EMPLOYMENT TRIBUNALS

Claimant: Mr R Bryce

Respondent: Nuneaton & Bedworth Borough Council

Heard at: Birmingham (via video link from day 2)

On: 6-10,13-17, 20-22, 27, 28 March & 15,16 May 2023

Before: Employment Judge J Jones
Mrs J Keane
Mr S Woodall

Representation
Claimant: in person
Respondent: Mr R Bailey (counsel)

RESERVED JUDGMENT

1. The respondent's application to strike out the claims on the grounds that they are vexatious fails and is dismissed.

2. The claim of discrimination arising from disability fails and is dismissed.

3. The claim of indirect disability discrimination fails and is dismissed.

4. The claim of failure to make reasonable adjustments fails and is dismissed.

5. The claim of harassment because of disability fails and is dismissed.

6. The claim of unlawful deduction from wages fails and is dismissed.

7. The claim of victimisation succeeds. The parties should provide the Tribunal with any dates of unavailability within the next 4 months when the claim will be listed for a remedy hearing with a time estimate of 1 day.

REASONS

Introduction

1. By a claim form (1311185/2020, “the first claim”) presented on 13 December 2020, following ACAS early conciliation between 14 October and 28 November 2020, the claimant brought claims of automatic unfair dismissal (assertion of a statutory right), discrimination arising from disability, failure to make reasonable adjustments, harassment related to disability, direct disability discrimination, indirect disability discrimination and unlawful deduction from wages. The claimant’s line manager, Jade Fuller, and the Head of Human Resources, Ruth Bartlett, were second and third respondents to the harassment complaints. These complaints having since failed due to the non-payment of deposits, references to the respondent in these reasons are references to Nuneaton and Bedworth Borough Council.

2. The factual background to the first claim was that the claimant worked for the respondent as an Enforcement Officer from 24 September 2019 to 30 July 2020, when he was dismissed for poor performance according to the respondent, during his probationary period. The claimant is disabled by reason of Asperger’s syndrome and Dyslexia, which the respondent accepted were disabilities of which it knew at all material times.

3. The claimant brought a second claim on 23 May 2021 (1302667/2021) following early conciliation between 28 April and 21 May 2021, for failure to make reasonable adjustments following two unsuccessful applications he made to the respondent for the position of Revenue Shared Services Manager, subsequent to his dismissal from the Enforcement Officer post. A third claim presented on 24 May 2021 duplicated the second one (1302668/20210).

4. Finally, on 30 July 2021, the claimant lodged a fourth claim against the respondent for victimisation and harassment (1303357/2021), following early conciliation between 18 June and 16 July 2021. This claim arose out of the terms of a job reference the respondent provided to Staffordshire County Council for the claimant. In this claim, the claimant also challenged the respondent’s investigations with third parties who had been party to other litigation with him.

Case management

5. All the claims were considered at a preliminary hearing in private before Employment Judge Dean on 18 March 2022 (p341). As well as listing the case for final hearing, EJ Dean provided for there to be a preliminary hearing in public on 23 September 2022 to consider both parties’ applications that the

claim/response should be struck out and/or deposit orders made. She also summarised the issues in the case, albeit requiring the parties to liaise subsequently to confirm them.

6. In addition, EJ Dean heard, and granted, the respondent's contested application for specific disclosure from the claimant of the details of any claims he had made against his previous employers or prospective employers. The reason given for the respondent's application was that the information was relevant to its case that the claimant was abusing the tribunal system in two ways – first, by gaining employment and then engineering his dismissal in order to bring a claim, and secondly, by applying for jobs he had no desire to secure in order to bring a Tribunal claim when his job application was rejected. EJ Dean granted the respondent's application and made an Order (sent to the parties on 8 August 2022, p340) requiring the claimant to list such claims brought by him in the years 2018-21. EJ Dean refused to grant an Order requiring the claimant to disclose his bank statements (which the respondent wished to see as potential evidence of the claimant's income from other litigation).

7. The claimant appealed against EJ Dean's Order and did not comply with the Order for disclosure pending the outcome of his appeal. By a decision dated 30 November 2022 (p1247) HHJ Martin Barklem dismissed the claimant's appeal at the "sift" stage under EAT Rules, rule 3(7). The claimant exercised his right to request an oral hearing before a Judge under rule 3(10) but the Tribunal was advised that such a hearing had not been listed by the time this hearing took place.

8. On 23 September 2022 the preliminary hearing in public that had been listed to consider the strike out/deposit applications took place before Employment Judge Perry. The claimant did not attend that hearing, having previously applied unsuccessfully for it to be postponed on medical grounds, EJ Perry found that the medical evidence supplied by the claimant was insufficient to support his postponement application. The claimant sought financial support from the Tribunal as a reasonable adjustment to enable him to provide fuller medical evidence. This application was declined by Regional Employment Judge Findlay. The claimant also applied unsuccessfully in writing to be excused from the need to copy his correspondence with the Tribunal to the respondent under rule 92 prior to the hearing.

9. EJ Perry heard the respondent's strike out and deposit applications in the claimant's absence on 23 September 2022 but did not decide them, listing the case for a further preliminary hearing in public over 2 days for those to be finally determined (p392). On 13 November 2022 the claimant appealed against Employment Judge Perry's Order following that hearing. The Tribunal understood that this appeal had not been finally determined by the time of this hearing.

10. On 25 November 2022 the public preliminary hearing took place before Employment Judge Flood, in one day. EJ Flood permitted the claimant to make his submissions later in writing as a reasonable adjustment in light of his disabilities. EJ Flood's decision was promulgated with reasons on 27 January 2023 (p442). EJ Flood struck out a number of the claimant's reasonable adjustments claims together with the harassment claims made against the individually named respondents. She further ordered the claimant to pay a deposit if he wished to pursue his direct disability discrimination claims, automatic unfair dismissal claim and the indirect discrimination complaint as far as it related to the cost of a medical report, but refused other deposit order applications by the respondent. The respondent was also refused an order for third party disclosure to compel ACAS to disclose a list of claims notified to it by the claimant from 2018-21.

11. The claimant appealed against the order of EJ Flood but the Tribunal did not have a copy of his notice of appeal. The Tribunal was advised that this appeal had been rejected at the "sift" stage in the Employment Appeal Tribunal with the claimant's request for a hearing under rule 3(10) EAT Rules still pending at the time of the hearing.

12. The claimant did not pay the deposits he was ordered by EJ Flood to pay if he wished to pursue certain of his claims, and those claims did not therefore fall to be determined by the Tribunal.

The claims and issues

13. At the outset of the hearing, the Tribunal was presented with a list of the remaining issues by the respondent and a version of this list from the claimant with his tracked changes. The issues were discussed with the parties on the first day of the hearing. The Employment Judge then circulated a revised combined list of issues to which both parties made further minor amendments, leading to the final agreed list which is attached to these reasons, marked Appendix 1.

