EMPLOYMENT TRIBUNALS

Claimant: Zubair Ismailjee

Respondent: Morrison Data Services Limited

Heard at: Watford Employment Tribunal
On: 31 July, 1-3 August 2023, 4 August 2023 (deliberations)

Before: Employment Judge Young
Members: Ms L Jaffe
Mr A Scott

Representation
Claimant: Mr Walker (Counsel)
Respondent: Mr S Davis (Employment Rights Representative)

JUDGMENT

The unanimous judgment of the Employment Tribunal is each of the claims is unfounded and each is dismissed.

REASONS

Following Judgment and oral reasons given on 4 August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Introduction

1. The Claimant's employment with the Respondent as a Smart Meter Installer commenced on 10 February 2020 and ended on 3 February 2021. The Claimant contacted ACAS in the first instance on 12 December 2020 whilst still employed by the Respondent. The first ACAS Early Conciliation Certificate was issued on 22 December 2020. The Claimant then went to ACAS again for early conciliation on 31 December 2020 and the second ACAS Early Conciliation Certificate was issued on 4 January 2021. The Claimant's first claim was issued on 5 January 2021. However, the Claimant's employment was then terminated on 3 February 2021.

2. Following the Claimant's termination of employment, the Claimant engaged with ACAS again on 3 March 2021 and the third ACAS Early Conciliation Certificate was issued the same day. The Claimant brought his second Employment Tribunal claim on 30 March 2021.

The Hearing and Evidence

3. The hearing was in person over a period of 5 days. We were provided with a 333 paginated bundle. One page was labelled page 321 twice and there was a page 295A and 295B, so the hard copy of the bundle and the electronic copy had different page numbers. All references to page numbers in this judgment are to the electronic copy pages. The Claimant was represented by Mr Walker of Counsel, the Respondent was represented by Mr Davis, on behalf of the Respondent, Mr Mark Harris (National Head of Operations for Installation Services), Ms Olivia Jordan (Human Resources Advisor) and Mr David Wynn (Employment Relations Specialist) gave evidence. Mr Harris and Mr Wynn gave evidence in person. Mr Wynn and Ms Jordan were no longer employed by the Respondent. Ms Wynn gave evidence via CVP. The Claimant gave evidence in person. We received written witness statements from all the witnesses. We were told Mr Nicolaou and Mr Price could not be contacted, both potentially key witnesses were no longer employed by the Respondent.

4. On the first day, we were told there was a Schedule of Loss, but it was not contained in the bundle. We requested an up to date Schedule of Loss and were provided with the Schedule of Loss on the morning of the second day by the Claimant. We also requested a schedule of all the days that the Claimant was off sick. We were provided with that schedule on the morning of the second day of the hearing by the Respondent.

5. On the third day of the hearing, it became clear that the reference to the date 2 January 2021 was a mistake and the Claimant's case did not rely upon a protected act on this date. However, the Claimant did rely on a protected act on 15 December 2020. For reasons set out in the analysis and conclusion section of this judgment with written reasons, the Claimant was required to make an application to add the protected act dated 15 December 2020 to the claim. The Claimant did make that application to amend. We deal with the outcome of that application below in the analysis and conclusion section of the reasons for this judgment.

Strike out application

6. On first day, the Claimant made an application to strike out the Respondent's ET3. We were provided with an electronic strike out bundle. In summary, the application was made under rule 37 (1) (c), (d) and (e). The Claimant said the response was not being actively pursued because the Respondent failed to provide the Claimant with a paginated bundle and exchange witness statements in compliance with the Employment Judge M Warren's Order dated 5 April 2022. It was because of this non-compliance that there could not be a fair trial as the Claimant did not have sufficient time to prepare the case as they

only received the Respondent's witness statements just 2 days before the start of the hearing. The Claimant said the Respondent's failures show a pattern of the Respondent knowing that the Claimant has a disability and yet this is how it treated the Claimant. The Claimant said that it was a symptom of how the Respondent treated the Claimant overall. The Respondent's response to the application was that they did not present the case but were responding to it. The reason for the non- compliance of orders was due to slippage but the Claimant had not suffered any prejudice. The Claimant had the bundle 5 weeks before the first day of the hearing, albeit the bundle was not paginated at that stage.

7. In deciding the Claimant's application, we had regard to the Employment Appeal Tribunal's ("EAT") ruling in case of HM Prison Service v. Dolby [2003] IRLR 694 EAT, at paragraph 15. The EAT said the striking out process requires a two-stage test. The first stage involves a finding that one of the specified grounds for striking out has been established and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. We considered whether in the case of rule 37(1)(c) there was *intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice (see paragraph 17:* Evans v Metropolitan Police Commissioner [1992] IRLR 570). We had regard to whether a strike out was a proportionate response to the non-compliance.

8. We do not conclude that the response had not been actively pursued The Respondent though late in compliance was clearly in correspondence with the Claimant and responded to Tribunal correspondence. We noted that the Claimant was dilatory in providing disclosure as was clear from the email page 2 of the strike out bundle, where the Claimant had not by 27 June 2023 provided full disclosure of medical records. In those circumstances, the bundle was not in a position to be finalised as late as the end of June as the Claimant had not provided all the medical records. We also noted that the Claimant did not comply with the Employment Judge M Warren's orders in respect of medical evidence by 3 May 2023 or provide a Schedule of Loss by the 21 October 2022 [70]. We note that the Claimant was also supposed to provide a cast list and chronology for us on the first day of the hearing, but none had been provided.

9. Both parties were in breach of Employment Judge M Warren's order, and it cannot be in accordance with the overriding objective to penalise the Respondent alone for non-compliance, neither was a proportionate response to the Respondent's non-compliance. We considered that it was not ideal for the Claimant to have only 2 days to prepare for trial, and the Respondent did not appear to have a good reason for their delay. However, we do not think the delay was intentional and we considered that it was still very possible to have a fair trial. No new defence was presented by the Respondent in the witness statements. It was the Claimant's case, and the burden of proof is mostly on him, at least initially. We therefore considered the prejudice to the Claimant was minimal and we did not exercise our discretion to strike out the Respondent's defence. The Claimant's application to strike out failed.

Application to hear witness evidence via CVP

10. The Respondent made an application for both Mr Harris and Ms Jordan to give evidence by CVP. Both were located in the northeast of England. The application for Mr Harris was made on the basis of resource, cost and time. The application for Ms Jordan was based upon the fact that Watford is a long way away from Sunderland to travel. Ms Jordan was in a new job and had caring responsibilities. She lived near Sunderland but would be leaving from Newcastle thereby extending her journey for even longer. The Respondent pointed to EJ Warren's comments in the 5 April 2022 order that the case was suitable for CVP should the interests of justice require it. [64]

11. The Claimant opposed the application, stating it was important for the witnesses to be in the Tribunal in order to decide their veracity. The parties knew about the dates for the hearing. Mr Harris was still employed by the Respondent and so was at their beck and call. The Claimant did have sympathy for Ms Jordan as she did not have a lot of significant evidence to give, but pointed out that the Claimant hadn't been provided with any evidence of the necessity of Ms Jordan giving evidence by CVP.

12. We decided to grant the application for Ms Jordan to have her evidence heard via CVP but refused the application for Mr Harris to have his evidence heard by CVP. We considered that based upon the limited evidence that Ms Jordan was likely to give it was disproportionate to require her to attend due to the distant and the practicalities. We had regard to her caring responsibilities and the fact that she was no longer an employee of the Respondent. Whilst Mr Harris was still an employee of the Respondent and so could be required to attend the Tribunal in Watford.

13. The Tribunal adjourned to read the documents. On return, the parties agreed the list of issues in accordance with Employment Judge M Warren's case management order dated 5 April 2022 on page 65 of the bundle, with the additional issue of knowledge added as issue 20.1 under the claim for direct disability discrimination.

The Claims and Issues

14. The Claimant presented 2 claim forms. The first claim form contained claims for direct discrimination, failure to make reasonable adjustments, discrimination arising from disability, indirect discrimination, harassment, victimisation all pursuant to the Claimant's disability and a claim for unpaid wages from 30 October 2021. The second claim form included an additional claim for dismissal by reason of disability discrimination.

15. The list of issues is contained in the annex to this judgment. Reference to issue numbers in this judgment with reasons are the numbers contained in the annex list of issues.

16. A preliminary hearing was held on 26 September 2022 to determine the issue of whether the Claimant was disabled. In the written reasons of Employment Judge Quill, he found that the Claimant had a disability of chronic migraines but not anxiety and depression which the Claimant was also relying upon as a disability. In paragraphs 73 & 74 of those reasons, Employment Judge Quill found that the Claimant was disabled from 2008 as his disability was a recurring condition [89].

17. However, at the case management hearing on 23 March 2022, the Claimant withdrew the unlawful deduction of wages claim. That claim was dismissed upon withdrawal in the judgment of Employment Judge M Warren dated 5 April 2023.

Findings of material facts

18. The Employment Tribunal heard evidence on issues that did not form part of the Claimant's case. Where that is the case, the Tribunal will only make findings that are relevant to determine the agreed issues set out above.

19. We have had careful regard to all the evidence that we have heard and read. It is not necessary for the Tribunal to rehearse everything that we were told in the course of this case in this judgment, but we have considered all the evidence in the round in coming to make our decision. All numbers in square bracket are page references to the bundle. The following findings of fact are made on the balance of probabilities.

20. In November 2019, the Claimant applied for the role of Smart Meter Installer with the Respondent. The Respondent is a very large organisation with approximately 4,000 employees. 350 of those staff are field staff operatives for Installation Services which is part of the Respondent's energy division. There are 13 field managers to cover 350 field engineers in the Installation Services department. As part of a government initiative, the Respondent had contracts to install smart meters with companies such as EDF, Bulb and SOW. Appointments to install smart meters were booked six weeks in advance. In allocating work, the Respondent took into account what they refer to as a 20% shrinkage this is the likely percentage where in customers would cancel installations. The Claimant worked in Installation Services.

21. In the Claimant's application for the role, in November 2019, the Claimant ticked the "no" box on the form in response to the question "Do you consider yourself to have a disability?" [257]. Ms Jordan said that she would have looked at the Claimant's file before advising Mr Harris or Mr Price on how to deal with the Claimant's request for reasonable adjustments and to be treated as disabled. However, the Respondent did not mention this document in any of its decision making process about the Claimant. Mr Wynn said that he saw the form sometime in January 2021, but said it would have made no difference at all to his advice as he had already decided at that time the Claimant was not disabled in any event. We find that the Respondent did not know that the Claimant had ticked he was not disabled until January 2021 when Mr Wynn saw the application form.

22. The Claimant was supposed to start work on 9 December 2019. However, the Claimant was hospitalized due to a stomach problem and was unable to start at that time. However, the Claimant did start on 10 February 2020, with 2 weeks technical training about the installation of the meters. During this training, the Claimant says he told the trainer that he had a chronic migraine condition and the trainer told him to contact HR to inform them. However, the Claimant did not contact HR until 19 July 2020 [92]. He did not say at that stage that he had a disability but did say he suffered from chronic migraines [92].

23. The Claimant's contractual hours of work were 8am- 8pm Monday- Saturday, however the Claimant worked 8-6pm with no weekends. The Claimant's contract of employment stated, "terms and conditions of employment relating to trade union membership, equal opportunities policy, grievance procedure, disciplinary procedure and appeals procedure are outlined in your staff handbook." The Claimant accepted in evidence that the handbook was on his tablet.

24. The Claimant was expected to be carrying out 4 jobs a day, which were referred to as duels. However, the Claimant was regularly doing 2 duels a day and the Respondent had accepted that initially but expected the Claimant to go up to 4 duels as this was the required amount in order to make the business viable. At the time, the Respondent was subject to KPIs which if they did not meet could result in the Respondent fined to the tune of 2% of their turnover.

