EMPLOYMENT TRIBUNALS

Claimant: Mr D Lee

Respondent: Aurorium UK Limited

HELD AT: Liverpool **ON:** 4, 5, 6, 7 & 8 September 2023

BEFORE: Employment Judge Johnson

MEMBERS: Mr J Murdie

Ms M Plimley

REPRESENTATION:

Claimant: unrepresented
Respondent: Ms R Kight (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) Upon the application of the respondent and the agreement of the claimant, the name of the respondent is varied from *'Vertellus Specialities UK Limited'* to *'Aurorium UK Limited'.*

(2) The complaints of disability discrimination contrary to sections 15 and sections 20 & 21 Equality Act 2010 which were the subject of an application to amend the grounds of complaint made on 14 April 2022 were made outside the time limits provided by section 123 Equality Act 2010 and it was not just and equitable to extend time. These complaints are therefore dismissed

(3) The remaining complaint of disability discrimination contrary to sections 20 & 21 Equality Act 2010 and included with the original claim form was not well founded. This means that this complaint was unsuccessful and is therefore dismissed.

(4) The provisional remedy hearing date listed for 26 October 2023 will now be cancelled.

REASONS

Introduction

1. These proceedings arose from the claimant's employment with the respondent and for whom he had worked for many years. This case involved the period from 2019 until 2022, when he experienced several periods of sickness absence, the management reaction to those absences and issues involving allegations of bullying from work colleagues involving graffiti/abusive messages and the making of a mess around the areas where he worked.

2. The claim form was presented on 25 March 2021 following a period of early conciliation from 11 March to 12 March 2021. The claimant was not dismissed when the proceedings were presented to the Tribunal, and it is understood that he has remained employed by the respondent although he has not returned to work following sickness absence which began in December 2021.

3. In his claim form, the claimant indicated that he wished to bring a complaint of disability discrimination and age discrimination, (he was 66 years old when the claim began). He referred to severe mental health depression/anxiety attacks and low mood swings in section 8.2 of his claim form. The proceedings were presented by Peter Cooke who is his brother in law and who requested a stay of the proceedings because of the claimant's mental health. A separate application seeking a stay was enclosed with the claim form. Some details by way of background were included within the claim form as at the date of presentation on 25 March 2021.

4. The response was presented shortly afterwards which resisted the claim and seeking further particulars. Judge Allen ordered on 12 July 2021, that the case be stayed until 1 October 2021, and this continued until 5 April 2022 when Judge Batten ordered that the case be listed for a preliminary hearing case management (PHCM). At this point, Mr Cooke has ceased to represent the claimant due to ill health and the claimant's son wrote to the Tribunal on his behalf from December 2021.

5. A PHCM took place 21 April 2021 before Judge McDonald. On 14 April 2021, the claimant's solicitors Lyons Davidson confirmed that they had been instructed to act for the claimant and requested that the stay be lifted, and they provided further particulars with an application to amend the claim.

6. Judge McDonald listed the case for this final hearing date and discussed the issues with the parties. Mr Alvin (solicitor) attended on behalf of the claimant. Orders were made for the parties to agree a list of issues with a further PHCM being allowed if required. He referred to time limits and that these would be

an issue at the final hearing. An agreed list was provided by the parties, and it is referred to below. The respondent presented an amended grounds of resistance and the claimant withdrew the age discrimination claim with Judge McDonald issuing a judgment on its withdrawal.

7. Further particulars were provided, a list of issued finalised and an amended grounds of resistance presented. The respondent accepted that the claimant was disabled within the meaning of section 6 Equality Act 2010 (EQA), relating to the depression at the material time to which this claim relates, but they did not concede knowledge of the disability in question.

8. The name of the respondent was varied as a result of final submissions by the respondent and with the agreement of the claimant and is accordingly corrected as part of the Tribunal's judgment.

Issues

9. The parties included the agreed list of issues in the final hearing bundle, (p91). It was understood that it was agreed while the claimant was still represented, his solicitor having since come off the record before the final hearing before this Tribunal.

Time Limits

10. Given the date the claim form was presented any complaint about something that happened before 12 December 2020 may not have been brought in time.

11. Were the discrimination complaints made within the time limit in section 123 EQA. The Tribunal will decide:

    a) Were the complaints made to the Tribunal within 3 months (allowing for any early conciliation extension) of the act to which the complaint relates?

    b) If not, was the conduct extending over a period?

    c) If so, were the complaint made to the Tribunal within 3 months, (allowing for any early conciliation extension), of the end of that period?

    d) If not, were the complaints made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

        i) Why were the complaints not made to the Tribunal in time?
        ii) In any event, is it just and equitable in all the circumstances to extend time?

    The claimant contends he presented his complaints within the relevant limitation period. The claimant contends that the last act relating to his claim for failure to make reasonable adjustments (concerning the bullying conduct), fell within the relevant limitation period.

The respondent contends that any allegations of discriminatory conduct predating 12 December 2020 are out of time.

In relation to the claimant's complaint of a failure to make reasonable adjustments (concerning the bullying conduct), the claimant contends that there was conduct extending over a period to allow the claim to be within time.

The respondent denies that alleged conduct complained about relates to an element of conduct extending over a period or alternatively, extending over a period to allow the claims to be within time.

To the extent the Tribunal determines that any allegations of discriminatory conduct predating 12 December 2020 re out of time, the claimant contends that the reason why was because he was suffering from severe depression and was incapable of doing so (having been admitted to hospital during the relevant limitation period). Alternatively, the claimant argues it was just and equitable to extend time for these reasons and that the balance of prejudice would fall to the claimant if he were denied the opportunity to rely on discriminatory allegations that occurred before 12 December 2020.

The respondent disputes that it was just and equitable to extend time.

Discrimination arising from disability - Section 15 EQA

12. Did the respondent know, or could it reasonably have been expected to know that he had the disability? From what date?

13. If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

    a) Inviting the claimant to a capability review meeting on 21 July 2021.

14. Did the following things arise in consequence of the claimant's disability?

    a) The claimant's absence from work from 19 December 2020 onwards because of his disability.

15. Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

16. If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

17. If not, was the treatment a proportionate means of achieving a legitimate aim?

    a) The respondent says that its aims were namely to manage its staff levels and/or manager absent employees on the basis of ensuring employee welfare and/or operational requirements, (including the efficient running of the department), of the business.

