RESERVED **Case Number: 2415590/2020**

EMPLOYMENT TRIBUNALS

Claimant: Mr R Wooder

Jaguar Land Rover Limited

HELD AT: Liverpool (in person hearing) **ON:** 26 June 2023
3 August 2023 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mr G Pennie
Mr R Cunningham

REPRESENTATION:

Claimant: In person
Respondent: Ms L Badham, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims of disability discrimination and other payments are dismissed on withdrawal.

2. The claimant was not subjected to victimisation and his claim for discrimination brought under section 27 of the Equality Act 2010 is dismissed.

REASONS

Preamble

The hearing

1. The documents that the Tribunal was referred to are in a bundle of 271 pages together with additional documents produced by both parties marked C1 – C10 and R1 to R3, the contents of which I have referred to where relevant below.

2. Reasonable adjustments were made for the claimant who could take as many breaks as he wanted. The Tribunal also made sure that there was a break in the middle of the morning and afternoon session, and the claimant was given plenty of time to answer questions. The claimant was assured that if the hearing went beyond the predicted timetable we agreed the Tribunal could always reserve its judgment and he should not feel anxious about asking for and taking breaks.

Witnesses

3. The Tribunal was provided with a bundle of witness statements consisting of written statements prepared by the claimant signed and dated 15 June 2022, Brian Curphey, trade union representative, Kathryn Wooder, the claimant's wife, and Stephen Vass, work colleague.

4. Brian Curphey chose not to give oral evidence, and his disputed witness statement could not be tested on cross-examination. The Tribunal has given no weight to the disputed paragraphs in his witness statement dated 1 July 2022.

5. With reference to the claimant's evidence there are reliability issues stemming from the claimant's medical condition, the passage of time and the fact that he took no contemporaneous notes and nor did his union representatives. Both relied upon their memory and the Tribunal found that recollection was coloured by this litigation, although not intentionally so.

6. The claimant was asked by the Tribunal about paragraph 2 in the report dated 23 July 2022 from Steve Flatt dealing with the claimant's therapy in 2019/2020 from notes taken by the treating therapist. Steve Flatt wrote: "I can report Mr Woodier was initially seen on 25 October 2019…the therapist reported that his anxiety was so extreme that he found it difficult to concentrate and to be able to remember things from moment to moment." When asked about the reliability of his evidence the claimant responded that he kept on returning to the incidents that were "etched on his memory." The claimant did not recognise that memory can be fallible and contemporaneous documents written when litigation was not in the contemplation of parties the key to what events could have taken place going back in time.

7. Ms Badham referred the Tribunal Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor. [2013] EWHC 3560 (Comm) para 15 to19. The Tribunal is satisfied that the claimant reinterprets historical events in his own mind, a history which he genuinely believes is true confirming the bias against the respondent the claimant already possessed in relation to the first set of proceedings, and yet in the words of Ms Badham the claimant was "so sure and yet so wrong." The Tribunal concluded there was no attempt by the claimant to mislead it, he anticipates and perceives retribution, expecting the worse because of what he perceives happened to him previously. For example, during this final hearing the claimant indicated that he had not been provided with notes of meetings contrary to Sharon Hollier's evidence that notes taken of all meetings were provided in hard copy to the claimant and his union representative, with copies available at each hearing. The contemporaneous documents reflect the claimant had a copy of notes taken by the respondent and questioned them at a meeting on the 25 November 2019 with David Brodie. Towards the end of that meeting the

claimant mentioned his children, and at the meeting 9 December 2019 the claimant disputes the notes of the 25 November 2019 challenging the respondent 's version of the conversation concerning his children and nothing else. This was the only matter raised by the claimant in terms of validity of the notes taken.

8. The Tribunal concluded that (a) had the notes of meeting taken by the respondent been incorrect either the claimant or his union representatives would have commented on this as they had the opportunity, (b) apart from the one comment by the claimant there was no issue with the accuracy of the notes and (c) the only notes that were not provided to the claimant were the handwritten bullet points taken by John Williams when he met the claimant on the 10 October 2019.

9. In conclusion, the Tribunal gave the contemporaneous documents, including notes of meetings, a great deal of weight and preferred to rely on their content rather than the claimant's memory. It is notable that the respondent's witness evidence was supported by the contemporaneous documentation. Had they not been the same observations made by the Tribunal in respect of the claimant's memory and credibility would have been repeated in respect of the respondent's witnesses.

10. There was one matter which did concern the Tribunal. When the claimant was giving evidence on cross-examination Ms Badham asked the claimant if all the documents on the desk before him included his personal documents and claimant assured her that there were no personal documents. It transpired later, the respondent's witnesses having drawn it to Ms Badham's attention, the claimant was using a lever file with visible post it notes that was not the witness bundle and was the claimant's personal bundle. Ms Badham pointed that this gave rise to a credibility issue and the claimant was trying to hide the fact he was using his own personal bundle. The Tribunal took the view that it raised a question mark over the claimant's ability to say something when it was not true, and was a credibility issue. The Tribunal felt the claimant had not grasped the significance of his response, how it could be perceived and its possible effect on his credibility.

11. Kathryn Wooder gave evidence largely based on what she had been told by her husband, and she had no direct knowledge of the events with the exception of the claimant being refused his request that she support him at the meeting with John Williams.

12. On cross-examination Stephen Vass conceded that his "memory was foggy" and he did not remember various dates. In paragraph 2 of his written statement Stephen Voss made reference to the John Williams speaking to the claimant and waiving around a grievance document whilst the claimant was working on the line. Stephen Vass was unable recall the incident in any great depth, and there was confusion as to whether it was a meeting in August 2019 now relied on by the claimant (but not referenced in his witness statement) or the 10 October 2019 meeting which Mr Voss could recall. Due to passage of time and lack of memory Stephen Vass was unable to clarify the position and in this respect he gave truthful straightforward evidence.

13. On behalf of the respondent the Tribunal heard from David Broady, production manager, John Williams, production leader, Phil Hannah, production manager and Sharon Hollier, human resources manager ("HR").

14. With reference John Williams, the Tribunal accepted he knew the claimant by sight but no more than that. The claimant's line manager was Jimmy Mack, the same level

supervisor. On the 9 October 2019 John Williams met with the claimant as a favour to Jimmy Mack because the claimant had used the incorrect form and had to be told this. On the balance of probabilities the Tribunal preferred the evidence of John Williams that he had not been told by the claimant he was involved in litigation before the 10 October 2019. The Tribunal heard no compelling evidence that a meeting had taken place in August 2019 as alleged by the claimant in oral evidence only; there was no evidence that the grievance had actually been lodged by a trade union representative who had decided not to forward one of the claimant's grievances for fear of distressing the claimant due to the claimant experiencing mental health issues at the time. Taking into account the factual matrix the Tribunal concluded on the balance of probabilities that John Williams called in the claimant to the meeting at 6pm on the 10 October 2019 because of the claimant's behaviour and his "massive overreaction" which had upset and annoyed him, and to ask the claimant to explain his behaviour the day before. There was no causal connection with the earlier proceedings or any alleged meeting in August 2019.

