



EMPLOYMENT TRIBUNALS

Claimant: Mr D. Cooper

Respondent: Travis Perkins Trading Company Ltd

Heard at: Bury St Edmunds **On:** 9, 10, and 11 May 2023 (Full Merits Hearing)

Before: Employment Judge Boyes
Members: Ms S. Elizabeth,
Mr A. Schooler

Representation

Claimant: In person

Respondent: Ms Randall, Head of Legal Services

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

- 1. None of the complaints of direct discrimination on the grounds of disability under section 13 Equality Act 2010 are well founded. The Claimant was not directly discriminated against because of his disability and all of his claims in that respect are dismissed.**
- 2. The Respondent was in breach of the duty to make reasonable adjustments from 20 September 2021 to 4 October 2021 in respect of the disciplinary investigation and proceedings.**
- 3. The Respondent was not in breach of the duty to make reasonable adjustments in relation to the allocation of transport related duties. The Claimant's complaint in that respect is not well founded and is dismissed.**
- 4. The Claimant was subject to harassment related to his disability on the 10 September 2021. His complaint in that respect is well founded and succeeds.**
- 5. The Claimant was not subject to harassment related to his disability on the 29 September 2021. His complaint in that respect is not well founded and is dismissed.**

There will be a hearing (1 day) to determine remedy. Further Case Management Orders will be sent to the parties in respect of the remedy hearing.

REASONS

1. By a claim form presented to the Employment Tribunals on 2 January 2022, following Acas Early Conciliation between 10 November 2021 and 6 December 2021, the Claimant pursues disability discrimination related complaints against the Respondent under sections 13, 20/21 and 26 of the Equality Act 2010 (“EqA”).
2. The Respondent denies liability in respect of all of the Claimant’s complaints.
3. The Claimant also brought a complaint that he had been unfairly dismissed. However, as he was employed for less than two years, and does not assert that his dismissal was automatically unfair, he confirmed during the preliminary hearing that he wished to withdraw his complaint of unfair dismissal, and that he was content for the complaint to be dismissed on withdrawal. That complaint was dismissed in a Judgment dated 19 July 2022.

The Hearing

4. The Claimant gave evidence. He adopted his Impact Statement and email of 26 April 2023 as his evidence in chief. He was cross examined by the Respondent and asked questions by the Tribunal.
5. The Respondent called three witnesses. These were Mr Matthew Orrell (Branch Manager), Mr Stephen Smith (Senior Sales Assistant at time of Claimant’s employment), Mr John Brain (Regional Director at time of Claimant’s employment). They adopted their witness statements, were cross examined by the Claimant and asked questions by the Tribunal.
6. Both parties made oral closing submissions.
7. Judgment was reserved as there was not sufficient time for Judgment and Reasons to be given orally on the final day of the hearing. The hearing length was reduced from four to three days because of the additional bank holiday for the King’s Coronation.

Documents

8. As well as the documents held on the Tribunal file, the Tribunal had before it a bundle of 277 pages.
9. There were statements from two further witnesses for the Claimant who did not give oral evidence.
10. The Tribunal also viewed CCTV footage during the course of the hearing. This had been captured by the Respondent’s CCTV. There were five separate videos.

Issues to be determined

11. A partially drafted list of issues had been prepared at the case management hearing. This was finalised at the hearing before us.
12. The Respondent accepts that the Claimant has bipolar disorder and that this amounts to a disability for the purposes of the EqA. The Respondent's position is that it did not become aware of the Claimant's disability until the mid to the end of July 2021.
13. The issues that the Tribunal is required to decide are:

Direct disability discrimination (section 13 Equality Act 2010)

1. Did the Respondent do the following things:
 - i. Undertake investigations in relation to fork lift truck incidents involving the Claimant;
 - ii. Suspend the Claimant for health and safety breaches;
 - iii. Suspend the Claimant at a time when investigations of harassment and bullying were being investigated;
 - iv. Fail to permit the Claimant to sign the investigation notes;
 - v. Fail to take any action following health and safety breaches by other employees.
2. Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. The Claimant says he was treated worse than Stuart Miller, Andy French, Michael Overitt and Paul McGarvey.

There must be no material difference between their circumstances and the Claimant's circumstances.

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.
3. If so, was it because of disability?
4. Did the Respondent's treatment amount to a detriment?

Reasonable Adjustments (sections 20 & 21 Equality Act 2010)

1. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?
2. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:
 - i. A requirement or expectation that employees at the Claimant's level should take on additional duties and responsibilities as requested by their manager?

- ii. A disciplinary policy that included provision for employees to be suspended in cases of suspected misconduct and which granted discretion to managers as to the structure and timing of any disciplinary process?
3. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's bipolar disorder means he has a greater need for structure and certainty and makes him more susceptible to pressure, stress and other 'triggers' that exacerbate the symptoms of his condition?
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?
5. What steps could have been taken to avoid the disadvantage? The Claimant suggests:
 - i. Not allocating him transport duties in May 2021, alternatively distributing these duties more equitably amongst the Claimant and other colleagues;
 - ii. Consulting the Claimant about the allocation of transport duties in May 2021, with a view to agreeing an appropriate allocation of such duties with him;
 - iii. Not suspending him from his duties on 20 September 2021, alternatively ensuring that any period of suspension was strictly limited;
 - iv. Making available counselling, employee assistance or some other form of pastoral support to the Claimant following his suspension on 20 September 2021, and notifying the details of such support to him in writing;
 - v. Clearly communicating the disciplinary process to the Claimant in writing at the outset and ensuring that the structure and timetable was strictly adhered to;
 - vi. Regular breaks in any disciplinary meetings or hearings; and
 - vii. Making notes of any disciplinary meetings or hearings promptly available to the Claimant and ensuring that his comments on the notes were accurately captured and recorded.
6. Was it reasonable for the Respondent to have to take those steps?
7. Did the Respondent fail to take those steps?