25. When the Claimant started his employment his line manager was Mr Stravros Nicolaou who was the Field Manager. It was unclear exactly when Mr Nicolaou left the Respondent, but by 22 December 2020 Mr Nicolaou had left and Mr Anthony Price became the Claimant's line manager. Both Mr Price and Mr Nicolaou reported to Mr Mark Harris, who was the Head of Operations South (at the relevant time). Mr Harris reported to Mr Nick Griffiths who was the Director of Installation Services. The Respondent had a large HR department, with specific HR advisors allocated to specific departments. Ms Olivia Jordan was such an HR Advisor who was allocated to the Data Collection department, which was part of the same energy division, but was covering Installation Services in the winter of 2020 and in 2021 during the COVID pandemic because of understaffing due to Ms Jordan's colleagues being on furlough. Mr Wynn was in the role of Employment Relations Specialist. Mr Wynn's role required him to provide training to HR and advice to all the managers as well as deal with all ACAS conciliation before passing any tribunal claims on to the Respondent's in house legal team.

26. From 25-28 August 2020, the Claimant was off work for 4 days because he had tonsilitis. The Claimant was then off work on 18 September 2020 for 1 day because of his migraines. The Claimant did not say in his return to work meeting on 21 September 2020 that his migraines were a disability. [268]

27. On 12 October 2020, Mr Nicolaou wrote to the Claimant's team, including the Claimant requiring everyone to have taken at least 12 days annual leave by the end of November 2020. The Claimant had taken 7 days at that point and had a further 5 days to take. On 17 October 2020, the Claimant applied for 4.5 days leave following the warning he had received. On 22 October 2020, Rota management refused the Claimant's request for leave. Rota management's role was to allocate appointments for smart meter installations. For the

Claimant's role, it was fundamental that there were sufficient smart meter installers to meet the appointments. Rota management had the role of deciding the resources that were required to this end. The email dated 22 October 2020 to the Claimant said that "Gemma" of Rota management had spoken to Mr Nicolaou, but it made it clear that it was Gemma's decision to refuse the leave. The Claimant was invited to speak to his line manager Mr Nicolaou regarding the nature of the request and to see if anything could be done regarding the Claimant's request.

28. The Claimant was off sick from 22-23 October 2020 due to a migraine attack. The Claimant returned to work on 24 October 2020 [273]. The Claimant attended a return to work interview. The Claimant did not say he was off work due to a disability.

29. On 22 October 2020, whilst the Claimant was off work, the Claimant contacted Mr Nicolaou to ask why his request for leave had been refused and Mr Harris asked the Claimant for medical evidence [110]. We don't accept that the Claimant was singled out because he was being asked for medical evidence. We find that Mr Nicolaou asked the Claimant for medical evidence because the request for leave was based upon a request for time off for medical treatment. There was clearly a manpower resources issue which was why Rota Management refused the Claimant's request for leave. Mr Nicolaou was trying to accommodate the Claimant, but needed to ensure that he could justify the decision where it affected the commercials of his department.

30. The Claimant said in his conversation with Mr Nicolaou that Mr Nicolaou said that he did not believe the Claimant had his condition or that he'd booked any appointments and asked to see evidence of his appointments. We find that Mr Nicolaou did not say that he did not believe the Claimant had a condition or that he'd booked any appointments in that telephone conversation. There would be no reason for Mr Nicolaou to have made these comments. If Mr Nicolaou had made these comments, we believe that the Claimant would have recorded this in the e-mail attaching all the medical evidence. However, there is no reference to this alleged comment in the email. We do believe that Mr Nicolaou asked to see evidence of the Claimant's appointments.

31. The Claimant said that his request on 17 October 2020 was a request for annual leave. The email to Rota Management chasing the request is undated, but the subject is annual leave. The Respondent regarded the request for leave as one for medical leave not annual leave. We heard evidence from Mr Wynn that there was a drop down menu which set out a number of options to define the leave requested. The Claimant says he doesn't remember seeing the leave drop down menu but that if he did, he would have picked annual leave to categorise his leave but would not have chosen medical leave. We find that that there was a drop down menu and the Claimant chose medical treatment as option. We find this because on the document we were provided with at page 105 it has next to each of the dates for leave the word "medical treatment". This would not be there if this was a comment. The Claimant said that he had only applied for leave once and so we preferred Mr Wynn's evidence who was more familiar with the system and said that the comment box was optional to complete the reason for leave. We find that the Claimant applied for medical leave although he wanted to use his annual leave up to this end.

32. The Claimant said that the refusal on 22 October was a refusal by Mr Nicolaou. However, we were not shown anything that indicated that Mr Nicolaou did actually refuse the Claimant's request for holiday. It appeared to us from the evidence that rota management made that decision not Mr Nicolaou. It was Mr Nicolaou who actually approved that Claimant's request for leave albeit on receipt of medical evidence.

33. The Respondent's sickness absence procedure set out what the triggers are for short term absences as *"three days or three periods of absence in a six month. Seven days or four periods of absence in a 12 month."* .[328]

34. Under the heading of "short term sickness absence" the policy says:

    "*All sickness absence is monitored and a pattern of repeated sickness absence will be of concern to the company because of its impact on workload management.."*

    "Absences directly due to a disability will normally be disregarded so long as they are within generally expected ranges. There are certain types of other absences that may be disregarded:

    As absence due to non recurring ailments for example a minor accident where early recovery is likely and there will be no after effects. Examples are broken bones, sprain, or short term hospitalisation […]

    Certain diseases such as measles which are unlikely to recur."

35. Under the heading *"Reference to medical opinion", "if there is doubt about the sickness absence of an individual or concerns about underlying health problems the case may be referred to: employee's own General practitioner, independent General practitioner, Occhea limited, independent Occupational Health consultants."* [329]

36. Under the "Long Term Sick Absence" heading it says, *"long term absence is usually considered to be a period of four weeks or more of continuous absence."*

37. We heard evidence from Mr Wynn and Ms Jordan that the sickness absence policy was applied to all staff and there were instances where disability related illnesses were disregarded so that the trigger to start the process of warnings did not take place. This evidence was not contested, and we accept the Respondent's evidence on this point.

38. There is also a reference to company sick pay ("CSP") in the sickness absence policy. However there is no explanation of when CSP is received. We were told and accepted Mr Harris's evidence that CSP was discretionary and was applicable in other parts of the Respondent's business but was not applicable in Installation Services where the Claimant worked.

39. Mr Nicolaou did not trigger the sickness absence procedure after the 4 days of sickness leave of tonsillitis of the Claimant. Mr Nicolaou did not trigger the sickness absence procedure after the first incidence of the Claimant's sickness leave due to his migraine in September 2020. We accepted Mr Wynn's

evidence that this was because Mr Nicolaou was a laid back manager and would try to keep his team happy. However, when the Claimant was off work on 22-23 October due to migraines on 23 October 2020, after taking advice from Mr Wynn, Mr Nicolaou sent the Claimant a letter inviting him to attend a capability hearing for the 29 October 2020 in respect of his 3 incidences of absences in 6 months [111]. We find that Mr Nicolaou did this because by then, Mr Nicolaou knew that the Claimant's van had been seen outside his home on Monday 19 October 2020 before 16:00 and on 20 October arrived 15:38. On 26 October 2020, Mr Nicolaou emailed the Claimant to say that the Claimant's van had been seen on these occasions [109]. We think this is when the relationship between the Claimant and Mr Nicolaou soured, as Mr Nicolaou was saying in that email he was going to review the Claimant's performance in 2 weeks.

40. On 27 October 2020, the Claimant contacted Mr Nicolaou to find out whether his request for leave was now going to be approved. The Claimant alleges that Mr Nicolaou said to him "Zubair, just to let you know this does not look like a medical clinic, it looks more like a Massage Parlour" and that the 30-minute slots were for "pleasure purposes and not treatment". We accept that Mr Nicolaou did say these things to the Claimant in that conversation. However, the Claimant would have had his treatment in his home not at a medical facility by alternative therapists. We find it was not a medical appointment and this is what Mr Nicolaou was questioning in his comment.

41. The invitation to the capability hearing for 29 October referred to attachments of a 'capability report and associated documents'. We accept those documents were never provided to the Claimant. At the capability hearing on 29 October 2020, the Claimant was asked by Mr Nicolaou "do you think there is anything the business can do to help?" [232]. The Claimant responded "it's a tough one I understand where the business is coming from, but I am doing whatever it takes I am doing my part I don't think the business can do anything to help me cure my migraines." The Respondent said that they took this response to mean that there were no reasonable adjustments that could be made for the Claimant by the Respondent. However, the Claimant contested this and said that he was only saying that the business could not cure his migraines. We find it was reasonable for the Respondent to interpret the Claimant's response to the generic question on that basis of its face value. We find the Respondent did not from that time believe that there were any reasonable adjustments they could make for the Claimant that would have removed any disadvantage that the Claimant may have had.

42. The outcome of the capability hearing was that the Claimant was given a written warning of 12 months.[233] The Claimant was told this in the meeting on 29 October 2020 and this decision was later confirmed in writing in a letter to the Claimant of the same date. In the meeting, Mr Nicolaou made it very clear in his decision to give the Claimant a warning that he did believe the Claimant had a genuine condition, but that he was receiving a warning because of the impact of the Claimant's absence on the business and the Claimant's colleagues. [233]. Mr Nicolaou said that the Claimant's absence could result in a compensation pay out by the business. We accepted that this was Mr Nicolaou's position.

43. In the meeting and outcome letter on 29 October 2020, Mr Nicolaou did warn the Claimant that any further absences could exceed the agreed threshold and could result in formal action. We find this was consistent with the Respondent's sickness absence policy. The Claimant was extremely unhappy about the decision. The Claimant contacted Mr Nicolaou by phone to express his disappointment. The Claimant said that Mr Nicolaou said to him in that telephone conversation "there is no point walking up and down feeling sorry for yourself at home, I advise you to get up and work ASAP!" We accept that Mr Nicolaou did say this to the Claimant.

44. On 30 October 2020, the Claimant went off sick with migraines and stress at work [275]. The Claimant told us that his migraine attacks happened at night, and he had never had an attack at work. The Claimant had told the Respondent in the capability meeting on 29 October that it he had never had an attack at work too. The Claimant said to Mr Nicolaou that his attacks happen for half a day, a day or two days and could happen between 4-6 weeks [229]. The Claimant said at that stage that he did not know what triggered the attacks. [229]

45. On 30 October 2020, the Claimant immediately wrote to HR to appeal the written warning given to him the day before [123-124]. The Claimant also raised a grievance about the comments that Mr Nicolaou had said to him on 27 & 29 October in telephone conversations by letter dated 2 November 2020 [130]. The Claimant submitted a sick certificate from his GP for 1 month from 30 October until 30 November 2020 [275].

46. It is in the Claimant's grievance letter dated 2 November 2020, that the Claimant says for the first time that he is being discriminated against because of his condition and there is unlawful discrimination. However, the Claimant does not at that stage say that his condition is a disability nor does the Claimant refer to reasonable adjustments.

47. Furthermore, on 6 November 2020 the Claimant emailed Mr Nicolaou's line manager Mr Harris to request discretionary sick pay as he was suffering hardship. The Claimant says in that email that he has been bullied and harassed and discriminated against, but the Claimant does not say why in that correspondence. Mr Harris wrote back to the Claimant on 9 November 2020 refusing his request for CSP and explaining that the Respondent would not be able to pay the Claimant anything above sick pay. Mr Harris explained that he was not prepared to pay the Claimant CSP as the Respondent did not operate CSP in the Claimant's department. We accepted Mr Harris's evidence on this point. Mr Harris also explained that he would be in touch regarding the Claimant's appeal and explained that the appeal and grievance would be heard together as they "read the same". Mr Harris said that he took HR advice from Mr Wynn on how to deal with the appeal and grievance. Mr Wynn explained that he did see the appeal and grievance as the same. The letter also said that the grievance would not be progressed at that time.