14. Issue 8 in the list of issues ("Vexatious/unreasonable litigation/no prospect of success") was as previously formulated at the preliminary hearing before EJ Dean. The Tribunal asked the respondent to clarify its position in relation to the question posed at 8.2 namely, how does the claimant's alleged vexation impact on the claims? The respondent provided the following response:

<u>Relevance of vexatiousness / abuse of process</u>

(1) A claim can be struck out at any stage on the ground that it is vexatious: rule 37. That includes at or after judgment. Judge Dean agreed that the issue could not be determined prior to the full fact find (Judge Dean paras 5-18) [342-346] (EAT) [1248]

(2) For the discrimination arising claim, there is no unfavourable treatment if the termination of employment is the engineered objective.

(3) The Claimant's motivation is relevant to the issues of whether he is, in truth, adversely affected by a PCP and to the extent of any injury to feelings (Judge Dean para 8) [343] (EAT) [1248]

(4) For the reasonable adjustments claim there is no disadvantage (and no loss) if there is not a genuine desire to obtain employment.

The hearing and evidence

15. The claimant made an application to postpone on the first day of the hearing. This was the renewal of an application he had made in writing to the Tribunal on 31 January 2023 and which EJ Flood had rejected. It is sufficient to say that the application was made on the grounds that the claimant had a number of outstanding appeals to the Employment Appeal Tribunal in these proceedings, that the Tribunal might draw an adverse inference from his failure to disclose his litigation history pending the outcome of one of those appeals and that the respondent was relying on documentation disclosed late in the proceedings which the claimant had not had the opportunity to fully consider.

16. The Tribunal heard the application, and the respondent's opposition to it, and declined it for the reasons given orally to the parties at the hearing, which are not repeated here. In summary, it was in the Tribunal's unanimous view that this long-listed and lengthy hearing needed to proceed in the interests of justice. The reasons also included the fact that adjustments could and would be made to address any disadvantage the claimant might experience from the late disclosure and rather complex presentation of documentation (see further below). The parties were advised that no adverse inference would be drawn by the Tribunal from the fact that the claimant had not complied with the disclosure order of EJ Dean relating to his previous claims, given that this order remained the subject of appeal.

17. The Tribunal was provided with a joint file of documents that was initially 1648 pages in length. Additional pages were added to the bundle during the course of the hearing by both parties until it numbered 1677 pages. This will be referred to as "the main bundle". Page numbers in these reasons are references to the page numbers of the hard copy of the main bundle, unless otherwise stated.

18. The Tribunal also received in evidence from the respondent a bundle known as the "Exhibits Bundle". This included 10 exhibits labelled by reference to the witness who was to introduce the evidence. Each exhibit was internally numbered. Many, but not all, of the exhibits included documentation produced by witnesses called by the respondent who had been party to separate

litigation with the claimant and included a miscellany of pleadings, orders, evidence and correspondence. Some of these exhibits were very lengthy – for example, Exhibit GK1, relating to the evidence of Gregory Kelly from Elite Security Limited, which ran to 132 pages. Five of the respondent's witnesses on the substantive issues (Philip Richardson, Margaret Mitchell, Rachel Dobson, Jade Fuller and Ruth Bartlett) also produced further documents by way of an exhibit to their statement, comprising a further 150 pages combined, which were not in the main bundle.

19. During the hearing the claimant supplied further evidence about practices within the security industry which was the backdrop to some of his other claims. For convenience the parties added that 85 page bundle to the Exhibits bundle labelled "RBryce1". References to the pages of the Exhibits bundle in these reasons will be prefaced with the letters "EB" and will then be followed by the title of the exhibit (eg MM1) and the internal page number within it.

20. The third bundle that the Tribunal received in evidence was from the respondent's counsel and contained 11 judgments downloaded from the Employment Tribunal's website or the Employment Appeal Tribunal's website which the respondent put forward as evidence of the claimant's Tribunal litigation history. The claimant submitted that two of the judgments related to claims that did not involve him – R Bryce-Stafford v Sepura PLC 3329470/2017, a rule 52 judgment, and R Bryce v Main Tool Co Ltd 4102163/2017, a rule 52 judgment from the Employment Tribunals in Scotland. Whilst the respondent did not accept the claimant's assertion in this respect (suggesting that the name "Bryce-Stafford" could have been a pseudonym of the claimant as he lives in Stafford) the Tribunal heard no evidence from the respondent about either claim which would link it to the claimant. This bundle will be referred to in these reasons as the "Previous cases or PC bundle".

21. The Tribunal also received in evidence a video of an appeal hearing which was held before a committee of the respondent's Members via remote video conferencing. The claimant alleged that it showed that certain of the Members were not paying any or sufficient attention to his appeal.

22. The respondent's counsel also produced a file of 13 authorities, together with a reading list, chronology, cast list and outline submissions. During the course of the hearing, the claimant also provided the Tribunal with a number of authorities.

23. Both parties produced written closing submissions which they supplemented orally.

24. The Tribunal heard oral evidence from the following witnesses. Each witness produced a written statement as their evidence in chief and was cross-examined. The claimant's witness statement contained some omissions on key issues. By agreement with the respondent, the Employment Judge asked the claimant some supplementary questions on the understanding that the respondent's counsel would have time to take instructions on that evidence

prior to cross-examination of the claimant if necessary. The statement of Alan Fitzgerald, deputy Director of HR, Birmingham City University, was accepted by the claimant without the need for him to be called.

Claimant:

24.1 The claimant
24.2 Robert Evans – Trade Union representative (UNISON)
24.3 David Stewart - Director, Autism Success Formula Ltd.

Respondent:

24.4 Jade Fuller – Revenue Shared Services Manager
24.5 Ruth Bartlett – Head of People & Culture
24.6 Linda Downes – Head of Audit & Governance
24.7 Jessica Bertram – HR Officer
24.8 Rachel Dobson – Head of Revenues & Benefits
24.9 Margaret Mitchell – HR Business Partner
24.10 Philip Richardson – Director for Planning & Regulation
24.11 Gregory Kelly – Business Support Manager, Elite Security Ltd.
24.12 Karen Wright – Accounts Manager/Exec Assistant, Dukes Bailiffs Ltd.
24.13 Amy Pittam – Respondent's in-house solicitor
24.14 Simone Hines – Director of Finance
24.15 Brent Davis – Chief Executive
24.16 Dewi Lynn Thomas – Company secretary, Corps Security (UK) Ltd
24.17 Daljinder Dhillon – solicitor, Birmingham City Council

25. The Tribunal discussed with the claimant what adjustments were required to assist him to fully participate in the hearing and give his best evidence, in light of his disabilities. The hearing was converted to be held by remote video conferencing from the second day onwards. This would enable the claimant to avoid the stress of travelling to and from Tribunal from Stafford each day with voluminous documents and would also facilitate him giving his evidence in familiar surroundings where temperature and other potential sensory triggers could be controlled by him. The majority of the respondent's witnesses wished to give their evidence remotely in any event. The Tribunal also took a 10 minute break approximately every hour during the hearing. Thirdly, the claimant was given time to consider new documents as required. Fourthly, the Tribunal adjourned the hearing on Wednesday 22 March 2023 and took Thursday and Friday 23/24 March 2023 as non-sitting days to allow the claimant time to put his closing submissions in writing prior to hearing those submissions on Monday 27 March 2023. Whilst the claimant had asked for a longer postponement, and the respondent for none at all, the Tribunal considered this adjustment to be reasonable and in accordance with the overriding objective and the guidance in the Equal Treatment Bench Book.