Harassment related to disability (section 26 Equality Act 2010)

1. Did the Respondent do the following things:
 - i. On 10 September 2021, Paul Ainsworth called the Claimant "spastic", "mental" and "not right", and asked him why he couldn't be like everyone else/others; and

- ii. On 29 September 2021, during his disciplinary hearing, Dale Southgate told the Claimant to “keep it brief”, called him a liar and was generally aggressive towards him?
 2. If so, was that unwanted conduct?
 3. Did it relate to disability?
 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?
 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.
14. The Claimant has not put his case on the basis that the alleged breaches of health and safety and bullying, and subsequent disciplinary proceedings, arose as a consequence of his disability. On the contrary, his case is that his actions in relation to forklift truck driving were not so serious as to justify disciplinary proceedings. He denies any form of bullying. Consequently, section 15 EqA was not identified in the list of issues prior to the hearing and the Tribunal did not reach conclusions in relation to section 15 EqA in this case.

Findings of Fact

15. Our findings of fact are as follows:

The Respondent

16. The Respondent is a builders’ merchant and is part of the Travis Perkins Trading Group. It is a large employer trading on multiple sites.
17. The Martlesham Heath branch was opened in spring 2021 shortly after the Claimant commenced employment with the Respondent. The Claimant did some initial company training at the Ipswich branch.

The Claimant

18. Prior to commencing employment with the Respondent, the Claimant worked as a Yard Manager at Silverton Aggregates.
19. The Claimant commenced employment with the Respondent on 8 March 2021. His employment ended on 4 October 2021 when he resigned. The Claimant was employed as a Yard Manager at its Martlesham Heath Branch. His duties included the supervision of other members of staff. His duties included organising vehicle loading, supplier unloading and looking after customers in the yard as well as supervising yard housekeeping.
20. The Claimant was a qualified and experienced B1 counterbalance forklift truck driver. He was last tested in that respect on 12 March 2021. He was also qualified to use a M1 Multi Directional Counterbalance lift truck and was last tested in their use on 15 March 2021.
21. The Claimant has bipolar disorder. He was diagnosed in February 2008 and has been on a mood stabiliser, Lithium 1000mg per day, since he was diagnosed.

Chronology of Events

22. The Claimant's job interview was undertaken by Matthew Orrell at the Ipswich branch.
23. The Respondent states that the Claimant was provided with a document called, *Safe System of Work - Fork Lift Trucks* [109-110]. The Respondent states that the Claimant signed to say that he received the document [111] and had been briefed on the same on 23 April 2021 [112]. The Claimant says that he does not know if he did sign the document concerned. He accepts that it is his signature on the document [at 111] but not that the purpose of the signature was to confirm that he had read *Safe System of Work - Fork Lift Trucks*.
24. The Tribunal was satisfied that the sign off sheet [111] related to the document called *Safe System of Work - Fork Lift Trucks*. This is because the document at 111 is entitled "*Safe System of Work Sign Off Sheet-Fork Lift Trucks*".
25. On or around 7 July 2021, the Claimant told Matthew Orrell that the organisation of transport was getting too much for him and causing him stress. This was then taken away from him and handed over to Paul Mills. However, he then undertook the work for a further period on the week commencing 19 July 2021 for around four days whilst Paul Mills was away on holiday. Matthew Orrell's evidence is that the Claimant offered to cover the work over this period as he had the skills to do so, and that he told him that it would be helpful but only if he was happy to do it to which the Claimant said that he was. Matthew Orrell's evidence was that subsequently the Claimant's only responsibility in relation to transport was to ensure that the products were picked and loaded on vehicles safely as part as his role as Yard Manager.
26. John Brain's evidence is that none of the branches he is responsible for have a dedicated transport supervisor role. This includes his biggest branch in Cambridge that has 8 trucks. These transport related duties are undertaken by a member of yard staff or foreman.
27. Having heard witness evidence, the Tribunal found that it was the Claimant who offered to provide cover whilst Paul Mills was away rather than this work being forced upon him. After Paul Mills returned, the Claimant's involvement in transport was more limited as a consequence of the introduction of a new Openfleet transport system on or around 13 July 2021.
28. More generally, the Tribunal accepted John Brain's evidence that the transport duties were not considered to be a stand alone role but were carried out by yard staff as part of their role.
29. The Claimant does not appear to have raised anything further about any retained transport related duties causing him difficulties in August or in September 2023 prior to the investigation. What is clear from the evidence before us is that the Claimant was a keen and enthusiastic team member and the Tribunal considered that the Claimant's offer to help with transport related duties when a colleague was away was in keeping with that.
30. The Tribunal accepts the Claimant's evidence that he did sometimes feel that he was expected to do more in terms of transport related duties than he thought reasonable or could cope with and that he expressed how he felt about this in the yard with his team and also on one occasion made some

loads difficult to be disruptive with a view to bringing attention to the issue. However, he did not formally raise it as an issue with the Respondent.