The Tribunal will decide in particular:

a) Was the treatment an appropriate and reasonably necessary way to achieve those aims.
b) Could something less discriminatory have been done instead?
c) How should the needs of the claimant and the respondent be balanced? instead?

18. The claimant contends that the respondent knew or could reasonably have been expected to know that he had depression from 2017. The claimant made his Shift Production Manager, Peter Cook aware of his mental health issues and the medication he was taking in around late 2017 and the respondent's HR manager Daniel Morana in or around August 2018.

19. The claimant contends that the unfavourable treatment arose from his disability related absence and therefore arises in consequence of his disability.

20. The respondent admits that the conduct occurred as alleged but denies it has treated the claimant unfavourably because of something arising in consequence of any disability.

21. The claimant contends that the respondent cannot justify the treatment alleged as being a proportionate means of achieving a legitimate aim. He says it would have been proportionate to establish his mental wellbeing by receiving the invitation to the meeting prior to sending it by either obtaining a report from a medical practitioner or holding an informal catch-up meeting first.

Reasonable adjustments - sections 20 & 21 EQA

22. Did the respondent know, or could it have reasonably been expected to know that the claimant had the disability? From what date?

23. A PCP is a provision, criterion or practice. Did the respondent have the following PCPs?

a) Declining to take seriously and/or investigate and/or take action to prevent conduct amounting to bullying.
b) Holding capability review meetings.

24. Did the PCPs put the claimant at a substantial disadvantage compared tpo someone without the claimant's disability, in that?

a) The claimant's underlying medical condition was exacerbated resulting in a severe depressive episode.
b) The threat of capability action and/or the stress caused by the prospect of attending a capability review meeting exacerbated his condition.

25. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

26. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

    a) In relation to the bullying conduct –

        i) Investigate the conduct properly.
        ii) Identify the potential employees responsible.
        iii) Take disciplinary action against those employees.

    b) In relation to the capability review -

        i) Obtain confirmation from the employee's medical practitioner or advisor that the employee is well enough to attend a capability review meeting before inviting the employee to such a meeting.
        ii) To provide more than one clear day's notice of any capability review meeting.
        iii) To meet informally with employees on long term sickness absence prior to beginning the formal capability review process.

27. The claimant contends that the respondent knew or could reasonably be expected to know that he had depression around late 2017. The respondent contends it was unaware of the disability at the relevant time.

28. The respondent disputes that it declined to take seriously and/or investigate and/or take action to prevent conduct amounting to bullying or alternatively that these amounted to PCPs under the EQA.

29. The claimant contends that the respondent knew or could reasonably be expected to know that he would have been placed at a disadvantage by the PCPs. The respondent argues it was not aware of the claimant would have been so disadvantaged.

30. In relation to the asserted adjustments relating to bullying conduct, it did not identify the employee responsible but denies taking action to make reasonable adjustments in this regard or at all.

31. In relation to the adjustment involving the capability review, the respondent accepts that it did not take the steps identified but denies that it failed to make reasonable adjustments as alleged or at all.

Remedy for discrimination

32. To be considered if some or all of the complaints were successful

Evidence used

33. The claimant gave oral evidence and did not call any other witnesses.

34. The respondent called two witnesses to give oral evidence, namely:

(a) Ms Lisa Aspley (UK HR Manager for respondent from 5 July 2021
(b) Mr Peter Cook (Shift Production Manager)

35. The respondent also relied upon an unsigned and undated statement from Mr Daniel Morana who was a former HR manager.

36. Documents were provided in a 500 page bundle including the proceedings, the list of issues, a schedule of loss and relevant photocopy photographs of abusive messages, policies and procedures and emails and other correspondence.

37. An additional email from the respondent was provided during the hearing regarding representation of the claimant during the proceedings and the extent to which he was supported by a solicitor.

Findings of fact

The parties

38. The respondent is a large international chemicals business, and this case involves its premises in Widnes. It is a USA owned company, but its UK Head Office is in Ouseburn, Newcastle upon Tyne. The workplace where the claimant worked comprised of 55 operators who would work shifts and who each had a shift manager. The claimant's shift production manager was Mr Peter Cook.

39. The claimant (Mr Lee) was employed as a Chemical Process Operator and he had worked for the respondent since 10 August 1979. Most of the employees in his work area worked shifts and this was the case for Mr Lee.

40. He shared a locker room with 55 colleagues. There was no dispute that the locker room was not in a good condition and to use Mr Lee's words its appearance was *'dated'.* Many of the lockers were damaged and had graffiti on. The room was generally untidy with dirty clothes and rubbish being left lying around. This was supported by copies of photographs of the locker room taken on various occasions during the material time to which this case relates.

41. The respondent has like many large employers, access to significant HR and Occupational Health (OH) support. At the relevant time, Daniel Morano was the HR manager who dealt with the issues involving Mr Lee. There were policies and procedures in place which applied to all employees and the relevant documents for this case which were included in the hearing bundle were, (and which the Tribunal were referred to):

A) the Company Capability Policy, (pp411-416).
B) UK Attendance Management Policy, (pp153-161).

The claimant's disability

42. There was no dispute that Mr Lee had suffered from ill health for a number of years, and he also had the strain of caring for his disabled wife. The emotional load of these circumstances would have no doubt been significant for Mr Lee and the Tribunal acknowledged that they would have had an ongoing impact upon his mental health.

43. From the OH evidence available, the first reference of mental health issues was contained in the OH report of 22 January 2021. Reference was made to *'…a severe deterioration in his [the claimant's] mental health'*, (pp287-89). This was obtained following his absence which began on 19 December 2020.

44. Mr Lee had been referred to OH on number of occasions prior to that date. On 22 January 2020, reference was made to a chest infection and problems with his kidney, (pp116-7). No mention was made of mental health problems of any sort.

45. Similarly, a Med3 Fit Note dated 27 April 2020 produced by Mr Lee's GP described his absence as being attributable to a '*cough',* (p126). The chest and kidney problems continued and at a Sickness Absence Review Report on 14 June 2020, Mr Hill signed this document to confirm that he had been absent on 4 occasions since March 2019 and that these were attributable to chest infection and kidney problems with consequential hospital procedures. It was noted that management felt he communicated his health issues very well while he was off sick, and no reference was made to any mental health problems existing at this time, (pp150-1).

