimant's ability to obtain further work, since the respondent's decision to terminate his agency worker assignment.

14. Having identified those issues, the next task for the Tribunal is to determine *the degree to which the issue in question inherently turns on expert evidence*. It is clear to the Tribunal that an expert report would be required, to determine those issues.

15. The third task is for the Tribunal to determine *the likely significance of the contribution that expert evidence may make*. In the Tribunal's judgment, the contribution is likely to be insignificant. The Tribunal has before it a letter from a Dr Chris Douglas, consultant psychiatrist, to the claimant's GP dated 19 July 2022. This confirms a diagnosis of paranoid schizophrenia, with a secondary diagnosis of recurrent depressive disorder (current episode moderate). The contents of the report indicate that the claimant has suffered symptoms in relation to the primary diagnosis, since at least 2013. The report also indicates, as does the claimant's witness statement, that he had issues in relation to a job in Sussex; and subsequently at a live-in job in a hotel in Cumbria.

16. The claimant subsequently studied on a City and Guidls Electrical Training course at a college in Yorkshire; issues also arose for him in relation to that course. Following the termination of his employment with the respondent, the claimant has continued to experience problems in relation to other jobs he has undertaken since. It is apparent from this information that the claimant had a pre-existing condition, prior to the matters which he complains about in his claim against the respondent. The Tribunal can already compensate the claimant for the injury to feelings he has suffered as a result of the discrimination claims which the Tribunal has upheld. It appears to the Tribunal that any exacerbation is likely to be insignificant. Further, there is likely to be a significant overlap between any such exacerbation, and the injury to feelings which the claimant will in any event be compensated for. In the Tribunal's judgment therefore, psychiatric evidence in relation to personal injury is likely to add little to the value of the claimant's claim for injury to feelings.

17. As for future loss, as noted above, the claimant has a history of problems in the workplace. Due to his pre-existing condition, the claimant is a vulnerable individual, who is understandably less resilient than most to the normal ups and downs that can occur in working relationships. In the Tribunal's judgement, it is unlikely that any psychiatric report would find that the claimant's current difficulties in obtaining and keeping employment, has been significantly impacted by his experiences with the respondent during a relatively short period in 2021. In the Tribunal's judgement, it is more likely that regardless of the discrimination that we have found did occur, the claimant would have continued to experience difficulties in obtaining and maintaining employment.

18. Bearing in mind the above, in the Tribunal's judgement, the cost of and time involved in obtaining expert evidence would not be proportionate to the modest increase in compensation it would reasonably be expected to give rise to. Further, the current hearing would need to be adjourned, and matters would not be able to be concluded for somewhere in the region of six months or more.

19. The Tribunal has also considered '*the importance of the issue itself in the context of the overall issues in the case'* but has concluded that this does not

add anything to what has already been set out above. All of which leads the Tribunal to the conclusion that a psychiatric report is not *reasonably required* in order for the Tribunal to be able to determine the remedy issues in this case.

20. Having determined the remedy issues subsequent to this decision on expert evidence being made, the Tribunal is content that expert evidence would not have assisted the Tribunal and the cost and delay which would inevitably have resulted from ordering that expert evidence be obtained would not have been justified.

Reasonable adjustments

21. The following adjustments were made to the hearing process:

    21.1. The Employment Judge explained the process to the claimant at the outset of the hearing, i.e. that evidence would be presented first, with witnesses being cross-examined; and that when the evidence was concluded, parties would be able to make written and or verbal 'submissions'. The Judge explained what was meant by that term.

    21.2. The claimant was encouraged to ask the Judge if he was not sure what was happening, or why, at any point.

    21.3. The Judge continued to explain what was happening throughout the hearing.

    21.4. The claimant was allowed to consult with the representative from Support through Court if required, although they only attended on the afternoon of the first day.

    21.5. The respondent's written submissions were provided to the claimant by 10.30 am on Wednesday 8 February, so that the claimant could consider those prior to the third day of the hearing on 9 February.

    21.6. The claimant was allowed to audio record the hearing when he was cross examining the respondent's witnesses, on the strict understanding that he would delete the recordings after the hearing had concluded; and would not make them publicly available at any time.

    21.7. The claimant having succeeded in relation to two out of five claims, the Judge explained to the claimant how the hearing would proceed in relation to the remedy issues. Both parties were agreed that, the Tribunal having declined to order expert evidence, the parties should be given the rest of Friday 10 February to prepare their respective cases in relation to remedy issues, and adjourned to the final listed of day of the hearing, Tuesday 14 February 2023. The Tribunal was content to agree to that suggestion, not least because it would be a further reasonable adjustment for the claimant.

    21.8. On the morning of the final day of the hearing, the Tribunal heard witness evidence from the claimant in relation to remedy, and submissions from Mr Robinson on behalf of the respondent. The Tribunal then agreed to take an earlier lunch break, to give the claimant time to prepare his response, prior to giving to the Tribunal his verbal submissions on remedy.

Findings of fact

The respondent

22. The Respondent is an end to end supply chain specialist which provides freight, warehousing, fulfilment and shipping solutions to businesses all over the country. The Respondent's head office is based in Leeds but it operates from units across Yorkshire and the North of England. It employs in the region of 1,200 people.

23. As demand for work can fluctuate widely, the respondent uses agency staff to 'flex' the workforce up and down. The respondent can have up to 40 agency staff working at the Leeds side at any one time, alongside permanent staff. Team leaders are responsible for allocating the tasks required of agency workers. Those tasks mainly involve picking, housekeeping and box making and are repetitive in nature. Tasks for agency staff are necessarily less varied than for permanent staff. This is because they are less experienced, and so at least initially, there are less tasks that they have been trained to carry out. Further, agency workers are used to meet fluctuations in demand and ensure orders are dispatched to customers on time and that is the priority for the business in relation to their deployment in the warehouse.

Performance targets

24. Warehouse staff are subject to targets. Those targets are set by engineers, who come to the site and work out the average times for various tasks. Agency workers are expected to reach about 80% of the target rate, after 8 to 10 weeks. Team leaders are responsible in the first instance for discussing performance targets with agency staff. If the worker has not reached or is close to the target rate after 8 to 10 weeks, the agency is told that the worker is no longer required back. If they do reach that 80% target, then after 12 to 15 weeks, the agency worker may be offered a permanent role and would then be expected to reach 100% of the target rate within a reasonable period thereafter. If the worker's performance is particularly poor when they start, action could be taken earlier to end the worker's assignment.

25. The claimant had not previously worked in a warehouse environment and was not familiar with what the role might involve.

26. The claimant attended an induction process with the respondent at their warehouse in Leeds, via the Know How Resourcing employment agency (Know How Resourcing Limited – 'Know How'), on 19 January 2021, for the role of Warehouse Operative. The assignment involved working on the Hush contract. Hush is a women's clothing retailer.

27. The claimant was asked to fill in a personal details form by Know How. In the general health assessment section, he disclosed that he had a disability, namely anxiety, depression, PTSD and psychosis. That was not forwarded to the respondent and was not seen by Jason West or Adrian Malinowski.

28. The main duties of a warehouse operative are:

    - *To receive and process stock items to the agreed quality standard*
    - *Ensure the warehouse and premises are kept clean and safe at all times*

• Report any issues of concern which may affect the smooth running of the warehouse

• Comply with all Company policies and procedures, including health & Safety

• Maintain highest security standards in the warehouse at all times

• Effective use of equipment in the Warehouse in accordance with relevant competencies

29. The respondent's dress code policy states that whilst casual clothing may be worn, certain items are not permitted, including hats or hoods, other than Torque issued headwear. In practice, agency workers can wear their own hats, but not hoods which obscure their faces.