31. The Claimant had his probationary review with Matthew Orrell. He passed his probation on 2 September 2021. His key strengths were identified as customer interaction, his positive personality, time keeping, social media presence/ company promotion, his continued observance of health and safety and housekeeping. Matthew Orrell's evidence is that during the probationary review, he did speak to the Claimant regarding certain forklift truck issues and how health and safety was paramount. He advised him not to use the forklift for unintended purposes, this included lifting the manual loading barrier with the forklift blades, pushing it down and pushing stock around with the forklift.
32. On the 10 September 2021, there was an incident involving the Claimant and Paul Ainsworth (Assistant Branch Manager at the time,, now Regional Stock Manager). The Claimant was using a radio to communicate with other employees. When Paul Ainsworth requested that the Claimant wait the Claimant said "*I want anyone but Ainsworth*". Paul Ainsworth swore at the Claimant telling him to "*fuck off*". This was heard by office staff and customers. The Claimant also asserts that on the same date, he went to speak to Paul Ainsworth, who called him a '*spastic*', '*mental*', '*not right*' and '*why could he not be like everyone else*'.
33. Matthew Orrell's evidence is that, at the time, Paul Ainsworth was not aware of the Claimant's disability but rather he told him about it in the days after the Claimant had been suspended. He stated that, after the incident, both the Claimant and Paul Ainsworth walked through the branch, apologised to each other, the Claimant put his arm around Paul Ainsworth and they shared a joke. He was not made aware of the incident until later. The Claimant did not bring the incident up with him on the following day or at any point afterwards.
34. Having heard evidence from the witnesses, we preferred the Claimant's account of events. Having considered all of the evidence before us, it was clear that there was animosity between the Claimant and Paul Ainsworth. Matthew Orrell was not at work on the 10 September 2023. We did not have the benefit of hearing evidence from Paul Ainsworth nor is there a statement from him despite him still working for the Respondent. We found that there was a ring of truth about the Claimant's account of what occurred. We found as a fact that events occurred on the 10 September 2023 as per the Claimant's account.
35. Matthew Orrell's evidence was that Paul Ainsworth did not know that the Claimant had bipolar disorder. He considered the conversation he had with the Claimant about this to be personal and private and the Claimant said that he did not want special treatment. However, having considered the Claimant's account of what happened and the content of what was said, and given that Paul Ainsworth was the Assistant Manager of the branch at the time, we considered it more likely than not that Paul Ainsworth would have been aware of the Claimant's disability. We do not accept that that he only found this out after the Claimant's suspension.
36. Matthew Orrell's evidence is that whilst he was in the yard, he noticed a damaged sign. He asked around and no one seemed to know what had happened to the sign. He was told informally that the Claimant had caused the

damage, but the colleague did not want to come forward as they felt threatened by him. He then reviewed the CCTV and saw the Claimant driving a forklift and proceeding to move and push the sign back with the forklift, which damaged it [113]. Whilst he was viewing CCTV, he saw the Claimant breaching forklift rules on numerous different occasions, and, in some situations, putting colleagues in the area at risk of injury.

37. On 20 September 2021, Andrew French (driver) emailed Matthew Orrell to report his concerns regarding the Claimant's treatment of Paul McGarvey, that is that Paul McGarvey felt bullied and belittled by the Claimant on a daily basis.
38. On 20 September 2021, there was a meeting at which the Claimant was present. The meeting was conducted by Matthew Orrell. Paul Ainsworth took notes. The Claimant was told that he was being investigated regarding serious breaches of health and safety whilst operating a forklift and bullying and intimidation of colleagues in the branch. Various incidents involving the Claimant's use of forklift trucks were referred to, as was the alleged bullying. The Claimant was informed at the meeting that he was being suspended on full pay pending an investigation in to his recent conduct. The Claimant was not asked to check and sign the notes of the meeting held on 20 September 2021. On the same date, the suspension was confirmed in writing. He was informed that the conduct may be considered to be gross misconduct.
39. Whilst the Claimant was suspended, he sent Matthew Orrell a message via WhatsApp. He wanted to know how long the suspension would be for. Matthew Orrell replied that it would be for as short a period as possible and provided him with the My Perks details which provides details of the Employee Assistance Programme.
40. On 22 September 2021, Matthew Orrell and Paul Ainsworth (Assistant Manager) held an investigatory meeting with Paul McGarvey (Yard Salesperson). Paul McGarvey has a hearing impairment. He said that he had been told that the Claimant had spoken about him whilst behind him so he could not hear what was said. He had referred to him in derogatory terms regarding his deafness, which hit hard and really upset him. It is recorded that he said that his first couple of months in the job were really positive but this has changed over the past couple of months. The Claimant was no longer helping or supporting the yard team and that he felt bullied by the Claimant.
41. On the 24 September 2021, the Claimant was sent a letter inviting him to attend a disciplinary hearing on 29 September 2021. The Claimant was informed in that letter that the allegations to be considered were serious breaches of health and safety rules and reported acts of intimidation and bullying. He was provided with statements, photographs, CCTV footage and the disciplinary procedure. He was told that as the conduct may amount to gross misconduct that he may be dismissed if found to have committed any such act.
42. The disciplinary hearing took place on the 29 September 2021. The meeting was conducted by Dale Southgate (Branch Manager, Ipswich). The Claimant attended. Laura Sharp (Personal Assistant) attended virtually to take notes. The Tribunal has been provided with a copy of those notes.
43. It is clear from the notes of the hearing that Dale Southgate did say to the Claimant "Can we keep this brief", and then when the Claimant responded that

that was not fair he said "Let's keep this concise and relevant". However, having carefully considered the notes the Tribunal can find nothing to suggest that Dale Southgate called the Claimant a liar and was generally aggressive towards him. We find that he did not call him a liar nor was he aggressive towards him.

44. The Claimant stated in the meeting that he was not asked to agree the notes of the investigation meeting, that allegations of bullying by others have been swept under the carpet and that it was unfair that Paul Ainsworth was present following his previous behaviour towards the Claimant. In particular, he told the Claimant to go fuck himself over the radio.
45. On 29 September 2021, Dale Southgate emailed the Claimant a copy of the minutes from the disciplinary hearing and asked that the Claimant come back to him if he has any concerns about them.
46. On 30 September 2021, the Claimant emailed Dale Southgate. He stated that he had also messaged Matthew Orrell and told him that the process was affecting his mental health. He states that Matthew Orrell called him for 1 minute, did not mention his mental health and just said that it would be done as quickly as possible. He stated that from the start of the process no one had contacted him to find out how he is. He stated that he was finding the process to be unfair, not caring and with a total disregard for the mental health issues that he faces. He requested a call from someone higher up in management such as John Brain or Josie.
47. On the same date, Dale Southgate replied stating that he had been told by Human Resources that a call to higher management was only permitted after a decision has been made as to whether or not to sanction him. He provided the Claimant with the telephone number for Care First.
48. On 4 October 2021, the Claimant emailed Matthew Orrell stating that he was resigning. He stated that he had lost trust in the company because of the way that he has been treated by being suspended and during the disciplinary process. He states that the disregard for his mental health had been very concerning. There has been very little communication with him and no additional care in relation to his mental health even though the Respondent was fully aware that he suffers from bipolar disorder.
49. On 4 October 2021, Matthew Orrell emailed the Claimant to state that he accepted his resignation. He told the Claimant that he could either resign with immediate effect or work his notice but if he did work his notice that the disciplinary process would continue. The Claimant replied on the same date stating that he was resigning with immediate effect as he could not continue because of his mental health issues.
50. On 4 October 2021, Matthew Orrell sent a letter to the Claimant. The letter stated that no decision had yet been made regarding the disciplinary matter. It referred to a further disciplinary meeting that was to take place on 5 October 2021 at which the Claimant would be able to raise any mitigating factors that may have affected his conduct, including relating to his health. The Claimant was offered the opportunity to reconsider his resignation.
51. On 5 October 2021, the Claimant raised a grievance. Amongst other issues he raised the total lack of regard for his mental health with no support or contact during the disciplinary process. He also stated that he believed that he had