46. As his health issues continued, Mr Lee remained under the care of OH and a further report was produced on 20 October 2020 which identified problems with his right knee. There was reference to an *underlying medical condition* which was *not relevant to this referral,* but in the absence of any suggestion as to what this was, his managers would not have been aware of problems which involved mental impairments, in contrast to the physical impairments which had been well recorded by this time in the available medical documents, (pp204-5).

47. Mr Lee was very friendly with his manager Mr Cook and asserted that he had shared a great deal of personal information with him. This included reference to depression and the medication which he had been receiving for this condition since 2017. This was disputed by Mr Cook who agreed that while they did have a friendly relationship, his knowledge of Mr Lee's personal issues related to the strains of caring for his disabled wife and the impact which this had on his sleep patterns.

48. On 18 December 2020, Mr Morana in HR received a call from Mr Lee regarding his mental health. Mr Morana replied by email at 4:42pm concerning this call and said the following (p260):

    'thanks for our call earlier on. I'm sorry to hear you're struggling with your mental health. As we discussed I wanted to direct you to some of the resources we have available that you might find helpful.'

He made reference to a confidential support service called *'Unum Life Works'* and provided its relevant contact details. While Mr Lee argued that he raised the issue of his mental health on earlier dates than this, there was no documentary evidence to support this and based upon the email sent to him at p260 by Mr Morana. The Tribunal finds on balance that had such conversations taken place, an email of this nature would have been sent to him immediately following such a contact.

49. Mr Cook discovered when he began his shift on 19 December 2020 that Mr Lee was *'off sick again and that he had spoken to Danny [Morana]'.* His email sent at 5.58 to Mr Carl Baker (Plant Director), (pp480-3) was lengthy and more than two pages in length. The main focus of the email was relating to the knee injury and also alleged bullying. It was only towards the end of the email that reference was made to mental health, and he concluded by saying:

'I don't think it's a bad idea for him to see the company Doctor, because sadly, I think he is having a breakdown of sorts and is not recognising it or wont admit it. He doesn't seem to be coping with the things we would brush off and I think he does need some professional help, to support him. His home life is not a bed of roses by all accounts. All is not right here, although he will not discuss this in any detail.'

He noted the following:

'I am an experienced manager of 28 years nd have come across many angry people where it transpires that they have other things in their lives that had affected their judgments. Dave is very similar, which is why I believe he may need some sort of professional help.'

50. Not surprisingly, given the time that had elapsed since this event, Mr Cook did struggle to some extent with his memory. However, despite this, the Tribunal found him to give credible and reliable evidence during the hearing and which was consistent with the candid comments which he made to Mr Baker. He appeared to be genuinely concerned about Mr Lee and gave a credible recollection of the call stating that no mention of mental health was made during the call, but that *'it was just my firm belief that people have problems and don't realise it'.* He described that it was a *'red flag moment'* when he came off the phone call with Mr Lee.

51. From the documentation referred to in the hearing bundle and taking into account the evidence heard during the hearing from Mr Lee and Mr Cook, the Tribunal finds on balance that the respondent through the managers Mr Cook and Mr Morana first became aware of Mr Lee's mental health issues on 18 or 19 December 2020. Prior to that date, they were only aware of the physical health issues which he suffered and the problems he experienced at home looking after his wife. He simply did not provide much if any information prior to December 2020 where the respondent could be placed on notice that there was an underlying mental health issue.

<u>Sickness absence and its management by the respondent</u>

52. Mr Lee had a number of periods of sick leave, the initial periods which can be summarised as follows:

    a) 18 March 2019 to 29 March 2019 – chest infection
    b) 14 July 2019 to 17 July 2019 – kidney biopsy/hospital procedure
    c) 23 December 2019 to 3 January 2020 -chest infection

53. He began a further period of sickness absence on 26 March 2020 and from 29 April 2020, he entered into a furlough agreement with the respondent following the arrival of the Covid pandemic to the UK in March 2020. He returned to work on 28 May 2020. The reason for this absence was because of a chest infection and his kidney function.

54. A further period of sick leave began on 8 September 2020 and ended on 2 November 2020 with a phased return until 18 November 2020. The reason given for this absence was a knee problem which affected his ability to walk. In order that he could return to work, Mr Cook placed Mr Lee on light duties with an assistant being provided to carry out the more physically demanding aspects of his job.

55. Following his absences, Mr Lee was reviewed on two separate occasions, 12 January 2020 (first sickness review) and 16 June 2020, (second sickness review).

56. As a result of the number of occurrences of sickness absence, a trigger point was reached under the UK Attendance Management Policy, (pp153-161) and a further review took place on 17 November 2020, (pp227-8). The recommendation by Mr Cook who investigated was that a further work assessment take place and that HR would review whether a disciplinary hearing was required under the Policy. He decided that a disciplinary should take place and Mr Lee was invited to a disciplinary hearing by letter on 23 November 2020 and the meeting took place on 8 December 2020.

57. Mr Lee was unrepresented at the meeting and Mr Baker chaired the meeting, with a note taker Emily Clamp from HR being present. Mr Baker explained the absences and gave Mr Lee and opportunity to participate, the meeting lasted for an hour and a stage 1 verbal warning was issued and confirmed by letter on 8 December 2020, (p245). A right of appeal was offered when the decision was made and on 16 December 2020, Mr Hill wrote requesting that he wished to bring an appeal concerning the disciplinary decision, (p254).

58. A further period of sick leave then began on 18 December 2020 and from this date, Mr Lee did not return to work. An appeal hearing was offered on the same day for 7 January 2021.

59. Sadly, at this point, Mr Lee was recorded as attempting suicide on 19 December, with the respondent's management being notified 2 days later on 21 December 2020 by his brother in law Mr Cooke who sent an email to Ms Clamp, (p271). He emailed the company with copies of sick notes on 30 December 2020 and explained that Mr Lee would not be fit to attend the appeal, (p273).

