EMPLOYMENT TRIBUNALS

Claimant: **Mr David Ashford**

Respondent: **Ruggles & Jeffery Limited**

Heard at: **East London Hearing Centre**

On: **6, 7, 8 and 9 December 2022**

Before: **Employment Judge Barrett**
Members: **Ms J Houzer**
Mr P Lush

Representation
Claimant: Represented himself
Respondent: Ms Venkata, Counsel

JUDGMENT having been sent to the parties on 13 January 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. The Claimant, Mr David Ashford, worked for the Respondent, Ruggles & Jeffery Ltd, as a Working Site Foreman from 11 March 2019, until he was dismissed without notice on 4 November 2020. Following early conciliation between 5 January and 15 February 2021, on 8 March 2021, he presented an ET1 form bringing claims under the Equality Act 2010 for discrimination arising from disability, failure to make reasonable adjustments and disability-related harassment.

2. The Respondent said that it did not discriminate against the Claimant and that he was dismissed because of his conduct. The Respondent accepted that the Claimant was at all material times disabled by reason of the following conditions: cancer, kidney failure, PTSD, depression and anxiety. However, it contended it did not know and could not reasonably have been expected to know about the Claimant's PTSD, anxiety and depression.

The hearing

3. The hearing was conducted over four days, 6, 7, 8 and 9 December 20220. The Claimant represented himself, with support from his partner, and the Respondent was represented by Ms Venkata of Counsel.

4. The Tribunal was provided with an agreed bundle of evidence numbering 514 pages.

5. During the hearing, the Respondent added further documents showing a timeline of the Covid-19 lockdowns in the UK and the Claimant's sign-in records on a client site. No objection was made by the Claimant.

6. The Claimant gave evidence on his own behalf.

7. The following witnesses gave evidence on behalf of the Respondent:

   7.1. Mr Tony Hannon, Business Development Director, who recruited the Claimant and dealt with his sickness absences and was the note-taker in his disciplinary investigation meeting and disciplinary hearing.

   7.2. Mr Lee Chart, Contract Manager, who oversaw the last project the Claimant worked on.

   7.3. Mr Michael Yeomans, Health, Safety and Environmental Advisor, who gave evidence about his role as a mental health first-aider at the Respondent.

   7.4. Mr Greg Flanagan, Contract Director, who was involved in the Claimant's recruitment process and conducted the disciplinary investigation.

   7.5. Mr Richard Holland, Account Director, who conducted the disciplinary hearing and made the decision to dismiss.

   7.6. Mr Darren Halls, Site Foreman, who gave evidence about what happened at a meeting on 22 October 2020.

   7.7. Mr Dave Sharp, Site Foreman, who gave evidence about what happened at a meeting on 22 October 2020.

8. After the evidence had been completed, Ms Venkata provided a written skeleton argument and both Ms Venkata and the Claimant made helpful oral closing submissions.

The issues

9. At the outset of the hearing, the parties agreed the issues for the Tribunal to determine were those set down at a previous preliminary hearing, subject to a later concession on disability status. The Tribunal also discussed with the Claimant the difference between the legal tests for discrimination because of something arising from disability and failure to make reasonable adjustments.

10. The issues were as set out below.

Discrimination because of something arising from disability

11. Did the Respondent treat the Claimant unfavourably? The Claimant alleges the Respondent treated the Claimant unfavourably by:

    11.1. Requiring him to work nights on the Superdrug refit from 13 to 30 October 2020.

    11.2. Failing to allow the Claimant to take the breaks that he required throughout his employment.

    11.3. Refusing to pay him when attending medical appointments.

    11.4. Refusing to pay him discretionary Company sick pay.

    11.5. Requiring him to work excessive hours (i.e. a shift of around 10 hours as opposed to a shift of around 8 hours) in the period from 13 to 30 October 2020.

    11.6. Failing to provide him with adequate support, (a) on his return to work in August 2020 (scaffolding tower help) and (b) during the Superdrug refit in October 2020 in terms of support with the amount of work and the paperwork involved, taking into account his lack of experience of Superdrug refits.

    11.7. Dismissing him.

12. If yes, was this because of something arising in consequence of the Claimant's disability or disabilities? The Claimant alleges the 'something arising' as a consequence of his disabilities was:-

    12.1. The Claimant's extreme fatigue that made him need a regular sleep pattern and a good night's sleep.

    12.2. The extreme fatigue and physical limitations that made him need regular breaks to rest and have time to drink plenty of fluid to flush his body.

    12.3. The need not to work excessive hours due to the extreme fatigue and physical limitations.

    12.4. That he required numerous medical appointments.

    12.5. His need for greater support due to his physical limitations and extreme fatigue.

    12.6. More frequent and sometimes lengthy periods of sickness absence.

13. If the Claimant was treated unfavourably because of something arising in consequence of the Claimant's disabilities was the treatment a proportionate means of achieving a legitimate aim? The Respondent asserted that its legitimate aims were:-

    13.1. Ensuring the safety of its workforce by spreading nights shifts among all staff to avoid exhaustion.

13.2. Allowing staff and in particular the site foreman the flexibility to take breaks as necessary to safely complete jobs.

13.3. A discretionary sick pay policy enables the Respondent to respond to changing circumstances, including financial changes, appropriately.

13.4. The Respondent‘s requirement that if additional support is needed, an employee should ask for that support.

13.5. The Respondent has to ensure all staff follow health and safety rules to maintain a safe work environment and staff, especially senior staff, who endanger colleagues can be dismissed.

14. In relation to any unfavourable treatment found to have been done because of something arising from the Claimant's PTSD, anxiety and depression, did the Respondent know, or could the Respondent reasonably have been expected to know, that the Claimant had one or all of these disabilities at the time of the unfavourable treatment?

Failure to make reasonable adjustments

15. Did a provision, criteria or practice ("PCP") of the Respondent place the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? The PCPs relied upon by the Claimant are:-

15.1. The requirement to work nights and excessive hours.

15.2. The requirement to work without breaks.

15.3. Not paying either discretionary Company sick pay or any other pay when attending medical appointments.

15.4. Not paying discretionary Company sick pay or any other sick pay when off sick.

15.5. The requirement to work without providing adequate support (a) on his return to work in August 2020 (scaffolding tower help) and (b) during the Superdrug refit in October 2020 (in terms of support with the amount of work and the paperwork involved, taking into account his lack of experience of Superdrug refits).

15.6. The requirement to undertake a large amount of high pressure work.

16. Did the PCPs relied upon place the Claimant at such a substantial disadvantage?

17. If yes, did the Respondent know, or ought the Respondent to reasonably have been expected to know, (a) that the Claimant had the disabilities of PTSD, depression and/or anxiety and (b) that the PCP relied upon placed the Claimant at a substantial disadvantage (in relation to all disabilities)?

18. If yes, would the following adjustments contended for by the Claimant have been reasonable to make and if so when?:-

18.1. Allow the Claimant to just work day shifts.

18.2. Pay the Claimant either discretionary Company sick pay or other pay when attending medical appointments.

18.3. Pay the Claimant discretionary Company sick pay or other sick pay when he was absent due to sickness due to his disabilities.

18.4. Provide the Claimant with adequate support (a) on his return to work in August 2020 - scaffolding tower support and (b) during the Superdrug refit in October 2020 - support with the workload and with paperwork).