been treated unfairly, that there had been breaches of health and safety by others and abusive and intimidating treatment by Paul Ainsworth.

52. On 5 October 2021, Jill Smith (Senior Employee Relations Advisor) informed the Claimant by letter that his grievance would be dealt with by a modified grievance procedure as the Claimant was no longer employed.
53. The grievance hearing took place on the 11 October 2021. The Claimant attended. It was conducted by John Brain. Laura Sharp took notes. The Tribunal has been provided with a copy of those notes.
54. John Brain wrote to the Claimant on the 18 October 2021 with the outcome of the grievance. He partly upheld the grievance on the basis that the Claimant did not see and sign the investigation meeting notes and was the subject of unacceptable language on the walkie talkie. He did not uphold the remaining aspects of the grievance. He concluded that Matthew Orrell and Dale Southgate followed the company procedure throughout the disciplinary process and dealt with the Claimant in a fair, unbiased way, keeping in contact with him via email as the Claimant had instructed. He stated that the Claimant chose to resign before the process was complete, which meant that he did not get answers to the queries and points that he raised during the process. He found that the Claimant had made an attempt during the grievance to discredit genuine colleagues by making false allegations.
55. There is a letter from the Claimant's GP, Dr S Ande, dated 18 July 2022. This letter was not before the Respondent at the time of the disciplinary proceedings. Dr Ande says,

"Bipolar disorder is a severe and enduring long-term mental health condition which is prone to relapse due to any form of psycho-social stress factor. Although his bipolar disorder has been stable, I understand that the recent disciplinary proceedings caused him a lot of stress and currently impacted his mental health."

The Respondent's knowledge of the Claimant's disability

56. The Claimant's position is that the Respondent was aware of his mental health problems from before he was employed through a mutual friend that he and Matthew Orrell shared. The Respondent's position is that it became aware that the Claimant had bipolar disorder from around July 2021.
57. The Claimant's evidence is that Matthew Orrell told him just after his employment started that he had had a conversation, prior to the commencement of the Claimant's employment, with the mutual friend who the Claimant had played football with for many years. He says that Matthew Orrell told him that his friend said that he was a big centre half, a scary person and then bipolar came up. The Claimant asked him where he had heard about it and he said that their mutual friend had told him. Matthew Orrell states that they just had a discussion about football.
58. Having considered the evidence before us, whilst the Tribunal accepts that such a conversation happened, it is not satisfied, on the evidence that it heard of the exact nature of what was said and whether there was an inference that the Claimant had mental health problems rather than it being specifically expressed. Further, there was no evidence from the mutual friend confirming the nature of that conversation.
59. On or around the 27 March 2021, the Claimant took part in an interview with

BBC Radio Suffolk. The interview took place by telephone whilst the Claimant was at work as it was a live broadcast. They had contacted the Claimant because throughout lockdown he had spoken on Zoom about mental health. His content was popular on social media. He was asked to speak about that and his mental health. He mentioned the Martlesham Heath branch of Travis Perkins. The Claimant sought Matthew Orrell's permission to take part as it was during working hours. The Claimant states that work colleagues listened and that afterwards Matthew Orrell came over to him to congratulate him, to tell him that he came across really well and to thank him for promoting the business.

60. We accept that the Claimant did take part in a radio interview as claimed and that he asked Matthew Orrell for permission. We accept that it is likely that some of the Claimant's colleagues listened to the broadcast. However, the Claimant's evidence was vague as to the content of the interview. We do not have a transcript of what was said. We accept that Cognitive Behavioural Therapy and motivational speaking during the COVID pandemic was mentioned as per the Claimant's evidence but cannot be satisfied that the Claimant specifically stated that he had bipolar disorder or ongoing mental health problems. Even if his mental health problems were specifically mentioned we cannot be satisfied on the evidence before us that Matthew Orrell or anyone else in management heard all of the interview and in particular any part in which the Claimant mentioned that he had mental health problems. Further, his colleagues were at work and it was a Saturday morning, so it is very likely that any colleagues that were listening to the interview were subject to work related distractions, so they may well not have listened to the entirety of the interview.
61. Matthew Orrell's evidence is that he became aware that the Claimant had bipolar disorder in around July 2021 when the Claimant was considering applying for a sales position elsewhere in the business. He says that the Claimant told him that he was anxious about applying for the role due to his bipolar disorder but said that his condition was not an issue, that it was managed by medication and no adjustments were required.
62. Consequently, taking into account the evidence before us, we find that the Respondent became aware that the Claimant's had bipolar disorder in around July 2021, but not before.