30. On the claimant's first full day at work for the respondent he was required to put together boxes all day. The claimant texted the agency querying why that was the case and pointed out that another new starter had been given more varied tasks. The claimant said he did not want to go back. Although the claimant said he felt a little humiliated, he did not suggest in the text that his mental health had been exacerbated by the repetitive nature of the work that day.

31. On 21 January 2021, the claimant was not able to attend work. He told the agency that he didn't feel the best mentally, that he '*suffers from depression and I'm on medication and this deepened my illness*'. He said he no longer wanted to work on the assignment.

32. The claimant must have had a change of heart because on 25 January 2021 he messaged the agency saying that he really wanted the job, as it was very convenient, being only three minutes from where he lived. The claimant asked to be put back in the warehouse. The agency arranged for him to do so; he subsequently worked there again on 27 January 2021.

Knowledge of the disabilities/substantial adverse effect

33. Within a few days of starting work for the respondent, the claimant asked not to be put on box-making duties all day. The claimant says that he told Mr Malinowski and his Team Leader on the afternoon shift, that doing repetitive tasks exacerbated his depression. Mr Malinowski denied that was the case. The Tribunal finds on the balance of probabilities that the claimant did not mention a link between his depression and repetitive tasks at this point. The reasons for doing so are as follows.

34. First, the text messages sent by the claimant to the agency on 20 and on 21 January did not mention a direct link. Second, whilst we note that in his evidence before the Tribunal, Mr Malinowski said he could 'not recall' the claimant mentioning his depression when asking to do different tasks, Mr Malinowski does recall, after the broom handle incident (referred to below), that the claimant did mention his depression and anxiety at that stage and he was 'shocked' by that. As a result, he spoke to his manager, Ms Whisker-Pollington about the conversation. Further, Rachel Harrison, Senior Warehouse Manager was interviewed by the respondent as part of an 'investigation' on 26 October 2021 and the note of the conversation with her confirms that the claimant did not mention any medical condition to her.

35. On the balance of probabilities therefore, the Tribunal finds that the claimant did not mention a link between being asked to be taken off box-making duties, and his anxiety and depression or other disabilities, in the first few days of his employment. The Tribunal notes that in any event, after making the request, the claimant was not subsequently put on box-making duties for more than half a day at a time.

Broom handle incident

36. On either 26 or 27 February 2021, Mr Malinowski and Raymondas Pakalnis, Operations Supervisor, were speaking near to the latter's desk. Mr Pakalnis was holding a broom handle. Mr Malinowski pointed towards the handle and asked him if it was an 'improvement stick'. They both laughed at the comment which was meant as a joke. The claimant was nearby when this conversation took place and overheard it. The Tribunal is satisfied that the comment was not directed towards the claimant although it accepts that the claimant thought it was.

37. The claimant was upset by the comment, which he took literally. He was concerned that Mr Pakalnis would hit him with the broom. After half-an-hour or so, he went to speak to them both about it. The claimant told them that he was worried that Mr Pakalnis was going to hit him with the broom handle. Mr Pakalnis apologised to the claimant and reassured him that the comment was just meant as a joke. During the conversation, the claimant told them both he suffers from anxiety and depression.

38. The claimant told the Tribunal during cross-examination that he knew the comment was a joke. The Tribunal prefers the evidence of Mr Malinoswki on this point, noting that on 5 March 2021, the claimant had a conversation with a therapist, John Grimshaw, in which he is recorded as saying:

> *He disclosed that he was feeling bullied at his work place which is a distribution warehouse for clothing. Stated that his boss had been telling him to work harder or he would hit him with a stick. I explored whether Damian thought that this may be a kind of teasing/joking? But Damian adamant that he felt threatened by this.*

39. Mr Malinoswki says in his witness statement that he was 'shocked' by the Claimant's comment about his mental health and informed the then Operations Manager, Abby Whisker-Pollington about the conversation with the claimant. Mr Malinoswki could not recall what her response was.

Request for reasonable adjustments

40. On 28 February 2021 the claimant asked Adrian Malinoswki if he could be given more varied tasks. He had been just doing picking and packing for a few weeks and wanted some variation. He did not mention his mental health during this conversation; although the Tribunal notes that he had mentioned those only a day or two previously. The claimant was given some housekeeping tasks but after a short while he was placed back onto picking duties to ensure a customer's order could be fulfilled.

41. The claimant was asked by Mr Malinowski not to wear his hood on 3 March, in line with the respondent's dress code policy. Mr Malinowski could not recall this but confirmed that the policy is in place for security reasons, so that people's faces can be seen on CCTV. Whilst the Tribunal acknowledges

that at this stage, all staff were wearing face masks, it is a matter of common sense that people with a hood up will be even harder to recognise on CCTV than those without.

Comparators

42. The claimant claims that he was given less varied tasks than other staff. Save for the first day of the assignment, the Tribunal has not been provided with specific enough evidence, to be able to make any reliable findings that the claimant was indeed treated differently to other agency worker staff. The Tribunal has found (see above), that the claimant would have been given less varied tasks than permanent staff for the reasons set out there. The Tribunal accepts that it is the claimant's perception that he was given less varied tasks than agency worker colleagues as well, but on the basis of the evidence before the tribunal, the Tribunal is unable to make any such finding on the balance of probabilities.

Complaint on 3 March 2021 – alleged protected act

43. On 3 March 2021 at 15:16, the claimant asked Zuzanna Picwajda by text how he could contact the HR department at the respondent or obtain their complaints policy.

44. The claimant emailed HR at the respondent on 3 March 2021. His email states:

> *My name is Damian Hadam, I work here on the Hush department via KH agency. Can you please provide me with your complaints policy and equality and human rights policy as wall if possible please. It's quite urgent for me.*

45. Craig Dunn of the respondent's HR department replied at 15:32:

> *Please can you advise what this is in relation to?*
>
> *Should you have an issue/complaint with something that has happened whilst working for Torque via the agency you would need to, in the first Instance speak with KnowHow who will liaise with Torque to resolve any issues there might be.*

46. Ms Picwadja texted the claimant at 16:48 to say that his shift on 4 March started at 6:15 AM. The claimant replied: '*no problem thanks'*.

47. Ms Picwadja provided her email address to the claimant at 17:02. At 20:26 the claimant emailed Ms Picwajda at KH. His email says:

> *I would like to make a complaint about Adrian, the supervisor from the Hush department.*
>
> *On Friday evening, around 7 o'clock, when I was picking up a trolley from near admin desks at Hush department, Adrian was standing there with Reymond, Reymond holding in his hand a broomstick, Adrian talking to me that Reymond will hit me with the broomstick if I won't work faster, after which he laughed, I felt embarrassed and walked away. Maybe after one hour, around 8 o'clock or maybe later, I came back to the admin desk to confront Adrian, Karolina from the admin was there, Raymond and Adrian, I said that what Adrian said made me upset, Adrian in response to that pretended that he doesn't know what am I talking about, then he said that*

actually he was not talking to me. But I am sure he was talking to me, he was right in front of me, looking at me and no one else was there but me.

Reymond who was holding the broomstick started to apologise to me, he said that it was only a joke and it meant to cheer me up. I said that I didn't find It funny but Raymond was very apologetic and trying to ensure that there was good intentions in it even though Raymond was not the one who initiate it in the first place because that was Adrian.

Adrian didn't say sorry to me, he was not even present to the end of conversation, and he was in complete denial even though Raymond already admitted to what happened.