26. For the sake of completeness, the Tribunal records the fact that, on the fourth day of the hearing, the respondent's counsel advised the Tribunal that in his view, and that of his clients, the Tribunal was displaying apparent bias towards the claimant. Counsel did not apply for the Tribunal to recuse itself and asserted that he did not think that the Tribunal was in fact biased. He opined that the fact that the claimant had a history of appealing to the Employment

Appeal Tribunal, was likely to be influencing the approach being taken by the Tribunal which he viewed as “being helpful to the claimant whenever the opportunity arose” and “rude and obstructive” to the respondent.

27. The Tribunal reflected on counsel’s observations and discussed them as a panel. The Tribunal members were invited to provide honest feedback to the Tribunal Judge if they considered there to be any truth whatsoever in the suggestion that she had been rude to respondent’s counsel. They were unanimous in their view that the Tribunal Judge had behaved courteously and appropriately at all times and were in fact concerned that respondent’s counsel had at times displayed discourtesy to the Tribunal and a lack of appreciation that the claimant’s (admitted) disabilities meant that reasonable adjustments needed to be made for him in order to ensure that there was a fair hearing.

28. The Tribunal reassured the parties that the possibility of an appeal by either party was a constant, as it is a right enshrined in statute, and that the proceedings were and would be conducted the same regardless of that possibility. Reasonable adjustments continued to be made for the claimant despite the respondent’s assertions that he was exaggerating his condition and the respondent was encouraged not to see these as indicative of bias. The rest of the hearing proceeded without further complaint by the respondent and, when giving evidence, the former second and third respondent both confirmed that they were satisfied that they had or no longer had any perception of bias on the part of the Tribunal and were content with the way in which the proceedings were being conducted.

Findings of fact

29. Based on the evidence heard, the Tribunal made the following findings of fact.

The claimant’s disabilities

29.1 The claimant was diagnosed with Dyslexia at age 11 by Suzanne M. Boyd, a Chartered Educational Psychologist, working with The Dyslexia Institute (p1048). His symptoms related to weaknesses with auditory and visual memory, speed of information processing skills and phonological processing skills.

29.2 The claimant’s diagnosis of Asperger’s syndrome came later in 2008 when he was aged 23, by Andrew Barlow, Team Manager of the Liverpool Aspergers Team at the Mersey Care NHS Trust (p1037). In Mr Barlow’s Assessment Report, he recorded that the claimant displayed social impairments, had narrow interests, undertook repetitive routines, used speech and language and non-verbal communication all in a way that was consistent with a diagnosis of Asperger’s syndrome.

29.3 The social impairment resulting from the claimant's Asperger's syndrome was found by Mr Barlow to include "resort to legal cases" as "a form of rule bound consequences for others actions". Mr Barlow added that the claimant, who had a history of being bullied in connection with his condition, used rules and the law as a way of asserting himself when, as was frequently the case, he felt disempowered by situations (p1041). "Avidly researching the law as a means to resolving his own problems" was identified as a "narrow interest" for the claimant, consistent with the diagnosis.

29.4 The Tribunal accepted the evidence in the claimant's impact statement about his disabilities, which the respondent did not challenge. In it the claimant asserted that he may display behaviour, interests and activities that are restricted and repetitive or sometimes abnormally intense or focused as a result of his condition. He experiences difficulties with the basic elements of social interaction including misunderstanding or not recognising the listener's feelings or reactions, which to others may come across as insensitive. The claimant's disability also leads him to become at times argumentative and short-tempered and he can struggle to let things go. The added disability of dyslexia causes the claimant to struggle with memory and with reading numbers or words correctly. He can misread the numbers on a digital clock. The Tribunal witnessed this in that the claimant frequently transposed the digits in the lengthy page numbers of the tribunal bundle as he looked for a particular document. As a result of the combination of his disabilities, the claimant finds even the simplest task can become a "struggling challenge". He has suffered with depression which, during the time of his employment by the respondent, he attempted to manage in a number of ways including a strict, almost obsessive, routine of regular gym attendance.

29.5 The claimant lives alone and has a limited network of family members for support. He worries about money and, at the time the Tribunal was concerned with, tended to carry out secondary employment in the security industry at the weekends as a means of boosting his income and also to create social connection. The claimant found the Covid-19 national lockdowns in 2020-2021 especially challenging in view of the associated social isolation he experienced.

29.6 The claimant presented to the Tribunal as a professional man who was courteous to the Tribunal, counsel and the respondent's witnesses, despite the often challenging nature of the questions being put to him during cross-examination. He was able to articulate arguments on paper and orally provided he had sufficient time to do so. The Tribunal found that the claimant was eager to educate others about his disabilities and the impact they have on him day to day. His evidence at times revealed his frustration that his conditions are not well understood, or are misunderstood, by those in the "neuro-typical" world. He was very passionate about the arguments he advanced in support of both his claims against the respondent and the cases he was asked

about that he had brought against other parties, some of which were years beforehand. Losing an argument did little or nothing to diminish his belief in its correctness and he did not appear to the Tribunal to find it easy to see a point of view other than his own.

The claimant's recruitment

29.7 On 3 June 2019 the claimant submitted an application to the respondent for the role of Enforcement Officer (p478-492). He completed the respondent's on-line application form, including details of his working history. He also filled in a table showing how he believed he was able to meet each of the criteria in the person specification for the role and wrote a free-style response outlining which of the respondent's 7 values he felt most appropriate to the role he was applying for and why. The claimant requested to be considered under the Disability Confident Scheme which the respondent operates. This guarantees an interview to disabled applicants who meet the essential criteria for a role.

29.8 The claimant's working history included relevant experience working for 4 years (2013-17) as an Enforcement Officer (council tax) for Hackney Borough Council and then a year (2017-18) working as a Professional Enforcement Manager for London Borough of Croydon managing a team who were engaged in recovering debts and unpaid council tax. The claimant did not have any previous experience of housing and enforcement relating to rent arrears. At the time of his application to the respondent, the claimant was working for Tamworth Council as a Community Warden (p492).

29.9 The claimant was interviewed by the respondent and made a conditional offer of employment as an Enforcement Officer on 1 July 2019 (p498). He completed a pre-employment medical questionnaire (p493) confirming that he had a physical or mental health problem that had lasted 3 weeks or longer, that he had a serious illness in the last 5 years, that he required adjustments to his proposed work and that he had health problems that could be affected or made worse by the activities identified in the job description for the role.