15. David Broady, John Williams, Phil Hannah, and Sharon Hollier were credible witness who made concessions, their evidence was supported by contemporaneous documents and at no stage did they contradict themselves or each other.

List of issues

16. A list of issues had been prepared at an earlier case management hearing that was further clarified by the claimant today, who produced a handwritten note during the adjournment setting out six additional issues including an earlier date when John Williams was allegedly told by the claimant about the original Tribunal proceedings. There is no reference to this in the claimant's witness statement. The claimant confirmed the list forwarded to him by counsel was agreed and the additional 6 issues (with the exception of new issue 1 that included in part the 9 October 2019 allegation) were to be relied on by way of background evidence and not claims in themselves. Mrs Wooder confirmed that he wanted to do was make sure that the Tribunal understood the background of his claim, and it was explained to the claimant that he could cross-examine witnesses on the background information. The claimant confirmed that he had already produced a list of questions for all witnesses.

17. The parties revisited and we discussed the list of issues, which were agreed as set out below. A separate copy was provided to the claimant to assist him in the presentation of his claim and remind him about his case as the hearing progressed from the evidence to oral submissions based on the agreed issues. The claimant seeks to recover substantial damages including personal injury and aggravated damages in excess of £100,000 and it was agreed the Tribunal would deal with liability only, with remedy at a later date if applicable.

The issues

1. Did the Claimant do a protected act under section 27 (2)(a) of the Equality Act 2010 when he brought claim number 1302563/2018 against the Respondent in May 2018?

2. Did the Respondent do the following things:

a. on 9 October 2019, through an unknown member of HR, Carmel from HR and/or John Williams, reject the Claimant's application for shared parental leave as not being contained on the correct forms;

b. on 9 October 2019, through an unknown member of HR, Carmel from HR and/or John Williams, refuse to supply the correct forms to the Claimant to enable him to apply for shared parental leave;

c. on 10 October 2019, through David Broady, summon the Claimant into work for an absence review on the first day of a period of absence;

d. from 11 October 2019, through Jimmy Mac and/or John Williams, require the Claimant to ring into work for 8 days of absence before his shift was due to start;

e. in October and November 2019, through David Broady and/or Sharon Hollier, require the Claimant to attend absence review meetings;

f. on 9 December 2019, through David Broady, threaten the Claimant with dismissal;

g. on 17 January 2020, through David Broady and/or Sharon Hollier, require the Claimant to attend an employment review hearing;

h. from October 2019 to March 2020, through David Broady, Sharon Hollier and/or Phil Hannah, ignore the contents of Occupational Health and medical reports in respect of the Claimant during his absence;

i. from December 2019 to January 2019, through David Broady and/or Phil Hannah, subjected the Claimant to employment review after only 8 weeks of sickness absence and threatened to dismiss him.

3. If so, by doing so, did the Respondent subject the Claimant to detriment?

4. If so, has the Claimant proven facts from which the Tribunal could conclude that it was because the Claimant did a protected act or because the Respondent believed the Claimant had done, or might do, a protected act?

5. If so, has the Respondent shown that there was no contravention of section 27 of the Equality Act 2010?

<u>The pleadings</u>

18. In a claim form received on 7 October 2020 following early ACAS Conciliation that took place on the 14 September 2020 the claimant, who remained employed by the respondent, brought claims of disability, pregnancy and maternity and sex discrimination under the Equality Act 2010 and a claim for other payments. With the exception of the victimisation complaint, the claimant withdrew his claim for disability discrimination and other payments which are dismissed on withdrawal.

19. With reference to the victimisation complaint the protected act relied on is the claim of sex discrimination under section 13 and 19 of the Equality Act 2010 brought claim number 1302563/2018 against the Respondent on 25 May 2018. In relation to that claim the section 19 complaint was struck out in a reserved judgment sent to the parties on the 7 October 2020 and the claimant's claim of sex discrimination was struck out on the 21 December 2021 under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 on the grounds that it had no reasonable prospects of success.

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20. In relation to the current proceedings brought under section 27 of the EqA Tribunal jurisdiction in respect of time limits was in issue, and at a separate hearing a judge sitting alone determined that it was just and equitable to extend time on 31 March 2022. The order was sent to the parties on the 3 May 2022.

21. The claimant alleges the acts set out in the agreed list of issues was because he had brought the first claim.

22. The Tribunal has taken into account the documents and having considered the oral and written evidence and written and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the written and oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), we have made the following findings of the relevant facts.

Facts

23. The respondent is a nationwide car manufacturer with significant resources employing approximately 42,000 employees in Great Britain. The claimant is employed at the respondent's Halewood factory in the trim and final section along with approximately five hundred employees in that section, two production managers David Brodie (production) and Phil Hannah (business improvement) and nine supervisors including John Williams and Jimmy Mack. Jimmy Mack was the claimant's line manager.

24. The assembly line consists of employees responsible for the production process with two supervisors per team. A car comes off the production line in just over eighty seconds per vehicle, so keeping the line going, performance and attendance was important to the respondent. UNITE the union has a significant presence and the respondent's employees and managers have access to has an on-site HR department.

25. The respondent issued employees with an Absence Management Policy agreed with UNITE. It provided managers with training to deal with absence and other matters including mental health, a main trigger for early intervention which included meeting the employee. The requirement for an early intervention meeting is not documented and arose as a result of mental health issues and suicides. The meeting is carried out at supervisor level on the day an employee is absent with mental health issues. The objective is to make contact with employees particularly those with mental health issues at the very earliest opportunity in order to understand what the issue is and provide assistance/support if possible, including occupational health referrals and offering a paid counselling service. The respondent was sensitive to mental health issues as there had been previous issues with employees including suicide, and managers were required to treat mental health issues seriously and expeditiously. Initial contact was by telephone when managers asked the employee to come

into the business. Employees have an obligation to ring in to their supervisor on the first day of sickness before the shift commenced and they may be required, depending on the circumstances, to ring into work once a day before the start of the shift for a period of time and/or until they are well enough to return to work. It is the respondent's belief that daily contact should, where possible, take place with absent employees as this assists their return to the workplace.

26. If employees refused to comply and failed to attend the first "welfare meeting" this could result in action being taken for unauthorised absence including repercussions on pay as they may not be paid full sick pay and pay could be limited to statutory sick pay ("SSP"), depending on the individual circumstances.