Also I just can't imagine Adrian making such a statement to any other person and I never heard about it therefore it makes me believe that Adrian perceives me as a weak target to pick upon. …

Having a mental health condition makes me a particularly vulnerable person, just in November last year I was admitted to a hospital due to severe depression and I was for almost 2 months under acute mental health team support so I don't want people to pick up on me (sic) because it Is not easy to live with my health condition, making jokes out of week (sic) people is something that makes me wanna cry and having no remorse for it is just cruel.

On Sunday morning Adrian asked me to do some housekeeping, I thought - sound alright, at least something different to do because I do nothing but picking and relocating, but after 30 minutes Adrian changed his mind and said that actually he wants me to do picking, I said okay and I also asked that maybe as far as it is possible he can give me some variety of tasks to do because all I do is picking, he said that he will see what he can do I think but still all I do is picking, I have seen other people arranging things around and doing different things but somehow I rarely do and definitely never from Adrian initiative, I mentioned to Adrian on one occasion that repetitive jobs make my mental health worse.

So please can I have some variety of jobs to do, I do have a slight learning disability, sometimes I get panic attacks so I might require a little more patience but eventually I will learn anything. Also not allowing me to learn new tasks makes everything worse because I feel even more anxious and panic attacks can got more frequent …

There is one more thing that I like to mention although it is a less of an issue. Sometimes when boxes are loaded to trucks, cold air floods the warehouse so I put my hood on because I feel cold in my head, but for some reason Adrian doesn't like it, he asks me to take it off because he cant see my face, just today at around 11.05 when I was standing next to Isa (might spelled his name wrong), guy from Bradford working for KH who was wearing bandana covering his face, Adrian didn't mind him and only told me that I can't wear my hood…

Claimant 'stood down' for 4 March

48. At 20:46 on 3 March 2021, Know How's Tom Gilligan forwarded the claimant's email to Ms Whisker-Pollington. His covering email stated:

We have had the below from Damian.

I have stood him down for tomorrow.

49. At 20:58 the claimant was told by text sent by Ms Picwadja that he would have 4 March off and that she would '*call him tomorrow to discuss everything*'. She did not in the event call him as promised.

Claimant 'not required back' (NRB)

50. On 4 March 2021 at 15:00 hours, Ms Whisker-Pollington sent an email to Tom Gilligan of Know How, with a spreadsheet attached, which she filled in to say that the claimant was 'Not Required Back' (NRB).

51. The claimant went to see his GP on 5 March 2021. He was given a fit note which confirmed that he was not fit for work because of anxiety between 4 and 18 March 2021.

The claimant's 'service'

52. By 3 March, the claimant had worked on the following dates: January: 27- 28, 31; February: 1 - 2, 5 - 10, 14, 17, 19, 21, 23, 24, 25, 26, 28, 29. This gives a total of 21 days until the termination of his engagement on 4 March 2021.

Further emails on 5 March

53. At 09:24 on 5 March 2021 the claimant sent an email to Ms Picwadja saying:

> *Also there may be one more witness for the first situation, when I was confronting Adrian and Raymond. Her name is Jelena or Yelena (i dunno how to spell her name) she was one of only few people working that Friday evening and I think she Is around 40 years old.*

54. He sent a further email to her at 17:38:

> *I would also like to add that Discrimination is illegal in the UK under the Equality Act 2010, and my illness is a disability, I was off work for well over a year because of my mental health and … there are also other reasons, therefore I require that reasonable adjustments should be made that I stated in previous letter, quote: [there then followed the passage above commencing 'So please can I have some variety of jobs to do'].*

55. The claimant sent a third email to Ms Picwadja at 18:33:

> *Sorry but this whole situation is stressing me out, I just would like to add this as well.*
>
> *I do not want to be left out of work because I made a complaint related to my disability or that I asked for reasonable adjustments, this is also unlawful under Equality Act 2010 and if such a thing will happen I will be [seeking] early conciliation with ACAS and eventually taking the case to the Tribunal. Please also let me know whether I will get paid for those days that I am absent from work due to protecting me from further harassment. If I am not getting paid I need to come back to work as soon as possible.*

56. The claimant sought further mental health support on 5 March. A letter produced by Andrew Catley his Care Co-ordinator (Psychiatric nurse) dated 5 March states:

> *Mr Hadam has continued to voice that he often finds himself struggling with his mental health whilst at work and this is because he reports that he struggles to trust others that he works with, but also that learning new*

tasks will often result in Mr Hadam experiencing panic attacks. Mr Hadam also will often find himself ruminating on experiences that he has had at work and this will often result in Mr Hadam ruminating about the thoughts of himself also which will in turn result in low mood and depression.

Further emails between Ms Whisker-Pollington and Know How

57. On 15 April 2021, Ms Whisker-Pollington emailed Tom Gilligan, cc Jason West and Rachel Harrison as follows:

The above agency was NRB'd from Torque. Unfortunately he did not perform at an expected rate after his training period

There was also a couple of occasions where he left the site without contacting his supervisor and could be quite argumentative with his supervisors in regards to tasks asked to complete. So due to poor performance and poor attitude he was no longer needed by Torque.

58. In a further email sent to Mr Gilligan, copied to Rachel Harrison and Craig Dunn (HR) on 29 April 2021 Ms Whisker-Pollington referred to performance statistics about the claimant, showing a picking rate of 54% w/c 7 February; 47% w/c 14 February; and 60% and 49% w/c 28 February (morning and afternoon shifts respectively). Ms Whisker-Pollington concluded her email:

His performance did improve but as he states in his email he didn't want to pick all the time but unfortunately we needed him to do that when requested.

He was asked to remove his hood by his team leader as per company policy, he was NRB'd due to poor performance and the fact he did not want to do the tasks we asked him to.

Emails from HR – September 2021

59. On 18 September 2021, the claimant emailed Craig Dunn of HR as follows:

Thank you for the information. The complaint was already sent to the agency but because of lack of communication I do not know If it was ever investigated. I will copy and paste all the complaints here, would you be able to double check whether this complaint ever reached your company? If not I would like it to be investigated as in this instance Know How would refuse to do so.

Also I would like to add that I am suffering with anxiety depression PTSD and Psychosis, the complaint was sent on the 3rd of March 2021. [The claimant then copied and pasted from his 3 March email].

60. On 20 September 2021 Mr Dunn emailed Rachel Harrison, referring to the email above, and asking her to obtain an update from Abby and the agency to see what action the agency took with regard to the claimant's complaint. Ms Harrison contacted Tom Gilligan of Know How who informed her that the claimant was pursuing a disability discrimination claim and their solicitors were dealing with that.

61. Ms Whisker-Pollington was asked by Stuart Mallinson of the respondent by email on 4 November 2021 about her, apparently, telling him the day before that it was Tom Gilligan of Know How who requested that the claimant be marked 'NRB'. Ms Whisker-Pollington replied on 4 November 2021 as follows:

It was Tom that said he would just NRB him, however some time later he asked me to send him this email with his performance on and the uniform guidelines as he needed the info, unfortunately I've just written the email up not realising how precise and careful I should have been with my phrasing.

The communication was done over the phone, to request this.

Relevant law

Direct discrimination (section 13)

62. The Equality Act 2010, s.13(1)-(2) 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.

63. A claimant must show that he was treated less favourably than a real or hypothetical comparator. Other than the protected characteristic, there must be no material difference between the circumstances of a claimant and the comparator (s.23(1)). Where there is an actual comparator who shares some, but not all, of a claimant's relevant characteristics, the Tribunal can consider the comparator's treatment as evidence as to how a hypothetical comparator would have been treated.

64. If less favourable treatment is established, the Tribunal must consider the reason why. If the protected characteristic had a '*significant influence on the less favourable treatment, discrimination would be made out*.[1] The crucial question however is *why* a claimant received the less favourable treatment – what was the reason why the alleged discriminator acted as they did? What, conscious or unconsciously, was their reason? [2]

Unfavourable treatment due to something arising from disability (s.15)

65. Section 15 Equality Act 2010 reads:

(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.