29.10 The claimant was assessed by Occupational Health (OH) who sent a report to the respondent dated 12 July 2019 (p499). The report identified that the claimant would need adjustments to support him in work given his "long-term conditions," advising that these be discussed with the claimant directly. Suggested adjustments included more time to complete tasks, lowering target rates, considering a longer probationary period, the use of unambiguous words and clear and concise instructions and the provision of a car park space to reduce anxiety at the start of the working day.

29.11 The respondent raised additional questions with OH having read the report (p500). OH answered those questions in a further report dated 29 July 2019 (p502) declaring that the claimant was fit for the role and reiterating that the claimant would require adjustments such as more time to complete tasks and additional support and supervision.

29.12 On 12 August 2019 the claimant met with Jade Fuller, then Enforcement Team Leader, and Sophie Frain, HR officer, to discuss the OH reports (p504-8). The claimant explained that he would need more time to do things and that memory was his main problem, adding that he would know more about the adjustments he needed once he had a feel for the job. The claimant was positive and persuasive regarding his ability to do the tasks involved in the role. Miss Fuller explained that the claimant would be a "Level 1 car user" which meant that he would be "given a car park pass to use within the Council" but would not be allocated a specific space. The claimant indicated that would be acceptable as long as he knew which car parks (p505).

29.13 Following this meeting the respondent confirmed the claimant's offer of employment. On 6 September 2019, in advance of the claimant commencing employment, Sophie Frain made contact with Dave Stewart of Austism Success Formula, who is a work place support worker specialising in autism. Mr Stewart previously offered support to the claimant and the London Borough of Hackney when the claimant worked there. Mr Stewart's services were engaged by the respondent and a meeting was arranged between him and Jade Fuller.

29.14 On 18 September 2019 Jade Fuller sent an email to Sue Trahern, Revenues Manager, and Miss Fuller's line manager (EB, JF2 p1). In it she wrote,

> "Myself and Sharon interviewed and recruited to the full time position only. After we offered Raymond the job there were a couple of things highlighted from the pre-employment medical questionnaire, the adjustments suggested by occupational health we were unable to accommodate. Sophie (HR) and I had a meeting with Raymond where he has stated that the adjustments from occupational health are above and beyond what he would expect and he will have no problems completing the tasks of the role. We found that we didn't have enough information to go on to withdraw our offer of employment. Sophie has all the details of this meeting.
>
> Raymond is due to start next week but it has been established that he has Asperger's and Dyslexia all of which we can accommodate to an extent but there may be scenarios that are out of our control which could adversely affect him.

> He is happy for the team to know about his disability although I have not had this discussion with them yet.
>
> Raymond also asked for an extended probation period but I have informed him we will discuss at his 4 month probation if it is needed.
>
> Based on the information we have, I have no reason to believe that these conditions can't be managed in the appropriate way and Sophie has arranged for support to be put in place including job coaching.
>
> Attached is a copy of the support plan we have received."

The support plan attached was a draft provided by David Stewart. The Tribunal found that the references in the email to adjustments that could not be accommodated or could only be accommodated "to an extent" were reflections from Jade Fuller on the fact that this was a public-facing role requiring contact with service users and the Court system, which were largely outside of the respondent's control.

The claimant's employment

29.15 The claimant commenced employment with the respondent on 24 September 2019 (p509). Jade Fuller had prepared a detailed induction/ training plan for the claimant (p516-519) covering each of the tasks and topics that the claimant was to be trained about, and by whom, from his first day of employment until 5 November 2019.

29.16 On his first day the claimant signed an application form for a Staff Level 1 parking permit (p521). The form contained terms and conditions, the first of which was that the permit was applicable in Long and Short Stay car parks excluding Rope Walk, Town Hall and Riverside car parks. The Tribunal found that Jade Fuller also said this to the claimant verbally.

29.17 On 1 October 2019 David Stewart attended a meeting with Jade Fuller and Sue Trahern. It was agreed that Mr Stewart would provide job coaching for the claimant for a 26 week period. During this meeting the respondent explained to Mr Stewart that there was limited experience within the team of working with staff with Autism or Aspergers and that the respondent wished "to ensure that [we] have sufficient understanding to provide effective support and not undermine the opportunity for Raymond to demonstrate that he is able to fulfil the role." (p522). Mr Stewart gave advice to the respondent's managers on a number of topics, including that they should provide clear expectations to the claimant. The respondent was encouraged to be clear with the claimant, for example, about what

was non-negotiable when discussing his start time of 9 am which Miss Fuller explained to Mr Stewart (and later the claimant) was key because it was linked to customer service needs, being the time when the service was open for telephone and in person queries.

29.18 Mr Stewart met with the claimant and with Jade Fuller approximately weekly thereafter to discuss the claimant's progress in the role. Meetings then took place with all three present. Miss Fuller's meetings with Mr Stewart covered a range of topics designed to help her to understand the claimant's disabilities and how she could help to support him to perform in the role.

29.19 Having carefully considered the evidence of Miss Fuller, the Tribunal formed the following impression. She came across as a committed, hard-working and professional manager and the Tribunal found her to be a credible witness. A very large proportion of the enforcement activity which Miss Fuller and her team were responsible for was in the area of housing – principally rent arrears. This was an area of work that the claimant had never done before. Miss Fuller was keenly aware that the client group her team worked with were often very vulnerable. She told the Tribunal how important it was that everything was done right with applications for possession because people's homes were on the line. The Tribunal found that Miss Fuller was eager to do the right thing and manage the claimant appropriately but it weighed heavily on her from fairly early on in the claimant's employment that he was not appearing to pick up and remember the topics she was teaching him and that this might result in a mistake that could impact adversely on a vulnerable person. The service was also under strain due to a high volume of work and the need for additional human resources to meet this demand.

The claimant's progress in the role

29.20 The claimant's training and induction plan had to be altered after the first 2 weeks because he failed to progress beyond that point. Miss Fuller took advice by telephone as well as in the weekly meetings from Mr Stewart. This led to her amending the training plan and delivering additional one to one training to the claimant, which he was encouraged to record. Miss Fuller also created a number of bespoke training documents specifically for the claimant and in discussion with Mr Stewart which described the processes he had to follow. Miss Fuller found, however, that implementing these measures did not appear to assist the claimant to retain the information necessary to be able to progress with his training beyond the basics of the role. The training plan was designed so that the basic building blocks of the work would be learnt first before additional elements were added in.

29.21 There was a further meeting between David Stewart and the claimant's line managers on 14 November 2019 (p524). The minutes of that meeting

included a summary of the areas of concern that Jade Fuller had raised at previous meetings with Mr Stewart as follows:

- "Inability to take on verbal instruction
- Not retaining information
- Not considering all of the case information/too focussed on next point
- Not referring to procedures/manuals
- Not proof-reading
- Significant number of errors on basic tasks
- Jade has as yet not been able to sign off a single item on his training plan yet
- Raymond has not met any of his milestones in his training plan to date
- He is considerably behind on an already extended training plan
- We have tried everything we can to enable him to take on information and fulfil the job role however to date he is not fulfilling any part of the role
- Jade is spending a considerable amount of her time with him
- Lack of concentration & not listening
- Lateness − (this has improved over the last 3 weeks)"

After a lengthy discussion at the meeting, it was agreed that Miss Fuller was going to spend the whole day with the claimant again the following day to go over previous training and the claimant was to be encouraged to take notes in the manuals.