48. We find that the appeal and grievance did not read the same. The appeal was against the written warning. The grievance was against Mr Nicolaou's conduct regarding things that he said that upset the Claimant. We do accept Ms Jordan's explanation for the sentence "I will not progress your grievance at this

time" as supposed to say grievance process, the word 'process' being what was missing from that sentence.

49. Mr Harris also says in the same letter that he wants the Claimant to be referred to Occupational Health and asks that the Claimant confirm his agreement to be referred to Occupational Health. The Claimant was not referred to Occupational Health until 18 December 2020. Ms Jordan's evidence was that the Claimant's Occupational Health referral fell through the cracks because of the Claimant's copious correspondence, and it was difficult to keep track. We accepted Ms Jordan's evidence on this point. It was clear to us that Ms Jordan was dealing with a tremendous amount of work covering her own department and Installation Services as well as dealing with internal hearings every day because her colleagues were on furlough.

50. The Claimant rejected the Respondent's proposed combination of the appeal and his grievance. On 9 November 2020 wrote to Mr Harris, asking that he reconsider his rejection of the Claimant's request for CSP and for his grievance to be heard separately from his appeal. The Claimant also alleged harassment by Mr Harris against him. Mr Harris accepted that he did not respond to the Claimant's correspondence. However, the Claimant confirms he agreed to be referred to Occupational Health.

51. By letter 12 November 2020, the Claimant was invited to attend the appeal/grievance for 20 November 2020 [140]. However, 20 November 2020 date had to be cancelled because Mr Harris suffered chest pains and had to be hospitalized. Mr Harris was off work for 2 weeks. By letter dated 24 November 2020 [145] the hearing was rescheduled for 2 December 2020. We find that the delay of approximately 2 weeks was not unreasonable and could be explained by Mr Harris's sudden illness.

52. At the hearing on 2 December 2020 [234-236], the Claimant's grievance was not discussed at all. All points raised were in respect of the Claimant's appeal. Mr Wynn accepted that Mr Harris should have raised the points of the grievance in the meeting but that it was the Claimant's grievance, so he also had a responsibility to raise it. Ms Jordan seemed to believe it was the Claimant's sole responsibility to raise his grievance. We find that the Respondent should have raised points of the grievance in the meeting on 2 December 2020 as that is what they said they would do in Mr Harris' letter, after all Mr Harris was in charge of the meeting.

53. Mr Harris confirmed in evidence that the disciplinary policy applied to the capability procedure. The disciplinary policy said that "any breach of rules and standards will be investigated under the disciplinary procedure" [312]. The disciplinary procedure allows for the giving of a written warning where an employee's conduct "is below standard" [314]

54. On 10 December 2020, Mr Harris provided the outcome of the appeal against the Claimant's written warning. The Claimant's appeal was rejected. However, Mr Harris discounted the Claimant's migraine absences and said that the written warning was only in respect of the Claimant's 4 days absence for tonsilitis. There was no reference in the letter to any findings in respect of the Claimant's 2 November 2020 grievance against Mr Nicolaou. Mr Harris admitted in evidence that he did not speak to Mr Nicolaou to investigate the

grievance. We accepted Mr Wynn's evidence that managers would do their own investigations to obtain the information they needed to make decisions. We find that Mr Harris failed to hear the Claimant's grievance or investigate it, and this is reflected in the outcome letter [151-155] which mentioned absolutely nothing about the grievance. We were not convinced by the Respondent's evidence of all 3 witnesses that the grievance was heard with the appeal. There was no evidence to support that conclusion. There was overall lack of detail from Mr Harris' in how he approached the grievance, and it was clear from the evidence we heard from Mr Harris that he did not know what he was doing regarding the grievance and relied on HR. He was not competent to carry out the appeal and grievance process together.

55. On 19 December 2020, Mr Price texted the Claimant to inform him that he had taken over the Claimant's team and would like a catch up call with the Claimant [158]. The Claimant responded to tell Mr Price he would only like to be contacted in writing. Mr Price explained that the policy required him to contact the Claimant by phone and not text. There were a number of texts sent by Mr Price where he was trying to make contact with the Claimant, however, some of those texts were undated.

56. The Claimant said that on 15 December 2021 he was told by a colleague Mr Suraj Patel that he was being made fun at work and Mr Patel had a conversation with a Mr Hayat on 15 December 2020, said with reference to the Claimant. Mr Hayat, a supervisor, allegedly said "Tell him to stop acting like a child and get back to work it's just a migraine attack and nothing else!". Neither Mr Suraj nor Mr Hayat appeared before us as witnesses. The Claimant was not at work at the time and so must have been told this alleged comment on the phone, as nothing was provided to us in writing of this comment from Mr Suraj. This was secondhand evidence being proposed to us. We had no context for the alleged comments. We find that Claimant was told this comment, but we do not accept that this was a comment that came from the Respondent's supervisor Mr Hayat or that Mr Hayat said this.

57. Between 30 October 2020-22 December 2020 the Claimant claimed that he did not have any welfare calls with the Respondent. There was no record of the Claimant raising the issue at the time. None of the Respondent witnesses answered why this was the case. It appears that the Claimant fell between the cracks. We find on a balance of probabilities that because the Claimant had told Mr Nicolaou on 2 November that he would only like correspondence in writing for the period of his sickness [128] then this would have meant no calls as the Respondent's procedure required welfare contact to be by telephone. Furthermore, the Claimant had just accused Mr Nicolaou of harassment and bullying and Mr Nicolaou was leaving the Respondent so was unlikely to be eager to speak to the Claimant. If there was a gap, it would be between Mr Nicolaou leaving and Mr Price being assigned to manage the Claimant as it seems unlikely that Mr Price having been appointed the Claimant's manager would wait for some period before contacting the Claimant if he had just become his line manager.

58. On 15 December 2020 having received the outcome of his appeal, the Claimant raised a grievance against Mr Harris ("Second Grievance"). The Claimant says in that grievance, "I also believe that I have been discriminated and harassed because of my disability". [158] Mr Griffiths dealt with this grievance and

responded to the Claimant's second grievance by letter dated 22 December 2020 [166- 168]. Each of the Claimant's complaints in his Second Grievance is addressed. The Claimant said that in his complaint that he was not provided with an explanation as to why the formal process was triggered. However, it was addressed in point 2 of Mr Griffiths' letter stating, *"he seemed to be of the belief that if a line manager asserts their discretion when managing absences within their team and does not take action immediately for any absences are not to be considered or taken into account."* [164]

59. In the 22 December 2020 outcome letter of the Claimant's Second Grievance [148-165], Mr Griffith referred to the Claimant's complaint that he is being ridiculed. Mr Griffiths request details of who and what was said, and details of the colleagues involved. Mr Griffiths also requested that the Claimant provide any additional information that had not been supplied to the Respondent within the next 7 days [166]. We had no evidence from the Claimant that he did provide that evidence to Mr Griffiths of details of his complaint of being ridiculed. We find that Mr Griffiths did not investigate the comments of Mr Hayat as he did not have enough information to do so.

60. Mr Griffiths also referred to the Claimant's migraine condition as not falling within the scope of being a disability in 22 December 2020 letter. Mr Wynn explained that he advised Mr Griffiths that the Claimant was not disabled because that was his belief after research on Bailli looking up cases and considering that the Claimant would only have 8 attacks in a working year of 260 days. Mr Wynn had looked at the Claimant's file and the medical evidence available at that stage but did not see the OH report before advising Mr Griffiths. In any event Mr Wynn said having seen the OH report, it did not change his view about the Claimant's disability as the OH did not say the Claimant was disabled but just probably. Mr Wynn considered he was not bound to take their advice as they were not the final arbiters of the question of disability, but the Employment Tribunal were. Mr Wynn has a law degree and is an associate CILEX with 16 years of experience in employee relations. Mr Wynn was in the background in respect of all the decisions made by the managers about the Claimant's disability and gave advice in this regard.

61. The Claimant had a telephone welfare call with Mr Price at 15:46 on 22 December 2020 for 4 minutes [164 &169]

62. On 22 December 2020 Mr Price wrote to the Claimant to remind him about keeping contact by phone as the Claimant had told him he did not want to be contacted during his period of absence [170]. The Claimant has said in his texts messages that he wanted to be contacted only in writing and in evidence the Claimant confirmed that he did not want to be on the phone at that time as it was difficult for him because of his condition.

63. On 22 December 2020, the Claimant had his consultation with Occupational Health and a report was produced the same day [280]. The same day it was sent to the Respondent and the Claimant, but we had no evidence as to what time. Mr Wynn accepted that he was in work at the time, but it was not his report, and he did not read it until January, but he would have sent it on to the manager Mr Price and Ms Jordan. Ms Jordan was away during the Christmas break and so did not see the report until her return in January 2021. We accepted both Mr Wynn and Ms Jordan's evidence on these points and find

neither saw the Occupational Health report on 22 December 2020. The Occupational Health report said in response to the question "Is the health problem likely to recur in the future?" "Migraines are often a chronic condition although many individuals benefit from specialist advice/medication that results in fewer and less frequent symptoms." [278]

64. The report recorded that *"…. In terms of accommodations he requests that the written warning is removed that he is limited to one to two jobs a day and that his working days are adjusted so he starts at 11 AM rather than 7:30 AM. A phased return to work might also be beneficial but how this is organised is that management discretion."*

65. The Occupational Health's view on whether the Claimant was covered by the EA 2010 was *"Although it is a legal decision rather than a medical one, I think it possible that super could be covered by UK disability discrimination legislation on a historical basis [….] you may wish to consider an adjustment to absence triggers adjustments are at management discretion and dependent on operational feasibility"* [278]

66. Occupational health also made the following recommendations *"Zubair is temporarily unfit to return to work. Have encouraged him to plan a return to work in the next four weeks. He is likely to need support to do this"* …. [277]

67. The Claimant also provided Mr Price with his GP medical report dated 22 December 2020 [280] on 14 January 2021. The report said, "*Given condition would be classed as disabled under the Equality Act 2010, reprimanding him for absences secondary to his chronic illness would be unlawful."*

68. The Claimant copied his correspondence to both Mr Griffith and Simon Best who was at the time, the Respondent's CEO. In response to the Claimant's demanding email dated 22 December at 16:02 on 23 December 2020 Mr Price wrote to the Claimant to warn him not to continue to copy in these senior managers to his email correspondence [169]. Mr Price warned the Claimant that the Respondent had a clear code of conduct setting out clear expectations. The Claimant was asked to be mindful of this as breaches could result in disciplinary action. Mr Price also pointed out that failure to comply with welfare calls could result in disciplinary action. The Claimant was given 4 January 2021 as the next date for his welfare call, and it was proposed that the Occupational Health report would be discussed as well [173]. The Respondent's handbook referred to the right to refer a grievance to the managing director. Mr Harris confirmed in evidence that at that time the material time, the managing director was Mr Best, the CEO. However, we find that the warnings contained in the letter were reasonable. The Claimant had utilized the Respondent's process and had exhausted it, so far as the written warning and the discretionary CSP were concerned. For the Claimant to continue to write to the CEO and Mr Griffiths was an unreasonable attempt to bypass the Respondent's established processes and procedures and bully the Respondent to revise their decisions.

69. Despite Mr Price's communication with the Claimant on 23 December 2020, by letter dated 23 December 2020, the Claimant wrote to Mr Griffiths about his outcome letter dated 22 December 2020 of the Second Grievance [175]

70. On 4 January 2021, however Mr Price was unable to make contact with the Claimant at the prescribed time and texted the Claimant to call him back [179]. The Claimant does call Mr Price back, and they have a call on 4 January 2020.

71. The Claimant said in his witness statement that it was during the welfare call on 4 January 2021, that he asked Mr Price to remove his written warning as a reasonable adjustment.