18.5. Reduce the work requirements of the Claimant.

18.6. Adjust the disciplinary procedure to take account of the impact of his disabilities upon him and his ability to perform his duties, such that he would not have been dismissed.

Harassment

19. Did the Respondent engage in unwanted conducted related to the Claimant's disability, namely Tony Hannon in a staff meeting on 22 October 2020 shouting that the Claimant was being paranoid and everyone knew he had mental health issues?

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

21. In considering whether the conduct had the relevant effect the Tribunal should take into account:-

21.1. The Claimant's perception.

21.2. The other circumstances of the case.

21.3. Whether it was reasonable for the conduct to have that effect.

Time limits

22. Did any acts or omissions found to amount to discrimination occur before 6 October 2020? (I.e. more than three months plus the conciliation period before the presentation of the claim.)

23. If so, did they form part of conduct by the Respondent amounting to 'conduct extending over a period' within the meaning of s.123(3) Equality Act 2010, which ended on or after 6 October 2020?

24. If not, would it be just and equitable to extend time for said earlier matters to be considered?

Remedy issues not considered at this hearing

25. The Tribunal directed that for reasons of time the hearing would be used to determine liability issues only (i.e., issues relevant to whether the claims succeed and not issues relevant to compensation).

Findings of fact

How the factual findings were made

26. The Tribunal's findings of fact were made on the balance of probabilities. The Tribunal does not know and cannot know what actually happened in the past. It took into account the evidence seen and heard over the course of the hearing to decide what was more likely than not to have happened. The Tribunal did not need to decide every dispute of fact, only those that were relevant to the issues in the case. Set out below is the key evidence which the Tribunal relied upon in reaching its findings, but it also had regard to the wider evidence heard throughout the hearing. The Tribunal considered that all of the witnesses were courteous and helpful and did their best to assist, although in some aspects, there were very different memories of events.

Start of the Claimant's employment

27. The Respondent is a building contractor with its head office in Wickford. It has approximately 44 employees and works over a broad geographical area. Its employees, other than office staff, spend the majority of their time working on client sites.

28. The Claimant applied to the Respondent for the post of Working Site Foreman by submitting his CV. He held a Site Supervision Safety Training Scheme ("SSSTS") qualification and had extensive prior experience as a foreman in residential and commercial construction projects. On 8 February 2019 he was interviewed by Mr Hannon and Mr Flanagan.

29. The Claimant told Mr Hannon and Mr Flanagan that he had been recovering from cancer, had suffered damage to his thyroid from radiotherapy, and had a long-term kidney disorder which would require him to attend some hospital appointments. Both Mr Hannon and Mr Flanagan remember he told them he could not lift above his head due to the effects of his cancer treatment.

30. The Claimant said he also mentioned that he suffered from PTSD, which meant that night shifts would not be healthy for him, and that he needed regular breaks. Mr Hannon and Mr Flanagan dispute that he told them about his PTSD or any requirements relating to night shifts or breaks. The Tribunal accepted that the Claimant mentioned his kidney disease meant he needed to rehydrate regularly. However, he did not request additional breaks over and above the flexibility to have water breaks that would be usual on sites. The Tribunal found the Claimant did not object to night shifts because if he had done so, it would likely have been acknowledged by the Respondent in the same way as his lifting limitations were. An objection to night shifts would also have been inconsistent with the Claimant's subsequent approach to night shifts, discussed below. The Tribunal found that the Claimant did not disclose his mental health conditions at interview. The Claimant in giving evidence in his witness statement conflated his memories of the interview and the induction day, which is natural given the passage of time. Mr Hannon and Mr Flanagon's memories were clearer on this point.

31. The Claimant was offered the job by letter of 13 February 2019, enclosing an employment contract. The contract provided, insofar as is relevant, that:

    31.1. The Claimant's normal working hours would be from 8am to 4.30pm on Monday to Friday with an unpaid 30-minute break in every shift over 6 hours. He could be required to work different hours or shifts with

reasonable notice. Saturday and Sunday work attracted higher rates of pay. (Although not stipulated in the contract, night shifts were also paid at 25% premium.)

31.2. The holiday year ran from 1 January to 31 December. The Claimant could take 4 weeks' paid holidays every year. He was required to arrange his holidays with his manager at least 4 weeks in advance and was warned that he could not always go on holiday when he wanted to because it may not be convenient to the Respondent. In his first year of employment, holiday could only be taken on a pro rata basis in proportion to the unexpired part of the holiday year. If he left part-way through a holiday year having taken more than a pro rata allocation of annual leave, the excess could be deducted from his pay.

31.3. Company sick pay was discretionary and not a contractual right, such that sick leave might be paid either at full or SSP rate.

32. The Claimant signed the acceptance slip on 20 February 2019.

33. The Claimant started work on 11 March 2019. On his first day, he met with Mr Flanagan and Mr Hannon, and Mr Hannon completed his induction. Part of the induction was to fill out (retrospectively) a job application form. The Claimant was also asked to complete an engagement form, an induction checklist and a medical questionnaire. The Respondent's practice is to ask for medical questionnaires to be completed post-engagement, to encourage full disclosure of any condition which an applicant might worry could be a barrier to employment.

34. On the Claimant's medical questionnaire, he stated that he had *"High blood pressure when younger", "Type 2 diabetes controlled by diet and one tablet",* and "*Kidneys: nephrotic syndrome controlled by 1 tablet".* He was asked "*Are there any medical reasons why you should not do shift work (inc night shift)?*" to which he responded *"no".* He was asked if he suffered from *"Anxiety, depression or any other nervous complaint?"* and responded *"no".* He was also asked *"Do you have any other disability or serious illness?"* and responded *"no".*

35. The Claimant said that he was told by Mr Hannon not to mention his PTSD or depression on the medical questionnaire because doing so would cause issues with health and safety. This was strongly disputed by Mr Hannon. The Tribunal preferred Mr Hannon's evidence on this point. The Respondent's approach to employee wellbeing and health and safety at work was conscientious, as demonstrated by the fact they appointed two mental health first-aiders and promoted mental health support in the workplace. Requiring the completion of medical questionnaires post-engagement was another example of good practice. The Claimant was able to be open about his post-cancer complications and kidney condition. It was unlikely that his mental health conditions would have been viewed by the Respondent as a health and safety problem if his physical conditions were not. Having heard from Mr Hannon in evidence, the Tribunal considered it unlikely he would have instructed the Claimant to lie. The Claimant may well have felt some reluctance to include these conditions because he was worried about possible stigma, but that concern did not originate with Mr Hannon.

36. The Claimant commenced a 6-month probationary period, starting with 3.5 weeks job shadowing with a Senior Site Foreman before taking on his own site responsibilities.

Shift allocation, breaks and medical appointments

37. The Respondent allocated operatives to jobs using a spreadsheet (called a "labour board") with a column for each employee and a row for each calendar day. The cells on the spreadsheet recorded the work site each operative was assigned to on each day. Employees could make themselves available to work outside their normal working hours by calling the office and requesting to be marked "*in*" for additional days; if not available they were marked "*off*". The Claimant generally asked to be marked "*in*" on Saturdays and Sundays, and was allocated weekend shifts in addition to working his normal Monday to Friday shifts.