29.22 The notes of the meeting also record that the claimant had asked to work from home but been told that this was not appropriate because no single task had yet been signed off. Jade Fuller told the Tribunal, and the Tribunal accepted, that when the claimant was in the office, he sat close to her and was able to readily ask for help, which he did frequently. She did not consider that it was in the interests of the organisation or the claimant for him to work from home where he would not have assistance on hand at a time when he was struggling with the basic tasks of the role. The Tribunal found that this was the reason why his request was refused.

29.23 All new employees of the respondent were subject to a probationary period, usually of 6 months. Probationary reviews were carried out every 2 months until the probationary period was satisfactorily completed or not, in which case employment might be terminated before the end of the probationary period if it appeared unlikely that a satisfactory standard of work was likely to be achieved within a reasonable period.

Two month probation review

29.24 The claimant's 2 month probationary review took place on 25 November 2019. It was conducted by Jade Fuller with Ruth Bartlett, HR officer (as she then was) present. The respondent's probationary policy (p1617) provides at paragraph 5.3.1 that an HR representative will not usually

attend a first formal probationary review but “guidance is available from Personnel if required”. Jade Fuller asked Mrs Bartlett to attend the meeting because of the concerns at that stage about the claimant’s performance.

29.25 The content and outcome of the 2 month probationary review meeting was recorded on the respondent’s pro-forma for the purpose, (p526-7) which the claimant signed. The comments included the statement “Raymond has shown a willingness to learn all that he has been asked to. Rent is a new area of working for him and he is keen to learn different things to allow him to complete required tasks”. The Tribunal found that at no time during the claimant’s employment did it occur to Jade Fuller or any other member of management or HR that the claimant was not genuine in his attempts to perform in the role.

29.26 The record of the meeting included the observation that, although nothing had been added to the claimant’s training plan, it was approximately 5 weeks behind. The claimant was struggling to retain information even where it had been repeated to him and after even a short break, such as lunch, it would be necessary to start again with a learning activity.

29.27 The claimant’s error rate was recorded at that time as between 60-90% depending on the activity. The Tribunal found that Jade Fuller checked each piece of work the claimant carried out. She did this for other new employees too, applying the same process to the claimant. If there was a very minor error on a file, such as a typographical or spelling mistake, she did not record it but where there was a more substantive error, such as the use of the wrong template letter, or a date incorrectly transposed, or the wrong process followed, she would record that as an error. Miss Fuller carried out this review for quality control reasons on the files and also to provide her with objective information as to how new employees were performing. The claimant had no target as to the volume of work that he was required to carry out so that if he did a single piece of work well, he would score highly. Miss Fuller was focussed on the quality and not the quantity of the work being produced by the claimant and she stressed this to him.

29.28 The claimant’s time-keeping was discussed at this probationary review. It was recorded that the claimant was consistently late arriving after 9am during the first 5 weeks of his employment but that the situation had “improved considerably” over the previous 4 weeks.

29.29 The outcome of the 2 month probationary review was that the claimant’s probation was to be extended by 2 months and he was to be provided with a personal improvement plan (PIP). Taking account of the Christmas holiday period, his progress with the PIP was to be reviewed on 3 February 2020, with the claimant’s 4 month formal probationary

review scheduled for 24 January 2020. There was to be a referral of the claimant to OH for consideration of his request for a standing desk.

29.30 The PIP (p532) was dated 2 December 2019 and followed a standard template. It identified the area for improvement, the standard required by the claimant, how that standard was to be achieved, how the standard would be measured and what support the claimant was to be provided with to reach the required standard. The three identified areas for improvement were phone calls, letters and case management. The claimant was to achieve an accuracy rate of 70% with his letters by 2 weeks and 80% by 4 weeks. The claimant clarified that these were guidelines from Miss Fuller, not a rigid rule.

29.31 The claimant signed the PIP and probation review form but at the same time wrote an email to Jade Fuller dated 9 December 2019 (p535). In the email the claimant made a number of observations, such as that he thought that the respondent had the "wrong expectation level" of him and that he should have been provided with a 12 month probationary period from the outset which would have reduced his anxieties. He expressed the view that he would have been performing better if he had been allowed to do certain tasks such as dealing with customers and going to court. He stated that he would be raising the 9-5 timing of the respondent's service with OH with a view to obtaining a reasonable adjustment.

29.32 Jade Fuller replied to the claimant's email on 11 December 2019 (EB, JF1 p14) outlining some of the steps that had been put in place to support the claimant, including the provision by her personally to the claimant of 69.5 hours of one to one training, excluding his induction week. She reiterated that David Stewart's support was available and that the claimant's training would continue in line with his PIP.

Occupational Health

29.33 On 12 December 2019 the respondent's OH service submitted a written response to HR following a series of questions posed on 10 December 2019 about the claimant's conditions and reasonable adjustments (p1669). The report relayed the claimant's views as received by OH, for example, that the claimant felt he was being assessed on his least strong qualities, including writing and processing cases. The report stated that the OH service could not provide a medical opinion on this. In relation to time-keeping the OH report recorded that the claimant might arrive 5-10 minutes late due to traffic issues on his way to work and that this caused him increased anxiety. In relation to adjustments, the report included the following list of adjustments that the claimant requested:

> "1. To be given the chance of carrying out all tasks related to his job role to allow for a more rounded evaluation of his performance

2. For his preferred learning methods to be accommodated. He tells me that he picks up instruction better through verbal communication rather than reading.

3. Lengthening his probation period to adjust for his disability, and in view of his recent level of absences, this may be considered supportive. He has requested an extra 6 months' probation, however this would need to be a management decision.

4. To assist with his letter writing, verbal dictation software may be helpful.

5. He has asked if he can work from home on occasions as this will alleviate some of the anxiety created by driving to work.

6. He tells me that he struggles with his memory at times and this may result in him asking more questions and requiring more reminders for actions which need to be taken. He is likely to require some support with this, for example a note book where he can record instructions and required actions. What else can be provided will need to be discussed with him.

7. He has requested a standing desk which he feels will help with his concentration.

8. He has requested to be near a window so that he can better control the ambience of his environment.

9. He appreciates the existing adjustment that allows him to take breaks away from his desk as required. However he tells me that he is concerned that this may judged negatively by colleagues."

29.34 Ruth Bartlett emailed OH on 12 December 2019 indicating that the original referral had been specifically to consider whether a sit/stand desk would be suitable for the claimant. OH responded in writing on17 December 2019 (p538) stating that a sit/stand desk would help the claimant's concentration at work. The medical officer added that the other issues and requests suggested by the claimant would also be beneficial for him.