72. By email dated 5 January 2020 [179] Mr Price proposed to the Claimant a return to work plan ("Proposal") that includes the following:
"1st week return to work- 2 duels per day- 11am until 5pm
2nd week return to work- 2 duels per day- 11am until 5pm
3rd week return to work- 3 duels per day- 9am until 6pm
4th week return to work- 3 duels per day- 9am until 6pm
5th week return to work to full contractual duties and hours."

73. Mr Price confirmed in the 5 January 202 email that the Claimant had agreed to speak to him about his Occupational Health report on the phone on 8 January 2021. Mr Price also confirmed that the removal of the Claimant's written warning is not considered a reasonable adjustment. [179]. At no point in the letter is the removal of the written warning a condition attached to the proposed Proposal. Mr Price says that any further attempt to ask for the written warning to be reconsidered, removed, or looked again would be considered unacceptable conduct and could result in disciplinary action.

74. In response to Mr Griffiths' request in his 22 December 2020 letter to the Claimant to provide him with any more information that he wished to rely on, the Claimant wrote directly to Mr Griffiths by email dated 5 January 2021[181] saying that he will provide a report from his GP that he is waiting for.

75. On 6 January 2021, the Claimant wrote to Mr Price stating that Occupational Health say that his migraines constitute a disability [182]. The Claimant complained that all of Mr Price's communications with him to date were "hostile" [182] the Claimant asked for a postponement of the discussion about the Proposal and Occupational Health report until 15 January 2021 so that he could be in possession of his own GP report.

76. On 8 January 2021, Mr Price tried to call the Claimant [183]. However, the Claimant responded saying that he would speak to Mr Price on 15 January [184] as confirmed.

77. On 14 January 2021, the Claimant emailed Mr Price with a counter proposal ("Counter Proposal"). The Claimant's Counter Proposal as follows:

"*1st week return to work- 1 duel per day- 11am until 5pm*
2nd week return to work- 2 duels per day- 11am until 5pm
3rd week return to work- 2 duels per day- 9am until 6pm
4th week return to work- 2-3 duels per day- 9am until 6pm
5th week return to work to full contractual duties and hours- subject to and conditional upon OH report and recommendations.

In addition I would propose as recommended by OH and my GP that for the first week (and potentially second week), given the safety critical work I

undertake, I'm supervised as I believe this support would help with my self-esteem, confidence and anxiety [...] I would also request that a OH referral for a further assessment is made towards the end of week 4[….] as recommended by OH and my GP a stress risk assessment […..] I would also suggest given what has transpired for the company to consider mediation between myself, mark, nick and yourself this can be done internally, or we could consider an external provider."

78. The Claimant agreed in evidence that this Counter Proposal was sent at approximately 19:20 in the evening. The following morning, Mr Price responded to the Claimant's Counter Proposal saying "*due to your e-mail from last night I will have to postpone our meeting, I will contact you soon with a new time"* [187]

79. By text on 19 January 2021 Mr Price rescheduled the meeting for 29 January 2021 at 11:00 AM [188]. By email dated 22 January 2021 Mr Price told the Claimant he had reviewed the Claimant's Counter Proposal and did not consider it to be reasonable, and therefore could not agree to it. The Claimant's Counter Proposal was not rejected on or about 15 January 2020, but on 22 January 2020. It is also at that stage that Mr Price says given the amount of time that the Claimant had been off work, the Claimant was invited to attend a capability hearing and the letter of invitation was attached to that e-mail. [192-193]. The Claimant repeatedly said that he did not understand why the meeting turned from an informal meeting as initially arranged. It was certainly the case that Mr Price's letter dated 23 December 2020[170] implied that a discussion of the Occupational Health report would be informal because Mr Price suggested that it be on the telephone during a welfare call. However, we find that Mr Price never said that the Claimant would have an informal meeting about the Occupational Health report.

80. By letter dated 22 January 2021, the Claimant was invited to attend a capability hearing at 14:30 by Google Hangout. The Claimant was warned in the letter that the outcome of the meeting could result in the Claimant's dismissal with notice. [192]. Ms Jordan's evidence which we accepted was that after the Claimant refused to communicate via phone, she advised that it best to make proceedings formal to ensure a robust process. We find that the capability process was instigated by the Respondent at this stage as the Claimant had by then been off work for 2 months without an agreed return to work plan in place.

81. By letter dated 26 January 2021 to Mr Price, the Claimant objected to being asked to attend a capability meeting. The Claimant mentioned his tribunal claim in that letter. The Claimant says in that letter that the Respondent rejected his Counter Proposal outright and retracted the Proposal. However, we find this was not true, at that stage the Respondent had not retracted the Proposal and at no time later did the Proposal come off the table. Mr Price confirmed to the Claimant in the capability hearing on 29 January that the Proposal was still on the table. [236].

82. The notes of the meeting on 29 January 2021, suggest that was it conducted professionally. When asked in evidence what was hostile about the meeting the Claimant could not point to anything that we could find amounted to hostility or intimidation in the meeting. We find that the meeting was not hostile nor intimidatory.

83. By letter dated 3 February 2021 [199-203] the Claimant was dismissed from his employment. The reason given was *"I have found that the recommendations and office of support that have been put forward to you have been entirely reasonable and compliant with the recommendations set out by Occupational Health. On the other hand the counter proposals which you have made are not reasonable as they would have a material financial impact on the business, specifically your request to be paid in full for a five week phased return plan, during which time you would only be undertaken an average of two dual fuels installs per day. This level of productivity for this length of time is not financially sustainable for the business […..] taking into consideration the medical evidence presented in the Occupational Health report, your testimony during the hearing on 29 January 21 and considering the active written warning on file for reason of excessive absence have come to the decision to terminate your employment on the grounds of ill health capability an excessive absence."* [206]. We accept Mr Wynn's evidence that Mr Price had been informed of the Claimant having brought ACAS early conciliation and a tribunal claim by the time of the dismissal letter. Neither the notes nor the letter refer to any discussion by the Claimant about his grievances or his tribunal claim with Mr Price.

84. In the letter of dismissal by Mr Price dated 3 February 2021, the reason why the Claimant's request for reasonable adjustments were not made is set out as *"it is not reasonable for the business to make these adjustments on a longer term basis. This is because in doing so, the business would incur significant costs associated with your role and underperformance." [*202]. It was stated in the letter that the original proposed phased return to work plan always remained available to the Claimant. However, as of the date of the capability hearing on 29 January 2021, the Claimant had not accepted the Proposal. Mr Price said in the letter that he had only just become the Claimant's line manager and so mediation was not appropriate. The Claimant did send a letter dated 3 February 2020 for the urgent attention of Mr Price. However, in the letter the Claimant argued for his Counter Proposal and did not at any point accept the Respondent's Proposal.

85. We find that the Respondent did properly consider the Claimant' Counter Proposal. Mr Price set out in his letter of outcome that the stress risk assessment could be done on the Claimant's return to work and why the rest of the Proposal was not acceptable. We find that mediation was considered and that it was decided that it was not appropriate. We fail to see what mediation could have achieved in this context. The Claimant did not want to accept the Respondent's position and had utilized the Respondent's processes to express his disappointment and sense of injustice. The Claimant wanted his way or no way at all. The Claimant's Counter Proposal was not based upon any medical evidence that he could point to and so was based upon his desire and wants and non disability related issues, like the effect on the Claimant of his anti depressants. Even the GP report dated 22 December made it clear in the report that it was the Claimant asking for the H&S risk assessment. [280]

86. The Claimant appealed the decision to dismiss by e-mail dated 7 February 2021. The Claimant said the dismissal was flawed discriminatory and the process a sham. The Claimant said he was not rejecting Mr Price's Proposal. [211] However, the Claimant did not say he was accepting the proposal. By e-mail 15 February 2021 the Claimant chased up his appeal against dismissal

[212]. By letter dated the 22 February 2021, the Respondent acknowledged the Claimant's appeal and apologised for the delay in responding. The appeal was scheduled for 2 March 2021 with Mr. Harris. However, on 2 March 2021 the Claimant did not dial into the appeal hearing, and due to unforeseen circumstances, the Respondent had to reschedule the appeal meeting with a new chair of the appeal, Ms Louise Patton, because Mr Wynn had taken the view that it was not appropriate because of Mr Harris prior involvement, for him to be the chair of the appeal. Ms Patton was an independent person whom the Claimant had never met before.

87. On 4 March 2021 Ms Michelle Benford of HR, tried to contact the Claimant to reschedule the appeal meeting and wrote to the Claimant by letter dated the 4 March rescheduling the appeal for 10 March 2021. By e-mail dated 8 March 2021 the Claimant confirmed his attendance for the appeal on the 10 March 2021. The appeal hearing took place on the 10 March 2021. In total there was a delay of 6 working days. Again, there was no discussion in the appeal about the Claimant's grievances or Tribunal Claim. We find that a delay of 6 working days is not an unreasonable delay. There was no evidence that Ms Patton knew about the Claimant's Tribunal claim or his grievances. We find that she did not.

88. At the appeal the Claimant was asked about the Proposal [240]. However, the Claimant did not accept it. By letter 25 March 2021, Ms Patton rejected the Claimant's appeal against dismissal and upheld the Claimant's dismissal. [221-224]. Ms Patton explained in the appeal outcome that the reason for the delay was that Mr Harris could not reschedule the appeal within a reasonable period of time and so it was thought best to try and find another chair for the appeal who could hear the appeal within a reasonable period of time. We accept that this was Ms Patton's understanding of the reason for the delay.

89. The Respondent found the Claimant to be combative in the way he went about making his complaints. They found him to be demanding and unreasonable. We find that the Claimant's demands for responses in 48 hours only in writing were not reasonable. By way of way of example, the Claimant would make statements suggesting that if his demands were not met he would take further action, though he did not say what this further action was going to be [146].

90. We find the Claimant sent 35 pieces of correspondence (that we were provided with) to the Respondent. The Claimant sought sympathy for his condition but did not seem to think that he needed to give sympathy to other employees in HR or management. For example, Ms Jordan did say that she had a bereavement and so she had to take some unexpected compassionate leave and she would have the appeal outcome of his written warning to him the following day. The Claimant's response was "I appreciate you had a bereavement last week however if you could review it today and send to me COB today immediately."

91. It was also the case that whilst the Claimant accepted in evidence Mr Harris' hospitalisation as the reason for the delay in respect of appeal/grievance hearing in November 2020, he was still pursuing a harassment claim in respect of this alleged unreasonable delay. The Claimant was also saying that he wouldn't have a conversation unless he could record it [173]. The Claimant refused to speak to a new manager who he had no relationship with, who was seeking to have regular fortnightly welfare calls as "hounding" him, and at the

same time he was complaining to the Tribunal that he did not receive any welfare calls in period 30.10.20- 19.12.20. We find that the Claimant's conduct was of more concern to the Respondent in the manner in which the Claimant pursued his complaints against the Respondent rather than the complaints in themselves.

92. We were conscious that all the events that took place that the Claimant is complaining about, took place during the height of the COVID pandemic. The impact of the pandemic exacerbated an already heavy case load for the Claimant's colleagues and the managers particularly where there would have been a large number of people furloughed and out of the business due to shielding etc.

Relevant Law

Burden of Proof in Discrimination

93. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination.

94. The burden of proof is set out at Section 136 Equality Act 2010 ("EQA 2010"). Section 136 EQA 201 says:-

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

95. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of any other explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough.

96. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means "a reasonable Tribunal could properly conclude from all the evidence".

97. As set out above at the first stage the Claimant must prove "a prima facie case". "However, the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more,

sufficient material from which a tribunal could conclude that there has been discrimination. Each case is fact specific, and it is necessary to have regard to the totality of the evidence when drawing inferences. Once the burden of proof has shifted it is for the Respondent to show that the relevant protected characteristic played no part whatsoever in its motivation for doing the act complained of.

98. It is, however, not necessary in every case for the tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal pointed out in Laing v Manchester City Council [2006] IRLR 748 "If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever".

99. This approach to the burden of proof has been confirmed by the Court of Appeal in Ayodele v City Link and another 2017 EWCA Civ 1913.