60. Mr Morana involved OH from this point and an initial letter on 22 January 2021 confirmed the deterioration in his mental health and that he was not fit for work. Mr Cooke continued to be in contact explaining that Mr Lee was receiving psychiatric treatment and needed to recuperate, but did say *'david and paula do appreciate you [sic] message and kind words'.* (p290)

61. On 23 February 2021, Mr Lee raised a query with the respondent concerning his ongoing entitlement to sick pay and this was explained by Mr Morana in a letter dated 23 February 2021, that it would move to half pay from 22 March 2021 and this would run out on 25 August 2021. However, he explained that he was concerned about Mr Lee's welfare and that he wanted to *'ensure we are doing all we can to support through your absence and in your return to work, you including resolving any issues within the workplace'.* These steps included making a further referral to OH and making a call on 1 March 2021 to discuss the letter with the reassurance that it would *'not discuss a return to work at this stage'* (p291). The Tribunal did feel that this was a well written and sensitive letter, however, it was not well received.

62. Mr Cooke, replied on 26 February 2021 and told the respondent that he would arrange for authority to access medical records, but Mr Lee was upset about the sick pay element of the letter and that the decision to impose half pay should reconsidered. He also referred to Mr Lee's ongoing mental health issues and asserted that he was not fit enough to take calls. (pp292-4). This was followed by a further email on 1 March 2021 forwarding an email from Mr Lee's doctor confirming that he was not fit to be contacted by the respondent, (pp295-6). OH acknowledged that they would not pursue an appointment on 23 March 2021 when they sent an email to Mr Cooke, (pp297-8). Mr Lee's GP confirmed by letter on 12 March 2021 to OH that Mr Lee was not fit to be contacted, (p302).

63. Mr Lee continued to be absent from work and on 9 June 2021, Mr Morana attempted to arrange a follow up appointment with OH for Mr Lee, but Mr Cooke remained adamant that he was not well enough, (pp310-312). Mr Morana had then left the respondent's employment and other HR mangers became involved. Mr Cooke provided a signed medical authority from Mr Lee on 9 July 2021 and on 16 July 2021, Ms Aspley became involved acknowledging the authority and explaining how SSP worked as requested by Mr Cooke on behalf of Mr Lee, (p316).

64. By July 2021, Ms Aspley was concerned about the ongoing sickness absence and said that she was anxious that the only evidence that Mr Lee could not communicate with the respondent came from Mr Cooke who was not medically qualified. Once the consent had been obtained, an invitation by letter dated 21 July 2021 was given for a capability review meeting on 23 July 2021, (p321). Although little notice of the meeting was given, Ms Aspley said that had a request for an alternative date been given, it would have been provided by the respondent. In the letter, Ms Aspley recognised Mr Cooke's involvement and explained that although not normally permitted, he could attend the meeting to support Mr Lee and requested details of any other adjustments needed.

65. Mr Cooke replied with a lengthy emails on 22 July 2021, (ppo326-333) and suggested that Ms Aspley was trying to bully or harass Mr Lee. No meeting took place, Mr Lee continued to remain on long term sick leave. There was no evidence that Ms Aspley responded by placing Mr Lee under further pressure and during cross examination gave credible and reliable evidence concerning the balance being struck between the need to manage long term sickness absence while being sensitive to an employee with mental health issues.

Incidents of alleged bullying

66. The Tribunal accepted that although Mr Lee had worked for the respondent for many years, problems only began to arise during the last few years of his employment. There was an altercation between him and another member of staff in 2018 which resulted in disciplinary action but is not relevant to the issues before the Tribunal.

67. Although there appeared to be some confusion from the papers before the Tribunal as to precisely when the alleged bullying took place, on balance of probabilities, we identified the relevant events as occurring on the following dates:

    a) July 2019, Mr Lee discovered that the words *'sick note'* had been written next to his name card on his locker in the changing room. He showed this to Mr Cook at the time and although encouraged by him to escalate the issue to management, Mr Lee refused believing it to be a one off incident.

    b) 8 January 2020, Mr Lee returned to work following sickness absence and he found the words 'sick note' had been written on the front of his locker and a further remark which had been blacked out to make it unreadable. Although Mr Lee showed Mr Cook the graffiti, he again refused to escalate the matter and instead added his own graffiti marking it *'and proud Dave x'.*

    c) The word *'Lazy'* was added to the name card on his locker by the anonymous culprit and discovered by Mr Lee on 24 January 2020. On this occasion he added the words *'Pussy say it to my face'.* while we understand that Mr Lee thought his responses would make the culprit own up and then he could confront them, it did seem to the Tribunal to be an inappropriate step to take and unnecessarily provocative given that he was an experienced and longstanding employee. By this point, Mr Cook felt he needed to speak with senior managers and also asked Mr Lee to keep a record of incidents by taking photographs which were included in the bundle. Dave Varnam was informed and asked that Mr Cook monitor the isutaiton so that more evidence could be obtained concerning the culprits.

    d) Mr Lee discovered further comments namely the words *'back heal'* on 1 February 2020. This was understood by him to suggest that he was lazy and leaving jobs to be carried out by the next shift following him. Mr Cook was informed, and he looked at the handwriting of the graffiti and

compared it with handwriting of staff used in the logbooks which they completed each shift. Unfortunately, although he believed he had narrowed this down to 2 suspects, he did not feel confident that he could identify a single person.

e) Following Mr Lee's return from annual leave on 2 March 2020, Mr Lee found the words *'H Worker'*. It appears to the Tribunal from the style of the handwriting that in reply, Mr Lee wrote the words *'Grafter'*. The comment *'Gravy'* had also been written at around this time. (p397)

f) Mr Lee returned to work following sick leave and furlough on 27 May 2020 and found *'Lazy'* written above his name Dave Lee. Beneath were the words *'Cough, cough'* and the word *'Twat'* accompanied by a copy of a painting which appeared to bear some similarity to Mr Lee. On another locker which he used; Mr Lee found a photocopy photograph of the comedian Frankie Howerd making a 'V sign'. He also found graffiti which had been scrubbed out, but which could still be seen to say, *'why did you come back.'* These messages were particularly cruel given their nature, number and that they arose from a return to work during the Covid pandemic. Mr Cook was informed, and photographs were provided to him. He insisted on escalating the matter whether or not Mr Lee wanted him to and reported it to Mr Danny Morana of HR. Separately Mr Lee also raised the incident with Mr Morana.

g) The graffiti stopped at this point and instead Mr Lee complained of dirty gloves and towels being left near his locker in June 2020.