66. In a section 15 claim, a Tribunal must make findings as to whether:

66.1. The contravention relied on by the employee amounts to unfavourable treatment.

[1] *Nagajaran v London Regional Transport* [1999] IRLR 572.
[2] *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] IRLR 830.

66.2. Does the "something arise in consequence of disability"; for example, disability related sickness absence.

66.3. The unfavourable treatment was because of something arising in consequence of disability.

66.4. If unfavourable treatment is shown to arise for that reason, the Tribunal must consider the issue of justification, that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

66.5. In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on. Knowledge that the something arising led to the unfavourable treatment is not however required.

See the decisions of the EAT in *T-Systems Ltd v Lewis UKEAT0042/15* and *Pnaiser v NHS England [2016] IRLR 170 (EAT)*.

67. According to Harvey's encyclopaedia of Employment Law [Division L.3.A(4)(d), at paragraph 377.01]: 'As stated expressly in the EAT judgment in *City of York Council v Grosset* ***UKEAT/0015/16*** *(1 November 2016, unreported)*, the test of justification is an objective one to be applied by the Tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* (***[2018] EWCA Civ 1105, [2018] IRLR 746***) upheld this reasoning, underlining that 'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'.

Reasonable adjustments (sections 20 and 21)

68. Section 39(5) of the Equality Act 2010 imposes a duty on an employer to make reasonable adjustments.

69. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. The same duty arises where the substantial disadvantage arises from a failure to provide an auxiliary aid or a physical feature of premises.

70. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated in recognition of their special needs.

71. In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4,* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must first identify:

(1) the PCP applied by or on behalf of the employer;

(2) the identity of non-disabled comparators; and

(3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The question is whether the PCP 'bites harder' on the claimant (*Griffiths v Secretary of State for work and Pensions [2017] ICR 150* at #58. There just needs to be a prospect of the step alleviating the substantial disadvantage; there does not need to be not a 'good' or a 'real prospect' - *Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10 at #17.*

72. A PCP must be more than a one-off act. In *Ishola v Transport for London* [2020] IRLR 368, Simler J held:

> *The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs*.

73. The test of reasonableness imports an objective standard. *The Statutory Code of Practice on Employment 2011* published by the Equalities and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

74. As for knowledge, for the s.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (EQuA para 20, Schedule 8).

75. During their employment, a claimant does not need to suggest any adjustments, for the duty to arise – see *Royal Bank of Scotland plc v Ashton [2011] ICR 632*. However, when it comes to the Tribunal proceedings, a tribunal will only consider the reasonable adjustments that have been suggested by the claimant and which form part of an agreed list of issues - *Newcastle City Council v Spires UKEAT/0334/10*.

Harassment (section 26)

76. Section 26 Equality Act 2010 provides:

> *(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.

77. A harassment case therefore involves five questions. First, did the conduct take place at all? Second, was the conduct unwanted? Third, was the conduct related to disability? Fourth, did the person responsible for the conduct have the proscribed purpose? Fifth, if not, did the conduct have the proscribed effect, taking into account (a) the perception of B; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect?

78. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, Underhill J (as he then was) said at paragraph 15 and 16:

15. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase 'having regard to … the perception of that other person' was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the Tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus 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. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.

16. There is ample case law on the nature of the inquiry required by the (interchangeable) statutory phrases 'on the grounds of' or 'by reason that': see, classically, the speeches of Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572, at pp.575–576 and Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 at paragraph 29 (p.833). Mr Majumdar made it clear that no issue arose on this point in the present appeal. But we should observe that the inquiry into the perpetrator's grounds for acting as he did – or, to use Lord Nicholls' phrase, 'the reason why' he acted – is logically distinct from any issue which may arise for the purpose of 'element (2)' about whether he intended to produce the proscribed consequences: a perpetrator may intend to violate a claimant's dignity for reasons other than her race (or indeed any of the other reasons proscribed by the discrimination legislation). It is also worth observing that, although establishing the reason why a respondent in a discrimination case acted in the way complained of typically involves an examination of the 'mental processes' (using, again,

Lord Nicholls' terminology) of the decision-taker, that is not always so. In some cases, the 'ground' of the action complained of is inherently racial. The best-known example in the case law, though in fact relating to sex discrimination, is the decision of the House of Lords in James v Eastleigh Borough Council [1990] IRLR 288. In that case the criterion applied by the council inherently discriminated between men and women, and no consideration of the thought processes of the decision-makers was necessary: the application of the inherently discriminatory criterion could without more be identified as 'the reason why' the plaintiff had suffered the detriment of which she complained. It is only because in most cases the detriment complained of does not consist in the application of an overtly discriminatory criterion of that sort that the 'reason' (or 'grounds') for the act has to be sought by considering the respondent's motivation (not motive). It seems to us particularly important to bear that point in mind in harassment cases.6 Where the nature of the conduct complained of consists, for example, of overtly racial abuse the respondent can be found to be acting on racial grounds without troubling to consider his mental processes".

79. We also note the case of Land Registry v Grant [2011] ICR 1390) in which the head note records:

When assessing the effect of a remark, the context in which it is given is always highly material. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.

Victimisation

80. Section 27 Equality Act 2010 provides:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

81. In the case of *Nagarajan v London Regional Transport [1999] IRLR 572* Lord Brown Wilkinson addressed the causation test to be applied in relation to victimisation by comparison to direct discrimination claims. At paragraph 41 of his speech he stated:

For my part, it is not the logic of symmetry that requires the two provisions to be given parallel interpretations. It is rather a pragmatic consideration. Quite sensibly in s.1(1)(a) cases the Tribunal simply has to pose the question: why did the defendant treat the employee less favourably? They do not have to consider whether a defendant was consciously motivated

in his unequal treatment of an employee. That is a straightforward way of carrying out its task in a s.1(1)(a) case. Common sense suggests that the Tribunal should also perform its functions in a s.2(1) case by asking the equally straightforward question: did the defendant treat the employee less favourably because of his knowledge of a protected act? Given that it is unnecessary in s.1(1)(a) cases to distinguish between conscious and subconscious motivation, there is no sensible reason for requiring it in s.2(1) cases.

82. In the case of *Peninsula Business Services Ltd v Baker [2017] IRLR 394* the EAT addressed the correct legal test to be applied in relation to victimisation claims at paragraph 70 of the Judgment as follows:

I accept the respondent's submission that the ET did not apply the right test in deciding that the claimant had been subjected to a detriment because of a protected act. The ET needed to ask why the respondent subjected the claimant to surveillance; what, consciously or subconsciously, was the reason for that (see Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830). There are three points. First, the repeated use of the word 'trigger' suggests that the ET was considering 'but-for' causation. Second, the ET describes different triggers with different contents in different passages in the Judgment. The respondent's suspicions that the claimant's allegation was untrue feature in some, but not all. Third, the finding in paragraph 80 suggests very strongly that the ET found that Mrs English's reason for the surveillance was nothing other the suspicion that the claimant was 'not dyslexic, or at least not very dyslexic'. That suggestion is reinforced by the ET's conclusion that the respondent's intention in ordering the surveillance was to catch out the claimant doing private work.

Time limits

83. As time limit issues have already been determined, the relevant law on time limits does not need to be set out.

Burden of proof

84. Under s136 Equality Act 2010, if there are facts from which a Tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

85. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The Tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

86. The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

> *Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

87. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

> *They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.*

Conclusions

88. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.

89. In reaching our conclusions, we have had due regard to the burden of proof under the Equality Act 2010. We have also considered each alleged incident of discrimination separately as well as collectively.