38. There was no specific way of indicating availability for night shifts. In practice, a contract manager looking to allocate shifts, including night shifts, would check operatives' availability and call to offer the work to suitable employees. The employee could accept or decline at that point. Allocated night shifts were marked on the spreadsheet with a hash symbol. Night shifts were generally popular with operatives because they attracted a 25% pay premium, and the Respondent endeavoured to distribute them fairly. Projects might require nightwork where refurbishment was undertaken in a business that was operating during the daytime, such as a shop or a bank. The Tribunal was told this type of work amounted to perhaps 10% of the Respondent's business during the period of time relevant to this claim.

39. During the Claimant's shifts, he was permitted to take breaks. He was entitled to a 30-minute unpaid mid-shift break and in practice operatives also took a paid 15-minute tea break during each full shift. In addition, every operative was able to take toilet breaks and water breaks as required. On jobs where the Claimant was acting as foreman, he was responsible for organising breaks on site. He could not always leave site for breaks, but he could take short breaks as needed. The Tribunal did not hear any evidence that he ever specifically requested a break which was denied.

40. From time to time the Claimant needed to attend medical appointments. Where these fell within working hours the Claimant's usual approach was to request annual leave so that he did not lose pay. He mentioned to colleagues on occasion that he was for example going for a blood test, but the Respondent was not routinely notified when he had medical appointments or of the reason why he requested annual leave.

41. On 15 July 2019 the Claimant attended a manual handling course. He already had significant experience in safe manual handling from his prior work history.

42. According to the labour board, the Claimant worked a week of night shifts in September 2019 and two weeks of night shifts in October 2019.

End of the Claimant's probationary period

43. On 28 October 2019, the Claimant passed his six-month probationary period. His probation review meeting was conducted by Mr Flanagan who recorded that the

Claimant was *"enjoying working with nice people and the opportunity to earn as much as he can… Dave has become a key player in the site team and is open to working early, late and travelling where needed… Dave has not yet come across anything that has been tricky or not gone so well."* It was recorded that when asked if there was anything his disliked or wanted to be less involved with, he said surveying, because he preferred to be 'hands on'.

44. The Claimant said that during the meeting he raised the issue of not being required to work nights because of the negative impact it had on his health, and also that his kidney disease had progressed to the point he needed a kidney transplant. Mr Flanagan denied that the Claimant had expressed any problem with working nights. The Tribunal found that the Claimant did not object to night shifts as that would have been inconsistent with his recorded comment that he was open to working late.

45. On 20 December 2019 the Claimant attended fire marshal training.

46. According to the labour board, the Claimant worked three night shifts in February 2020.

Mental health seminar

47. On 24 and 26 February 2020 the Respondent put on a joint event with the Essex Wildlife Trust, a local charity it supports. The event included a session on 'Mental Health and Well Being' coordinated by Mr Yeomans. Mr Yeomans is one of the mental health first-aiders at the Respondent. He used the session to introduce a new company mental health and wellbeing policy and the range of support available to staff, including access to a confidential helpline run by a charity called the Lighthouse Club.

48. The Claimant said in his witness statement that at the event he gave a talk about his PTSD and how it affected him. In oral evidence he clarified that he did not give a formal talk but addressed the room during the session and said that he was a "*sufferer of mental health through (having had) cancer*", and that the Lighthouse Club was good because not everyone had someone to confide in and no one should feel ashamed. Mr Yeomans' evidence was that the Claimant contributed his experiences for the benefit of everyone attending. He had perceived the Claimant to be providing historic information, not describing something he was currently suffering from. The Tribunal preferred the account the Claimant gave in his oral evidence to his witness statement and found that although he did disclose having suffered with his mental health he did not go into specifics and in particular did not share that he had a diagnosis of PTSD, depression and anxiety.

Impact of the Covid-19 pandemic

49. The Claimant worked night shifts on 23, 24 and 25 March 2020. As a result of the Covid-19 pandemic, the Respondent's business was closed from 25 March 2020. Staff were kept at home and subsequently furloughed. Mr Hannon sent regular emails to the company's employees updating them on the unfolding situation.

50. On 15 May 2020, Mr Hannon emailed the Claimant (as he did other employees) to enquire if he was classified as clinically vulnerable or clinically extremely vulnerable, such that he needed to minimise contact with other people. The

Claimant replied: "*In response to your email regarding vulnerability and returning to work, I would like to advise you that I have type 2 diabetes and a kidney disorder (Nephritis) which does leave me more vulnerable than normal according to government guidelines I am however, in the same position health wise now as I have always been and able to work ok physically and happy to return to work when it is required of me. After reading the list of options I would consider myself clinically vulnerable If at all possible, it may be better for me to work nights if they are available due to a much less chance of social interaction*".

51. Some employees returned to work from 18 May 2020. The Claimant was recorded as being on furlough until 13 July 2020. On 14 July 2020, he attended hospital for a skin graft procedure on his arm for the purpose of dialysis. He was marked as *“shielding”* on the labour board from 15 to 28 July 2020. He returned to working on sites from 29 July 2020.

Time off for medical procedure and blood test

52. On 3 August 2020, the Claimant sent Mr Hannon an email saying, “*Following on from my recent surgery I had a scan to assess the function of the graft in my arm, unfortunately it has not worked and I therefore require another operation which has been booked for the 18th August 2020 at Springfield hospital I would like to ask for this day and the following day to be taken as holiday if possible*”.

53. Mr Hannon replied that he was sorry to hear it and asked the Claimant to complete a holiday request form. The Claimant took three days off for the operation and recovery time. He was aware that if he took sick leave, and the Respondent did not grant discretionary sick pay, there would be no SSP for the first three days of any absence.

54. The Claimant was allocated to work night shifts on 10, 11, 12 August 2020, and also on 24 August 2020.

55. On 26 August 2020, the Respondent’s Accounts Manager emailed Mr Hannon and Mr Flanagan, “*Dave Ashford has taken a further 3 days holiday last week and, although this doesn’t take him over his annual allowance, it takes him 2 days over what he has accrued so far. Do you want me to pay him for this holiday or should it be unpaid? I remember a conversation regarding his holiday a few weeks back and being asked to make sure that he doesn’t take more than he has accrued at any point in time.*”

56. Mr Hannon replied on the same day, “*Eventually got through to Dave and explained that he will only receive one day’s holiday pay for last Wednesday and two days at zero pay for Monday and Tuesday as he doesn’t have enough holiday entitlement left to cover either of those two days. He was fine about it and fully understood.*” The Claimant therefore lost two days’ pay.

57. Mr Hannon explained in evidence that although it is not written down in the contract of employment or in the staff handbook, the Respondent has a practice of not allowing staff to take more annual leave at any point than had been accrued during the leave year up to the point of the absence. The Tribunal considered that this approach was unusual and inconsistent with the contractual provisions on accrued leave. However, the Respondent was not obliged to grant annual leave on any particular day.

58. On the Claimant's first day back at work following the second skin graft procedure, he collected an aluminium scaffolding tower from the Respondent's yard. It was disassembled in preparation for transportation. He did not ask for help with loading the component parts into his van. The Tribunal found that if he had asked for support, especially given his recent medical procedure, it would have been given.

59. On 4 September 2020, the Claimant worked a four-hour half-day shift and took time off for a blood test appointment in the afternoon. He was only paid for the half-day and queried the position with the Respondent's accounts manager. She followed up the query with an email to Mr Hannon on 11 September 2020. After discussing the matter with the Claimant, Mr Hannon decided that he should be paid for the full day, in effect granting a half-day's discretionary sick pay.