Harassment

100. Section 26 Equality Act 2010 ("EQA 2010") sets out the legislative framework for 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
i. (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—
(c) the perception of B;
(d) the other circumstances of the case;
(e) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are— disability;"

101. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find and employer liable for harassment: a. Did the employer engage in unwanted conduct, b. Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, c. Was that conduct on the grounds of the employee's protected characteristic?

102. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant himself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so many cases.

103. Not every comment that is slanted towards a person's disability constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of

hypersensitivity by imposing liability on every unfortunate phrase (Richmond Pharmacology v Dhaliwal).

104. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

105. Although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so.

106. An action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. (Section 212 EQA 2010). This is because the definition of detriment excludes conduct which amounts to harassment.

107. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"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))"*

Direct Discrimination

108. Section 13 EQA 2010 sets out the statutory position in respect of claims for direct discrimination because of disability.

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."

109. The comments of Court of Appeal in Madarassy v Nomura International plc [2007] EWCA 33, albeit a sex discrimination case under the pre Equality Act 2010, Sex Discrimination Act 1975, are still very much applicable to direct discrimination claims. Mummery LJ giving judgment says at paragraph 56, *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient*

material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

110. It can be appropriate for a Tribunal to consider in a direct discrimination case, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

111. A Tribunal is not required to infer from evidence that an employer has behaved unreasonably, that there has been less favourable treatment because of disability. It was established in the House of Lord authority of Glasgow City Council v Zafar [1998] ICR 120, a pre 2010 race discrimination case, that it cannot be inferred, nor presumed, from the fact an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances.

Knowledge of Disability

112. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (Jennings v Barts and The London NHS Trust UKEAT/0056/12). In that case the Employment Appeal Tribunal suggested that an employer should concentrate on the impact of the impairment, not on any particular diagnosis.

113. In Gallop v Newport City Council [2013] EWCA Civ 1583, the Court of Appeal highlighted that it is vital for a reasonable employer to consider whether an employee is disabled and form their own judgment on this issue.

114. Langstaff P in Donelien v Liberata UK Ltd UKEAT/0297/14 (affirmed by the Court of Appeal 2018 IRLR 535) warned that when considering whether a respondent 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden is on the employer to show it was unreasonable to have the required knowledge.

Indirect Discrimination

115. *Section 19 EQA* 2010 *sets out the statutory provision in respect of indirect discrimination as:*

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—
(a) […]
disability;"

116. Baroness Hale in Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558, provides helpful guidance in approaching indirect discrimination claims which can be summarised as:

(1) indirect discrimination does not require an explanation of why a particular PCP puts one group at a disadvantage when compared with another.

(2) indirect discrimination does not require a causal link between the less favourable treatment and the protected characteristic (being concerned with 'hidden barriers which are not easy to spot').

(3) The reasons why one group may find it harder to comply with a PCP are many and various; they and the PCP itself are ultimately 'but-for' causes (in that if they are removed the problem is solved).

(4) There is no requirement that every member of the group sharing the protected characteristic be at a disadvantage – in Essop some BME/older employees will have passed the assessment, just as some women chess players will have done well in scoring.

(5) The factual disparity of impact (without the need for establishing its reason) can be established by statistical evidence (as the SDA 1995 and the RRA 1976 had made clear on their wording).

(6) It is always open to the Respondent to show that its PCP is justified. This is an essential part of the action for indirect discrimination, which should not be underplayed by Tribunals; it involves no stigma or shame on the employer relying on it as a defence.

Justification in respect of indirect discrimination

117. When considering the defence of justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business needs of the Respondent.

118. As to justification, in paragraph 4.27 of the Equality and Human Rights Commission Code of Practice on Employment (2011) ("Code") considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages: -

119. The first stage is: is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

120. if so, the second stage is: is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

121. Having regard to the first stage, there must be a legitimate aim being pursued (which corresponds to a real need of the Respondent), the measure must be capable of achieving that aim (i.e., it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

122. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say at paragraph 4.31: -

"*although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

123. In Chief Constable v Homer 2012 ICR 704 Baroness Hale explained that to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. It is necessary to weigh the need against the seriousness of the detriment.

124. The burden is upon the employer to show that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business, but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test. The Court of Appeal in Hardy & Hansons plc v Lax [2005] IRLR 726 clarified it is for the tribunal to weigh the reasonable needs of the employer against the discriminatory effect of the measure, and to make its own assessment of whether the former outweighs the latter.

125. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically refer to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

126. At paragraphs 23 & 44, HHJ Eady QC in the EAT decision of City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18 elicits from the authorities the point that in striking the balance between the discriminatory effect of a measure and the reasonable needs of the undertaking, it is an error to consider only the impact of the PCP on the individual.

127. In Chief Constable of West Yorkshire Police and West Yorkshire Police Authority v Homer [2009] IRLR 262 the EAT state "*… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions".*

Unfavourable treatment because of something arising in consequence of disability

128. Section 15 of EQA 2010 states: -

(1) "A person (A) discriminates against a disabled person (B) if –
A treats B unfavourably because of something arising in consequence of B's disability and
A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Subsection (1) does not apply if A shows that A did not know and could not have reasonably been expected to know, that B had the disability."

129. The correct approach when determining section 15 EQA 2010 claims is set out in the EAT decision of Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31.

130. The approach is summarised as follows:

(a) The Tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

(b) The Tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

(c) Motive is irrelevant when considering the reason for treatment;

(d) The Tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

(e) The more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

(f) This stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

(g) Knowledge is required of the disability only, section 15 (2) EQA 2010 does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

131. In the EAT case of Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P, summarises the approach as, *"[t]he current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something," and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."*

Justification defence under section 15 EQA 2010

132. Having already set out the position on justification under section 19 EQA 2010 indirect discrimination above. The principles espoused in the abovementioned section apply equally to justification under section 15 EQA 2010.

133. In the case of indirect discrimination, it is the provision, criterion, or practice (PCP)] which needs to be justified whereas in the case of discrimination arising out of disability it is the treatment.

134. Although it is worth noting that unlike section 19 where knowledge of the disability is not a necessary component, knowledge of the disability is a requirement to justify section 15 discrimination arising from disability claim.

Reasonable adjustments

135. The duty to make reasonable adjustments is set out in sections 20 – 21 EQA 2010, and in Schedule 8 (dealing with reasonable adjustments in the workplace).

136. The pertinent parts of Section 20 says: -

"(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."

137. Section 21 EQA 2010 establishes that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

138. Therefore, the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20) (see Wilcox v Birmingham CAB 2011 EqLR 810)

139. In the case of Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013]UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

140. The statutory duty is for the Respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" therefore imports an objective standard (see Smith v Churchills Stairlifts plc [2005] EWCA 1220.)

Victimisation

141. *Section 27 EQA 2010 sets out the relevant statutory provisions in respect of claims for victimisation.*

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

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

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

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual."

142. The issue of causation is fundamental to proving victimisation. The detriment relied upon cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail.

143. In the seminal case of Nagarajan v London Regional Transport 1999 ICR 877, HL*:* The House of Lords ruled that victimisation will be made out, even if the discriminator did not consciously realise that he or she was prejudiced against the complainant because the latter had done a protected act.

144. Lord Nicholls put it like this in Nagarajan *"Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances".*

145. The Code explains that at paragraph 9.11- 9.12.

"9.11 Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.

9.12 There is no time limit within which victimisation must occur after a person has done a protected act. However, a complainant will need to show a link between the detriment and the protected act."

146. A considerable length of time may elapse between the protected act being done and the detriment being suffered. (See Chambers v Abbey National plc ET Case No.2200567/98).

147. If the detriment is inflicted not because they have carried out a protected act but because of the manner in which they have carried it out. In the EAT decision of Martin v Devonshires Solicitors 2011 ICR 352, EAT. Mr Justice Underhill as he was then, expressed the view, at paragraph 22.

"The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for

the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint."

148. Underhill J recognised that the distinction made is a finely spun one but maintained that such fine lines have to be drawn *"if the anti-victimisation provisions, important as they are, are to be confined to their proper effect and not to become an instrument of oppression"* (see paragraph 25).

149. This distinction was approved by Underhill LJ when in the Court of Appeal case of Page v NHS Trust Development Authority 2021 ICR 941, at paragraph 55 where he reiterated the principle at paragraph 55 that "*a complaint of discrimination does not constitute victimisation if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable"*

Amendments

150. When considering an application for an amendment irrespective of the party making the application, the tribunal should have regard to the well rehearsed factors of nature of the amendment application, time limit issues and the manner of the application and the timing and manner of the application itself, espoused in the seminal case of Selkent Bus Company Ltd v Moore EAT/151/96. However, these are not the only factors that the Tribunal should have regarded to. A Tribunal should take into account all relevant factors and ignore all irrelevant factors.

151. As was emphasised in Vaughan v Modality UKEAT/0147/20/BA HHJ Tayler in the Employment Appeal Tribunal set out the approach:

(a) firstly, consider Selkent. Selkent is still good law and must always be considered.

(b) Secondly Selkent does not establish a mere checklist that would supply the judge with the outcome, and nor did it contain an exhaustive list of the factors that might be relevant.

(c) As per Selkent, it is always important for the judge to consider the nature of the amendment application, time limit issues and the manner of the application and the timing and manner of the application itself. However, it is important to bear in mind that doing so is merely part of the overall process of taking into account all relevant matters when deciding where the balance of injustice and hardship lies, and these factors are not, in themselves the test for whether to grant the amendment or not.

(d) As per Selkent, the nature of the amendment, time limit issues, and timing and manner of the application are not the only things that might be relevant.

(e) The ultimately the test that the judge must apply is to decide whether the balance of injustice and hardship is in favour of allowing the amendment or of refusing it.

152. Allowing an amendment for a Claimant will almost certainly have at least some degrees of injustice and hardship to the Respondent. Whereas refusing to allow an amendment to the claim is almost certainly going to have some degree of injustice and hardship to the Claimant. It is therefore a balancing exercise.

Submissions

153. At the end of day 4, the parties were given 30 minutes each to give submissions. The Claimant gave oral submissions that can be summarised as: the Respondent was deaf to the Claimant and tried to minimize the Claimant's disability. The Respondent did not provide evidence from key witnesses Mr Nicolaou and Mr Price, adverse inferences should be drawn. The Claimant was a believable witness. The Respondent did not present proper evidence of the financial implication of the Claimant's Counter Proposal. Mr Harris was not a helpful witness and threw HR under the bus. Mr Wynn was certain the Claimant not disabled and was the driving force so that explains why the Claimant dismissed. Harassment happened as comments from Mr Nicolaou were said. The Respondent had knowledge of Claimant's disability from the emails and medical notes. The Respondent's approach to the Claimant was one of distain and so everything that flowed from that was discriminatory and unwanted conduct. The Respondent failed in their duty to show the refusal to make adjustments is a legitimate aim. The PCP put the Claimant at a disadvantage. The Claimant's grievances were not heard. Tribunal should find in favour of Claimant.

154. The Respondent gave some oral submissions which lasted approximately 10 minutes which were in summary the Tribunal heard a lot of evidence and should consider it in respect of all the heads of claim. The Respondent put the majority of their submissions in writing, which we considered.

Analysis & Conclusions

155. The Tribunal spent a considerable period of time considering the evidence that had been led and the submissions made by both parties which were fully taken into account in our analysis and conclusions.

156. We considered each issue with reference to the issue number in the list of issues. We answer the issue below each of the issue headings. We repeated this so far as it relevant in respect of each complaint.

157. Whilst it was not helpful that 2 key witnesses, Mr Nicolaou and Mr Price were not in attendance, we did not conclude adverse inferences should be drawn from their absence. We accepted that Mr Nicolaou & Mr Price could not be contacted, and both had left the Respondent's employ.