27. The early intervention meeting (also referred to as a "welfare meeting") is not set out in any recognised written procedure and not covered by any the respondent's written absence procedures with the result that some employees, such as the claimant, believe they are being treated differently to others when being asked to attend the meeting in circumstances where they have a sick note and it is the first day of absence. The claimant complained during his evidence that because the early intervention policy was not in writing as a recognised policy, it appeared that managers could do whatever they wanted. Unbeknown to the claimant, managers were trained in early intervention meetings by working through training scenarios, and until he became involved would have been unaware that early intervention was a possibility. As a result the claimant believed he was being victimised and in his own mind it could only be linked to the litigation he was involved in. The Tribunal found that it was understandable he would feel the way he did, and had the early intervention procedure been in a written format this may have reduced the claimant's fears, however, once the union became involved and explained the position to the claimant, those fears should have been assuaged.

28. The respondent used to but no longer offered home visits to employees who are absent from work, including those with mental health issues, and the Tribunal found in any event the claimant would have considered himself victimised had a home visit taken place.

<u>The original proceedings 1302563/2018</u>

29. On the 23 May 2018 the claimant issued proceedings claiming direct and indirect sex discrimination following the birth of his son when he wanted to take time off beyond his initial parental leave which he could not afford to do as the rate of pay was set by statute. His complaint was that a mother on maternity leave was paid at an enhanced rate (and not a lower statutory rate) and this was discriminatory. Case number 1302563/2018 is the protected act in the claim for victimisation before this Tribunal and the respondent has conceded this point.

30. It is undisputed from 23 May 2018 the claimant was a litigant in person dealing with the first claim, he continued to work as usual and there were no complaints about how he was treated at work during this period. The claimant did not discuss his claim with anybody on the factory floor, including managers and supervisors, until the events of 9 and 10 October 2019 and the Tribunal finds that John Williams did not possess the requisite knowledge required for a victimisation claim until the 9 October 2029. The victimisation allegation arose as a result of the claimant seeking to take parental leave for his second child born on the 6 September 2019. He intended to take 6-weeks parental leave in the summer of 2020. The claimant had tried to obtain copies of the shared parental forms and had been unable to do

so, which he found frustrating especially given his first claim was related to parental leave. The claimant decided to use an unauthorised government shared parental leave form which was incorrect as the respondent had their own shared parental leave in-house form available for all employees to download on the intranet. The Tribunal was never shown this document as it was not in the bundle, however the parties agree there was a different form which had to be completed in order for a parental leave application to be made.

31. The claimant submitted his request for parental leave on the unauthorised government form which was rejected by someone in HR because the incorrect form had been used

9 October 2019 incident

32. On the 9 October 2019 Jimmy Mack , the claimant's supervisor, asked John Williams to "do him a favour" and return to the claimant his completed government shared parental leave form, advise him it had been rejected because he had failed to use the respondent's form which was the company's standard process. Accordingly John Williams spoke to the claimant who was working on the assembly line at the time. John Williams anticipated it would be a quick discussion with no issue, and was taken by surprise at the claimant's behaviour. It is undisputed the claimant's reaction was aggressive and he "massively overreacted" in front of other employees who were also working on the line. The claimant acknowledges that he was upset at the time, which resulted in John Williams telling the claimant to calm down and then see him in the office. The claimant continued to act in a confrontational way, he was angry and shouted, maintaining that he had been discriminated against due to the shared parental leave not being available to him. John Williams could not recall whether the claimant mentioned he might be having a breakdown, and his evidence that he was taken aback by the claimant's behaviour resulted in him either not hearing or registering the claimant's concerns was credible in the circumstances. John Williams described the claimant's behaviour as the most heated discussion he had experienced with any employee in the last 10 years, and he struggled to understand why the claimant had over reacted to the situation.

33. John Williams was concerned and he made bullet point notes of the 9 October 2019 meeting; "court case 2 years, bullied by company solicitor, threat of court costs, trying to get forms for parental leave shared from HR…" There is no description about the claimant's mental health, and it appears from the contemporaneous note that the claimant was linking his behaviour to the court case and the parental leave form which was John Williams' understanding at the time.

34. John Williams had a discussion with Jimmy Mack about the claimant's behaviour, and when the claimant came back into the office one hour later Jimmy Mack was also in attendance. The claimant was calmer but distressed and described his previous attempts to obtain the shared parental leave form. Neither Jimmy Mack nor John Williams reacted proactively as both had the opportunity to resolve the claimant's concerns. All they needed to do was to print out a form and hand it across to the claimant. It is likely that this could have diffused the situation. John Williams did not think it was his job as a supervisor to provide a copy of the document to the claimant, instead he suggested the claimant came in the next morning early to make contact with HR to get the correct form.

35. On the evidence before it the Tribunal found on the 9 October 2019 an unknown member of HR had reject the claimant's application for shared parental leave as not being

contained on the correct forms. John Williams had not taken the decision to reject it and it was at the request of Jimmy Mack he was the messenger informing the claimant of the rejection. At the meeting of the 9 October 2019 the Tribunal found on the balance of probabilities John Williams had not refused to supply the correct forms to the claimant to enable him to apply for shared parental leave; he had suggested the claimant came in the next morning to speak with HR who could then provide the correct form and his actions had no connection with the ongoing litigation.

36. In oral evidence on cross-examination the claimant raised an allegation that John Williams had refused to provide him with a copy of the correct form because he had informed him in August 2019 that a claim had been brought against the respondent . This allegation is not in the list of agreed issues and for the avoidance of doubt, the Tribunal found no satisfactory evidence to this effect, preferring the more credible version of events put forward by John Williams that the claimant raised the litigation and the problems it was causing him at the meeting of 9 October 2019 for the first time, and there is no causal connection between this information and the claimant being requested to come into work for a meeting on the first day of absence and so the Tribunal found on the balance of probabilities.

37. On the 10 October 2019 the claimant rang John Williams informing him that he was not coming to work as he was too stressed before the shift, having seen his GP and handed his fit note to a colleague with whom he car shared. The colleague handed the fit note in to Jimmy Mack which was immediately sent on to HR in accordance with the respondent's practice. John Williams did not see the sick note signing the claimant off for 7-days.

38. John Williams was concerned about the claimant's behaviour on the 9 October 2019 and he raised the incident with David Broady, the production manager, discussing the claimant's mental health, welfare and the next step to be taken. It was agreed that the claimant should brought in for an early intervention face-to-face meeting because of his behaviour. John Williams in oral evidence confirmed to the Tribunal that it was not usual for an employee to be brought into a meeting on the same day as their first day of absence, although he had never done this before in direct contrast to the daily telephone calls employees could be required to make as a matter of course. David Broady had no knowledge of the earlier litigation and it cannot therefore have been a causal link to his decision that the claimant should be called in to an early intervention/absence review meeting on the first day of a period of absence.