Request for sick pay

60. On 29 September 2020, the Claimant emailed Mr Hannon as follows: "*I would like to update you regarding my kidney transplant and how things have progressed since we last spoke about it. As from Monday 5th October 2020 I will be activated on the national transplant data base and on standby In the hope that a suitable doner becomes available. If I am fortunate to be tissue matched and deemed clinically suitable to an available kidney, I will be contacted and have to make my way to addenbrookes for transplant. I have been advised that my recovery time, time off work will be up to 12 weeks and following that regular visits to hospital for follow up appointments. Although we have spoken briefly about my situation I would like to ask you how I stand with regards time off and if I would receive financial support as my contract only advises that pay is discretional for sickness, I don't have any financial security and my partner is working full time at the moment on zero contract hours but will need to be at home more to help me for the first few weeks, I want to get my affairs in order now to give me peace of mind and less stress going forward in my recovery. If I know where I stand now I can try to make plans for when it all starts to roll. I'm positive about going through with the transplant and hoping to make a full recovery and continuing my work within the company I will keep you updated with any further developments and hope to see you sometime soon*".

61. Mr Hannon replied on the same day, "*Thank you for your email further outlining what may happen going forward if a suitable kidney becomes available. We would want to support you in every way possible should you have the transplant. I guess the first thing to say is that time off work associated with tests and recuperation after the operation will not in any way jeopardise your job security. I think that you are absolutely right to be planning ahead of any operation. In the current economic climate finances are tough for us and none of us knows what might be ahead should we have a second wave of Covid-19 outbreaks and what economic affect that might have. Any time that you will be off sick will be covered by Statutory Sickness Pay, subject to the first three 'waiting days' in any period of absence. Many people mistakenly think that Statutory Sick Pay is recoverable for the employer from the Government. That in fact is not the case, to be able to recover Statutory Sick Pay from the Government there needs to be an extremely high proportion of the work force off on sick leave at the same time. I think it is great that you are so positive about the transplant; naturally your family will share optimism and anxiety in equal measures. We very much hope that a kidney*

becomes available soon and that you have a successful transplant and a complete and full recovery. Please don't hesitate to let us know if we can help any further in any way."

62. Mr Hannon stated in evidence that the reason why he did not offer the Claimant discretionary sick pay for his prospective transplant operation and recovery period was because the company was in a *"precarious"* and *"desperate"* financial state due to the pandemic, and it would have been irresponsible and potentially misleading to give an assurance regarding pay that may not have been possible to stick to. He said that although other employees had been paid discretionary sick pay in the past, no one was offered it during this period of the pandemic. The Tribunal accepted this evidence as it was consistent with the fact that a few weeks later, the Respondent was obliged to ask all employees to agree to take a temporary pay cut to avoid the need to make redundancies.

Events of 6 October 2020

63. On 6 October 2020, the Claimant was driving to a work site to commence a day shift when he was overcome by an overwhelming feeling of helplessness, a symptom of his depression and PTSD. He pulled over and used his mobile to telephone Mr Hannon. He was crying and sounded distraught on the phone. Mr Hannon told him to wait until he felt safe to drive and then go home.

64. The Claimant emailed Mr Hannon at 11.28am that day saying, "*I wanted to let you know I am home now and to thank you for your understanding this morning I just fell and didn't know where to turn, I feel better for confiding in you but was worried that I was putting you in an uncomfortable situation I will call you this afternoon as arranged if that's ok Thank you again*".

65. Mr Hannon replied, "*Thanks Dave, hope you are feeling better. Look forward to speaking with you later*."

66. They did speak again that afternoon. Mr Hannon sent an email to a colleague at 3.23pm saying "*Just spoke with Dave who is feeling much better this afternoon and will be back at work in Barnet in the morning*."

67. Mr Hannon's evidence was that the Claimant told him he had not slept the night before, he was upset and could not cope, but by the afternoon the rest had done him good, and he was ready to come back to work the following day. He was reassured the Claimant was feeling better and saw no need to pursue the matter further. He thought that asking more questions about what caused the Claimant to be upset would be prying into his private life. The Claimant said that Mr Hannon's main concern in the afternoon call was to get him back to work, and that it ought to have been clear there was a mental health issue that required further investigation and support. The Tribunal found that Mr Hannon was supportive, as evidenced by the Claimant's email showing he was able to confide in him.

68. The Claimant was paid a full day's pay in respect of 6 October 2020, which in effect was discretionary sick pay.

Leigh-on-Sea refurbishment

69. In October 2020, the Claimant was assigned to oversee a shop refurbishment at the Superdrug site in Leigh-on-Sea. The project was scheduled for five weeks from 12 October to 25 November. It involved working night shifts. The Contract Manager for the job was Mr Chart. The client was a company called AS Watson which managed the overall project on behalf of Superdrug. AS Watson engaged three subcontractors (who were referred to during the hearing as Paul, Geoff and Tom) to undertake the refurbishment work under the Claimant's supervision.

70. Prior to commencing the project, Mr Chart completed a Risk Assessment and Method Statement ("RAMS"). The Claimant was familiar with these documents and briefed the subcontractors on them. All operatives on site, including the Claimant, signed them. The Method Statement provided that the Claimant as foreman was the designated fire marshal and that "*The Site Foreman is to monitor the safety performance of all personnel on site as the works progress, he is also to complete, as a minimum, written weekly safety inspections*".

71. Because the Superdrug shop was open during the day, the site was only accessible from 6pm. The project entailed the Claimant's team working eight-hour shifts on site, with an additional 30-minute unpaid break taken during the shift. The Claimant completed time sheets showing his time on site, driving time, and "yard time" at the Respondent's head office, unloading his van and loading materials.

72. On the first day of the project, Mr Chart and the Claimant conducted a site walkthrough and discussed the project. The Claimant said that he informed Mr Chart that he was going to struggle and would need close assistance on the project as he had no experience of Superdrug refits, and his mental state was such that he had difficulty in dealing with paperwork. He said he also expressed his concerns that there was a lot of work being expected of him and the subcontractors who had been allocated to the job. Mr Chart's evidence was that the Claimant seemed excited about doing the night work and at no point did he ask not to work nights or raise concerns that he did not have sufficient support to undertake the job. He stated that there were more operatives allocated than usual for a job of that type.

73. The Tribunal found that the Claimant did not raise concerns in the stated terms to Mr Chart at this stage. It was considered that if he had, the Respondent's interest in providing a good service to the client would have led them to provide additional support or different personnel on the project. Further if the Claimant had raised these concerns with Mr Chart and Mr Chart had ignored him, it is likely the Claimant would have escalated the matter to Mr Hannon, whom he felt able to confide in.

74. There was a dispute over whether there was a heavy workload on the project. The Tribunal noted that the job was worth £87,000 and the Claimant had previously overseen a project worth £250,000. The Claimant accepted that when he was well there would have been nothing unusual about the project and the workload it entailed.

75. On the first night of the project, the Claimant's team was unable to carry out any work other than the site walkthrough because asbestos needed to be removed from the building. That meant that work started a day behind schedule. It was

then delayed further because one of the subcontractors hit a waterpipe causing a flood which necessitated urgent plumbing repairs and a clear up.