Forklift Truck Incidents / Health and safety breaches

63. A considerable proportion of the hearing was spent on witness testimony and evidence relating to what was said to be inappropriate forklift truck use.
64. The Claimant's case is that he was treated differently to others when near misses occurred or when he made a mistake.
65. Matthew Orrell's evidence is that there were issues with reporting health and safety breaches and what are called 'near miss' incidents in the early days when the branch first opened due to issues with the system. In essence, his evidence is that various near misses that occurred were learning experiences initially and then practices were put in place on the back of those near misses. Those new to the industry were directed to correct procedures whereas the Claimant was aware of these practices but still broke forklift safety rules.
66. His evidence was that the team generally learnt and changed their behaviour

but that the Claimant did not. He states that the Claimant continued to use the forklift incorrectly and the incorrect forklift for operations, such as using the counterbalance forklift in narrow aisles, carrying two packs of product at once and not looking in the direction of travel. He states that the forklift was too wide to turn in the aisle to obtain materials from the rack or remove product. A combi-lift forklift was on site to stop the hazard of hitting the racks and causing racking collapse. He states that he was the only person that used the incorrect type of forklift. The rule is to look in the direction of travel on a forklift and carrying two packs on the forklift prevents you from seeing where you are going. It also increases the risk of the load falling off the forklift which had happened with the Claimant and a near miss was created. This near miss put in place the practice of only carrying one pack at a time. The Claimant continued lifting two packs on occasions.

67. Five CCTV excerpt have been provided of the Claimant using a forklift truck. According to the Respondent, these show, on separate occasions, the incorrect use of the forklift truck in an aisle, dropping MDF from raised forks whilst turning, moving a 6 metre pipe, not looking back when reversing and splitting new packs of timber with forks. The Respondent asserts that these actions breached forklift truck operating rules, and that some of the actions put colleagues at risk of injury.
68. In his disciplinary hearing, the Claimant accepted that he reversed in the vicinity of two colleagues and that he did not look back [154]. He agreed that he should have looked back on that occasion. He challenged the correctness of certain other aspects of his forklift truck use that was being criticised.
69. When considering the Claimant's grievance, John Brain concluded that the fork lift truck incidents involving Paul McGarvey and Stuart Miller was careless behaviour from new recruits that was being monitored whereas, as a more senior member of staff, the Claimant should have been setting an example to junior colleagues. His evidence was that his investigations revealed that the Claimant was being investigated as to his forklift driving in its entirety, not just looking at the moving of the pipes at height. There were a number of examples of him operating the forklift in a manner deemed reckless or dangerous and these combined led to his driving being reviewed.
70. The Tribunal asked the Claimant what he thought the motivation was for starting an investigation against him. He said that it was because of his bipolar disorder, because he says things as they are. He was being targeted for being the person he was and not being like anyone else. When asked why he reached that conclusion he stated that it was smaller things like not buying him a drink and putting another employee on the apprenticeship programme and not him.
71. Matthew Orrell was asked whether consideration was given to whether the Claimant's behaviour was caused by his mental health problems. He stated that he did not give any consideration to this.

The Investigation / Disciplinary Process

72. The Respondent's Disciplinary and Appeal Policy can be found at pages 222 to 233 of the bundle.

73. The Claimant's evidence was that, as someone with bipolar disorder, he struggles to "adapt and divert". This caused him difficulties with the manner in which the disciplinary process was undertaken.
74. He stated that he found it difficult to focus in the investigation meeting with Paul Ainsworth being present: he found Paul Ainsworth's presence at that hearing really difficult. When he entered the meeting, he had initially thought the meeting was to discuss what had happened on 10 September. He told Matthew Orrell that he was not happy with Paul Ainsworth being present. He said that it was not fair him being there after what had happened. Matthew Orrell said that he understood that the Claimant and Paul Ainsworth were friends again, but that was not the case. He felt ganged up on. He cried all the way home. The unknown scares him. He did not agree any notes and there were things that were said in meeting that were not noted. When he got home, he broke down and told his wife that he had been suspended. He felt embarrassed and belittled.
75. Matthew Orrell's evidence was that had he known about the altercation and that either had an ongoing grievance, Paul Ainsworth would not have been in that investigation meeting.
76. We accept the Claimant's evidence that he was not happy with Paul Ainsworth being present and that he raised this at the start of the meeting. It seemed to us that it would have been very likely that the Claimant would have raised such a matter given the nature of what had occurred on the 10 September.
77. The Claimant did not ask for breaks during the meetings that he attended. When asked why not, he said that it was not for him to ask.
78. In his disciplinary hearing, the Claimant mentioned his mental health at [157].
79. The disciplinary hearing became quite heated [155]. The Claimant was told to "keep this brief" and "concise and relevant" [157].
80. Matthew Orrell confirmed in oral evidence that he did not tell the Claimant about the EAP but he did say that he could find help on the My Perks application.
81. There was no mention of the EAP in the suspension letter.
82. The Claimant's evidence was that he began to feel suicidal during the disciplinary process. It felt like a downward spiral. He stated that the long gaps in the disciplinary proceedings caused him upset and anxiety.
83. We accept the Claimant's evidence of how the investigation and disciplinary proceedings affected him. He gave a clear and detailed account of what had happened. Further, his account of how he was affected because of his bipolar disorder is consistent with the medical evidence before the Tribunal.

The Relevant Law

Direct Discrimination

84. The relevant sections of the Equality Act 2010 are as follows:
"13. Direct discrimination

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

23. Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case."

85. In *Glasgow City Council v Zafar* [1998] ICR 12 it was said that the provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably. The concept of treating someone "less favourably" inherently requires some form of comparison. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if they had not had the protected characteristic. This is often referred to as the hypothetical comparator.
86. In *Bahl v Law Society* 2004 IRLR 799, it was held that unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator. In that case it was said that *"where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups."*
87. In *Madarrassy v Nomura International Ltd*, it was held that the bare facts of the difference in protected characteristic and less favourable treatment is not *"without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the Respondent" committed an act of unlawful discrimination"*. There must be *"something more"*.
88. In *Nagarajan v London Regional Transport* [1999] IRLR 572, the House of Lords held that the crucial question in every case was, *'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'*
89. Where the treatment of which an individual complains is not overtly because of a protected characteristic, the key question is the reason why the Respondent took the decision or action. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible [as per *Amnesty International v Ahmed* [2009] IRLR 884]. The protected characteristic must have had at least a material influence on the act in question.
90. *Burrett v West Birmingham Health Authority* 1994 IRLR 7, EAT confirms that it is for the Tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one.