<u>10 October 2019 meeting</u>

39. At approximately 4pm the claimant was instructed by Jimmy Mack to come into work that afternoon.

40. The meeting at 6pm was with John Williams, the claimant and Brian Curphey, who did not take notes. The only notes taken were the short bullet point notes made by John Williams produced during the course of this final hearing and marked "R1." They record that the claimant set out why he was "anxious." He referred to the parental leave forms that he was unable to access, lack of response to an unspecified grievance from John Williams (which the Tribunal has never seen) and John Williams wrote "J Williams apologised for missing the email initially." Reference was made to the claimant's wife wanting to attend the meeting and being refused.

41. John Williams informed him that Dave Broady had requested a meeting to discuss the claimant's health. During his discussion with Jimmy Mack the claimant understood he was attending an absence review meeting and requested his wife accompany him, which was refused. John Williams made bullet point notes of the meeting, which are the only contemporaneous notes. The claimant did not take issue with the contents at this final hearing. The bullet points record the claimant had difficulty accessing the form and had raised a grievance in August "..no response, not happy with J Williams handling of the grievance J Williams apologising for missing the email initially and also agreed that any further discussions would be in the office," a reference to the claimant's wife wanting to "represent him" at the meeting on the10 October and "had asked him several occasions to go to the doctors regarding his anxiety around this."

42. The respondent had issued a number of policies including "Guide to JLR attendance management procedure" dated November 2018 and November 2019 which referred to occupational health and the joint responsibility on employees, supervisors and line managers to manage attendance. The policy provided for employees to be accompanied by union representatives and colleagues only. The claimant's wife did not fit in to either category.

43. The Tribunal found that on 10 October 2019 as a result of a decision made by David Broady, the claimant was summonsed into work for a meeting to discuss his health and the problems he was having in the workplace on the first day of a period of absence which the respondent's written procedure did not provide for, Due to historical issues with employees suffering from mental health David Broady required the claimant to come into work for a meeting following a discussion he had with John Williams, who agreed with his manager and also referred him to occupational health. There is no reason to doubt David Broady's evidence that he was unaware of the litigation at the time, given the claimant's confirmation under cross-examination that he had no idea whether David Broady knew about his claim on the 10 October 2019. The Tribunal found there was no causal link between the earlier litigation, David Broady's decision and the manner in which the 20 minute meeting was carried out by John Williams also attended by the claimant's union representative who raised no complaint.

<u>Referral to occupational health 10 October 2019</u>

44. Before the meeting with the claimant took place John Williams completed the occupational health referral form by 16.33 which he sent off accidently. The referral confirmed the reason for absence was "depression and anxiety…I have spoken to Richard today and he has told me he is feeling depressed and anxious with regards to a problem he has been having with JLR over the past two years." The "problem" in question was the ongoing litigation.

45. The Tribunal finds that John Williams was aware of the earlier litigation by 9 October 2019 at the earliest before he had the meeting with the claimant at 6pm on the 10 October 2019. Before that date John Williams did not have the requisite knowledge. The motivation of John Williams was to understand the claimant's reaction to him handing the form across the day before, and there was no causal connection with the first set of proceedings. John Williams was concerned with the claimant's behaviour and the Tribunal concluded on the balance of probabilities that early intervention was in his mind and he was put out by the claimant's behaviour, John Williams repeatedly returned to the claimant's behaviour during cross-examination. Because the situation was unusual he obtained advice and support from his manager, Dave Broady. There were no disciplinary consequences for the claimant as a

result of his behaviour the day before. Whilst the Tribunal is satisfied that there was no act of victimisation by John Williams, it is unfortune that Jimmy Mack and John Williams adopted the less then helpful attitude towards the claimant, as it would have been a straightforward matter for them to have just handed across a copy of the in-house form, diffuse the situation and act in a kindlier manner towards the claimant, placating him with consideration and care bearing in mind the possibility from his behaviour that he had mental health issues. Even if employees were expected to download documents themselves, it is not below a manager working at supervisor level or above to carry out a basic administrative function to assist an employee who is clearly distressed, no matter how badly behaved they have been on the factory floor. Neither provided the claimant directly with that form and for this they can be criticised. For the avoidance of doubt, the Tribunal found on the balance of probabilities that there was no causal connection between the protected act and lack of action by John Williams; he was of the view that printing out a form was below his managerial status and HR was better placed to assist.

The claimant ringing in over 8-days/8 shifts

46. From 11 October 2019 John Williams required the claimant to ring into work for 8 days of absence before his shift was due to start. This was usual practice for the respondent, however, because the early intervention policy is not well-publicised and in writing it came across as heavy handed to the claimant who was not aware of what happened to other employees. In oral evidence on cross-examination the claimant confirmed employees were required to ring in "2 to 3 max per week" and the requirement that he rang once a day for 8-days was personal. The Tribunal repeats its findings above in relation to John Williams and the lack of causal connection to the protected act, satisfied that there was no connection as John Williams was following procedure. It is unfortunate that the respondent does not set this practice out in a written form, there was a lack of transparency about a routine process with the result that employees, such as the claimant, can feel they are being singled out when they are not.

47. In an email sent on the 14 October 2019 Kathryn Wooder complained about the difficulty the claimant had attending the meeting on the 10 October, the fact he was so unwell that she agreed to drive him "due to fear of disciplinary action" the fact the claimant had contacted his union representative regarding the situation, and she requested copies of the sickness and absence policies "highlighting where it states that employees are required to attend absence review meetings on the first day of absence." It is notable in this email Kathryn Wooder referred to Jimmy Mack advising the claimant that if he did not attend the absence review meeting "it would be noted as AR absence from review which from my husbands understating [understanding] may lead to disciplinary action." This contemporaneous email sent 3-days after the telephone call with Jimmy Mack includes information that contradicts the oral evidence given by the claimant on cross-examination to the effect that he was told "I'd be disciplined - it may lead to disciplinary". The Kathryn Wooder email undermined the claimant's evidence which could not be relied on, the Tribunal concluding that the claimant was not threatened with disciplinary action as alleged and had he been Kathryn Wooder would have recorded it in her lengthy email.