29.35 The claimant attended a one to one meeting with Jade Fuller on 20 December 2019. The detailed notes of this meeting were recorded on a proforma for the purpose and signed by the claimant on 2 January 2020 (p540). The notes outlined the areas of work that the claimant was struggling with, despite receiving training. These included navigating the software packages central to the management of the respondent's housing cases known as Northgate and Civica. It was also noted that the claimant was arriving late for work again in the morning which he attributed to needing to go to the gym after work, not getting home until 10 or 11pm and not therefore getting enough sleep. Miss Fuller told the

claimant that the need to arrive by 9am could not be flexed because that was when service users could telephone or call in and work not covered by the claimant would fall to his colleagues to pick up. Other problems with the claimant's work recorded in the notes included the claimant being away from his desk 4 or more times per hour, often taking personal mobile phone calls. He was reminded that he could work from a different office if he needed quiet or a break.

Four month probation review

29.36 On 7 February 2020 the claimant attended his 4 month probation review meeting. This meeting was chaired by Jade Fuller with Ruth Bartlett again in attendance from HR. Jade Fuller noted that the claimant was still struggling to complete basic tasks accurately. At that time his accuracy rate was 52.1%. There had been no progression with the claimant's training plan since the 2 month probation review because the claimant had failed to meet the accuracy targets he'd been set. Miss Fuller observed that the claimant's preference for receiving training was to receive it verbally but that he did not make any notes, relying solely on his memory which he stated was not good due to his disabilities. He had been provided with a dictaphone but, despite encouragement, did not use it to record training sessions. Miss Fuller summarised that 1/3 of the tasks in the claimant's training plan had been covered but none had successfully embedded. The claimant's time-keeping remained unsatisfactory and he would arrive for work at or after 9am on multiple occasions each week.

29.37 Miss Fuller concluded the meeting stating that as she had been unable to sign off the claimant's PIP as complete and in light of inadequate improvements being made, the claimant's case would be referred for a hearing regarding the future of his probation. Mrs Bartlett confirmed that the claimant's allegations that he was underperforming because of a failure by the respondent to make reasonable adjustments would be considered at that hearing.

The grievance process

29.38 On 7 February 2020 the claimant lodged a grievance (p561) by email to "HR services" alleging that he was not "adequately receiving the reasonable adjustments recommended by Occupational Health and in an Employment Tribunal judgment and by my own requests". He said he was being directly discriminated against because of his disability.

29.39 Sophie Frain of HR responded on 11 February 2020 advising that no medical opinion about working from home had been received but that the director Simone Hines had agreed to let the claimant work from home one day per week on a trial basis, provided he had a suitable space to work from.

29.40 The claimant responded on 11 February 2020 (p556) with a lengthy formal grievance quoting from both OH reports of 12 and 17 December 2019 and asking for formal discussion about his reasonable adjustments.

29.41 On 21 February 2020 the claimant had another one to one meeting with Jade Fuller (p545). The claimant's performance remained poor and he was continuing to arrive late for work. A report from Access to Work was awaited to facilitate the funding for a stand/sit desk. The claimant told Miss Fuller at this meeting that he was extremely stressed due to a number of personal issues as well as those which were work related. One such issue related to the claimant's personal litigation caseload. He had asked to take annual leave on 13 February 2020 to attend the High Court in connection with his judicial review following a speeding offence and the resultant fine of £2,500. Miss Fuller suggested some counselling might help and advised the claimant to speak to his GP. She expressed concern that the claimant was using his annual leave to attend court for personal matters. Action points arising from the meeting included work between Jade Fuller and David Stewart to assist the claimant to improve his language on calls with customers and to arrange further refresher training on the tasks that the claimant was carrying out, with further thought being given with Mr Stewart on ways to assist the claimant to improve his accuracy levels at work.

29.42 On 28 February 2020 the claimant received notification that he was eligible for financial support to cover the support he was receiving from Mr Stewart, a height adjustable desk, Dragon speech recognition software and 4 half days of training in using it (p562). The Tribunal found that this notification had been delayed in part because the claimant was late in applying for the Access to Work grant and had to be chased by Mr Stewart to do so.

Car parking

29.43 On 12 February 2020 it came to Jade Fuller's attention that the claimant had been parking in the Town Hall car park. This was a pay and display car park used primarily by members of the public with some spaces for the respondent's executive team and staff with physical disabilities affecting their mobility. The claimant was not authorised to park there by the terms of his level 1 user pass, which instead provided free parking for him in a number of car parks a few minutes' walk away. Jade Fuller spoke to the claimant about the fact that his car was parked in the wrong place and asked him to move it. He replied that he wanted a pass for the Town Hall to assist him to get into work on time. The claimant did not move his car as requested and was issued with a PCN later the same day. (JF1 p11)

29.44 At a preliminary meeting with Jade Fuller and Sophie Frain from HR on 14 February 2020 the claimant advised that he had been parking at the

rear of the Town Hall without paying and without receiving a ticket since the start of his employment. A formal investigation under the Council's Disciplinary Policy was commissioned which was carried out by Linda Downes, Head of Audit and Governance. Having interviewed the claimant and others, Mrs Downes wrote a report dated March 2020 (p611-624 & p1661 (missing page)). She found that, as well as signing the terms of the level 1 user pass, and being advised by Miss Fuller verbally, the claimant had received emails on 20 September and 31 October 2019 advising him of the car parks he could use and had been told by Parking Services on 10 February 2020 over the phone that he could not park at the Town Hall. Mrs Downes recorded her finding that the claimant was not aware that he was doing anything wrong by parking at the Town Hall without paying. The position had not been assisted by the fact that the claimant had done so without criticism or receiving a PCN from 24 September 2019 until 12 February 2020. Mrs Downes made a number of recommendations about improving the clarity of signage and distinguishing executive passes and level 1 user passes by colour to facilitate an improvement in enforcement.

29.45 Mrs Downes' report was submitted to Dawn Dawson, Director of Housing, Communities and Economic Development who decided that the claimant should be invited to a disciplinary hearing. The claimant was advised of this by letter of 29 April 2020 (EB MM1, p6). As this was written during the first UK national lockdown due to Covid-19 Mrs Dawson gave the claimant the choice to attend a hearing remotely or await the easing of restrictions so that a face to face meeting could be arranged. The claimant chose the latter. No such meeting took place before the claimant's employment ended for other reasons on 30 July 2020.

29.46 In her letter Mrs Dawson also dealt with and rejected the claimant's grievance that he should be provided with a car park pass for the Town Hall as a reasonable adjustment. The claimant had requested a Town Hall pass in writing to Simone Hines, Director, on 14 February 2020 (EB, MM1 p3) after receiving the PCN. She declined the claimant's request on 19 February 2020 stating that OH had recommended that the claimant have a car parking pass but not that it needed to be at the Town Hall. The concern was around certainty about where the claimant could park and that there would always be a space available. Ms Hines considered that need would be best met by the claimant having a level 1 user pass, noting that the Town Hall car park was often overcrowded in any event. (EB, MM1 p2). In her decision, Mrs Dawson noted that the claimant had told Miss Fuller on 12 August 2019, before he took up his employment, that it would be acceptable for him to have a car park pass for nearby car parks although he would not have a designated space. The claimant appealed against this decision.