76. Throughout the project, the Claimant signed in and out of the Superdrug site when he arrived and left. The sign-in sheets show that on most nights he was on site between 6pm and 2am. On two nights he stayed longer, until 4am and 4.30am. On one night he left at 12.30am due to the burst water main. One two other nights he left at 1.30am. In addition, the Claimant attended the head office each afternoon before going on to the Superdrug site in order to offload rubbish from his van for waste disposal from the yard, and load materials. There was a dispute over how long this would take to accomplish. The Claimant said it took two hours from 4pm to 6pm, the Respondent said the offloading and journey ought to have taken perhaps one hour. Allowing for these trips in addition to the site shifts, on average the Claimant worked over 9 hours per night during the Leigh-on-Sea project.

77. A S Watson engaged a third party, Eurosafe UK, to undertake a site inspection on 15 October 2020, during the first week of the project. The site safety report gave a score of 96%. Mr Hannon congratulated the Claimant and Mr Chart on this achievement.

78. Mr Chart also visited the site on at least one evening during the following week, the second week of the project. He did not observe any health or safety issues, including at the fire exit to the rear of the shop. The Tribunal accepted that was the case and that if Mr Chart had seen a health and safety issue, he would have escalated the matter.

79. On 21 October 2020, Mr Chart visited the site during the day and observed that the project was falling behind. On the same day, a Superdrug manager sent a text message to the AS Watson project manager complaining that the team had taken a lot of breaks, left at 1am and that *"apparently Dave was sat on the stairs all night and didn't do anything"*. This message was forwarded to Mr Chart.

80. Mr Chart telephoned and emailed the subcontractors to discuss the client's concerns and emphasise the need for commitment to working full shifts. He also spoke to the Claimant. Their conversation took place at the Respondent's office that afternoon before the Claimant travelled to the site for his night shift. The Tribunal accepted Mr Chart's evidence that the Claimant was very apologetic but did not raise any health issue with him; it is likely that if the Claimant had mentioned he was struggling with his health, Mr Chart would have escalated that concern or taken remedial action, if only to protect the Respondent's performance on the client project.

81. The Claimant's evidence was that his kidney condition deteriorated sharply in October 2020, and that he was also suffering poor mental health. He did spend a majority of one shift sitting on the stairs because he was feeling so ill. The Tribunal accepted that the Claimant struggled due to the health issues he was experiencing. Until that point there had been no performance concerns with his work. He was on the kidney transplant list and worried about not receiving sick pay in future. However, the Claimant did not tell anyone that he was struggling.

Meeting on 22 October 2022

82. During the week commencing 19 October 2020, the Respondent held team briefings at which Mr Hannon delivered a presentation on the company's financial circumstances and asked all employees to consider agreeing to take a temporary 10% pay cut in the hope of avoiding the need to make redundancies. The Claimant attended a team briefing on 22 October 2020 with Mr Halls, Mr Sharp and a fourth colleague (referred to as Joe).

83. The Claimant said that at the meeting, Mr Hannon stated that if productivity did not improve there would be serious consequences, meaning termination of the employment of people he felt were not pulling their weight. He said that he raised his concerns about limitations due to his disabilities and was told by Mr Hannon that if he did not comply, he would be no good to them and his employment would be terminated as a result. He said he requested that a memo be sent to all his fellow employees to let them know that his capabilities were limited as there were some who just thought that he was lazy. He alleged that Mr Hannon shouted at him that he was being paranoid, and everyone knew he had mental health issues.

84. Mr Hannon refuted that any such exchange took place or that the Claimant mentioned any health issues at all during the meeting. Mr Halls' and Mr Sharp's evidence was that Mr Hannon did not shout or make the comments alleged. Mr Halls said that he himself had raised his voice to the Claimant, and said words to the effect that if he was going to take a 10% pay cut, he did not want to have to do 50% of other people's work. This was because he had been on jobs with the Claimant where he felt the Claimant did not pull his weight, but he did not make any link between that and the Claimant's health conditions.

85. The day after the meeting, the Claimant sent Mr Hannon an email, which unfortunately has been lost and neither party has been able to retrieve it. The Tribunal did see a copy of Mr Hannon's reply, which said, "*There were no minutes taken at the meeting that I can provide you with regarding the questions you put about your health. If you wish to discuss then I shall be in the office this afternoon for a briefing to others at 3.30pm. I can speak with you after 4pm if you wish*."

86. The Tribunal found that Mr Halls made a comment in the meeting about people pulling their weight and this prompted the Claimant to refer to his own health conditions. However, the Tribunal considered it unlikely that the Claimant asked for an email to be sent to the company about his health and unlikely that he would have wanted such a public disclosure to be made. Mr Hannon did not shout at the Claimant or make any comment about his mental health. From the Tribunal's impression of Mr Hannon in evidence and in correspondence this would have been wholly uncharacteristic of him.

Issue with the fire exit

87. From 25 to 29 October 2020, Mr Chart was away on annual leave and handed responsibility for the Superdrug project to Mr Flanagan. On 26 October 2020, Mr Flanagan sent the Claimant a revised programme for the project.

88. On 28 October 2020, the AS Watson project manager emailed Mr Flanagan and Mr Chart saying, "*I've had a complaint from the store that the fire exit is part blocked. See picture attached. We need this clearing now*." The picture attached showed flammable materials left by a wall near the external side of the fire exit, partially blocking the route people would use in case of a fire.

89. Mr Flanagan made immediate arrangements for another operative, Mr Kevin Curran, to attend the site and clear the rubbish. Mr Curran took a further photograph of the fire exit, which showed a similar scene viewed from a different angle. Some items had been moved between the first and second photographs being taken. The Tribunal considered that was due to the time that had passed in between the two photographs rather than any deliberate manipulation of the scene. Both pictures showed a serious and concerning situation.

90. Mr Flanagan was concerned about the issue and instigated a disciplinary investigation into the Claimant's role in the fire exit issue. He visited the Superdrug site. By that time, the rubbish by the fire exit had been cleared. He formed the view that the project was falling behind.

Disciplinary investigation

91. The Claimant was invited to attend an investigation meeting with Mr Flanagan on 2 November 2020. Mr Hannon attended as a note-taker. At the meeting, the Claimant said he had been taking as much rubbish away as could fit in his van each night but there was still rubbish remaining in the fire exit route because he could not fit it all in his van. The Claimant said that Mr Chart had told him to leave the rubbish on site. He said that the subcontractor Paul had heard Mr Chart say he was going to ask another operative to remove the rubbish at the weekend. He said although it was a fire exit there was still room for people to get by the rubbish in the event of a fire. He said there was nowhere else to store it as the other relevant area on site was full of Superdrug equipment and trolleys. He said he did not know he could have collected keys to another of the Respondent's vans and do a separate trip to collect rubbish. He said the subcontractors were not willing to take it in their vans. He accepted he did not message anyone else at the Respondent to let them know about the rubbish and said this was because he had been told by Mr Chart to leave it. He also gave reasons why the project was falling behind.

92. During the meeting the Claimant did not mention his health or suggest there was any link between his mental or physical health conditions and the situation by the fire escape, or the job falling behind.

93. At the conclusion of the meeting the Claimant was suspended and told to attend a disciplinary hearing on 4 November 2020.