91. The fact that an individual believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although their perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.
92. In *Anya v University of Oxford & Another* [2001] IRLR 377, it was said that it is necessary for the Employment Tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Duty to make reasonable adjustments

93. The relevant sections of the Equality Act 2010 are as follows:

“Section 20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

Section 21 Failure to comply with duty

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

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments. [...]

94. Part 3 of Schedule 8 to the Equality Act 2010 (“Work: Reasonable Adjustments”) provides, at paragraph 20 (“Lack of knowledge of disability, etc”) 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...that an interested disabled person has a disability and is likely to be placed at the disadvantage...”

95. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the Employment Appeal Tribunal in *Environment Agency v Rowan* [2008] ICR 218 and in *Royal Bank of Scotland v Ashton* [2011] ICR 632, both approved by the Court of Appeal in *Newham Sixth Form College v Sanders* [2014] EWCA Civ 734.

96. If it is accepted that the individual is a disabled person, the following are the key components which must be considered in every case:

- i. What is the provision, criterion or practice (“PCP”), physical feature of premises, or missing auxiliary aid or service relied upon?
- ii. How does that PCP/ physical feature/missing auxiliary aid put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

- iii. Can the Respondent show that it did not know and could not reasonably have been expected to have known that the Claimant was a disabled person and likely to be at that disadvantage?
 - iv. Has the Respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?
 - v. Is the claim brought within time?
97. The Equality and Human Rights Commission's Statutory Code of Practice on Employment ("the Code") contains guidance on the duty to make reasonable adjustments at chapter 6.
98. Paragraph 6.28 of the Code sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:
- i. The extent to which it is likely that the adjustment will be effective;
 - ii. The financial and other costs of making the adjustment;
 - iii. The extent of any disruption caused;
 - iv. The extent of the employer's financial resources;
 - v. The availability of financial or other assistance such as Access to Work; and
 - vi. The type and size of the employer.
99. The test of the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of each individual case (paragraph 6.29 of the Code).
100. The EqA does not define PCP. It says in the Code, at paragraph 6.10, that the phrase should be construed widely and could include informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.
101. In *Cumbria Probation Board v Collingwood* [2008] All ER (D) 04 (Sep), EAT, HHJ McMullen said that "*it is not a requirement in a reasonable adjustment case that the Claimant prove that the suggestion made will remove the substantial disadvantage*".
102. The duty to make adjustment arises by operation of law. It is not essential for the Claimant himself to identify what should have been done (as per *Cosgrove v Ceasar and Howie* [2001] IRLR 653, EAT). In *Southampton City College v Randall* [2006] IRLR 18, the Employment Appeal Tribunal held that a Tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.
103. Section 212(1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis (paragraph 6.15 of the Code). In order to do so, the Tribunal should consider whether a non-disabled person would be affected by the PCP in the same way as a disabled person in which case there would be no comparative substantial disadvantage.

Harassment

104. The relevant sections of the Equality Act 2010 are as follows:

26. Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. [...]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

105. The Respondent may be held liable on the basis that the effect of its conduct has been to produce the prescribed consequences even if that was not a purpose.

106. A respondent should not be held liable merely because its conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created.

107. The words of the statute were considered by the Employment Appeal Tribunal in *Betsi Cadwaladr University Health Board v Hughes and others* UKEAT/0179/13. Justice Langstaff referred to the judgment of Lord Justice Elias in *Grant v HM Land Registry* [2011] EWCA Civ 769 that; “*the words “violating dignity”, “intimidating, hostile, degrading, humiliating, offensive” are significant words [...] 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.*”

108. In *Grant v HM Land Registry & EHRC* [2011] IRLR 748, the Court of Appeal emphasised the importance of giving full weight to the words of the section when deciding whether the Claimant’s dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created: “*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.*”

109. In *Pemberton v Inwood* [2018] EWCA Civ 564, Underhill J said “*In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was*

reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))”.

110. Context is very important in determining the question of whether there was an intimidating, hostile, degrading, humiliating or offensive environment for a claimant.

Burden of proof

111. In *Igen v Wong and Others* [2005] IRLR 258, it was confirmed that the Employment Tribunal should go through a two-stage process. The first stage requires the claimant to prove facts which could establish that the Respondent has committed an act of discrimination, after which, and only if the Claimant has proved such facts, the Respondent is required to establish on the balance of probabilities that the treatment was not for the proscribed reason. In concluding whether the Claimant had established a prima facie case, the Tribunal is to examine all the evidence provided by the Respondent and the Claimant.
112. In relation to reasonable adjustments, if the claimant proves they have a disability, the burden is placed on the employer to establish that there was no actual or constructive knowledge of that. If any such defence fails, the claimant must prove facts from which it could reasonable be inferred, absent an explanation, that the duty has been breached. That means proving facts relating to the application of a PCP, the substantial disadvantage, and the adjustment which might have avoided that disadvantage. The burden will then shift to the respondent. It might discharge that burden in various ways such as proving there was no knowledge of the substantial disadvantage or by showing that the proposed adjustment was not reasonable.