Employment status and disability

90. The respondent accepts that the claimant is 'in employment' for the purposes of the Equality Act 2010. Further, the respondent accepts that the claimant has a disability within the meaning of section 6 of the Equality Act, in relation to the following disabilities:

    90.1.1. Depression

    90.1.2. Anxiety

    90.1.3. PTSD

    90.1.4. Psychosis/Paranoid schizophrenia

    90.1.5. Obsessive Compulsive Disorder

91. Each of the claimant's claims under the Equality Act 2010 are considered in turn.

Direct disability discrimination (Equality Act 2010 section 13)

Issue 4.1 - Did the Respondent, between January 2021 and March 2021 give the Claimant repetitive tasks to do? The Claimant says he was not given a variety of tasks to complete like his peers were.

92. The claimant was required to do repetitive tasks in the first few days, mainly box making; and then in the following three weeks or so, mainly picking and packing. The Tribunal accepts that agency workers are given less varied tasks than permanent employees but that is a reflection of the fact that they are brought in to deal with temporary fluctuations in work and are deployed where needed most. The Tribunal has rejected the claimant's claim that he was provided with less varied work done bellow agency workers.

Issue 4.2 - Was that less favourable treatment? The Claimant relies on hypothetical comparators.

93. The Tribunal concludes that the claimant has failed to prove that he was subjected to less favourable treatment than other agency staff; he was treated the same as them. He was however given less varied tasks than permanent staff.

Issue 4.3 - If so, was it because of disability?

94. The Tribunal concludes that the difference in the variety of jobs between permanent staff and agency workers is because agency workers are brought in to deal with temporary fluctuations in demand, and have less training and experience in the full range of warehouse tasks. Further, the respondent would have been less concerned to give agency workers a variety of tasks, and more concerned with ensuring that orders are properly fulfilled and dispatched in time. None of this has anything to do with the claimant's disability. In any event, the Tribunal concludes that the respondent was not aware of the claimant's disability until 26/27 February 2021, so any less favourable treatment could not have been because of disability.

Discrimination arising from Disability s15 EQA 2010

Issues 5.1 and 5.2 - Did the claimant suffer unfavourable treatment because of something arising in consequence of his disability? The claimant alleges the following unfavourable treatment: not requiring the claimant back at work due to his poor performance and inability to undertake very repetitive tasks for prolonged hours, despite knowledge of the claimant's disabilities.

95. For reasons which will become clear when we set out our conclusions in relation to the victimisation issue, the Tribunal concludes that performance issues were not the real reason for the claimant's assignment being terminated. The Tribunal notes that the claimant did not tell Know How on 20 or 21 January that repetitive tasks adversely affected his depression and anxiety. That is however what the claimant told the agency on 3 March. Ms Whisker-Pollington specifically states in her email of 29 April:

> *His performance did improve but as he states in his email he didn't want to pick all the time but unfortunately we needed him to do that when requested.*

96. The Tribunal therefore concludes that not requiring the claimant back at work was linked to the claimant's stated inability to undertake repetitive tasks for prolonged hours as a result of his disabilities.

Issue 5.3 - Was the treatment because of something arising in consequence of the claimant's disability?

97. The Tribunal concludes that there was such a link. In order to succeed in this claim, the claimant does not, in our judgement, have to prove with medical evidence showing that his depression would indeed be exacerbated by carrying out repetitive tasks. It is sufficient that he raised the link in his email of 3 March, and that 24-hours later, Ms Whisker-Pollington had marked him as 'NRB'.

Issue 5.4 - Is the respondent able to demonstrate that the treatment is objectively justified in that it is a proportionate means of achieving a legitimate aim?

98. In submissions on behalf of the respondent, Mr Robinson relies on conduct and performance issues as justifying the decision to dismiss. Since the

Tribunal has concluded that those were not the real reasons (see the conclusions regarding Issues 8.4/8.5 below), the justification defence fails. What should have happened is a supportive conversation between Ms Whisker-Pollington, and the claimant, in order to discuss what variety of tasks could reasonably be offered, given the claimant's position as an agency worker, and the duties required to be undertaken by such workers. The lack of any such conversation further reinforces the Tribunal's conclusion that the treatment was not a proportionate means of achieving a legitimate aim. The real reason was that the claimant was seen as 'a problem', due to the issues raised in his email of 3 March.

Issue 5.5 - Did the respondent know, or could the respondent reasonably have been expected to know that the claimant had the disability?

99. Yes, from 26/27 February in relation to the disability of depression and anxiety; and from 3 March that as a result he wanted to be given more varied tasks, due to his perception that those conditions were exacerbated by him constantly being given repetitive tasks to do.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

Issue 6.1 - Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

100. The Tribunal concludes that the respondent was aware that the claimant had a disability from 26/27 February 2021, after the broom handle incident.

Issue 6.2 - A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs: Requiring agency workers [and workers and employees] to only work on a limited amount of tasks?

101. We refer to the conclusion in relation to Issue 4.1 in which we decided that the respondent does require agency workers to carry out a more limited amount of tasks, compared to permanent employees.

Issue 6.3 - Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's mental health and depression deteriorated to the extent he required time off work and suffered financial loss?

102. The Tribunal is satisfied that the claimant was at a substantial disadvantage compared to someone without his disability, in that he was more likely to perceive that repetitive tasks were having an adverse effect on his mental health.

Issue 6.4 - Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

103. Based on our findings of fact, the Tribunal concludes that the respondent was not aware of any potential disadvantage until 3 March.

Issue 6.5 - What steps could have been taken to avoid the disadvantage? The Claimant suggests: Being allocated a variety of tasks. The Claimant says that he requested that he be given a variety of tasks.

104. Given that the respondent did not know about any potential substantial disadvantage until 3 March, no steps could have been taken before the claimant was stood down for 4 March, after which he was not required back.

During his employment therefore, no steps could have been taken to avoid this particular disadvantage, in relation to picking and packing.

Issue 6.6 - Was it reasonable for the Respondent to have to take that step and when?

105. After 3 March, it may have been necessary to give the claimant more varied tasks, but not before then. The Tribunal concludes that the claimant could have been given a greater variety of tasks, even if the main task required of him was still picking and packing - just as the respondent was able to ensure that the claimant only needed to make up boxes for up to half a day, after he complained about having to make up boxes all day.

Issue 6.7 - Did the Respondent fail to take that step?

106. Given our conclusions at 6.4 and 6.5 above, no. This claim therefore fails.

Harassment related to disability (Equality Act 2010 section 26)

Issue 7.1 - Did the Respondent do the following things: "Adrian" said "He [referring to another colleague, Raymondas] will hit you with a broomstick if you don't work faster" on or around 27 February 2021.

107. The claimant overheard a conversation, but we have found that the remark was not directed at him. This claim therefore fails on the facts.

Issue 7.2 - If so, was that unwanted conduct?

108. Had the remark been directed at the claimant, it would be unwanted conduct.

Issue 7.3 - Did it relate to disability?

109. The remark that was made could not have been related to the claimant's disability, because Mr Malinowski did not know of the claimant's disability until after the claimant had complained to him about the remark. There is nothing inherently 'disablist' about the remark, or that could link it to the claimant's or anyone else's disability, without Mr Malinowski having such knowledge.

Issue 7.4 - Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

110. Given the conclusions above, it is not proportionate or necessary to reach any firm conclusion on this or the following issue.

Issue 7.5 - If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

111. See above, regarding Issue 7.4.

Victimisation (Equality Act 2010 section 27)

Issue 8.1 - Did the Claimant do a protected act by raising a grievance dated 3 March 2021.