94. Mr Flanagan followed up by sending written questions to Mr Chart, who responded on 3 November 2020. He wrote that he had never instructed the Claimant to leave rubbish on site or said that another operative would go to collect rubbish. Mr Chart also provided an email with a summary of what had been done at the Superdrug site and what tasks had not been completed.

95. Mr Chart's evidence to the Tribunal was, consistently with his answers to Mr Flanagan, that he never instructed the Claimant to leave rubbish next to the fire exit. The Tribunal accepted that evidence, taking the view it implausible that any experienced building contractor would have considered leaving rubbish by the fire exit to be an acceptable solution when it would easily have been possible to arrange for another employee to assist in clearing the backlog.

96. Mr Flanagan decided that the matter should be escalated to a disciplinary hearing. His reason for doing so was solely because of the fire exit issue. He

would not have treated the job falling behind as a disciplinary matter but, in his words during evidence, he saw the fire exit situation as unforgivable and a potential risk to life.

Disciplinary hearing

97. The Claimant asked that company director Mr Ian Jeffery attend his disciplinary hearing as his companion. That request was refused by Mr Hannon on the basis that Mr Jeffery was not available, and in any event might be called upon to hear any appeal. He stated that the Claimant was welcome to bring an alternative colleague or union representative.

98. The disciplinary hearing took place at 1pm on 4 November 2020. It was conducted by Mr Holland. The Claimant attended without a companion; he was offered an adjournment to find one but declined. Mr Hannon took notes. During the meeting, the Claimant agreed to the accuracy of the notes of the investigation meeting.

99. Mr Flanagan attended to present his investigation findings then left.

100. The Claimant was invited to add anything he wished. He said that the subcontractors had been moonlighting and had not supported him on the job. He said that while there was stuff on the fire exit route there was at least a 2-3 metre gap for people to exit through. Mr Chart's responses were put to him, and he said that he disagreed with all of them. He was asked about his fire warden training, and he reiterated that fire exit was not completely blocked. He was shown a copy of a photograph (we are told it was the one provided by the client not the one taken the one taken by Mr Curran) and he said he did not think it was like that.

101. The hearing adjourned at 2.10pm and during a 20-minute break Mr Holland reached a decision that the Claimant should be dismissed. The notes record that when the meeting reconvened at 2.30pm, he stated, "*There is clearly a differing view of how events unfolded between you and Lee. The fact of the matter remains however, that the job has been failing badly and that you as the Site Foreman could have done more to ensure that the job was on track. What concerns me most however, is that you allowed a Fire Exit Route to be severely blocked. Although you stated today that it was only marginally blocked, the photograph I am handing you now clearly shows a fire exit route being dangerously blocked…. Allowing that to happen is an act of Gross Negligence and incompetence. It is for that reason that my decision is that your employment is terminated. Because this constitutes Gross Misconduct, there is no notice period and your employment terminates today*".

102. Mr Holland confirmed the decision in writing on the same day, by a letter stating, "*Having been satisfied that we have gone through a proper process and having given very careful consideration to all I have heard, it is my decision that you are guilty of Gross Negligence and Gross Misconduct and that there has been a complete breakdown in trust and confidence in you as an employee, as explained at the conclusion of our meeting today*".

103. The Tribunal found that Mr Holland dismissed the Claimant because of the incident of the partially blocked fire exit and for no other reason. When asked about whether he had considered the possibility of a final written warning, Mr

Holland said it was in his mind, but the severity of the situation meant that dismissal was the only appropriate outcome.

Submissions

104. The Tribunal took into account the submissions made by Ms Venkata on behalf of the Respondent both orally and in writing, and the Claimant's carefully prepared closing speech.

105. Ms Venkata submitted that the Respondent was not aware of the Claimant's depression, anxiety and PTSD because he had not disclosed it in his medical questionnaire at the start of employment or during the mental health and wellbeing seminar, and that on 6 October 2020, Mr Hannon only knew that the Claimant was feeling bad after a sleepless night. She invited the Tribunal to find that the Claimant wanted to work night shifts as this allowed for social distancing and was happy to accept the Leigh-on-Sea project. She noted that the Claimant was allowed to take breaks, paid sick pay on occasion and chose to take annual leave to cover medical appointments. Further, it was submitted that the Claimant was appropriately supported throughout his employment and disputed that there was evidence to show a link between the Claimant's disabilities and the problems which arose with the Leigh-on-Sea job. The reason for dismissal was the blocked fire exit, which was not something arising from disability. This was said to be a serious instance of negligence and the dismissal was submitted to be fair in all the circumstances.

106. The Claimant submitted that the Respondent had failed to check in with him or to make changes to his workload in consideration of his declining health. He believed the two different photos showed that evidence had been placed in the fire exit for effect so the Respondent could dismiss him. He explained that the disciplinary process and dismissal had caused him severe stress and anxiety.

The law

107. The relevant legal principles are as follow.

Burden of proof

108. For all of the Claimant's Equality Act 2010 claims, the Tribunal must consider if there are facts from which it could decide that the essential elements of the claim are made out. If so, the "burden of proof" shifts to the Respondent to establish on the balance of probabilities that they are not liable.

109. The burden of proof provisions are contained in s.136(1)-(3) Equality Act 2010:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

110. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

‘It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:
(1) At the first stage the Claimant must prove “a *prima facie* case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination”. As he continued (pp. 878-9):

> **“56. … The bare facts of a difference in status and a difference in treatment 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.**
> **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …”**

(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> **“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.”**

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.’

111. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

112. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that the Tribunal should avoid adopting a ‘fragmentary approach’ and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

113. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but

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[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Discrimination arising from disability

114. Section 15 Equality Act 2010 provides that:

> **(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.**

115. In *Pnaiser v NHS England* [2016] IRLR 170 at [31], Simler P summarised the proper approach to a s.15 Equality Act 2010 claim as follows:

> **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required... The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
>
> **(c) Motives are irrelevant...**
>
> **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links... the causal link between the something that causes unfavourable treatment and the disability may include more than one link...**
>
> **(e) ... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**
>
> **(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.**

> **(g) ...Weerasinghe ... highlights the difference between the two stages — the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.**
>
> **... (i) ... it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.**

116. If the two-stage test is satisfied by the Claimant, the burden moves to the Respondent to show that the treatment is a proportionate means of achieving a legitimate aim. Determining whether the treatment is a proportionate means of achieving a given aim "*requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition*": *per* Balcombe LJ in *Hampson v Department of Education and Science* [1989] ICR 179.

Knowledge of disability

117. As for knowledge of disability, if the employer knew, or could reasonably be expected to have known, that the Claimant had an impairment, it does not matter that it had no precise diagnosis. It is, however, a requirement that the employer should know that the Claimant had an impairment the adverse effects of which were both substantial and long-term (*Wilcox v Birmingham CAB Services Ltd* [2011] EqLR 810.

118. An employer may also have 'constructive' knowledge of disability where it could reasonably have been expected to know about it. The EHRC Employment Code of Practice states that employers must 'do all they can reasonably be expected to do' to find out whether an employee has a disability. It gives the following example at para 6.19:

> **'A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements'**

119. The Respondent cites the case of *A Ltd v Z* [2020] ICR 199 as authority for the principle that an employer is not fixed with constructive knowledge of disability in circumstances where making further enquiries of the claimant would not have resulted in disclosure of the relevant condition.