h) Further complaints were made on 6 August 2020 concerning equipment and PPE being left in the locker room, but we accepted Mr Cook's evidence that from our consideration of the photographs provided by Mr Lee that they revealed a generally messy locker room with no obvious targeting of Mr Lee.

i) There was also reference to valves in his work area being left open by an operator on the previous shift to Mr Lee. Mr Cook believed it was a single incident, but the Tribunal were unable to find on balance that this was a deliberate act. We preferred Mr Cook's evidence that this was something which could happen as valves were often being released and closed, was not dangerous and Mr Lee was responsible for dealing with the valves on his shift. He had been a Health and Safety representative during his time with the respondent and there was no evidence available that he reported anything as a formal safety incident at the relevant time.

j) On 2 November 2020, Mr Lee returned to work following further sick leave and found his locker had been vandalised with superglue in the lock and the message left which said *'dirty'* above the name Dave Lee, (pp216-7). Mr Cook put in place a number of management steps as a consequence and the incidents to cease.

k) The final incidents before Mr Lee began his long term sickness absence took place on 15 December 2020 with a dirty pair of boots being allegedly

left by his locker and on 17 December 2020 with a dirty sock, face mask and coat being left by the locker. These events were communicated to Mr Cook and he was unable to establish that these were anything other than single events which formed part of a pattern of behaviour by the culprits in question. No repeated incidents took place following monitoring by Mr Cook and he noted that the graffiti had stopped.

68. Mr Lee was unhappy that the respondent's managers failed to take seriously or investigate or take action concerning the incidents which he complained of. The graffiti and interfering with his lockers formed a serious and unpleasant series of events which understandably upset Mr Lee and constituted bullying on the part of one or more anonymous colleagues. It was unpleasant and cruel and something which those responsible should be ashamed of, especially taking into account the cowardly way in which it was carried out.

69. The Tribunal was satisfied that management were not complicit in any way with the alleged conduct and were genuinely concerned of way in which the abuse continued, and Mr Cook was clearly keen to address the matter formally from the beginning and to raise the matter with line management and HR.

70. Unfortunately, Mr Lee did confuse matters initially as he did not want to escalate the issues and naively perhaps, felt that it would not be repeated. Mr Cook at this point behaved reasonably in not taking the matter further. Moreover, Mr Lee complicated matters at this point by retaliating and leaving his handwritten replies next to the offensive comments that had been made. Mr Cook could have perhaps told him not to respond in this way, but it was perhaps inevitable that this caused further incidents to arise given that Mr Lee gave the impression that he was engaging in a conversation with the anonymous culprit.

71. Not surprisingly, the graffiti continued and quite rightly a point was reached where Mr Cook decided that regardless of Mr Lee's views, management action should be taken. Mr Cook sent an email to shift managers on 27 May 2020 and referred to *'an incident with obscenities being found on a locker in the operators changing area', (p138).* The Tribunal believed that it was sensible not to mention Mr Lee by name to avoid him being targeted for making a complaint. Instead, the email took a more general approach and referred to a need to clear up the locker room and to improve standards. While Mr Lee may have felt that this was not taking his issues seriously, the Tribunal finds that this step attempted to protect him from further harassment which was appropriate given that it was not possible to identify the culprit at this point. He also said that he would put together a toolbox talk which shift managers could used when addressing staff on the issue.

72. Mr Lee did refer to a handwriting expert being used, but the Tribunal felt that this would not have been appropriate or would have resulted in a single culprit being identified given the limited number of words written and that that single letters and capital letters were used rather than joined up handwriting of any length.

73. While Mr Lee may have suspected a particular employee, Mr Cook was correct to note that there was ill feeling between the two of them already and this belief was not supported by any further evidence.

74. Mr Cook was in the Tribunal's view taking the matter seriously and engaging managers in the process. We accepted that he was clear that individuals could contact him on a confidential basis if they wished to do so.

75. The graffiti appeared to stop until 2 November 2020 and we accepted that things began to improve if not completely resolve. Mr Lee was understandably vigilant as a result of the incidents in question, and he believed the valve incidents and leaving messy items near his locker were aimed at him. The Tribunal accepted on balance that these matters were acknowledged by Mr Cook and management but were difficult to successfully investigate although they were clearly monitored, and Mr Lee was encouraged to keep photographs of incidents in question.

76. A toolbox talk was produced by Mr Cook in November 2020 (p120) for use by shift managers and this was entitled '*Locker Room Obscenities and Workplace Bullying'.* It was addressed to staff and called out the behaviour for what it was and stated that it would be tolerated by management. The notice was reviewed by all relevant employees, and they were required to sign and state that they understood it, which they did as required by management, (pp229-233). Mr Cook also briefed managers of the problem.

77. Mr Lee was understandably struggling at work towards the end of 2020 and began his long term sickness absence, but his warning concerning sickness appeared to be the major issue of concern to him during that year as he was frightened of losing his job. Management did take the bullying incidents seriously and we accept that they would have continued to do so had Mr Lee remained in work. Incidents of this nature are very difficult to investigate and improving the work culture in the meantime is often the best way of eliminating these issues until such a time where behaviour changes or the individual responsible is discovered. However, it is not reasonable to investigate employees whom Mr Lee was unhappy with unless there was something more available to suggest that they were responsible for the graffiti and other aggressions which he has referred to.

78. An additional problem was the general messiness of the locker room and other work areas, and this meant that although Mr Lee might see further aggressions relating to mess, it was often difficult to tell that it was targeted at him and a general policy of tidying these places effected through management training was the most effective way of dealing with these matters at that time.

Law

Time limits (section 123 EQA)

79. Section 123(1) of the EQA provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which

the complaint relates, or (b) such other period as the Tribunal thinks just and equitable.

80. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

81. In *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In accordance with *British Coal Corporation v Keeble* [1997] IRLR 336 a Tribunal may have regard to the following factors:

    a) the overall circumstances of the case;
    b) the prejudice that each party would suffer as a result of the decision reached;
    c) the particular length of and the reasons for the delay;
    d) the extent to which the cogency of evidence is likely to be affected by the delay;
    e) the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and,
    f) the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action.

    The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see *Department of Constitutional Affairs v Jones* [2008] IRLR 128.