112. The respondent accepts that the email was a protected act. The Tribunal considers that this concession was rightly made, since the email contains an allegation of disability related harassment; and a request for a reasonable adjustment, namely more varied tasks. The email thus raised the possibility that the claimant might take an Employment Tribunal claim for harassment

and/or failure to make reasonable adjustments in future. [We note the combined content of the 5 March emails also amount to a protected act but since the NRB decision had been made on 4 March, there can be no causal connection between the NRB decision and the 5 March emails.]

Issue 8.2 - Did the Respondent do the following things: On 4 March 2021, the Respondent procured the removal of the Claimant from his assignment.

113. The Tribunal refers to the above findings of fact. The Tribunal concludes, on the balance of probabilities, that the decision to not require the claimant back was made by Ms Whisker-Pollington. Her emails of 4 March, 15 April and 29 April all suggest that is the case. It is not until 4 November 2021 that Ms Whisker-Pollington suggests otherwise, in her email to Stuart Mallinson and Rachel Harrison. The Tribunal is not at all convinced that the contents of the 4 November email reflect the true position.

Issue 8.3 - By doing so, did the Respondent subject the Claimant to detriment?

114. Yes, undoubtedly.

Issue 8.4 - If so, was it because the Claimant did a protected act? And Issue 8.5 - Was it because the Respondent believed the Claimant had done, or might do, a protected act?

115. The Tribunal concludes that the reason Ms Whisker-Pollington did not require the claimant back was because of the contents of his email of 3 March, which we have concluded amounted to a protected act. While Ms Whisker-Pollington refers to performance issues, the Tribunal notes that by the time of his dismissal, the claimant had only worked for the respondent for 21 days, just over four weeks (see Mr Robinson's submissions at paragraph 2, which was accepted as accurate by the claimant). Performance issues are not normally raised until after about 8 to 10 weeks. Ms Whisker-Pollington then suggested in the 29 April email that the claimant's performance did improve, contradicting her earlier email. Issues of conduct were then raised, having not, apparently, been raised or noted previously. Mr Malinowski, who the Tribunal heard direct evidence from, was the claimant's team leader - but his witness statement contains no allegations that the claimant was argumentative, or that he was unreliable because he left site without contacting his supervisor.

116. Further, when interviewed in October 2021, Mr Malinowski could not even remember the claimant, which hardly suggests he was a difficult individual. Again, the reasons put forward by Ms Whisker-Pollington appear to the Tribunal to be after the event justifications for not requiring the claimant back, which changed over time, when the real reason was that the claimant was seen as a potential problem, having raised an allegation of harassment, and made a request for reasonable adjustments.

117. In the circumstances, the Tribunal considers that the burden of proof has shifted to the respondent, to prove that the respondent did not victimise the claimant. Since the Tribunal has not heard from Ms Whisker-Pollington directly, the burden of proof has not been discharged. The Tribunal does not find the 4 November 2021 email at all convincing. Ms Whisker-Pollington had said in three earlier emails, within two months of the NRB decision, that it was her/Torque that NRB'd the claimant. The 4 November 2021 email was

sent some 8 months after the event, when the respondent was facing an Employment Tribunal claim.

Overview

118. Looking at each incident individually, we have not found any evidence which can shift the burden of proof on the claims of direct discrimination or harassment. We have also looked at the incidents as a whole, to see if they could convey a different impression. Since different individuals were involved in the circumstances leading up to the section 15 and victimisation claim, compared to the direct discrimination and harassment claims, those are clearly distinguishable. Looking at matters in the round has not therefore shifted our position in relation to those claims. The reasonable adjustments claim has foundered on the issue of knowledge, on which we were able to make clear findings of fact.

Remedy

Further findings of fact relating to remedy

119. Between 2013 and 2016, the claimant worked as a chef and kitchen porter at the Malmaison hotel in Brighton. There is in the Employment Tribunal bundle a letter from the claimant's GP dated 30 March 2016, which confirms that at that stage the claimant was suffering severe depression and anxiety, as a result of his perception that he was being bullied in that workplace. After that job ended, the claimant did not work for nearly 3 years.

120. The claimant next worked in a hotel in Grasmere in the Lake District. He wanted to become an electrician, and so moved to Yorkshire, to study on an electrician's course during 2020. The claimant told the Tribunal that it has been an ambition of his for years to become a trained electrician; he had tried before, but unfortunately his previous attempts to gain a qualification as an electrician did not succeed because he was not able to complete the course at that time.

121. The claimant was sectioned under S.136 of the Mental Health Act and spent a night in hospital on 28 October 2020 before being allowed to leave, and to be supported in the community. This was during the claimant's period studying on the electrician's course. A letter from Aspire dated 6 November 2020 confirms that the stress of the course had led to the claimant feeling suicidal, and he had some contact with Crisis Services. The claimant eventually completed the course on 14 January 2021.

122. The claimant's medical notes dated 7 November 2020 refer to him wanting to take a claim against the College but the claim had been turned down by solicitors and he was upset about that. The claimant confirmed that he did take a claim to the County Court against the College in which he represented himself, but he made some mistakes with the claim and withdrew it. The note records that the claimant hears voices and that:

> *Damian agreed that at times this voice could be described as his own internal thoughts but then at times felt it was external to him. Damian then began to speak about delusional beliefs of this world not being real and how he is in the "matrix". Mentioned that I am not human and does not believe that anyone around him is human*.

123. After the assignment with the respondent ended, the claimant obtained a job via an agency working with DPD between 23 March and 9 April; then with a firm called Clippers between the 13 and 27 of April. He then had a number of other agency jobs, including at the Amazon warehouse at Doncaster, until he obtained a job as an agency worker job as an electrician's mate in Sheffield.

124. A medical note dated 19 May 2021 records:

> *Damian explained that at the weekend he found himself to be very stressed and was able to recognise that this was due to his current working situation. He explained to me that his longstanding job came to an end as he does not feel that he was supported whilst he was working there and his manager did not help him with regards to his mental health needs and explained that he was given repetitive jobs to complete and it felt that he was not trusted to do anything else and did not give him any self worth. As a result Damian left his role. He has since being working from an agency and currently has some night work and explained that he has been struggling with this and that his anxiety and confidence to mix with others has declined since leaving his previous post and explained that he feels that his previous manager has made this worse for him. He explained that he is working for the next 3 nights but does not know if he … can continue with this or not.*

125. The reference to the 'longstanding job' is a reference to the assignment with Torque (although it was in fact relatively short). But at this time the claimant had not spoken with Mr Catley for two months or so.

126. A medical note dated 10 June 2021 records:

> *Damien (sic) explained that he has been working in Sheffield and there have been times where he has struggled with this which has caused his anxiety to increase where he has found this difficult to manage at times but has managed to stay in work despite this*.

127. The claimant confirmed that this was a reference to the job in Sheffield as an electrician's mate which he started on 1 June. That work lasted until 6 September 2021, just over three months. The claimant took an Employment Tribunal claim about that assignment.

128. A medical note dated 24 June 2021 records:

> *Damian explained that he is struggling with work at present time with his anxieties and that these seem to be getting in the way of him progressing at work. He explained that he feels that he is not getting the same opportunities as others because he feels that he cannot prove himself to management, that he is doing a good job and he feels that others are getting extra opportunities. Damian explained that he is worried about how others perceive him and that he feels that he is struggling to communicate effectively with colleagues.*

Again, that was a reference to the job as an electrician's mate.

129. A medical note dated 20 August 2021, again referring to the same job, records:

> *He explained to me that he is still struggling with work at present time and despite still attending he admitted to struggling with the role when he is there and explained that he feels that he is struggling with certain tasks.*

We talked about liaising with Workplace Leeds to see if they can deliver some retention worker and Damian explained that he would have a think about this.