Our Conclusions

Direct Disability Discrimination

113. Having considered all of the evidence before it, the Tribunal reached the conclusion that the Claimant was, on some occasions, treated differently to some other more junior employees in respect of forklift truck near misses /health and safety breaches. However, having heard evidence from the Claimant, Matthew Orrell and John Brain and viewed the CCTV and other evidence, the Tribunal did not consider that this differential treatment was in any way related to, or because of, the Claimant's disability.
114. Having view the CCTV footage and considered all of the evidence before it the Tribunal formed the view that some aspects of the Claimant's conduct when driving forklift trucks was on the more serious end of the scale. In particular, the incident in which the Claimant reversed without looking behind him could have resulted in the injury of others.
115. The Tribunal considered the Claimant's explanation as to why he believes the differential treatment was because of his disability. The Tribunal found his evidence in this respect to be quite general, vague and unpersuasive.
116. Conversely, having considered the oral evidence that it heard about Matthew Orrell's thought process when deciding whether to commence an investigation against the Claimant, and why he took the disciplinary action that he did, we are satisfied that his sole reasons for the differential treatment were as follows. The Claimant was a much more experienced and more

senior member of staff than others who had been responsible for near misses/health and safety breaches. He was the Yard Manager and expected to set an example to others in his team rather than consciously breaching rules. He was not new to the industry: he was experienced forklift truck driver. Conversely, the other team members who caused near misses or made mistakes were new to the industry and /or newly trained forklift truck drivers. Further, some of the incidents were, in effect, as a result of the Claimant's conscious decision to act in the way that he did rather than mistakes through lack of experience.

117. The Tribunal also bore in mind that the Claimant succeeded in passing his probationary period only 18 days before the investigation began. It was only after Matthew Orrell noticed that a sign had been damaged by being picked up by a forklift truck that the investigation commenced. It seemed to us that had there been an underlying bias against the Claimant because of his disability that it is unlikely that the Claimant would have passed his probation or that Matthew Orrell would have been so positive during his probationary review.
118. The Tribunal found that the less favourable treatment of the Claimant in deciding to investigate the Claimant and not others was because of the Claimant's more senior position, experience and knowledge. Further, there was not a direct comparison between the Claimant's and the identified comparators' circumstances because they were in more junior roles than the Claimant. The Tribunal was not persuaded on the evidence before it that the Claimant's treatment in relation to the forklift truck incidents was in any way because of his mental health problems. The Respondent has provided clear and cogent reasons for its actions in this respect. The Claimant has not shown that Respondent's treatment of the Claimant was, in any way, because of his disability.
119. In relation to the allegations against the Claimant that he was bullying Paul McGarvey, this was investigated following a concern raised by Andrew French another employer: it did not emanate from Matthew Orrell or other managers within the store. The email that Andrew French sent to Matthew Orrell to report his concerns was detailed and raised potentially serious allegations of bullying. Any reasonable and conscientious employer would have taken steps to investigate such concerns, including by interviewing Paul McGarvey and speaking to other employees. The Tribunal did not consider the decision to do so was less favourable treatment on the part of the Respondent.

Duty to make reasonable adjustments-investigation and disciplinary process

120. The question posed in the List of Issues prepared prior to the hearing was whether the Respondent had as a PCP "*a disciplinary policy that included provision for employees to be suspended in cases of suspected misconduct and which granted discretion to managers as to the structure and timing of any disciplinary process?*".
121. The Respondent does have a disciplinary policy that states that an employee may be suspended. The circumstances in which that policy is to be applied is "*when circumstances warrant (e.g. where conduct/performance could possibly lead to dismissal)*".
122. The disciplinary and appeal policy provides some information as to the

structure and timing of the disciplinary process. There is reference to allowing an interpreter to attend an investigation or disciplinary hearing or special arrangements for employees aged under 18. There is no mention of any possible adaptations that may be needed to be made for employees with disabilities.

123. In terms of the timetabling of the disciplinary process, the policy states that employees must be given at least 48 hours notice of the date of the hearing and that they, in turn, must notify the manager conducting the disciplinary proceedings if they are to be accompanied. Appeals must be submitted within 5 working days and a date for an appeal hearing will be notified within 10 working days. The policy does not govern all aspects of the time scales.
124. In many regards the disciplinary and appeals policy is vague and so how to handle proceedings in an individual case appears very much to be in the hands of the manager conducting the proceedings.
125. The Respondent was already aware, at the point when the investigation commenced, that the Claimant had bipolar disorder. Despite this there is nothing before the Tribunal to suggest that any thought was given by the Respondent as to whether the behaviour that it was investigating was because of a deterioration in the Claimant's mental health. The Tribunal considered this surprising given the possibility that mental health problems, such as bipolar disorder, can affect mood and behaviour, and that individuals with a mood related disorder may be more vulnerable to being adversely affected by stressful events or circumstances. It found this to be indicative of the Respondent's lack of awareness and proactiveness generally in terms of the Claimant's mental health during the investigation and disciplinary process.
126. More specifically, in terms of the Respondent's potential duty to make reasonable adjustments as necessary during the investigation and disciplinary process, on the evidence before it, the Tribunal formed the view that the Respondent made no real attempt to apply its mind to whether any adjustments or adaptations were necessary to accommodate the Claimant's disability either during the initial investigation or during the disciplinary process. This was despite the Respondent being aware by July 2021 that the Claimant had bipolar disorder and Claimant raising his mental health problems on several occasions during the process.
127. The Tribunal was particularly surprised that no thought was given by the Respondent to obtaining an occupational health report prior to commencing the investigation and disciplinary process, given the nature of the Claimant's disability and the possibility that any conduct issues being investigated may have in some way been caused by his bipolar disorder. Such a report may well have identified what adjustments/adaptations should have been put in place during the course of the investigation and disciplinary process.
128. The Tribunal finds that the PCP referred to at paragraph 120 placed the Claimant at a substantial disadvantage compared to someone without bipolar disorder.
129. The distress caused to the Claimant by being suspended without any prior notice and for an indeterminate period had, we have no doubt, a very negative impact upon his mental health. This in turn would have made it more difficult for him to deal with the process, including absorbing and

assimilating the information provided to him and enabling him to provide a clear and cogent response.