48. During this period the claimant and Kathryn Wooder were under a great deal of pressure; the litigation was continuing with the final hearing due to take place on the 14 and 15 October 2019 which was adjourned, and they were looking after a newly born baby. It is unsurprising that the claimant, who took no notes of telephone calls or meetings, is confused in his recollection when viewing the respondent's actions through the lens of a discrimination

claim. Had he been able to consider the matter objectively he would have realised that the managers he was dealing with knew little or nothing about and had no involvement in at any stage of the case. In oral evidence on cross-examination the claimant agreed that his feelings had "built up" over the 2 year litigation period when he dealt with the case as a litigant in person. The Tribunal found the claimant's perception of events during this period were skewed by the litigation he was involved in, and under cross-examination he conceded that there had been no reference to disciplinary proceedings, punishment or possible termination of employment. In short, the respondent was trying to help the claimant get back into work, actions which the claimant perceived to be victimisation because his litigation was foremost in his mind when it was not necessarily in the mind of those managers who were dealing with him. This is the nub of the case.

In October and November 2019, through David Broady and/or Sharon Hollier, require the claimant to attend absence review meetings;

49. The respondent had an effective occupational health referral system ("OH"), and it undisputed evidence that occupational health had a detailed knowledge of the respondent's business.

50. Early intervention included fast track response and OH provided the first report on the 11 October 2019, within 24-hours of the referral. The consultation was carried out on the 11 October and the claimant consented to its release. The report confirmed that in-house counselling was recommended "as early intervention was the best route for him" a review was arranged, and the absence was not expected to exceed 4-weeks.The report confirmed the claimant "tells me he has been going through a few issues with JLR and they have become too stressful to deal with and still be at work." The claimant was recommended for early intervention counselling. The report did not refer or suggest the claimant ringing in everyday to speak to his manager was inappropriate or would exacerbate his mental health, and there was no reference to the claimant being unfit to engage in meetings, and had that been the case the Tribunal accepts the report would have set this out as would the fit note provided by the GP. In short, the Tribunal finds the claimant was well enough to ring and speak with his manager and attend meetings.

51. After the OH report the claimant was not required to ring in every day after the first week of absence, and was required to ring in once a week from the 22 October 2019. It is undisputed that the claimant's conversations were very short, the longest discussion with Jimmy Mac on an unknown date was 3.5 minutes. The Tribunal found on the balance of probabilities that the requirement for the claimant to make telephone contact was in accordance with the respondent's absence policy, it was not punitive and the objective was to ensure employees continued to engage with the business during their absence. There was no causal connection between the claimant being required to spend a few seconds/minutes speaking with his supervisor and the protected act, either on the part of Jimmy Mac or John Williams. The procedure setting out the responsibilities of employees. Supervisors and line managers provided "if your absence is longer than one day you will need to contact your supervisor/line manager regularly as agreed."

Occupational health report 21 October 2019

52. The second OH dated 21 October 2019 confirmed counselling via the respondent had started and counselling through GP had been arranged. There was a reference to a longer absence exceeding 4 weeks before a return to work.

Absence Review Case Management Meeting 31 October 2019

53. The meeting took place before Dave Broady, the claimant was represented by Brian Curphey and Sharon Hollier was case management advisor. In the meeting the claimant complained about being bullied by the company solicitor, the litigation, strike out and adjournment and the shared parental leave. Contrary to the claimant's evidence at this final hearing it is clear from the notes of the meeting that the claimant's primary concerns was the ongoing litigation, and it was agreed the next steps would be for Sharon Hollier to provide the shared parental leave form, an occupational health referral and possibly an absence review. The claimant's accepted under cross-examination that his mental health was discussed.

54. Sharon Hollier sent the parental leave documents to the claimant on the 1 November 2019 by attaching them to an email. The claimant says they were not attached, however, it is clear that at some stage the claimant received, completed and submitted the correct application form and parental leave for the dates he had requested was granted.

Third occupational health report 8 November 2019

55. The third OH report dated 8 November 2019 is critical. The claimant referred to feeling unwell "he attributed this to ongoing issues relating to the court case…due to ongoing issues he also submitted internal grievances. OH's opinion was "**he is currently unfit for all work**…**a significant maintaining factor for his current psychological symptoms is the ongoing court proceedings, grievances and his perception of his work situation. Until such times as these matters are resolved it is highly questionable whether his psychological symptoms will improve to such an extent that he will be well enough psychologically to return to some work**." Mediation was suggested. The claimant was considered "fit to engage in any necessary meetings or dialogue. **It is not possible to predict a timeframe for a return to work at the present time** as this is likely to b influenced by how successfully the aforementioned issues can be addressed…I cannot identify anything further that would assist at the present time. I do not recommend a specific follow-up in occupational health…"[the Tribunal's emphasis].

56. The claimant authorised the release of the report, and on reading it Dave Broady was concerned because he had never received an occupational health report which had closed the case down with no return to work plan. David Broady as the production manager in charge of approximately 500 staff not including managers and supervisors, would have experience of occupational health reports and the Tribunal found his evidence compelling. The Tribunal found there was no causal link between the litigation and the steps taken by David Broady including calling the claimant into absence review meetings which he was entitled to do.

Absence review meeting 25 November 2019

57. David Broady discussed the claimant's health, medication, counselling including the one session with counsellor paid for by the respondent. The claimant brought up the litigation, the solicitor he was dealing with, the adjourned hearing and was told by David

Broady and Sharon Hollier that "they can confirm today the company will not be pursuing costs" which was an issue for the claimant. The claimant was asked "what's stopping RW returning to work" to which the claimant replied "he wants to spend more time with his kids." When asked "what can be done to help RW return" David Broady offered the claimant a phased return of 4 hours work the next day which the claimant did not take up. The note records the claimant stating the reason for his absence was "the court case" and when asked the claimant made it clear he could not return to work whilst litigation was ongoing and "he is back to the judge in March 2020 and "when he comes back they are going to be after him – discipline him over silly things" despite conceding that nothing had happened over the 2 year litigation period. The note reflected David Broady's response; "DB explains Tribunal irrelevant…will be treated the same as everybody else." David Broady made it clear to the claimant that he would not be victimised as a result of the litigation and would be treated the same as everybody else working on the vehicles. The meeting ended with a discussion about what support was available to the claimant and a further meeting in 2-weeks to review the situation.

Absence review meeting 9 December 2019

58. The claimant made the point to David Broady that by this date that two people had committed suicide, he was off with mental health issues and yet David Broady was asking him to come back to work. The claimant confirmed "doctor has said he is not ready for counselling" as he was "stressing he wants to get into the right frame of mind…he wants to come back but not at the present time…he has a lot of anxiety to leave the house." When asked whether there was anything that could be done to help the claimant he answered "no." The claimant explained his litigation was ongoing "he was not happy that the company said they didn't threaten him and he has not had it in writing that he won't be issued the costs so it won't mean anything. It is not finished, he has to go back in March to the judge." The claimant was unable to give a date or any indication when he would be well enough to return to work and confirmed that the medical information deemed him "unfit for all work for the foreseeable future" agreed that this was the case, and there was no support the respondent could give to assist his return to work. The claimant was told by David Broady that his understanding was "…the Tribunal is the only thing outstanding that was preventing him [the claimant] from being able to return to work but he had no idea how long it would go on for if its next year or more than 12 months away. Neither party could influence or resolve it." David Broady's response was "it is unreasonable for the company to wait for an unspecified amount of time so he is going to escalate RW to an employment review where his future employment will be considered."