130. A medical note dated 29 September 2021 records:

Main issues seem to be work related, feels as though his psychosis is bad at the moment and this is why he has taken a month off of work but he engaged with Mondana well on the phone.

131. The claimant was asked what sparked that off for him. He said he had been dismissed again from work, and was feeling very depressed. This was from another assignment as an electrician's mate, via an agency. That assignment lasted only 4 days. The claimant complained about being shouted at, and he says that as a result, the assignment was ended.

132. A report prepared by Dr Chris Douglas dated 19 July 2022, describes the claimant as being very paranoid in July 2022. It confirms:

Citing a more recent example of when he went to work in a charity place he could hear people talking about him "we better get rid of him as he's going to sue us".

133. The claimant confirmed that this was a reference to an organisation called Growing Works, where he worked as a volunteer in an allotment. The reports continues:

He had been working as a chef in 2013 and the head chef at that time had been very abusive, humiliating him in front of others. He wanted to quit , but due to his paranoia around this job, he forced himself to stay on for a year.

That is a reference to the Brighton hotel job.

134. The report goes on:

… he gets nightmares which involve his parents being drunk and people abusing him in traumatic ways. His parents were both heavy drinkers.

He's not taking any medication and thinks he probably should. He thinks the explanation that his difficulties are down to mental illness is one possible explanation, however it's not, that's irrelevant because this is all a simulation.

As far as he remembers he was bullied from the age of six right through till sixteen. He didn't do well academically.

He thought having been abused as a chef that being an electrician would be a very different culture, but his hopes were then dashed about people being civil towards him. He did finish the course and worked as an electrician for four months but people were bullying, harassing and tricking him and that led him to become very stressed and anxious.

He's [been] off sick since September 2021. He has tried to focus on a tribunal against his previous employer (electricians).

135. That claim was against the Sheffield employer he worked for, for three months. That claim did not succeed. It is noted that this report does not reference the period of time when the claimant worked for the respondent.

Conclusions on remedy

136. Bearing in mind all of the above facts, the Tribunal reaches the following conclusions in relation to remedy.

Issue 9.1 - Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

137. The Tribunal can only make limited recommendations since the claimant has not worked for the respondent since 3 March 2021, and the purpose of recommendations is to obviate or reduce the adverse effect of the discrimination on the claimant – see *Bayoomi v British Railways Board [1981] IRLR 431***.** In any event, the Tribunal was not asked to make any specific recommendation by the claimant. In these circumstances, the Tribunal does not consider it appropriate to make any recommendation.

Issue 9.2 - What financial losses has the discrimination caused the Claimant?

138. The decision was made to terminate the claimant's assignment with the respondent on 4 March 2021. The claimant obtained a fit note from his GP on 5 March, before he knew that the assignment had been terminated. He confirmed to the Tribunal that this decision was never formally communicated to him. It is clear from the conversation with his therapist on 5 March 2021, quoted above, that the claimant was upset about the broom handle incident at this time. The Tribunal has not upheld that allegation of harassment. The Tribunal has concluded therefore that regardless of the termination of his assignment, the claimant would have been on sick leave between 4 and 18 March 2021.

139. The Tribunal notes the claimant's chequered work history; his difficulties, due to his serious mental health problems, of developing and maintaining effective working relationships; that he was unhappy with the respondent for reasons other than the termination of his assignment, and which have not been upheld as separate acts of discrimination; and that the claimant was having difficulties reaching the respondent's performance targets (although there had been some improvement). If the claimant had worked for the respondent for a further four weeks from 19 March onwards, he would have completed eight weeks work, and at that stage his failure to meet targets would have been much more closely monitored. The Tribunal concludes that it is likely that the claimant would have worked for the respondent between 19 March and 16 April. After that date however, given the factors set out at the beginning of this paragraph, the Tribunal concludes that there was a 50% chance that the claimant would not have continued to work for the respondent, for the following 6 weeks or so either because he did not meet the performance targets, or because of a breakdown in working relationships.

140. The Tribunal notes that the claimant then obtained a job as an electrician from 1 June, at which point his financial losses were fully mitigated. He then worked for the same end-user as an agency worker electrician for a period of just over three months, before that assignment was terminated. The claimant was not happy about the assignment being terminated and took an Employment Tribunal claim in relation to it (as is his right). The Tribunal note that this claim was not successful.

141. The Tribunal concludes that this assignment as an electrician, and the termination of it, breaks any chain of causation between the termination of his assignment with the respondent, and any future losses after the beginning of September. In any event, the Tribunal concludes that by the end of May/beginning of June, the claimant would have taken up employment elsewhere, and/or his assignment with the respondent would have been terminated because he was not reaching targets; and/or because unfortunately, due to his serious and ongoing mental health difficulties, working relationships would have irreparably broken down. The claimant is not therefore entitled to any further financial losses from 1 June 2021 onwards.

142. The Tribunal calculates the claimant's average net wage with the respondent, for the period 11 February to 11 March 2021, as being £280 (i.e. a total of £1,402 earned during that period, divided by five, and rounded down to the nearest pound). Between 19 and 26 March, the claimant earned £123, a difference of £157. Between 27 March and 1 April, he earned £219, a difference of £61. For the week up to 9 April he earned £245, a difference of £35. For the week up to 16 April he earned £204, a difference of £76. That gives a total for that four-week period of £329. Due to our conclusions above, the claimant is only entitled to 50% of his losses between 17 April and the end of May. The Tribunal notes that during that period he earned more than £140 per week, and therefore no further compensation is due for that period. The total award for financial losses is therefore £329.

Issue 9.3 - Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

143. Bearing in mind our conclusions above, the Tribunal concludes that the claimant has taken reasonable steps to replace lost earnings, during the relevant period.

Issue 9.4 - If not, for what period of loss should the Claimant be compensated?

144. It is not necessary to reach any conclusions on this issue, given our conclusions in relation to issue 9.1 above.

Issue 9.5 - What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

145. The members of the panel were unanimously agreed that this case falls within the lower band of the updated *Vento* guidelines. *The Presidential Guidance on the Vento Bands* dated 26 March 2021 states:

> *In respect of claims presented on or after 6 April 2021, the Vento bands shall be as follows: a lower band of £900 to £9,100 (less serious cases) …*

146. Bearing in mind the examples of cases helpfully provided by Mr Robinson on lower band *Vento* cases, the Tribunal considers that an award of £4,000 is the appropriate award for injury to feelings in this case. The Tribunal notes that in the text messages to the agency during his sickness absence, the claimant was not raising issues about how upset he felt. The Tribunal does however note that during a consultation with his therapist on 19 May 2021, the claimant did specifically refer to being very stressed due to his working situation, and referred to his work for Torque as contributing to that. The

Tribunal has taken into account the fact that the claimant was and remains a vulnerable individual and that the termination of his assignment would have adversely impacted on his self-esteem and his mood. The Tribunal also notes however that the claimant was upset about a number of matters which happened during his time working for the respondent, including for example the 'broom handle' incident, which the Tribunal has not upheld as a claim of harassment. Taking all those matters in the round, and that the cases we have been referred to in which the award is at the upper end of the lower band generally reflect the fact that there were a number of different instances of discrimination upheld, rather than the one upheld in this case (albeit on two separate grounds), the Tribunal considers that the appropriate amount for injury to feelings is £4,000.