82. In addition to the cases referred to above, Ms Kight also referred the Tribunal to the more recent Court of Appeal case of *Adeji v University Hospitals Birmingham NHS Foundation* [2021] EWCA Civ 23 and its consideration of section 123 EQA and extensions of time on just and equitable grounds.

Disability (section 6 EQA)

83. Section 6 of the EQA provides that a person has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities.

84. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the EQA provides that the effect of an impairment is long-term if

it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected. An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct it and but for that it would be likely to have that effect.

85. The question of whether the claimant was disabled in this case was not in issue following a concession made by the respondent earlier in these proceedings that he was disabled by depression during the relevant period of time. However, the question of when the respondent knew or could have know the claimant was so disabled remained in issue and this remained a matter to be determined in these proceedings.

86. In relation to the question of knowledge, Ms Kight referred the Tribunal to the EAT case of *Gallacher v Abellio Scotrail Limited* [2020] 2 WLUK 691 and where the employee was found to have provided some information concerning her health to her manager, but with insufficient detail as to any substantial disadvantage and the effects on her day to day activities, or its duration, as required by section 6 EQA.

Discrimination in employment

87. Section 39(2) of the EQA provides, amongst other things, that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment.

Discrimination arising from disability (section 15 EQA)

88. Section 15 of the EQA provides that 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. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

89. Unfavourable treatment will not be unlawful under S.15 if it is objectively justified. In *Awan v ICTS UK Ltd* EAT 0087/18 the EAT overturned an employment tribunal's decision that the dismissal of a disabled employee on the ground of incapacity. This was during a time when he was entitled to benefits under the employer's long-term disability plan and the Tribunal had determined that it was a proportionate means of achieving the legitimate aim of ensuring that employees attend work. The EAT held that the Tribunal had wrongly rejected the employee's argument that an implied contractual term prevented his dismissal on the ground of incapacity while he was entitled to such benefits.

90. In *(1) The Trustees of Swansea University Pension & Assurance Scheme (2) Swansea University v Williams* UKEAT/0415/14/DM the EAT held that the words "unfavourable treatment" and "detriment" were deliberately chosen when being included in the EQA and had distinct meanings. Unfavourable treatment involves an assessment in which a broad view is to be taken and which is to be

judged by broad experience of life. It has the meaning of placing a hurdle in front of or creating a particular difficulty for or disadvantaging a person because of something which arises in consequence of their disability.

91. In addition to the above case of *Williams*, Ms Kight also referred the Tribunal to the case of *Pnaiser v NHS England* [2015] 12 WLUK 178, where the EAT considered the steps which should be taken by a Tribunal when determining a complaint of discrimination under section 15 EQA.

Reasonable adjustments (sections 20 & 21 EQA)

92. Sections 20, 21 and 39(5) read with Schedule 8 of the EQA provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

93. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

94. In the case of the *Environment Agency v Rowan* [2008] IRLR 20, the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify: -

    (a) the provision, criterion or practice applied by the employer;

    (b) the identity of non-disabled comparators where appropriate; and

    (c) the nature and extent of the substantial disadvantage suffered by the Claimant.

95. In addition to the above case, Ms Kight also referred the Tribunal to the case of *RBS v Ashton* [2011] ICR 632 EAT.

The burden of proof in discrimination cases (section 136 EQA)

96. Section 136 of the EQA sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

97. Thus, the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the Respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see *Igen Ltd v Wong and Others* CA [2005] IRLR 258.

98. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

99. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At this stage, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. The Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an explanation for the treatment.

100. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. *'Could conclude'* must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see *Madarassy v Nomura International* [2007] IRLR 246.

101. If the Claimant does not prove such facts, his or her claim will fail. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic (disability in this case), then the Claimant will succeed.

Discussion

102. In considering this case the Tribunal needed to take into consideration Mr Lee's unrepresented status during the hearing, while recognising that he had legal advice earlier in these proceedings for a period of time. We also noted his ongoing depression and took into account the relevant chapters of the Equal Treatment Bench Book in relation to mental health problems and unrepresented parties while keeping in mind our duty under the overriding objective under Rule 2 of the Tribunal's Rules of Procedure to deal with this case fairly and justly.

103. We acknowledged that this was a difficult case for Mr Lee given the recent history of his employment, his personal circumstances at home and the need to conduct his own advocacy during a 5 day final hearing.

104. He clearly remained very unhappy about many of the incidents of bullying and at times appeared to argue his case based upon alternative allegations of direct discrimination and/or harassment. These were not of course the issues which the Tribunal had been asked to consider in this case and no attempt had been made previously to *further* amend the issues once they had been agreed. Consequently, this case very much remained one where the application of section 15 and sections 20 & 21 EQA was the focus for the Tribunal.

Jurisdiction

105. This is a case where the consideration of time limits and jurisdiction is key issue given the history of the case and the way in which the proceedings were brought.

106. First of all, the Tribunal noted that Mr Lee had remained employed by the respondent and there was no dismissal date which would start the clock 'ticking' for the purposes of time limits in accordance with section 123 EQA which restricts the time available to a party to bring a complaint of discrimination.

107. As the complaint was about alleged discriminatory acts which did not arise from a dismissal, it was the dates of those acts which was key for our determination of time limits. The Tribunal noted that the claim form had been presented within one month (25 March 2021), of the early conciliation certificate being issued by ACAS, (12 March 2021) and accordingly the claim form was presented quickly.

108. What was more significant, was the application of section 123 EQA in relation to the time elapsed from the date of the alleged discriminatory act and the notification of a potential claim with ACAS, which took place on 11 March 2021. Consequently, any act of discrimination which took place before 12 December 2020 (being 3 months before ACAS was notified), could potentially be out of time.

109. Accordingly, we agreed with Ms Kight's submission concerning this issue and in relation to those allegations which took place before that date, the Tribunal needed to consider whether these earlier alleged acts formed part of a series of continuing acts which ended on or after 12 December 2021 or if not, whether it was just and equitable to extend time.