130. However, in terms of suspension, we consider that it was reasonable for the Respondent to suspend an employee who was subject to an allegation of bullying in particular. The Respondent has a duty of care towards all of its employees and this is likely to include ensuring the alleged perpetrator does not have any contact with the person who it is said has been bullied during the investigation and disciplinary process.
131. The great deal of discretion given to managers as to how to conduct disciplinary proceedings did put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability. Having considered the letter from the Claimant's GP and the Claimant's own evidence we are entirely satisfied that the Claimant's bipolar disorder means he has a greater need for structure and certainty and makes him more susceptible to pressure, stress and other triggers that exacerbate the symptoms of his condition.
132. The Respondent is a large nationwide business with a dedicated human resources department. The branch manager was aware that the Claimant had bipolar disorder in July 2021. It should have known, or could reasonably have been expected to know, that the Claimant was likely to be placed at a very significant disadvantage during the investigation and disciplinary process as a consequence of his mental health problems.
133. The Tribunal considers that it would have been reasonable for the Respondent to take the following steps to avoid or reduce the disadvantage to the Claimant:
 - i. Making available counselling, employee assistance or some other form of pastoral support to the Claimant immediately following his suspension on 20 September 2021, and notifying the details of such support to him in writing;
 - ii. Clearly communicating the investigatory and disciplinary process to the Claimant in writing at the outset, including and ensuring that the structure and timetable was strictly adhered to;
 - iii. Regular breaks in the investigation and disciplinary meetings; and
 - iv. Making the notes of the investigation meeting available to the Claimant and ensuring that his comments on the notes were accurately captured and recorded.
134. We accept that because of his bipolar disorder that the Claimant is likely to have more difficulty than a person without his disability with coping with stressful situations and that this may well have reduced his ability to absorb and understand what was being said and provide focused answers or clearly explain things from his perspective. We also accept that it is likely to reduce his ability to deal with sudden changes. Providing a clear structure and timetable in relation to the suspension and subsequent disciplinary proceedings would have provided more certainty for the Claimant and so would have been likely to reduce the distress caused by the process. The

above steps would have avoided or reduced the disadvantage to the Claimant during the investigation and disciplinary process.

135. We find that it would have been reasonable for the Respondent to take the above steps. An EAP provider is already engaged by the Respondent. The other steps would have been straightforward and inexpensive to implement.
136. We also observe that Paul Ainscough attended the investigation meeting on the 20 September 2021. This was despite him making derogatory comments about the Claimant's disability, which we have found amounted to harassment because of disability, only 10 days prior. This is a further factor which is likely to have added to the difficulties and distress experienced by the Claimant during the investigation meeting.
137. We find that the Respondent failed to make the reasonable adjustments as identified above contrary to section 20/21 of the Equality Act 2010.

Duty to make reasonable adjustments- Additional transport duties

138. The question posed in the List of Issues prepared prior to the hearing was whether the Respondent had as a PCP "a requirement or expectation that employees at the Claimant's level should take on additional duties and responsibilities as requested by their manager".
139. The Tribunal found that there was not a requirement or expectation that employees at the Claimant's level should take on additional duties and responsibilities as requested by their manager. The Tribunal was satisfied on the evidence before it that there was no specific transport role within the branch and that those duties were shared.
140. As there was no such PCP the Claimant cannot succeed in a claim that the Respondent failed to make reasonable adjustments in respect of any transport related duties.

Harassment

Comments made on 10 September 2021

141. We have found that Paul Ainsworth called the Claimant "*spastic*", "*mental*" and "*not right*", and asked him why he couldn't be like everyone else. This was after the Claimant went to talk to him because Paul Ainscough had told him to "fuck off" over the radio. We have found that Paul Ainsworth knew that the Claimant had mental health problems by this point. The comments that he made do appear to relate to the Claimant's mental health problems which are accepted as a disability.
142. We have not heard evidence from Paul Ainsworth, nor do we have a statement from him. However, whatever the purpose of the comments, we are satisfied that they had the effect of creating a degrading, humiliating or offensive environment for the Claimant.
143. This is particularly so given that the Claimant has had a significant and enduring mental health disability for many years. Despite the difficulties and challenges that this may have caused him over many it was very clear from the evidence before the Tribunal that the Claimant enjoyed his role, took a great deal of pride in it and had put a significant amount of effort in to succeeding in the role and helping make the new branch a success. Against

that backdrop we accept that the comment would have had a significant adverse effect upon the Claimant and be felt deeply by him. The Tribunal considers that it was reasonable for the comments to have that effect upon the Claimant.

144. The Claimant was harassed on 10 September 2023 because of the protected characteristic of disability.

Comments made on 29 September 2021

145. We have found that Dale Southgate did say to the Claimant “*Can we keep this brief*”, and “*Let’s keep this concise and relevant*” in his disciplinary hearing. We consider that this was an inappropriate comment given in particular the Claimant’s mental health problems and the difficulties that such a disability can cause when communicating in such a stressful situation. It undoubtedly added to the challenges that the Claimant faced in dealing with the disciplinary meeting taking into account also the failure to make reasonable adjustments as per our findings above.
146. However, we have found that Dale Southgate did not call the Claimant a liar nor did he act aggressively towards him in that meeting.
147. It is clear from the note of the disciplinary hearing that asking the Claimant to keep his answers brief was from the Claimant’s perspective unfair and unjustified.
148. The comments did not relate to the Claimant’s disability. Rather it was an attempt by Dale Southgate to manage the hearing and bring the discussion back to matters he wanted to discuss. Whilst it may have been an unfortunate and clumsy choice of words, and unfair given that the Claimant was in the process of responding to allegations put to him, we did not form the view that it was said with the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We also did not consider that those comments, when considered in the context of the meeting and the circumstances in which they were said could, on any reasonable view, have had the effect (without more) of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Other matters

149. I apologise to the parties for the delay in providing the Tribunal’s Judgment and Reasons. The delay is entirely my responsibility not that of my colleagues Ms Elizabeth and Mr Schooler.

Employment Judge Boyes

Date: 22 August 2023

Reserved Judgment and Reasons Sent to The

Parties On

.....22 August 2023.....

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FOR EMPLOYMENT TRIBUNALS

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