59. The Tribunal found the claimant was not threatened with dismissal by David Broady as the claimant alleges, he was informed that as a result of the medical evidence and the claimant's confirmation that he could not return to work in the foreseeable future, the normal routine company procedure was to "escalate" the claimant to an employment review in accordance with company policy. David Broady took this step because the claimant could not return to work in the foreseeable future and it was unacceptable for the claimant to be absent indefinitely while he was on full pay with no prospect of physically working, and that decision had no causal connection with the fact the claimant had brought proceedings against the respondent. It is notable that the claimant's anxiety over costs continued despite the fact that he had been promised the respondent would not claim costs in the litigation and this was recorded in the notes of the meeting, and the claimant was incorrect when he stated there was nothing in writing about the cost situation.

60. David Broady made it clear the employment review would be chaired by an independent manager with HR support, and this prompted a letter from Phil Hannah, production manager, inviting the claimant to an employment review on the 17 January 2020. The letter confirmed the claimant was medically unfit for all work in the foreseeable future and "**you confirmed there is no support that can be given to assist your return to work**…you have indicated that whilst the tribunal claim you are pursuing against JLR does not impact your day to day role, **this is the only thing outstanding that is preventing you from being able to return to work**. **Currently there are no expected timescales when the tribunal is likely to reach a conclusion and therefore no expected timescales of when you will be likely able to return to work**. You confirmed that neither you or your local management can influence or resolve your issues" (the Tribunal's emphasis). The claimant did not dispute the contents of the letter and the Tribunal was satisfied that it correctly paraphrased what had taken place at the earlier meeting. It was clear that at no stage was the claimant threatened with dismissal as he now alleges, he was not threatened with any punitive action and so the Tribunal finds.

Employment review meeting on the 17 January 2020 before Phil Hannah

61. The employment review meeting took place on the 17 January 2020 before Phil Hannah, the claimant, two union representatives supporting him and Sharon Hollier who took notes as she had in the previous meeting. Phil Hannah repeated the contents of the invite letter (see above) and the claimant did not dispute that was the case. When asked "if his work group knew about the Tribunal" responded "he had kept it to himself." In other words, the claimant had not told his supervisors or managers, and there is no reference to him telling John Williams in August 2019 as the claimant now alleges.

62. By the 17 January 2020 the claimant had changed his position and his union representative confirmed he was looking to return to work when his sick note ran out in 6 weeks' time. Phil Hannah responded "that RW saying he is returning to work is what he needs to hear…asks what the company can do, does he want to move areas, move shifts or a phased return to work?" The claimant's union representative added "the company can offer great stuff for RW and he should take up the offers." The claimant was offered a relocation in a different part of the factory, which the claimant refused as "he likes his job and where he works." The claimant made no mention of being victimised by managers.

63. A "uniform day" was also offered to come in for a "coffee and chat." Phil Hannah tried to reassure the claimant that when he came back there would be no retribution when the claimant stated "he feels that he will have a reputation that he will go off…he is fearful that JW will pull him for things because of this incident." Phil Hannah made a number of positive suggestions including "we will have a meeting to resolve any issues with JW" to which the claimant responded that it was a "fair assessment."

64. The claimant's oral evidence on cross-examination is contradicted by the written notes of the 17 January 2020 meeting which make it clear the claimant wanted to return to work in the same role and in the same area of the factor as Jimmy Mac and John Williams, suggesting that there were no concerns at the time and this is supported by the fact the claimant issued no grievance and undertook ACAS early conciliations months after the alleged victimisation on 14 September 2020 before issuing proceedings on the 7 October 2020. Had the Tribunal not determined it was just and equitable to extend time on the 31 March 2022, the claimant's claims would have been substantially out of time

65. An agreement was reached that the employment review would be adjourned "pending the 6 weeks for RW to return to work…he will expect RW to do a uniform day…"

Occupational health report 21 January 2020

66. The occupational health supported what was agreed at the 17 January 2020 meeting and confirmed the claimant was unfit and a review was arranged to discuss a return to work plan.

Occupational health report 21 January 2020

67. The report confirmed the claimant "tells me his anxiety type symptoms have improved greatly over the past 2 weeks. This is due to work addressing his issues and agreeing to his parental leave this June 2020. This has uplifted his mood and he feels positive about returning to work." The report included a phased return to work plan covering a 5 weeks period, the uniform day and the claimant's return was aimed at mid-March 2019. It was the most positive occupational health report in this case. There is no reference to victimisation or the 2018 litigation.

68. Without seeing the occupational health report dated 20 February 2020, which was not before Sharon Hollier, she wrote to the claimant on the 21 February 2020 referring to the employment review on the 17 January 2020 when the claimant agreed to return to work at the end of his fit note (29 February 2020) on the 2 March 2020. The letter correctly reflects what was discussed a the time of the meeting. Sharon Hollier's evidence that she did not have the 21 January 2020 report before her at the time she wrote to the claimant was credible. The Tribunal finds as a matter of fact Sharon Hollier did not ignore the contents of the occupational health reports when she wrote the 20 February 2020 email, and there is no causal connection between that email and the claimant's protected act.

Occupational health reports 5, 6 and 12 March 2020

69. Following the claimant's email to occupational health on 24 February 2020 concerning his return to work occupational health reported on the claimant's heightened anxiety at the prospect of returning to work on the 2 and not the 16 March 2020. It was made clear the claimant confirmed the 16 March 2020 return and the final 12 March 2020 report confirmed the claimant was discharged on publication of that report. Phil Hannah agreed to a return to work on the 16 March 2020 and the claimant returned on that date.

Victimisation

65 S.27 EqA provides that: 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

66 To succeed in a claim of victimisation the claimant must show she was subjected to the detriment *because* she did a protected act or *because* the employer believed he or she had done or might do a protected act. The acts that are protected by the victimisation provisions are set out in S.27(2). They are:

bringing proceedings under the EqA — S.27(2)(a)

giving evidence or information in connection with proceedings under the EqA — S.27(2)(b)

doing any other thing for the purposes of or in connection with the EqA — S.27(2)(c)

making an allegation (whether or not express) that A or another person has contravened the EqA — S.27(2)(d). The claimant relies on the grievance/letter before action letter dated 1 March 2021 as the protected act.