<u>When did the Respondent have knowledge of the disability?</u>

158. This is not a case where the Respondent did not investigate the question of disability. Initially, the Claimant stated he was not disabled in his application form but made constant reference to his long term chronic condition of migraines through his trainer and to HR but did not say he was disabled. Although the Respondent was unaware of the Claimant's negative disability

status on his application form until January 2021, the Claimant's condition was acknowledged by HR in the first instance and then recorded on the return to work documentation. At the Claimant's initial capability hearing on 29 October 2020, Mr Nicolaou asked the Claimant about his condition. The Claimant at that time was saying that he only experienced migraine attacks at 4- 6 week intervals, he had not had an attack at work and there was nothing the Respondent could do to support him.

159. We have sympathy for the Respondent's position regarding disability at that time, as the Claimant only had 2 absences in relation to migraines amounting to 3 days in total. It would have been very difficult to have determined at that stage that the Claimant was disabled. However, the position is different once the Respondent received the GP medical report dated 22 December 2020 [280] which says given the Claimant's position he would be classed as disabled, and the Occupational Health report dated 22 December saying the Claimant would probably fall within the scope of the disability legislation. Coupled with the fact that by then the Claimant had been off work for 2 months and the Claimant's sick certificate dated 30 October 2020 covering the period of 30.10.20-30.11.20 and dated 27 November 2020 covering the period of 27.11.20-31.12.20 [279], all mention migraines.

160. We had no evidence that anyone read the Occupational Health report on 22 December or what time it was sent on 22 December and so we conclude that it is only from 23 December 2020 the Respondent was put on notice that the Claimant was disabled. The receipt of the GP report did not affect this date of knowledge as it was accepted by the Claimant that he did not send the GP report to the Respondent until 14 January 2021.

161. We inevitably disagree with the Respondent's position on why they did not accept that the Claimant was disabled after 23 December 2020 following receipt of the OH report. The logical consequence of Mr Wynn's position is that every employer would not need to treat an employee as disabled until they had an Employment Tribunal finding saying that the employee was disabled. That cannot be the right and indeed it is not in accordance with principle in Donelien v Liberata UK Ltd that it is for the employer to demonstrate that it was unreasonable for the Respondent to have the required knowledge of disability. It was a matter of fact for the Tribunal to determine and the Respondent did not convince us that it was unreasonable for them to have known the Claimant was disabled on or after 23 December 2020.

Harassment

We considered whether the conduct referred to in issue 15 of the list of issues had the purpose or (taking into account Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Claimant. We considered whether the conduct was unwanted and whether it related to the Claimant's disability. We also considered whether where we found that that comments were made, and unwanted conduct took place we applied the burden of proof provisions under s. 136 EQA 2010 to determine whether the conduct was related to the Claimant's disability. We deal with all of these issues under each specific allegation.

Issue 15.1. On 22 October 2020, Mr Nicolaou refused the Claimant's holiday request.

162. We found that the refusal of the holiday request was by Rota Management due to workforce availability. The Claimant's holiday request was not refused on 22 October by Mr Nicolaou. Mr Nicolaou did not refuse the Claimant's request but actually granted it. In those circumstances, it was not unwanted conduct and Mr Nicolaou did not harass the Claimant within the meaning of section 27 EA 2010.

Issue 15.2. On 22 October 2020, Mr Nicolaou requested evidence of the Claimant's medical appointments.

163. We found that Mr Nicolaou did request evidence of the Claimant's medical appointments. However, we conclude that the request was for legitimate reasons arising out of a business need to ensure that there was sufficient manpower available and not related to the Claimant's disability. We consider it relevant that the Claimant himself did not at the time say he did not need to provide the medical evidence to Mr Nicolaou. We conclude that the conduct was not unwanted. The Claimant was not in any event attending medical appointments but a therapist appointment which could not be characterised as medical. We do not consider that the request had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Issue 15.3. On 23 October 2020, Mr Nicolaou commenced the capability process against the Claimant.

164. Mr Nicolaou did commence the capability process under HR advisement. However, we were convinced the reason was because Mr Nicolaou was concerned about the Claimant's performance as he believed the Claimant was not pulling his weight and was clocking off early. We consider that the conduct was not related to the Claimant's disability, it was legitimate action in accordance with the Respondent's sickness absence policy.

165. We therefore concluded that the Claimant had not made a prima facie case and the conduct was not related to the Claimant's disability.

Issue 15.4. On 27 October 2020, Mr Nicolaou commented, "Zubair just to let you know this does not look like a medical clinic it looks more like a massage parlour".

166. We found that Mr Nicolaou said those words on 27 October 2020, but we consider the comment was not related to the Claimant's disability. The Claimant described it as a medical appointment, but it was not. It was alternative therapy treatment. Mr Nicolaou needed to justify his decision to over rule Rota Management. In that context the comment did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Issue 15.5. On 29 October 2020, Mr Nicolaou issued the Claimant with a written warning under the capability process.

167. Even though the Claimant was issued with a written warning at that point including the Claimant's 2 migraine absences and this was unwanted conduct, we accept that Mr Nicolaou believed the Claimant had a genuine condition, but that he was receiving a warning because of the impact of the Claimant's absence on the business and the team. Mr Nicolaou said that the Claimant's absence could result in a compensation pay out by the business and we accept all of this as an explanation that was not related to the Claimant's disability. The purpose of the warning was because of the impact of the Claimant's absence on the team. We do not therefore conclude that the decision had the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

Issue 15.6. On 29 October 2020, Mr Nicolaou commented, "there is no point walking up and down feeling sorry for yourself at home, I advise you to get to work asap".

168. We have found that Mr Nicolaou did say these words and we consider it was unwanted conduct, but we do not accept it was said with ridicule and intention to belittle. We consider that Mr Nicolaou said it to encourage the Claimant to stay at work and not dwell on the written warning. We conclude that the words did not have the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

Issue 15.7. On 29 October 2020, the Respondent threatened the Claimant over any further absences.

169. We considered that there were no threats over further absences. We found it was not a threat to remind the Claimant of the sickness absence policy. Reminding the Claimant was the purpose the comments in the letter about the sickness absence procedure. Mr Nicolaou did not mention the absence that would trigger the sickness absence policy had to be due the Claimant's migraine. Mr Nicolaou was following procedure set out in the sickness absence policy. We therefore conclude that this reminder was not related to the Claimant's disability. We therefore conclude that the words did not have the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment.

Issue 15.8. The Respondent failing to consider the Claimant's Grievance.

170. It is the case that the Respondent did fail to consider the Claimant's grievance, and we accept that it was unwanted conduct. However, we consider that the purpose of this failure was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment as the intention was not to ignore the Claimant's grievance. We considered that this failure was one of incompetence and lack of attention to detail and therefore was not in any way related to the Claimant's disability. We conclude that the failure did not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Issue 15.9. The Respondent's refusal to provide company sick pay.

171. The Respondent was under no obligation to pay the Claimant company sick pay. The letter from Mr Harris informing the Claimant of refusal was professional. Refusal of payment may have been unwanted conduct, but its purpose was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment and nor did it objectively have this effect. The refusal was not related to the Claimant's disability, the refusal was because the Claimant's department Installation Services did not have CSP.

Issue 15.10. On 10 December 2020, the Respondent rejecting the Claimant's Appeal against the capability warning.

172. Although the Respondent did reject the Claimant's appeal which was unwanted conduct, it did disregard the Claimant's absences in relation to his migraines. The reason for rejecting the Claimant's appeal did not relate to the Claimant's disability. The reason was because the sickness absence policy stated that 4 days absence could result in a warning and so Mr Harris was following the procedure in upholding the capability warning as the disciplinary procedure allow a written warning where the Claimant's conduct fell below the required standard. The standard applied to the Claimant was the 4 days of absence set out in the sickness absence policy. The purpose of the rejection was not violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment but to follow the sickness absence procedure. Neither did the rejection have the effect objectively.

Issue 15.11. The Respondent's unreasonable delay in determining the Claimant's Appeal against the warning.

173. The Respondent's delay in determining the Claimant's Appeal against the warning was from 30 October 2020 when the Claimant submitted his appeal to 2 December 2020 when his appeal was heard. Most of that delay was due to Mr Harris' unexpected hospitalisation it was not related in any way to the Claimant's disability. In any event in the context of the pandemic and the constraints of the business we do not consider that the delay was unreasonable, let alone had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment or for the same reason had that effect.

15.12. The Respondent's failure to arrange an Occupational Health referral prior to the Claimant's Appeal.

174. The failure was due to the competing demands of Ms Jordan's role and was not related to the Claimant's disability. There was no evidence before us, that this was unwanted conduct or that it had purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. It did not amount unlawful harassment.

Issue 15.13. The Respondent's failure to consider the Claimant's further Grievance dated 15 December 2020.

175. We do not conclude that the Respondent failed to consider the Claimant's grievance of 15 December 2020. Thus, it follows there was no unwanted conduct. Mr Griffith addressed all the matters in his 22 December 2020 letter.

In any event such a failure would not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Issue 15.14. Mr Hayat ridiculing the Claimant for his disability on 15 December 2020.

176. We found that Mr Hayat did not ridicule the Claimant for his disability and so there was no unwanted conduct related to the Claimant's disability.

Issue 15.15. On 23 December 2020 and 5 January 2021, the Respondent sending the Claimant oppressive and intimidating letters threatening disciplinary action.

177. We found that Mr Price did give the Claimant warnings about disciplinary action in the letters of 23 December 2021 and 5 January 2021. However, we do not conclude either piece of correspondence contains anything oppressive or intimidating. The letters constituted unwanted conduct. The 23 December 2020 letter was in response to the 22 December 2020 16:02 email from the Claimant making demands on the Respondent [166]. The 5 January letter was telling the Claimant quite reasonably that he has utilised the process and that the process was at an end and continually challenging the process was not acceptable. There has to be an end to the process, and we found it was not reasonable for the Claimant to bully the Respondent by constantly seeking to revisit an already determined issue. We considered it was proper for the Respondent to warn the Claimant not to contact senior members of staff in this context. The Respondent's warning did not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. It did not amount unlawful harassment.

Issue 15.16. On 22 December 2020, Mr Griffiths concluding that the Claimant was not a disabled employee under the Equality Act 2010.

178. At the point Mr Griffith wrote the 22 December 2020 letter, neither he nor Mr Wynn who advised him on the letter had seen the Occupational Health report or the Claimant's GP report dated 22 December 2020. The Respondent did not have knowledge of the Occupational Health report until 23 December. It was unwanted conduct, but it was not unlawful harassment for the Respondent to have expressed this view of the status of the Claimant's disability at the time it and did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.17. The Respondent's failure to check upon the Claimant's welfare during the period 30 October 2020 to 22 December 2020.

179. We consider that it was an oversight. We do not know when Mr Nicolaou left so it was difficult to determine whether there was a gap where the Claimant did not have a dedicated line manager which is why there were no welfare calls. In any event the Claimant did not complain about the absence of calls and when welfare calls were instituted the Claimant said he regarded them as hounding. In those circumstances the absence of calls was not unwanted conduct. A responsible employer would and should check on the welfare of employees

who are off work. However, the failure to check the Claimant did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.18. The Respondent failing to exercise discretion and thereby not paying the Claimant during his absence between 30 October 2020 and 3 February 2021.

180. We recognise the Respondent's exercise of discretion was not exactly the same as the refusal to pay CSP. However, we consider the conclusions in respect of issue 15.9 are equally applicable to this issue. There is no reason to believe that the Respondent would have exercised their discretion to someone who did not have the Claimant's disability. We accepted Mr Harris' evidence that CSP did not apply in the Installation Services department as the reason why the Respondent did not exercise its discretion. The Respondent's failure did not amount to unlawful harassment.

15.19. On or about 15 January 2021, the Respondent's unreasonable rejection of the Claimant's proposals for a phased return to work.