Failure to make reasonable adjustments: s.20-21 Equality Act 2010

120. Section 20 Equality Act 2010 provides as relevant:

> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**
>
> **(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.**

121. Section 21 Equality Act 2010 provides as relevant:

> **(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.**
>
> **(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.**
>
> **…**

122. The Equality and Human Rights Commission Code of Practice on Employment (2011) ('the Code of Practice') at para 6.16 emphasises that the purpose of the comparison with persons who are not disabled is to determine whether the disadvantage arises because of the disability and that, unlike direct or indirect discrimination, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's.

123. In relation to the employer's actual or constructive knowledge of the employee's disability, and of the disadvantage, sch.8, Part 3, para 20(1)(b) Equality Act 2010 provides that:

> **(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—**
>
> **…**

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

124. The correct approach for the Tribunal in determining a reasonable adjustments claim is set out in *Environment Agency v Rowan* [2008] ICR 218 at [27] (the reference to sections are to sections of the Disability Discrimination Act 1995 "DDA"):

> **'In our opinion an employment tribunal considering a claim that an employer has discriminated against an employee pursuant to section 3A(2) of the Act by failing to comply with the section 4A duty must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant. ... Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.'**

125. The burden is on the Claimant to show the PCP, to demonstrate substantial disadvantage, and to make out a prima facie case that there is some apparently reasonable adjustment which could have been made (and that, on the face of it, there has been a breach of the duty): *Project Management Institute v Latif* [2007] IRLR 579 at [45] and [54]. If the PCP contended for was not actually applied, the claim falls at the first fence: *Brangwyn v South Warwickshire NHS Foundation Trust* [2018] EWCA Civ 2235 at [40].

126. A one-off act may be a PCP, but only if it is capable of being applied to others. 'Practice' connotes some form of continuum in the sense that it is the way in which things generally are or will be done; it is not necessary for it to have been applied to anyone else in fact (*Ishola v Transport for London* [2020] IRLR 368 CA *per* Simler LJ at [36-38]):

> **'The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee […] the act of discrimination that must be justified is not the disadvantage which a claimant suffers […] but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course […] that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.**

127. The reasonableness of an adjustment falls to be assessed objectively by the Tribunal: *Morse v Wiltshire County Council* [1998] IRLR 352. The focus is on practical outcomes: *per* Langstaff P in *Royal Bank of Scotland v Ashton* [2011] ICR 632 at para 24:

> **'The focus is upon the practical result of the measures which can be taken. It is not – and it is an error – for the focus to be upon the process of reasoning by which a possible adjustment was considered. As the cases indicate, and as a careful reading of the statute would show, it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment. It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reason.'**

<u>Harassment related to disability</u>

128. Harassment related to race is defined by s.26 Equality Act 2010, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **disability**
> **…**

129. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at [22]:

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on**

other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

130. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

131. He further held (at [13]):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that 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.'**

132. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in *Grant*, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Time limits

133. Section 123(1) Equality Act 2010 provides:

> **(1) … proceedings on a complaint within section 120 may not be brought after the end of—**
>
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**

...

134. Where a claimant pleads that a particular allegation which would otherwise be brought out of time amounts to part of “conduct extending over a period” for the purposes of s.123(1)(3)(a), the Tribunal will distinguish between a continuing act and a one-off act that has continuing consequences: *Barclays Bank Plc v Kapur* [1991] 2 AC 355 at pp.368-369.

135. As noted by Auld LJ in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576; [2003] IRLR 434:

    “… time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

    This does not imply a requirement that the circumstances be ‘exceptional’.

Conclusions

136. The Tribunal’s conclusions followed the structure of the list of issues that was discussed at the start of the hearing.

Discrimination arising from disability

137. The Tribunal accepted that a number of things arose as a consequence of the Claimant’s disabilities:-

    137.1. The Claimant did suffer fatigue as a result of his disabilities.

    137.2. The Claimant needed regular rest breaks and to rehydrate regularly.

    137.3. There was a medical need not to work excessive hours, although the Claimant may have chosen to work longer hours and additional shifts.

    137.4. It was the case the Claimant needed to attend medical appointments.

    137.5. The Claimant needed support with lifting heavier weights and lifting above his head.

    137.6. The Claimant did not have frequent or lengthy sickness absences during his period of employment with the Respondent so this was not ‘something arising’ from his disability. He did take some time off because of his disabilities, including for medical appointments and medical procedures.

138. The next issue to consider was whether the Respondent treated the Claimant unfavourably, and the Tribunal considered in turn each of the ways the Claimant said that he was treated unfavourably.

    138.1. Was the Claimant required to work nights on the Superdrug refit from 13 to 30 October 2020? If so, was this unfavourable treatment? The Tribunal concluded that the Claimant was not required to accept the Superdrug job, but having accepted it, he was required to work night shifts. However,

this did not amount to unfavourable treatment given that the Claimant had requested to work night shifts during the Covid 19 pandemic.

138.2. Was the Claimant not allowed to take the breaks that he required throughout his employment? The Tribunal found that the Claimant was allowed to take breaks as he needed and was never refused a break.

138.3. Was the Claimant refused pay when attending medical appointments? The Claimant was paid holiday pay for one day in August 2020 spent recovering from a medical procedure but refused pay for a day taken for the procedure and a day of recovery. He was initially refused half a day's pay for a blood test in September 2020 but that pay was restored to him following discussion with Mr Hannon.

138.4. Did the Respondent refuse to pay the Claimant discretionary company sick pay? The Respondent did not pay the Claimant discretionary sick pay for his procedure in August 2020 although the Tribunal noted on that occasion the Claimant asked for annual leave not sick pay. In September 2020, Mr Hannon refused the Claimant's advance request to be paid sick pay at such future time as he underwent his kidney transplant.

138.5. Was the Claimant required to work a shift of around 10 hours as opposed to a shift of around 8 hours in the period from 13 to 30 October 2020? Did this amount to excessive hours, and unfavourable treatment? The Tribunal found the Claimant worked an average of at least 9 hours per night during this period. The Tribunal did not consider this excessive given the demands of the job. It was normal practice and did not amount to unfavourable treatment.

138.6. Did the Respondent fail to provide the Claimant with adequate support on his return to work in August 2020 (scaffolding tower help)? The Tribunal found that the Claimant did not ask for help and if he had asked, then help would have been provided. Therefore, there was no failure on the Respondent's part to provide support.

138.7. Did the Respondent fail to provide the Claimant with adequate support during the Superdrug refit in October 2020 in terms of support with the amount of work and the paperwork involved, taking into account his lack of experience of Superdrug refits? The Tribunal found that the Claimant did not raise with the Respondent at the time a need for additional help. The job itself was not out of the ordinary given the Claimant's previous experience. Again, there was no failure on the Respondent's part to provide support.

138.8. Lastly in relation to unfavourable treatment, it was not disputed that the Respondent dismissed the Claimant, and that the dismissal amounted to unfavourable treatment.

139. Were any of the matters found to amount to unfavourable treatment done because of one or more of the things arising from disability? The Tribunal found that three matters were unfavourable, and in relation to each went on to consider whether there was any causal link to something arising from disability.