110. A further complicating factor was that at the time the proceedings were commenced, the claim form only related to those issues relating to part of the reasonable adjustments complaint under sections 20 & 21 EQA and the alleged PCP concerning *'declining to take seriously and/or investigate and/or to take action to prevent conduct to amount to bullying'.*

111. These allegations did involve a series of acts broken by the claimant's absences (at least in terms of their discovery by the claimant), beginning on 8 January 2020 with the *'sick note'* incident and ending with the issue raised by Mr Lee on 15 December 2020 concerning dirty boots allegedly left by his

locker and which continued until his next absence began on 19 December 2020. Although the incidents were broken on a number of occasions, this was related to Mr Lee's sickness absences and of course the alleged PCP involved the way in which management dealt with or did not deal with the incidents.

112. Ms Kight appeared to concede that these allegations could be considered in time and while the documents attached to the claim form were somewhat narrative in terms of content, we took in to account Mr Lee's ill health and the assistance required from his unqualified brother in law, Mr Cooke in presenting the claim. On balance, we were satisfied that this part of the complaint had been presented in time and could be considered on its merits.

113. However, this did leave us to consider the remainder of the issues identified in the agreed final list which comprised of the section 15 EQA complaint and the part of the sections 20 and 21 EQA complaint involving the invitation of the claimant to a capability review meeting and the threat of capability action respectively.

114. The invitation to attend a capability review meeting on 21 July 2021 post dated the presentation of the claim on 25 March 2021. This issue was first identified in an application made by Mr Lee's then solicitors Lyons Davidson on 14 April 2022 that the stay (imposed due to his health issues), be lifted and including an application to amend the claim based upon an accompanying *'claimant's further and better particulars of complaint'.* The claimant presented the application almost 8 months following this event. The amended grounds of complaint was permitted by Judge McDonald at the PHCM on 21 April 2022.

115. The case was stayed following a decision of Judge Allen on 12 July 2021 and this continued until 21 April 2021 when Judge McDonald agreed with the application to remove the stay. It was at this point there was a discussion concerning the final list of issues and amendments which the claimant wished to make to his complaint. He agreed that time limits should be determined at the final hearing to avoid questions of duplication by hearing evidence at a separate preliminary hearing which could well result in evidence being heard which overlapped with the issues to be considered at the final hearing. This was a proportionate way to proceed.

116. Applying the time limits allowed by section 123 EQA, the application to amend should have been made by 20 October 2021, (i.e. 3 months following the capability meeting on 21 July 2021). This time period was not complied with and consequently the application was clearly made out of time. The issues/complaint included within the application can therefore only be accepted by the Tribunal if it considers it to be just and equitable to do so.

117. The Tribunal took into account the fact that Mr Lee had been unwell for some time since his absence at the end of 2020 and was being supported by his brother in law, his son and eventually his solicitors, Lyons Davidson. He was too unwell to be able to work and remained absent through his ill health.

118. However, we did note that while being unavailable to work as referencd by his GP letters dated 28 September and 2 December 2021 (pp335-7), but during this point he was represented (or at least supported by), Lyons Davidson solicitors as the letters were addressed to this firm. They formally came onto the record with the Tribunal from no later than January 2022. In the absence of further explanatory information from them, we were left with the conclusion that any failure to progress these proposed amendments arose from a failure between Mr Lee and his solicitors to organise the complaints he intended to bring in good time.

119. But by this time, Mr Lee was aware of the right to bring proceedings, time limits and the need to avoid delay. The stay did remain in place until the PHCM before Judge McDonald on 21 April 2022, but this only arose following an absence of progress from Mr Lee's solicitor and decisions from Judge Batten on 5 April 2022 and 14 April 2022 concerning the listed of the case for a PHCM and refusing a request for a postponement.

120. We agreed with Ms Kight, that there was no case advanced by Mr Lee of failures to progress the case arising from his solicitors and in any event, such a failure if it existed, would be a matter to be resolved by a claimant and his solicitor outside of these proceedings.

121. Moreover, we agreed that a point had been reached by this stage, that a claim had been commenced by a claimant, he had secured some representation and while his health and the stay had some relevance, a point was reached where the balance of prejudice tipped towards the respondent and there was simply insufficient progress made from the beginning of January 2022 until April 2022 when Mr Lee's representative made an application for the stay to be lifted and for an amendment to the claim. This was made too late and while when a claimant is unwell, some allowance should be made for its impact on the ability to present a complaint in time, it is necessary to consider the whole period of time before the application to amend was made. This was a case where it could have been made earlier and once instructed, Mr Lee's solicitors should have reacted quickly or at least provided a detailed explanation as to why a further stay would be in the interests of justice supported by appropriate evidence. This was not available to the Tribunal and accordingly an extension of time from 20 October 2021 to 14 April 2022 is not just and equitable and contrary to the principles described in the case of ***Robertson*** as described above. An extension of time should be the exception and not the rule and certainly not open ended. This is because a point must be reached where a claimant should be expected to act, and 14 April 2022 was simply to late in this respect.

122. Consequently, the allegations made in the application of 14 April 2022 relating to section 15 and 20 & 21 EQA are out of time under section 123 EQA.

Disability and knowledge of disability

123. Ms Kight made specific reference in her submission to the *Gallacher* case and the question of whether adequate information had been provided by Mr Lee to his employer and she argued that the respondent could not have been aware of his disability until 18 December 2020 at the earliest. She said that while Mr Lee had spoken with Mr Cook his manager prior to this date, this was in relation to his wife's health issues, the impact upon his sleep and problems concerning his daughter. He did not reference specific details concerning a personal health impairment concerning his mental state.

124. Mr Lee argued that the respondent (through Mr Cook), would have been aware of his disability by 2017 at the latest. He makes reference in his witness statement to a conversation with Mr Morana in April or May 2019 that he had '*mental health issues'* (paragraph 10), but his evidence was vague concerning the question of making his employer aware of his asserted impairment and in his submissions, he asserted that Mr Morana would have known by May 2020.

125. The Tribunal felt that on balance and based upon the consideration of the documentary and available witness evidence that the respondent first became aware of the Mr Lee's mental health issues and as a consequence his asserted disability by 18 or 19 December 2020. This was when conversations took place between Mr Morana and Mr Cook and Mr Lee as discussed in the findings of fact above and the *'red flag'* moment where Mr Lee provided sufficient information to suggest that he had a mental health impairment.

126. Accordingly, we find that knowledge of Mr Lee's disability only arose from 18 December 2020 and allegation which took place before that date must fail given the claim solely relates to complaints of disability discrimination.