67 Section 39(4) provides that an employer (A) must not victimise an employee of A's (B):

as to B's terms of employment — S.39(4)(a)

in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training, or for any other benefit, facility or service — S.39(4)(b)

by dismissing B — S.39(4)(c), or

by subjecting B to any other detriment — S.39(4)(d). the claimant relies on S.39(4)(d).

Burden of proof

68 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the 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 provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

69 In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply, as affirmed in Ayodele v CityLink Ltd [2018] ICR 748. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that it did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondent and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case victimisation], failing which the claim succeeds.

Conclusion – applying the law to the facts

Burden of Proof

70 The claimant has not proved, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, and the burden has not

shifted in allegations 2a, 2b, 2e, 2f, 2g, 2h and2 I. If the Tribunal is wrong on its application of the burden of proof, and the burden shifted to the respondent to prove on the balance of probabilities that the claimant's disability was no part of the reason: Igen cited above, it would have gone on to find the explanation given on behalf of the respondent was untainted by victimisation.

71 Ms Badham referred the Tribunal to Greater Manchester Police v Bailey [2017] EWCA Civ 425 the Court of Appeal (Lord Justice Underhill) commented that: "it is trite law that the burden of proof is not shifted simply by showing that the Claimant has suffered a detriment and that he has a protected characteristic or has done a protected act." In the claimant's case the Tribunal found the burden of proof shifted in relation to allegation 2c and 2d, and the explanation given on behalf of the respondent was untainted by victimisation.

Victimisation (Equality Act 2010 section 27)

72 With reference to the first issue, namely, did the claimant do a protected act it is accepted that the Claimant did a protected act under section 27(2)(a) of the Equality Act 2010 when he brought claim number 1302563/2018 [49 TB] ("the first claim") against the Respondent in May 2018.

Detriments

73 The EHRC Employment Code provides "a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment' — paras 9.8 and 9.9.

74 The test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view, but the claimant's perception must be 'reasonable' in the circumstances: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL, which concerned the meaning of 'detriment' in Article 8(2)(b) of the Sex Discrimination (Northern Ireland) Order 1976 SR 1976/1042, established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. An unjustified sense of grievance could not amount to a detriment but the House of Lords did emphasise that whether a claimant has been disadvantaged is to be viewed subjectively. The test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances: Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841, HL.

75 Ms Badham referred to Harvey on Industrial Relations and Employment Law (Division L Equal Opportunities at [476]) considers that by analogy, a detriment in a victimisation claim will be found where *"a reasonable worker would take the view that the treatment was to his detriment"*, the test from MOD v Jeremiah [1979] IRLR 436. However, the test is not wholly objective- *"it is enough that a reasonable worker may take such a view"*.

76 With reference to the issues relating to detriments, did the Respondent do the following things:

76.1 Allegation 2a On 9 October 2019, through an unknown member of HR, Carmel from HR and/or John Williams, reject the claimant's application for shared parental leave as not being contained on the correct forms; the Tribunal found that the claimant's application was rejected by HR, John Williams was not the decision maker and did not have knowledge of the first claim at the material time. The form was rejected because it was not on the correct form, and as conceded by the claimant in oral evidence, had it been on the respondent's form the application would have been accepted as it was eventually. Viewed objectively, the claimant whilst upset about the amount of time it had taken the respondent to provide him with the correct form, this is not sufficient to constitute detrimental action in the context of victimisation discrimination given the fact that he had used the wrong form and was told that this was the reason why his first claim form was rejected. When the claimant submitted the correct form it was subsequently approved. There was no causal connection with the protected act, the core reason for the rejection was the undisputed fact that the claimant's application was on the wrong form not recognised by the respondent and there was no connection, either consciously or subconsciously by John Williams to the protected act. The Tribunal can infer from the very fact that the claimant's application was accepted when contained in the correct form, that an unknown member of HR/Carmel rejected the first application because he had issued it on the wrong form and not because of the discrimination proceedings.

76.2 Allegation 2b On 9 October 2019, through an unknown member of HR, Carmel from HR and/or John Williams, refuse to supply the correct forms to the claimant to enable him to apply for shared parental leave; the Tribunal found John Williams was unhelpful rather than obstructive. He believed it was not his responsibility and it lay with HR to produce the forms and for the claimant to approach HR directly. There was no refusal on the part of John Williams and no satisfactory evidence that HR had refused to provide the forms, and the claimant's perception was that these events were linked to his litigation when there was no such connection. The Tribunal accepts that had there been an actual refusal to supply the correct forms this would fall under the definition of a detriment and not merely an unjustified sense of grievance on the claimant's part. It is notable that the correct form was provided as evidenced in the bundle and the application granted as requested by the claimant. In the alternative, had the claimant established a detriment, the Tribunal would have found that the action by John Williams not to provide the claimant with a copy of the correct form but refer him to HR were not subconsciously or consciously linked to the protected act. His motivation was that he was a manager and managers did not provide copies of forms as it was the role of HR to do so.

76.3 Allegation 2(c) On 10 October 2019, through David Broady, summoned the claimant into work for an absence review on the first day of a period of absence; the claimant was told to attend an meeting and the Tribunal accepts that the claimant's perception was he was disadvantaged and this amounted to a detriment. The claimant had submitted a sick note through his friend, he

no longer had access to a lift and asked his wife to drive him to work so he could have the meeting. The request should not have entirely surprised the claimant given the aggressive behaviour he had shown towards John Williams the day before when working on the factory floor. The problem for the claimant is causation as Davis Broady had no knowledge of the earlier litigation and it cannot therefore have been a causal link. Even if this not been the case, the Tribunal concluded, taking into account David Broady's motivation that his evidence for the reason why he wanted the early intervention meeting to take place was credible as recorded in the findings of facts above. David Broady's actions were not subconsciously or consciously linked to the protected act. His motivation was to follow the unwritten procedure and get the claimant in for a meeting quickly to discuss the reasons for his behaviour and absence as recorded in the bullet point notes referenced above.

76.4 Allegation 2d From 11 October 2019, through Jimmy Mac and/or John Williams, require the Claimant to ring into work for 8 days of absence before his shift was due to start; the Tribunal took the view that the insistence that the claimant rang in every day may objectively appear intrusive and it accepted the claimant's perception was that he was disadvantaged by being forced to ring in and speak with Jimmy Mac over the 8-day period in question when he had a sick note and was not feeling well with mental health issues. However it was in accordance with Policy and the evidence before the Tribunal to the effect that the respondent's aim was to ensure contact was made with employees who were absent was credible.