181. We conclude that the Claimant's Counter Proposal was not reasonable in light of the Respondent's business needs. Whilst the rejection of the Counter Proposal was unwanted conduct, it was not based on medical evidence. Whilst the Respondent's proposal had taken into account the Claimant's medical evidence and the Occupational Health report. The refusal of the Counter Proposal did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.20. On or around 15 January 2021, the Respondent cancelling the informal Back to Work meeting.

182. The informal back to work meeting was cancelled because the Claimant had entered into long term absence. The sickness absence policy provided for the investigation of 4 week or more periods of absences, which was considered a period of long term absence. The Claimant was never promised an informal meeting and Ms Jordan decision to formalise matters was not related to the Claimant's disability. Notwithstanding, the cancellation was unwanted conduct. The Respondent had made it clear the issue of return to work would be discussed at the formal capability meeting. The cancellation of the informal meeting did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.21. On 22 January 2021, the Respondent instigating the formal capability process.

183. The Claimant's long term absence had triggered the sickness absence policy and so it was a reasonable decision to instigate the formal capability process. It was unwanted conduct. The instigation of the formal capability process did not automatically mean the Claimant would be dismissed. At that stage, the Respondent was trying to get the Claimant back to work. The instigation of the

formal process did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.22. On 29 January 2021, the Respondent conducting an intimidatory and hostile capability meeting.

184. The notes of the 29 January 2021 meeting do not disclose anything intimidatory or hostile. The Claimant did not point to anything in the meeting that Mr Price said violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment. There was no evidence of unwanted conduct. We consider that there was no unlawful harassment.

15.23. The Respondent's failure to properly consider mediation and / or the Claimant's phased return to work proposals.

185. The Respondent did not fail to properly consider mediation. Mediation was not appropriate in the circumstances as Mr Price was a new manager starting afresh. The Claimant was unhappy about the Respondent's decisions. Mediation would have made no difference to that. We found that the dismissal letter does deal with issue of mediation and the Claimant's Counter Proposal. We consider that there was no unwanted conduct and the Respondent's failure would not in any event have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.24. On 3 February 2021, the Respondent dismissing the Claimant.

186. The dismissal was with notice and there was nothing in the minutes of the meeting on 29 January 2021 as already referred to that could amount to unlawful harassment. The dismissal was unwanted conduct. But the Respondent's letter dated 3 February making the decision to dismiss did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.25. The Respondent's unreasonable delay in hearing the Claimant's Appeal against dismissal.

187. We didn't conclude the period of 7 February- 10 March 2021 constituted an unreasonable delay considering this delay was during the pandemic. The delay was because the Claimant did not attend the original hearing initially on 2 March 2021 and that hearing had to be rescheduled with another chair. The delay was unwanted conduct; however, the delay was not related to the Claimant's disability. The delay did not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15.26. On 25 March 2021, the Respondent unreasonably rejecting the Claimant's Appeal against dismissal.

188. An independent person heard the appeal. The Claimant had not met Ms Patton before. The Claimant's appeal was not unreasonably rejected considering that the Claimant refused to accept the Proposal and return to work. The rejection

is unwanted conduct. However, in the circumstances we consider the rejection did not have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Direct discrimination

189. We conclude that the Claimant's treatment does meet that low bar of being capable of amounting to unfavourable treatment except in relation to issue 15.1 where it was not Mr Nicolaou who made the decision to refuse the annual leave request, issue 15.14 where we concluded that Mr Hayat did not ridicule the Claimant, and issue 15.13 where we found Mr Griffith did deal with the Claimant's grievance. There was no unfavourable treatment of the Claimant in relation to these 3 points.

190. The Claimant did not rely on a real comparator and so in considering whether there was unlawful direct discrimination we applied a hypothetical comparator.

191. We considered the burden of prove as to whether there were facts from which we could infer direct discrimination on the grounds of disability. We repeat our findings in respect of all the conclusions we have made in respect of the harassment claim. We did not conclude that in respect of all the allegations save issue 15.13 which we deal with below, that there were facts from which we could infer that the Claimant was treated less favourably by the Respondent as compared to a hypothetical comparator in no materially different circumstances to the Claimant. We do not consider any of the alleged acts were because of the Claimant's disability.

192. We do accept, however, that the Claimant has made a prima facie case in respect of the Respondent's denial that the Claimant was disabled. However, when we turn to the Respondent's explanation for that denial, we accept that it was not for a discriminatory reason. The reason for the denial was based upon carefully researched law and consideration of medical evidence coupled with Mr Wynn legal background and judgment. In those circumstances, the Claimant was not treated less favourably than a hypothetical comparator in no materially different circumstances to the Claimant because of his disability.

Discrimination arising from disability

193. We carefully considered the evidence before us and concluded that it had not. been established, on the balance of probabilities that the Claimant was treated less favourably because his absences or his need to attend a clinical appointment which arose from his disability.

194. We have concluded that the Respondent did not know about the Claimant's disability until 23 December. It was only following the Respondent's receipt the report from Occupational Health & the GP report could they have known that the Claimant was disabled. We consider that the Respondent could not have reasonably be expected to know before 23 December 2020 because if they had made further investigations, they would have found that the Claimant had said on his application form that he was not disabled.

195. Although this means that the Claimant's complaints in respect of issues 23.1, 23.2, 23.3, 23.4 all fail because they predate 23 December 2020, we must still deal with the Claimant's dismissal.

196. There is no causal connection between the Claimant's clinical appointment and the Claimant's dismissal and so there can be no discrimination here.

197. However, the Respondent did rely on the Claimant's absences from work by relying on the Claimant's written warning in respect of the decision to dismiss. But that written warning by the dismissal date only covered the 4 days for tonsilitis as the migraine absences were disregarded at the capability appeal. So, the Claimant's disability absences did not form part of the dismissal decision. Furthermore, the Respondent's dismissal letter dated 3 February 2021 said in relation to the decision to dismiss, in addition to the Claimant's written warning, it relied on the Claimant's testimony and Claimant's refusal to accept the Respondent's proposal. The Claimant's testimony was not related to his absence, and neither was the Claimant's refusal to accept the Respondent's Proposal. We conclude therefore that the reason for the Claimant's dismissal was not causally connected to the Claimant's absences and therefore there has been no discrimination. We did not need to consider if there was justification. The Claimant's claim for unfavourable treatment because of something arising in consequence of disability fails.

Failure to make reasonable adjustments

198. In considering issues 27-32, we have found that the Respondent did not know of the Claimant's disability until 23 December 2020, in those circumstances the Respondent was not under a duty to make reasonable adjustments by disregarding the triggers under the sickness absence policy until 23 December 2020. It therefore follows that when the Claimant was given a written warning on 29 October 2020 the Respondent did not know and could not have reasonably been expected to know that the Claimant was disabled and so the duty to make reasonable adjustments did not arise at that time.

199. We do not accept that the Respondent's sickness absence policy put the Claimant at a disadvantage from 23 December 2020. The sickness absence policy stated that absence directly due to disability will normally be disregarded. The Claimant requested repeatedly that the sickness absence policy triggers be disapplied in respect to his disability related absences and whilst they were applied initially on 29 October 2020, on appeal on 10 December 2020 those absences were disregarded. The only reason why the Claimant received the written warning was in relation to his 4 days absence for tonsillitis which the Claimant did not rely upon as a disability.

200. Even though the Respondent did not consider the Claimant to be disabled they made reasonable adjustments in accordance with their policy. They were under no duty under section 20 or 21 EQA to disregard the 4 days absence because the absence was not due to the Claimant's disability.

201. We understand that the Claimant feels aggrieved by the decision to issue him with a written warning in the first instance. Even having disregarded the migraines it does seem a little harsh that he should have been issued a written warning for a genuine reason for absence such as tonsillitis however, the

disability discrimination legislation requires different considerations.

Indirect Disability Discrimination

Issue 33. Did the Respondent have the PCP of a Managing Absence Policy which provided that fixed periods of absence would trigger a process of warnings and potential dismissal?

202. We conclude that the answer to issue 33 must be yes. There are fixed period of either 4 days or 3 incidences of absence in 6 months, which the policy says must be investigated. The Respondent then investigates the absences under the disciplinary policy.

Issue 35. If so, did the Respondent apply (or would the Respondent have applied) the PCP to people who are not disabled?

203. The Respondent did apply the PCP to employees who were not disabled. The triggers could be disapplied to employees who were disabled, but where the Respondent did not believe an employee to be disabled, the sickness absence policy triggers would be applied.

Issue 36. If so, did the PCP put persons who are disabled at a disadvantage when compared with persons who are not disabled in that they are more likely to trigger the absence managing process leading to warnings and ultimately dismissal?

204. Yes, we accept that the PCP as defined by the Claimant would put persons disabled at a disadvantage when compared to those who are not disabled. It is common sense that those who disabled are more likely to take more days off sick and so are more likely to trigger the absence managing process leading to warnings and ultimately dismissal.

Issue 37. If so, did the PCP put The Claimant at those disadvantages at any relevant time?

205. We are bound by EJ Quill's finding that the Claimant was disabled from 2008 on the basis of his migraines. [See paragraph 73 of the judgment with written reasons dated 14 December 2022, page 81] So for the period of 29 October-10 December 2020 the Claimant was at a disadvantage in that he had on record a written warning that included absences due to his disability of migraines.

Issue 38. If so, has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is the need to manage absence so as to ensure that it employs a stable workforce capable of carrying out its operations.

206. We concluded that the aim relied upon by the Respondent to ensure that it employs a stable workforce capable of carrying out its operations was a legitimate aim. We do consider that the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim. We considered whether there were less discriminatory ways to achieve the aim and we concluded that there was not. The Respondent was and is entitled to have a process in place that monitors the days and incidences of absences, and having regard to the

business needs of the Respondent put in place a process that allows them to investigate those absences. That is the purpose of the triggers. The Respondent's business was client driven where the number of duels completed had a direct effect the commercials of the business. Appointments were booked 6 weeks in advance and needed to allow for shrinkage. The Respondent needed its staff to attend as many appointments to complete duels as possible or the business could be fined up to 2% of turnover.

207. We consider that it was appropriate at the time, for Mr Nicolaou to give the Claimant a warning. We accepted Mr Nicolaou's reason for the written warning at that time. In the meeting on 29 October 2020 when Mr Nicolaou gave the written warning he said "the issue is that there is an undeniable impact on your colleagues and the business. The impact potentially on your colleagues we would attempt to reorganise the schedule or worst case scenario we are called to attend and have compensation payment out".

208. We next considered whether the Respondent took such steps as were reasonable to avoid the disadvantage and we concluded that the Respondent did take such steps to avoid the disadvantage. We considered the discriminatory effect of the PCP against the reasons for applying the PCP. The sickness absence policy provided for the triggers to be disapplied where the absences was due to a disability and was within expected standards. There was an appeal process in place in the disciplinary process, that allow such disability absences to be disregarded which could result in a written warning or a dismissal decision being overturned. Considering the fact that the issue of disability is something that employers need to investigate which does not always have clear answers and can be a moving target in many cases, we cannot see that how the Respondent would be able to employ a stable workforce capable of carrying out its operations without having in place triggers that could lead to warnings and ultimately dismissal by less discriminatory means. We considered that the Respondent showed the PCP was a proportionate means of achieving the legitimate aim.

Victimisation

209. We had to consider the Claimant's application for an amendment to add the protected act of the Claimant's second grievance on 15 December 2020.

210. The Claimant's application was the protected act relied upon was an act of discrimination and this is set out in paragraph 8, of the Claimant's particulars of claim dated 15 January 2020 [18]. The actual act of discrimination is referred to in paragraph 22 of the particulars of claim. With reference to the Selkent principles, the balance of hardship was in the Claimant's favour as it was a significant part of the Claimant's case. This was about the conduct of the Respondent towards the Claimant after making his second grievance, which led to him being dismissed. The Claimant pointed out there was already an allegation in relation to 2 November 2020. By allowing the 15 December 2020 grievance as it is a protected act it strengthens the Claimant's position, and the Claimant was victimised by submitting the ET1 claim. The Claimant said that the Respondent defended the 15 December 2020 grievance in their ET3 and that we the Tribunal should consider the actual document itself. There was no prejudice to the Respondent as there is nothing new. The Claimant would suffer more than the Respondent.