Reasonable adjustments (section 20 &21 EQA)

127. As a consequence of the decision reached in relation to time limits, the Tribunal only had jurisdiction to consider the allegations of a failure to make reasonable adjustments relating to the alleged bullying conduct which was asserted as part of the information provided in the original claim form.

128. The asserted provision, criterion or practice (PCP), was that the respondent declined to take seriously and/or investigate and/or to take action to prevent conduct amounting to bullying. This of course relates to the duty which an employer has to make reasonable adjustments under section 20(3) EQA. A PCP is something which applies in the workplace to non disabled employees as well as the disabled claimant.

129. The Tribunal felt having considered the evidence before it, that the respondent has employer was in no way complicit with the graffiti and other behaviour relied upon by Mr Lee. Indeed, we were unable to see how they failed to take the matter seriously, fail to investigate or take action. This allegation was inconsistent with the evidence before us and it as actually Mr Lee's line manager Mr Cook who was pressing him to agree that the matter

be treated formally by management. He only agreed after many months, but once he did, the matter was investigated and as it was clearly difficult, it was not reasonable for management to simply single out an employee identified by Mr Lee with whom he had a poor relationship with and without evidence supporting the allegation. Even though they were unable to identify the culprit, measures were adopted including a tool box talk making clear that abuse would not be tolerated and the locker rooms should be left tidy. The latter step would of course deter items being left provocatively near Mr Lee's locker.

130. On the balance of the evidence, we could not conclude that the asserted PCP existed in this workplace and Mr Lee was supported once he wanted to take the issue of alleged bullying further. While it may have been a case that Mr Hill's mental health may have resulted in placing him at a substantial disadvantage compared with non disabled colleagues, the absence of the PCP means it is of no relevance to our determination of this allegation. However, an additional difficulty had such a PCP existed was that we were unable to find that the respondent was aware of Mr Hill's asserted mental health disability and thereby his substantial disadvantage until 19 December 2020 which was after the final potential act of bullying took place and shortly before his sickness absence began. Before that date and in relation to the earlier events during 2019 and earlier in 2020, the respondent simply did not have the requisite knowledge that Mr Lee would have been placed at a substantial disadvantage by reason of his disability.

131. While it is no longer relevant given the decision reached above in relation to the PCPs and substantial disadvantage, the Tribunal did conclude that a proper investigation took place and attempts were made to identify the employees responsible. This was carried out regardless of Mr Lee's disability and was simply an employer behaving reasonably when having grounds to investigate instances of bullying. It was acknowledged that the investigation was difficult, it was not reasonable to use CCTV in a changing room and that ultimately there was insufficient evidence available to single out one or more culprits. Nonetheless the respondent's displeasure in the behaviour was made clear to all of the relevant employees. While we have no doubt that employees if found to be responsible, would have been disciplined, based upon the respondent's witness and documentary evidence, it cannot be reasonable to discipline employees in an arbitrary and high handed way, without reasonable grounds being available to justify that action. Unfortunately, it was not possible for the respondent to find the necessary evidence on that occasion.

132. In relation to the other allegations of a failure to make reasonable adjustments relating to the capability review meetings, we were unable to consider the matter further because we found that we did not have jurisdiction to consider this amended allegation, because it was presented out of time and it was not just and equitable to extend time.

133. However, had we accepted this allegation, we would have agreed that the holding of capability review meetings during sickness absence was a PCP under section 20(3) EQA. It is something which would apply to all employees

and in the case of Mr Lee, it could have exacerbated his mental health issues given that such a process could ultimately lead to an employee's dismissal on medical incapability grounds. However, the Tribunal is not satisfied that the respondent could have known that this would have been the case at the time it proposed the meeting in 2021 as the OH report dated 22 January 2020 did not expressly state that capability meetings could cause issues for him. While it was aware of his mental health issues, it was not aware that they might be exacerbated by an invitation of this nature.

134. Once Mr Lee's brother in law replied to Ms Aspley's letter of 21 July 2021 on the following day, Ms Aspley provided reassurance as to the purpose of the invitation to a capability meeting and that OH evidence would be sought. The invitation was with short notice on 23 July 2021, but we accepted that a revised date would be agreed if inconvenient to Mr Lee. Ms Aspley gave convincing evidence that the respondent would have been flexible in order that this necessary capability action could be taken. Accordingly, even if this allegation had been allowed to proceed despite the issues relating to time limits, we would have found that the adjustments relied upon, would have been made by the respondent, namely, medical evidence of his fitness to attend, additional time before the meeting took place and an informal meeting if required.

Discrimination arising from disability – section 15 EQA

135. As we have explained above, the Tribunal has concluded that it does not have jurisdiction to hear this particular complaint/allegation. Had we accepted this complaint, we would have accepted that the respondent was aware of Mr Lee's disability at the time he was invited to the capability review meeting on 21 July 2021 for reasons given above. However, we disagree that the invitation to a capability review meeting could amount to unfavourable treatment as it was a normal and reasonable step for an employer to manage employee attendance. It is fair to say that a sanction imposed as a consequence of such a meeting could have been unfavourable treatment, but this was not the allegation before the Tribunal.

136. Accordingly, although the absence arising from his disability triggered the invitation, the step itself was not discriminatory and based upon there was no evidence before the Tribunal that the meeting would have automatically given rise to dismissal or some sort of disciplinary action. Indeed, as explained above, Ms Aspley was very reassuring when she explained what the purpose of the meeting was to Mr Lee's brother in law in July 2021.

137. However, even if we were incorrect in reaching such a conclusion, we accept that the asserted legitimate aim of managing staff absences, staff levels, employee welfare and operational requirements were indeed legitimate and the invitation to a meeting to discuss the absences was a reasonable step to take.

Conclusion

138. Accordingly, for the reasons given above, the Tribunal must conclude that the complaint of disability discrimination is not well founded and cannot succeed and that it does not have jurisdiction to hear the additional complaints brought under sections 15 and 20 & 21 EQA which were the subject of the claimant's application to amend under section 123 EQA as the amendment application was made out of time on 14 April 2022.

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Employment Judge Johnson

Date 12 October 2023

JUDGMENT SENT TO THE PARTIES ON
13 October 2023

FOR THE TRIBUNAL OFFICE