29.47 The respondent encouraged the claimant to apply for a “blue badge” and provide a medical report if he continued to assert that there was a medical reason why he needed to park specifically at the Town Hall car park. The claimant asked if the respondent would pay for such a medical report. On 21 May 2020 Margaret Mitchell (HR officer) emailed the claimant and said that the respondent would cover the cost of a report up to £500, based on the cost of other specialist reports (EB, MM1 p11). The claimant said that should be fine. The claimant later stated that he had received two quotes from specialist private companies, however, which were in the region of £1500-2000. These were for full assessment and diagnosis of the claimant rather than an opinion on the claimant’s parking requirements, as envisaged, and for this reason Mrs Mitchell suggested that the claimant proceed with applying for a blue badge with the medical diagnosis he already had (EB, MM1 p33). The claimant appealed the Council’s refusal to pay the higher amount for a medical report along with its refusal to provide him with parking at the Town Hall (EB, MM1 p30).

29.48 On 10 March 2020 Sophie Frain made a further referral of the claimant to OH (p1671) stating that the claimant had requested it, asking if OH could recommend a referral to a specialist clinical psychologist by the name of Dr Bahia. OH responded with a report dated 24 March 2020 (p1674) stating that a referral to a clinical psychologist would need to be made by the claimant’s GP and that, without a psychologist’s report it was difficult to advise from a medical perspective on any other adjustments or coping mechanisms that could be put in place for the claimant. OH reported that the claimant believed he was performing competently in the work that he had been given to do so far.

Lockdown restrictions and home working

29.49 From 23 March 2020, Covid-19 restrictions commenced at the respondent organisation and the claimant, along with the other members of his team, began to work from home full time. The claimant’s probationary period was extended to 24 September 2020 as a result as it had not been possible to convene the planned formal review of the claimant’s performance.

29.50 During lockdown Miss Fuller kept in touch with the claimant via regular meetings on Teams, including providing him with further training going over the manuals she had prepared for him. Contact with David Stewart also continued, but less frequently.

29.51 During the lockdown period, the amount of inbound contact from customers reduced dramatically. There were on average 10 short customer telephone calls per day. The claimant was tasked with managing the phone service. Miss Fuller also set the claimant a reporting task requiring him to navigate the respondent’s various on-line

systems to obtain information and collate it into a report setting out what had happened in a case, when and why. This task was set because it involved compiling a report similar to the sort of report that would be compiled in a case that was going to court. It was, however, set in relation to a dormant account.

29.52 Initially, the claimant was given 14 days to carry out the reporting task, but what he produced was not what Miss Fuller wanted and she therefore extended the time in which it was to be completed. In all, the claimant spent 140 hours on this task but had not been able to complete the report to Miss Fuller's satisfaction by the end of his employment. Miss Fuller noted that the claimant was not logging onto Civica, one of the respondent's main information systems. Miss Fuller checked this because she was receiving complaints from other team members that the claimant was referring customer calls to them instead of looking up the information on the respondent's systems and answering the queries himself.

29.53 Miss Fuller held a one to one with the claimant on 20 May 2020, filling out the proforma notes of the meeting (p589). The claimant confirmed that he was suffering from a number of personal and private stresses as well as stress at work but was less stressed about getting to work on time and was getting more sleep. Miss Fuller identified issues with the accuracy and ambiguity of the notes that the claimant was placing on the system having taken calls from customers, with a number of examples being provided. She scheduled "bitesize" hour-long refresher training sessions by telephone with the claimant to follow this meeting.

Flexi and travel time

29.54 The respondent operated a scheme which it referred to as "flexi-time". Where staff, like the claimant, were required to work, say, 37 hours per week, they could claim some activities, such as reasonable travel between appointments, towards those hours. Time worked outside the 37 hours could be recorded and claimed back over an 8 week period as "flexi-time", subject to the discretion of management. During lockdown, if staff were required to come into the office for any reason, a reasonable allowance was made for their travel time towards their working hours. This was a departure from the norm when travel to and from work did not count towards working time.

29.55 Between March and June 2020 there were approximately 4 occasions when the claimant needed to travel from home to the office, for example, to take his laptop to IT services. On 16 June 2020 there was one such occasion. The claimant took the train to work which took him in excess of 2 hours when his drive from home to the office, avoiding toll roads, would normally take in the region of 1 hour. Miss Fuller asked the claimant why he spent the extra time travelling by train (p643). The claimant replied

that he drove when he needed to go to the gym in Burton after work, and expressed frustration that Miss Fuller didn't appear to trust him. When asked to provide more explanation so that Miss Fuller could authorise the time and ensure the claimant was paid for his full travel time, the claimant replied (p640) "My previous answer is suffice. [stet]."

29.56 The claimant then entered into email correspondence with Ruth Bartlett from 16 to 24 June 2020 about the issue (p746f). The issue was referred to Simone Hines who suggested that a travel time of an hour was reasonable for the claimant to claim on his flexi sheet. Ruth Bartlett explained to the claimant that no deduction was being made from the claimant's pay (as he alleged) but rather a management decision as to how much time was reasonable for the claimant to record as working time for travel (p741).

29.57 The claimant continued to correspond about this issue with the respondent's HR team and it featured as part of his later grievance.

Final probation review

29.58 In June 2020 Miss Fuller wrote a report with 24 appendices (p648-651; p1655-1660) on the claimant's performance during his probationary period and the history of steps taken by her to support him. This was prepared for the overdue probation review meeting due to take place before Simone Hines, Director for Resources (as she was at the time). The report included the detail that the claimant's accuracy rate averaged 52.1% in the week to 31 January 2020 and had reduced to 48.4% between 19 March and 19 June 2020 since he had been working at home. Miss Fuller estimated that the claimant was currently undertaking approximately 25% of the role of an Enforcement Officer which, as a grade G role, required a level of autonomy with the post-holder undertaking the work with minimal support.

29.59 In terms of the reasonable adjustments provided, Miss Fuller recorded these at paragraph 3.2 of the report as follows:

- "Freedom to work from any office or training room in the building to alleviate issues surrounding noise and environmental triggers
- To get up and take a breather from his duties as and when required
- An extended training plan to allow RB to learn at a slower rate
- Probation was extended in line with policy and per the recommendation from occupational health
- From 24 September 2019 catch ups between JF and RB were carried out every week to update on progress. This continued until March 2020 and then every 2-3 weeks to date in addition to 1-2- 1s
- All training manuals have been given electronically, on paper and 1-2-1 training given in his preferred learning style of verbal.

A number of training manuals have been specifically created for RB to include diagrams, screen gabs (stet) etc. RB also has the option to bring use (stet) his Dictaphone during training.