139.1. Was the refusal of pay for a medical procedure and recovery time following a medical appointment in August 2020 done because of one or more of the things arising from disability? The Tribunal considered whether the correct analysis was that the need for time off arose from the Claimant's disability and the loss of pay resulted from the time off, therefore fulfilling the two-stage causal link required under s.15 Equality Act 2010. Alternatively, it could be said that while the need for time off arose from disability, the reason why pay was refused was because of the application of the Respondent's unusual approach to holiday leave, which was not disability-related. After some discussion, the Tribunal concluded the latter analysis was correct. The Claimant requested holiday pay not sick pay. The reason why the pay was refused was related to his remaining annual leave allowance and not to any of the matters the Claimant said arose from his disability.

139.2. In relation to the refusal of the Claimant's advance request in September 2020 for sick pay during his kidney transplant and recovery time, the Tribunal found the reason was the company's financial situation and therefore not disability-related.

139.3. The Tribunal found the reason for dismissal was the partially blocked fire exit at the Leigh-on-Sea site. The Claimant did not contend during the disciplinary process or during this litigation that the rubbish by the fire exit was related to any matter linked to his disability. Therefore, the Tribunal could not find that his dismissal was discrimination arising from disability within the meaning of s.15 Equality Act 2010.

140. The Tribunal concluded that none of the matters alleged to amount to unfavourable treatment were done because of something arising in consequence of the Claimant's disabilities.

141. It was therefore unnecessary to go on to consider whether the treatment was a proportionate means of achieving a legitimate aim. Nevertheless for the sake of completeness, the following is noted:

141.1. The Tribunal would have concluded that the dismissal was justified in furthering the aim of ensuring health and safety rules were maintained, given the serious nature of the health and safety breach.

141.2. The Tribunal would have found the refusal of the prospective request for sick pay was justified because of the precarious financial situation of the company at the time it was requested.

141.3. The Tribunal would have said that there was insufficient justification for applying an annual leave policy only permitting holiday to be taken pro rata with accruals throughout the leave year given that the consequence was the Claimant went unpaid for two days when he was undergoing and recovering from an operation connected with a disability. However, as set out above, the annual leave was not refused for a disability-related reason.

142. Therefore, none of the Claimant's claims for discrimination arising from disability under s.15 Equality Act 2010 were upheld.

Failure to make reasonable adjustments

143. The first issue to consider in relation to reasonable adjustments was whether the Respondent applied a provision, criterion or practice ('PCP') alleged by the Claimant. The Tribunal looked at each of these in turn.

143.1. Did the Respondent apply a requirement to work nights and excessive hours? The Tribunal concluded that there was no requirement for an operative to accept a job working nightshifts or additional hours but once the Claimant had accepted the Leigh-on-Sea job, he was required to work nights and on average in excess of 9 hours per night. Therefore, with the proviso that these hours were not 'excessive' in the context of the job, this was a PCP applied by the Respondent.

143.2. Did the Respondent apply a requirement to work without breaks? Given the factual findings made about breaks, the Tribunal concluded that there was no such requirement.

143.3. Did the Respondent have a practice of not paying either discretionary Company sick pay or any other pay when attending medical appointments? The Tribunal heard that the company sometimes paid discretionary sick pay, as was done on 4 September and 6 October 2020, and sometimes allowed annual leave to be taken to cover medical appointments. There was no practice of refusing pay for employees when they attended medical appointments that amounted to a PCP in the sense described the case of *Ishola v Transport for London*.

143.4. For the same reasons the Tribunal concluded that the Respondent did not apply a PCP of not paying discretionary company sick pay or any other sick pay.

143.5. Did the Respondent apply a requirement to work without providing adequate support? Given the factual findings made about the Claimant not requesting extra support, the Tribunal concluded there was no such requirement and that more support would have been provided to the Claimant had the need for it been communicated.

143.6. Did the Respondent apply a requirement to undertake a large amount of high-pressure work? Given the factual finding that the Leigh-on-Sea job was not out of the ordinary for a foreman of the Claimant's experience, the Tribunal concluded that there was no such requirement.

144. The Tribunal accepted one of the alleged PCPs was applied, namely that once the Claimant had accepted the Leigh-on-Sea job, he was required to work nights and on average in excess of 9 hours per night. The next issue to determine was whether that PCP placed the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Tribunal was prepared to accept that working nights and shifts of this duration would have been harder for someone with the Claimant's mental and physical disabilities than it would have been for a non-disabled person. In particular, the Tribunal accepted that his disabilities did cause the Claimant to suffer fatigue, which could well make night shifts and longer shifts more taxing.

145. As the Tribunal found there was a PCP which put the Claimant to a substantial disadvantage, it went on to consider whether the Respondent had the necessary knowledge of both the disabilities and the substantial disadvantage that would give rise to the obligation to make reasonable adjustments for the Claimant.

146. The Respondent accepted that it knew of the Claimant's cancer and his kidney condition. Did the Respondent know, or ought the Respondent to reasonably have been expected to know that the Claimant had the disabilities of PTSD, depression and/or anxiety? The Tribunal found that the Respondent did not actually know the Claimant had PTSD, depression and anxiety; these conditions were not disclosed at the commencement of or during employment. The Tribunal went on to consider whether the Respondent had constructive knowledge and ought to have enquired whether the Claimant had a mental disability. The point when this might have arisen was following the 6 October 2020 incident when the Claimant broke down in a phone call to Mr Hannon. This incident bears some similarity to the example given in the EHRC Code of Conduct of an employee with depression crying at work, putting her employer on notice to make enquiries. The Tribunal considered the matter was finely balanced but accepted Mr Hannon's explanation that having been reassured by the Claimant he felt better for a rest after a sleepless night, Mr Hannon did not want to pry further. The Tribunal accepted that he and the Respondent reasonably did not know about the Claimant's mental health conditions.

147. The Tribunal concluded that the Respondent did not know and could not reasonably have been expected to reasonably that the requirement to work night shifts and on average in excess of 9 hours per night placed the Claimant at a substantial disadvantage. On the factual findings made, the Respondent could not reasonably have known this because the Claimant indicated that he wanted to take on the responsibilities that came with the Leigh-on-Sea job and did not communicate to his managers that he was struggling.

148. Given that the Respondent did not know about the disadvantage and some of the relevant disabilities, the obligation to make reasonable adjustments at work for the Claimant did not arise. The Claimant's reasonable adjustments claim was also dismissed.

Harassment

149. The Claimant's final claim was for disability harassment. The first question in relation to that claim was, did the Respondent engage in unwanted conducted related to the Claimant's disability? In particular, did Mr Hannon in a staff meeting on 22 October 2020 shout that the Claimant was being paranoid and everyone knew he had mental health issues? The Tribunal found on the balance of probabilities that Mr Hannon did not do this. Therefore, the remaining issues relating to harassment fell away and the harassment claim also failed.

Time limits

150. The Tribunal did not uphold any of the Claimant's claims and therefore did not need to consider whether they were brought out of time. For completeness, it was noted that if the lack of pay for two days in August 2020 had amounted to discrimination arising from disability, that took place long before the claim was

presented on 8 March 2021, and it was difficult to see how an extension of time could have been just and equitable in relation to that sole matter.

151. The judgment of the Tribunal was therefore that the Claimant’s claims under the Equality Act 2010 were not well-founded and were dismissed.

Employment Judge Barrett
Date: 13 March 2023