76.5 The Tribunal heard no evidence from Jimmy Mac, however the claimant produced a sheet of calls made to Jimmy Mac which revealed the following outgoing calls were made: 10 October at 14.21. incoming call from Jimmy Mac 10 October 16.00 1 minute 31 secs, 14 October outgoing call of 18 seconds, 15 October 0 mins 12 seconds, 16 October 8 seconds, 17 October 1 second, 17 October 2 minutes 15 seconds and 18 October 14 seconds. Apart from 3 calls the conversations were either short or non-existent. David Brodie in his written evidence confirmed his recollection that he did not have any involvement or influence "over the level of communication required between Mr Wooder and his supervisors." The Tribunal accepted as credible the evidence of John Williams that he had no direct contact with the claimant following the welfare meeting on the 10 October, but discussed with Jimmy Mac the requirement to contact the claimant every day necessary because of concerns regarding the outburst on the shop floor, the claimant's mental health and wanted to stay in close contact with the intention of providing support. The Tribunal questioned how much support Jimmy Mac could give in the seconds the conversations took with the claimant, but the claimant is not raising as an issue the content of the calls, his issue was the inconvenience of him being required to make daily contact over the 8-day period given he had handed in a sick note and would have preferred not to have been in contact. Given the factual matrix the Tribunal on the balance of probabilities took the view that whilst calling daily inconvenienced the claimant and made him feel anxious, there was no causal nexus with the litigation.

76.6 With reference to 2e, in October and November 2019, through David Broady and/or Sharon Hollier, require the Claimant to attend absence review

meetings; it is the respondent's normal and routine policy and there was no causal connection with the litigation.

76.7 With reference to 2f, on 9 December 2019, through David Broady, threaten the Claimant with dismissal; the Tribunal was not satisfied that the claimant was threatened with dismissal, it is a requirement for a fair process to take place to ensure employees understand dismissal is a potential outcome. The claimant was given this information, it was not a threat, and had he been in any doubt his union representative would have clarified this.

76.8 With reference to 2g, on 17 January 2020, through David Broady and/or Sharon Hollier, require the Claimant to attend an employment review hearing; this was normal procedure and a fair process in a situation where there is no foreseeable return to work and no action/adjustments could be suggested by occupational health. There was no causal connection with the litigation.

76.9 With reference to 2h, from October 2019 to March 2020, through David Broady, Sharon Hollier and/or Phil Hannah, ignore the contents of Occupational Health and medical reports in respect of the claimant during his absence, the Tribunal did not accept this took place and it was clear from the record of meetings and correspondence the medical reports were considered and adhered to, with the result that the claimant returned to work on a phased return, having undergone a uniform day and the period of 6-weeks was extended.

76.10 With reference to 2i from December 2019 to January 2019, through David Broady and/or Phil Hannah, subjected the claimant to employment review after only 8 weeks of sickness absence and threatened to dismiss him, the Tribunal repeats its observations above. It was untenable for the respondent to be expected to wait indefinitely whilst the claimant was being paid full pay with no foreseeable return to work, and the process succeeded as the claimant returned on the 16 March 2020 having made it clear before this that there was no foreseeable return. The claimant's change of attitude was noticeable, and at no point did either he or his union representatives ever suggest the actions taken by the individual managers and HR could be or amounted to victimisation as a result of the earlier proceedings, and had this been the case the claimant would have said so bearing in mind he had access to trade union advice, raised ed grievances in the past and had experience of Tribunal discrimination claims. It is noticeable that the claimant in contemporaneous documents refers to having access to legal advisors but not affording representation at the final hearing itself, and the Tribunal is satisfied that had the claimant taken the view that he was being victimised before he returned to work on the 16 March 2020 action would have been taken before the 14 September 2020 ACAS early conciliation, a delay of almost 6 months.

77 With reference to issue 3, namely, if so, by doing so, did the respondent subject the claimant to detriment, for the reasons already stated the Tribunal found the claimant was not subjected to the detriments alleged with the exception of 2c and 2d.

78 With reference to the final issue 4, namely in respect of allegation 2c and 2d, has the claimant proven facts from which the Tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act, the Tribunal found on the balance of probabilities that the claimant has not proven such facts and the respondent has shown that there was no contravention of section 27 of the Equality Act 2010. Lord Nicholls indicated in the well-known race discrimination case of Nagarajan v London Regional Transport [*1999] ICR 877, HL* if protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out. Nagarajan was considered by the Court of Appeal in *Igen* (above) and Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial.' This test was applied by the EAT in the context of a victimisation claim in Villalba v Merrill Lynch and Co Inc and ors [2007] ICR 469, EAT and it was held: 'we recognise that the concept of "significant" can have different shades of meaning, but we do not think that it could be said here that the tribunal thought that any relevant influence had to be important… If in relation to any particular decision a discriminatory influence is not a material influence or factor, then in our view it is trivial.' In relation to Mr Wooder the Tribunal found the protected act had no influence whatsoever on the decision making process in relation to allegation 2C and 2d.

79 In the alternative, had the claimant proved on the balance of probabilities that any of the detriments listed had taken place, the Tribunal would have gone on to find there was no causal link between them and the protected act. Applying the test for victimisation the Tribunal must determine whether the lodging of the first claim by the claimant (the protected act) had had a significant influence . The essential question in determining the reason for the claimant's treatment is what, consciously or subconsciously, motivated the individuals referenced by the claimant in the list of issues to subject the claimant to the detriment's alleged. As can be seen from the findings of facts above, the Tribunal inquired into the mental processes of David Broady, Sharon Hollier and Phil Hannah to establish if the necessary link between the detriment suffered and the protected act can be established in order for the claim of victimisation to succeed, and it did not. Davis Broady had no knowledge of the earlier litigation and it cannot therefore have been a causal link. Fundamentally, by December 2019 there was no prospect of the claimant returning to work in the foreseeable future and no support could be put in place by the respondent to support his return to work, and in those circumstances it was appropriate for the respondent to apply its own procedures and proceed down the route of absence management, the claimant having been off work for 8 weeks on full pay. It is notable that the claimant, with advice and support of the union, soon came round and what appeared to be a lengthy continued absence with no foreseeable return transformed to a positive return to work within 6-weeks or so after the positive actions by David Broady and Phil Hannah who both dealt with the claimant compassionately and with a high degree of sensitivity, following occupational health advice and making a number of suggestions in an attempt to encourage the claimant to return to work and avoid proceeding down the absence management route.

Conclusion

80 In conclusion, the claimant's claims of disability discrimination and other payments are dismissed on withdrawal. The claimant was not subjected to victimisation and his claim for discrimination brought under section 27 of the Equality Act 2010 is dismissed.

Employment Judge Shotter
21.8.23

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 September 2023

FOR THE SECRETARY OF THE TRIBUNALS