147. The claimant also made an application for aggravated damages. The EAT has given guidance to the effect that it may be appropriate for an award of aggravated damages to be made where the distress caused by an act of discrimination has been made worse by (a) being done in an exceptionally upsetting way, eg 'In a high-handed, malicious, insulting or oppressive way', per Lord Reid in *Broome v Cassell [1972] 1 All ER 801***,** *[1972] AC 1027, HL*; (b) by motive: conduct based on prejudice, animosity, spite or vindictiveness is likely to cause more distress provided the claimant is aware of the motive; (c) by subsequent conduct: eg where a case is conducted at a trial in an unnecessarily offensive manner, or a serious complaint is not taken seriously, or there has been a failure to apologise, eg *Prison Service v Johnson, HM Prison Service v Salmon [2001] IRLR 425* and *British Telecommunications v Reid [2003] EWCA 1675*, *[2004] IRLR 327***.**

148. Having considered these categories, the Tribunal is satisfied that none of them apply in the circumstances of this case, for which the claimant is not adequately compensated for in the overall award for injury to feelings. In particular, regarding (c) above, nothing in the correspondence between the claimant and Mr Robinson suggests to the Tribunal that Mr Robinson has acted in any way improperly. The Tribunal notes for example that, particularly where litigants are representing themselves, there is often an argument about what should and shouldn't be included in the final hearing bundle. There is therefore nothing unusual in the fact that there was a disagreement between Mr Robinson and the claimant in this case about that issue. The claimant did have the opportunity to put forward other documents which he considered were essential for a fair hearing of his case, but has not done so. The Tribunal is in any event satisfied that all relevant documents have been put before the Tribunal, in order for us to fairly consider and determine the issues in this case.

Issue 9.6 - Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

149. For the reasons set out above, the Tribunal did not consider that this was an appropriate case where an order should be made for an expert report, from a consultant psychiatrist, about the effect of the termination of the assignment on the claimant's mental health. Bearing in mind the references quoted above to the various extracts from the medical evidence that was before the Tribunal, we are quite satisfied that the decision to exclude expert evidence was the correct one. That is reinforced by the conclusion above that the claimant's assignment as an electrician between June and September 2021

broke the chain of causation. Further, bearing in mind the references above to ongoing issues with his employment since 2013, the Tribunal is satisfied that we have been able to deal appropriately and proportionately with all remedy issues, without an expert report. Yet further, the Tribunal is satisfied that to the extent that the claimant's health was exacerbated by the discrimination, the Tribunal has been able to adequately compensate the claimant in the injury to feelings award for that; and that no further amount would in any event be appropriate in the circumstances for personal injury, given the overlap with the injury to feelings award.

Issue 9.7 - Is there a chance that the Claimant's engagement would have ended in any event? Should their compensation be reduced as a result?

150. The Tribunal has already dealt with this issue above, in relation to financial losses.

Issue 9.8 - Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

151. S. 207A of the *Trade Union and Labour Relations (Consolidation) Act 1992* provides:

> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. (our emphasis)*

152. S.295 *Trade Union and Labour Relations (Consolidation) Act 1992* defines an employees as someone working under a contract of employment. Hence the claimant is not covered by the *Acas Code of Practice on Disciplinary and Grievance Procedures*.

Issue 9.9 - If so, did the Respondent or the Claimant unreasonably fail to comply with it? Issue 9.10 - If so is it just and equitable to increase or decrease any award payable to the claimant? Issue 9.11 - By what proportion, up to 25%?

153. In the light of our conclusion in relation to issue 9.8, it is not necessary to come to any conclusions in relation to issues 9.9 to 9.11.

Issue 9.12 - Should interest be awarded? How much?

154. The regulations governing the award of interest in such cases are the *Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996*. Reg 2(1) requires tribunals to consider whether to award interest on compensation in discrimination cases. The current rate is 8%. The Tribunal considers that this is an appropriate case where interest should be awarded. Interest is awarded to the claimant on the compensation for injury to feelings and the financial losses awarded, for the period from 4 March 2021 to 14 February 2023, a period of 712 days. 712/365 x £4,329 x 8% = £676. The total awarded to the claimant is therefore £4,329 + £676 = £5005.

Employment Judge James
North East Region

Dated 16 February 2023

Sent to the parties on:
13 March 2023

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.

Annex A – Agreed List of Issues

Complaints

1. The Claimant is making the following complaints:
   1.1. Direct disability discrimination - s 13 Equality Act 2010;
   1.2. Discrimination arising from disability - s15 of the Equality Act 2010;
   1.3. Victimisation - s 27 Equality Act 2010;
   1.4. Harassment - s 26 Equality Act 2010; and
   1.5. Failure to make reasonable adjustments - ss 20 and 21 Equality Act 2010.

The Issues

The Issues the Tribunal will decide are as follows:

2. Employment status
   2.1. The respondent accepts that the Claimant was 'in the employment' of the Respondent within the meaning of section 83 of the Equality Act 2010.
3. Disability
   3.1. The Respondent agrees that the Claimant has a disability as defined by s.6 Equality Act 2010, in that he has the following disabilities:
      3.1.1. Depression
      3.1.2. Anxiety
      3.1.3. PTSD
      3.1.4. Psychosis/Paranoid schizophrenia
      3.1.5. Obsessive Compulsive Disorder
4. Direct disability discrimination (Equality Act 2010 section 13)
   4.1. Did the Respondent, between January 2021 and March 2021, give the Claimant repetitive tasks to do. The Claimant says he was not given a variety of tasks to complete like his peers were.
   4.2. Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was. He relies on hypothetical comparators.
   4.3. If so, was it because of disability?
5. Discrimination arising from Disability s15 EQA 2010
   5.1. Did the claimant suffer unfavourable treatment because of something arising in consequence of his disability?
   5.2. The claimant alleges the following unfavourable treatment: not requiring the claimant back at work due to his poor performance and inability to

undertake very repetitive tasks for prolonged hours, despite knowledge of the claimant's disabilities.

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

5.4. Is the respondent able to demonstrate that the treatment is objectively justified in that it is a proportionate means of achieving a legitimate aim?

5.5. Did the respondent know, or could the respondent reasonably have been expected to know that the claimant had the disability?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6.2. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP - requiring agency workers [and workers and employees] to only work on a limited amount of tasks?

6.3. Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's mental health and depression deteriorated to the extent he required time off work and suffered financial loss?

6.4. Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

6.5. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

6.5.1. Being allocated a variety of tasks. The Claimant says that he requested that he be given a variety of tasks.

6.6. Was it reasonable for the Respondent to have to take those steps and when?

6.7. Did the Respondent fail to take those steps?

7. Harassment related to disability (Equality Act 2010 section 26)

7.1. Did the Respondent do the following things: Adrian Malinowski said: "He [referring to another colleague, Raymond] will hit you with a broomstick if you don't work faster" on or around 27 February 2021.

7.2. If so, was that unwanted conduct?

7.3. Did it relate to disability?

7.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. Victimisation (Equality Act 2010 section 27)

8.1. Did the Claimant do a protected act as follows: Raise a grievance dated 3 March 2021.

8.2. Did the Respondent do the following things: On 4 March 2021, the Respondent procured the removal of the Claimant from his assignment.

8.3. By doing so, did the Respondent subject the Claimant to detriment?

8.4. If so, was it because the Claimant did a protected act?

8.5. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

9. Remedy for discrimination or victimisation

9.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

9.2. What financial losses has the discrimination caused the Claimant?

9.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.4. If not, for what period of loss should the Claimant be compensated?

9.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

9.6. Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

9.7. Is there a chance that the Claimant's engagement would have ended in any event? Should their compensation be reduced as a result?

9.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.9. If so, did the Respondent or the Claimant unreasonably fail to comply with it?

9.10. If so is it just and equitable to increase or decrease any award payable to the claimant?

9.11. By what proportion, up to 25%?

9.12. Should interest be awarded? How much?