211. The Respondent objected to the application saying that the case started by the Tribunal considering the Claimant's application for a strike out. The Respondent referred to Selkent but didn't go through it limb by limb. By granting the amendment the Tribunal would have to consider a separate set of facts and the basis upon which it that might be found. The Respondent said that time limits applied, and the Claimant's application was 30 months out of time. The Claimant has been professionally represented throughout but did not make the amendment application sooner. As regards the timing and manner of the application, it was being made in the middle of the proceedings. With respect to the Claimant, it was not the Respondent's claim nor was it the Respondent's position to help the Claimant identify heads of claim or the means by which to establish the claim.

212. The Respondent said that hardship was more on the Respondent as there was no opportunity to prepare the objection to the application and the Claimant gave the Respondent no notice the application was going to be made. The Tribunal should look at the prospects of success as a wider consideration. There were no reasons put forward by the Claimant for the delay. The Respondent referred to the EAT case Adedeji v University Hospital Birmingham NHS Foundation in respect of the time issue. In that case, 3 days late to present a claim was out of time, in this case the claim dates back to 2021. Paragraph 8 of the particulars of claim only refers to the word discrimination. There is no reference in paragraph 22 to a protected act as there is in paragraph 16 in the particulars of claim dated 15 January 2021. It is not in the interests of justice to make the amendment as the Claimant has had time since 2021 to put it right.

213. In considering the Claimant's application, we weighed where the balance of injustice and hardship would lie in accordance with the principles of Selkent Bus Company Limited v Moore [1996] ICR 836. We considered the parties submissions and took in to account all the relevant circumstances, including the nature of the amendment as to whether is it substantial or minor, any applicable time limits and the timing and manner of the application.

214. The protected act was not out of time as protected acts do not have time limits applied to them. However, the application came very late in the day and only after the Claimant was told that if the Claimant wished to pursue a complaint based upon the 15 December 2020 alleged protected act, the Claimant would have to have to make an application to amend because the protected act was not pleaded.

215. We considered that the Respondent was being presented with a new complaint 3 days into a 5 day final hearing where they had rightly believed that the issues in the case had been agreed and finalised. Mr Davis did not have sufficient time to take proper instructions on the application and so this put the Respondent at a material disadvantage. We did not see how the alleged protected act of 15 December 2020 assisted the Claimant's claim as he already had 2 alleged protected acts. The Claimant withdrew the protected act dated 2 January 2021 which we dismissed as he was not relying on a protected act on 2 January 2021. We did not consider that it was just an error of date it was a substantive amendment since there was no reference to the 15 December being a protected act, just an act of discrimination. Paragraph 8 just made general

allegation of discrimination, which is not sufficient, and the Claimant had claims for harassment and direct discrimination in respect of the second grievance.

216. The Tribunal accepted the Respondent's contention that the timing and manner of the amendment created further prejudice. The Respondent although legally represented did not have sufficient time to consider the amendment and it likely effect. We do not allow the amendment. But even if we had allowed the amended as will be seen below, we have found that the Claimant was not victimised.

Issue 39. Did the Claimant do the following, which he relies upon as protected acts:

39.1. Raise a formal Grievance on 2 November 2020;

39.3. Submit a claim of disability discrimination in an ET1 filed on 15 January 2021?

217. We consider that the Claimant reference to unlawful discrimination in his 2 November grievance amounts to a protected act under section 27 (2) (d) in that it is the making of an allegation (whether or not express) that the employer has contravened the Equality Act 2010.

218. We note that the Claimant says in his 15 December grievance that "I also believe that I have been discriminated and harassed because of my disability", so that would have fallen under section 27(2) (d) EQA 2010, if we had allowed the amendment.

Do all the allegations in issue 15 insofar as they post date each of the alleged protected acts amount to detriments and if so, were they inflicted upon the Claimant because of the protected acts?

219. Although the Claimant relied upon all the acts of discrimination in paragraph 15 of the list of issues, the Claimant only gave evidence on the dismissal as being the only detriment arising from having made protected acts. Whilst we accept that the allegations 15.2-15.13, 15.15, 15.17-15.- 15.26 amount to detriments, we do not accept that allegations 15.1, 15.14 &15.16 amount to detriments as we found they did not happen. There was no evidence available for the Tribunal to make a finding that Mr Nicolaou, Mr Griffiths, Mr Harris, all of whom knew about either the Claimant's grievance of 2 November or 15 December made their decisions because of the Claimant's protected acts. There was no evidence that Ms Patton knew about the Claimant's grievances.

220. There was no evidence that any one other than Mr Price knew that the Claimant had brought an Employment Tribunal claim. Mr Price knew because the Claimant had told him in letter of 26 January 2021 as had Mr Wynn.

221. We conclude therefore that Mr Harris, Mr Griffiths, and Ms Patton did not victimize the Claimant because of the protected acts or at all.

222. We were not provided with any evidence that the Claimant's protected acts had a subconscious affect on Mr Price's reason to dismiss the Claimant. And if we are wrong about that, if there was any subconscious effect regarding the

Claimant's protected acts, we conclude it was the manner in which the Claimant had made his complaints, not the complaints in themselves, that played upon Mr Price's mind. There was no doubt that the Respondent was concerned about the way that the Claimant went about complaining about his grievances, e.g., copying in senior members of staff into grievances and continually pursuing matter that had already been finally determined as is evidenced in Mr Price's letters dated 22 & 23 December 2020. It is for those reasons the Claimant's claim for victimisation fails.

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Employment Judge Young

Date 8 September 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

25 September 2023

FOR THE TRIBUNAL OFFICE

Annex

Disability Related Harassment

15. Did the Respondent engage in conduct as follows?

15.1. On 22 October 2020, Mr Nicolaou refused the Claimant's holiday request;

15.2. On 22 October 2020, Mr Nicolaou requested evidence of the Claimant's medical appointments;

15.3. On 23 October 2020, Mr Nicolaou commenced the capability process against the Claimant;

15.4. On 27 October 2020, Mr Nicolaou commented, "Zubair just to let you know this does not look like a medical clinic it looks more like a massage parlour";

15.5. On 29 October 2020, Mr Nicolaou issued the Claimant with a written warning under the capability process;

15.6. On 29 October 2020, Mr Nicolaou commented, "there is no point walking up and down feeling sorry for yourself at home, I advise you to get to work asap";

15.7. On 29 October 2020, the Respondent threatened the Claimant over any further absences;

15.8. The Respondent failing to consider the Claimant's Grievance;

15.9. The Respondent's refusal to provide company sick pay;

15.10. On 10 December 2020, the Respondent rejecting the Claimant's Appeal against the capability warning;

15.11. The Respondent's unreasonable delay in determining the Claimant's Appeal against the warning;

15.12. The Respondent's failure to arrange an Occupational Health referral prior to the Claimant's Appeal;

15.13. The Respondent's failure to consider the Claimant's further Grievance dated 15 December 2020;

15.14. Mr Hayat ridiculing the Claimant for his disability on 15 December 2020 (I make provision in the Order below for the Claimant to provide further information by stating what it is that Mr Hayat said by no later than 6 April 2022);

15.15. On 23 December 2020 and 5 January 2021, the Respondent sending the Claimant oppressive and intimidating letters threatening disciplinary action;

15.16. On 22 December 2020, Mr Griffiths concluding that the Claimant was not a disabled employee under the Equality Act 2010;

15.17. The Respondent's failure to check upon the Claimant's welfare during the period 30 October 2020 to 22 December 2020;

15.18. The Respondent failing to exercise discretion and thereby not paying the Claimant during his absence between 30 October 2020 and 3 February 2021;

15.19. On or about 15 January 2021, the Respondent's unreasonable rejection of the Claimant's proposals for a phased return to work;

15.20. On or around 15 January 2021, the Respondent cancelling the informal Back to Work meeting;

15.21. On 22 January 2021, the Respondent instigating the formal capability process;

15.22. On 29 January 2021, the Respondent conducting an intimidatory and hostile capability meeting;
15.23. The Respondent's failure to properly consider mediation and / or the Claimant's phased return to work proposals;

15.24. On 3 February 2021, the Respondent dismissing the Claimant;

15.25. The Respondent's unreasonable delay in hearing the Claimant's Appeal against dismissal; and

15.26. On 25 March 2021, the Respondent unreasonably rejecting the Claimant's Appeal against dismissal.

16. If so, was that conduct unwanted?

17. If so, did it relate to the protected characteristic of disability?

18. If so, did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Direct Disability Discrimination

19. The Claimant relies upon the same allegations set out above as also, allegations of direct discrimination.

20. Insofar as those allegations are upheld by the Tribunal and are not found to amount to harassment, the question will be whether those events

amount to, “less favourable treatment”? In other words, did the Respondent treat the Claimant less favourably than it treated or would have treated a hypothetical comparator being a person in not materially different circumstances?

20.1. Did the Respondent have knowledge of the Claimant’s disability at the relevant time?

21. If the Claimant was treated less favourably, the Tribunal will then ask whether the reason for that difference in treatment was that he was disabled by reason of migraines, anxiety, and depression?

Disability Related Discrimination

22. Did the following arise in consequence of the Claimant’s disability?

22.1. The need to attend clinical appointments; and

22.2. Absences from work.

23. If so, did the Respondent treat the Claimant unfavourably as follows:

23.1. Mr Nicolaou refusing his requests for holiday;

23.2. On 23 October 2020, Mr Nicolaou commencing the capability process against him;

23.3. On 29 October 2020, Mr Nicolaou issuing the Claimant with a written warning;

23.4. On 10 December 2020, the Respondent rejecting the Claimant’s Appeal against the capability warning; and

23.5. Dismissing him.

24. If so, did the Respondent treat the Claimant unfavourably in any of those ways because of either his need to attend clinical appointments or his absences caused by his migraines?

25. If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is the need to manage absence so as to ensure that it employs a stable workforce capable of carrying out its operations.

26. Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

Failure to Make Reasonable Adjustments

27. Did the Respondent not know, and could it not reasonably have been expected to know the Claimant was a disabled person?

28. A PCP is a provision criterion or practice, (a way of doing things). Did the Respondent have the PCP of a Managing Absence Policy which provided that fixed periods of absence would trigger a process of warnings and potential dismissal?

29. If so, did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he was more likely to be absent from work and thereby trigger the managing absence process of warnings and ultimately dismissal?

30. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to placed at such a disadvantage?

31. If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? the Claimant identifies as a reasonable adjustment, amendment to the periods of absence that would trigger the process.

32. If so, would it have been reasonable for the Respondent to have taken those steps at any relevant time?

Indirect Disability Discrimination

33. Did the Respondent have the PCP of a Managing Absence Policy which provided that fixed periods of absence would trigger a process of warnings and potential dismissal?

34. If so, did the Respondent apply the PCP to the Claimant at any relevant time?

35. If so, did the Respondent apply (or would the Respondent have applied) the PCP to people who are not disabled?

36. If so, did the PCP put persons who are disabled at a disadvantage when compared with persons who are not disabled in that they are more likely to trigger the absence managing process leading to warnings and ultimately dismissal?

37. If so, did the PCP put the Claimant at those disadvantages at any relevant time?

38. If so, has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is the need to manage absence so as to ensure that it employs a stable workforce capable of carrying out its operations.

Victimisation

39. Did the Claimant do the following, which he relies upon as protected acts:

39.1. Raise a formal Grievance on 2 November 2020;

39.2. Submit a claim of disability discrimination in an ET1 filed on 15 January 2021?

40. The Claimant relies upon each of the above mentioned allegations insofar as they post date each of the alleged protected acts, the question for the Tribunal will be whether those amount to detriments and whether they were inflicted upon him because of the protected acts?