- Since 24 September 2019 0.5 days per week have been set aside for support from Autism Success Formula Ltd

Since the 4 month probation meeting on 07/02/2020

- RB was given the opportunity to work from home 1 day per week
- Due to RB difficulties with retaining and remembering information, a personal training folder has been created as a quick access guide.
- RB has been given the freedom to learn at his own pace to assist with retention "

29.60 On 29 July 2020 the claimant attended a meeting chaired by Simon Hines, Executive Director, to consider his performance during his probationary period and continued employment with the respondent. This was held under the respondent's disciplinary policy. Ms Hines was supported by Jess Bertram, HR adviser. Jade Fuller presented the management case and was supported by Ruth Bartlett, HR adviser. The claimant was accompanied by his trade union representative, Robert Evans, and David Stewart, the Access to Work support worker. The meeting was recorded and the respondent produced a transcript of the meeting (p663). There was a detailed consideration of the information in Miss Fuller's report at the meeting, which was not challenged factually by the claimant or his representatives. The main thrust of the claimant's case at the meeting was that he needed more time to reach the required performance standard because of the effects of his disabilities.

29.61 At the end of the meeting, Simone Hines reached the decision to terminate the claimant's employment on the grounds of performance and the claimant's failure to pass his probationary period. In doing so, she accepted the claimant's disabilities were a factor in his poor performance. Having considered the adjustments that had been put in place for the claimant already, however, the amount of time that had passed since the claimant commenced employment (10 months) and the very limited progress that had been made by him in learning the tasks required and performing them correctly with "no positive direction of travel in performance", Mrs Hines decided that there was "no evidence to think that an improvement in performance was likely within the remaining two months of the probationary period". The Tribunal found that Mrs Hines' decision to dismiss reflected a concern about the impact that the claimant's poor performance was having on the service due to his error level and also the impact on his line manager, Jade Fuller, because of the amount of support she was providing to him. These factors led Mrs

Hines to recommend that the claimant should be paid for his notice period of 4 weeks but not required to work them. Mrs Hines further extended this notice period to 24 September 2020, and paid the claimant to the end of his probationary period.

29.62 The claimant was notified of Mrs Hines' decision at the end of the meeting. He appealed the same night (p708) alleging that Simone Hines was not impartial because she had involvement in his reasonable adjustments and operational decision making, he had been "discriminated through [his] entire employment directly or indirectly arising out of [his] employment", had been denied the chance to raise a grievance and had been dismissed for whistleblowing about the working time regulations and/or his disabilities.

29.63 The respondent confirmed the claimant's dismissal in writing to him on 30 July 2020 (p710), which was his effective date of termination of employment.

29.64 By formally written letter of 30 July 2020, on the claimant's personal headed notepaper, the claimant lodged a lengthy and wide-ranging "formal grievance" (p712-753). His grievances centred on his dismissal and the respondent's alleged failure to make reasonable adjustments for him, as well as including other standalone issues such as the reduction in his flexi-time claim.

Appeals against dismissal

29.65 The respondent acknowledged the claimant's appeal against dismissal and subsequent grievance in a letter dated 11 August 2020 from Christine Tyderman, Director for Business Improvement and Customer Service (p769). In this letter, Ms Tyderman explained that the "car parking issues" (i.e. the pending disciplinary and the claimant's grievance about it) would be suspended pending the claimant's appeal against dismissal. In relation to the claimant's grievance lodged on 30 July 2020, the claimant was reminded that he was no longer an employee so the respondent's Grievance Policy did not apply but in any event, as many of the issues raised related to the claimant's dismissal, he was invited to raise them in the appeal process.

29.66 The claimant compiled and submitted a detailed report in support of his appeal against dismissal (p754-765). This included submissions on the Equality Act 2010 and cited caselaw relating to disability discrimination. Simone Hines produced a management report dated 9 September 2020 for the appeal hearing (p771-4).

29.67 The claimant's appeal was heard on 28 October 2020 by Brent Davis, then Director of Operations (now Chief Executive), who was supported by Margaret Mitchell from HR. Simone Hines presented the management case supported by Jess Bertram. The claimant was again accompanied

by his trade union representative Robert Evans, and also David Stewart. The hearing was recorded and the Tribunal had a copy of the transcript (p777-825).

29.68 Mr Davis considered his role was to review the decision of Mrs Hines to ensure that it had been taken fairly and in accordance with Council procedures, not to decide the case afresh. In hearing the appeal, Mr Davis made a number of adjustments for the claimant such as obtaining a transcript of the hearing on 29 July 2020, tape recording the appeal hearing itself, taking breaks every hour, allowing either of the claimant's companions to interject and providing leeway in relation to the submission of evidence as necessary.

29.69 Mr Davis decided to uphold the decision to dismiss. He concluded, in summary, that a number of reasonable adjustments had been put in place for the claimant during his employment, that his probationary period had been extended, that clear targets had been set but that there was no evidence of a trajectory of improvement in performance so as to suggest that extending the probationary period further would be fruitful. Mr Davis confirmed his decision in writing to the claimant on 3 November 2020 (p826).

29.70 On 9 November 2020 the claimant exercised his further right of appeal against the decision to dismiss him, this time to the Council's Appeal Committee, a Panel comprised of Elected Members (p828).

29.71 The claimant's "second tier appeal" was heard by the respondent's appeal committee on 9 February 2021. The hearing was conducted via video link. Mr Davis wrote a report for the Committee (p836-850) setting out the background to the claimant and his findings in relation to each of the claimant's grounds of appeal. The committee resolved that Council policy and procedure had been adhered to in the decision to dismiss and as a consequence the appeal was not upheld (p851).

29.72 The claimant formed the view that some of the Elected Members had not been paying attention during the second tier appeal hearing. In particular, he believed one of the Members had fallen asleep. On 12 February 2021 he sent a pre-action protocol letter to the respondent setting out his intention to initiate proceedings for judicial review (p1272). Correspondence ensued between the claimant and the respondent's solicitor, Amy Pittam (p1275-1281), culminating in the latter issuing a costs warning to the claimant. On 4 March 2021 the claimant applied to the High Court unsuccessfully for a Protective Costs Order (p1282-1323). He withdrew his application for judicial review on receipt of the respondent's summary grounds of defence stating that the Council was the correct defendant. The application had been commenced against the appeal committee. On 4 November 2021 Her Honour Judge Carmel Wall ordered the claimant to pay the defendant's costs of the judicial review

proceedings in line with the usual order on a withdrawal (p1330). The claimant applied for a reconsideration of this decision (p1338) and also sought leave to appeal against it to the Court of Appeal (p1342). Leave was refused by Lady Justice Whipple on 27 July 2022 (p1360).

29.73 The claimant also sought to challenge the second tier appeal by making a formal complaint under the Code of Conduct for Elected Members. Philip Richardson, the respondent's Monitoring Officer, arranged for the complaint to be assessed by an external assessor, Paul Hoey, in consultation with an independent person appointed under the Localism Act 2011. Both persons viewed the second tier appeal hearing as it had been held on Microsoft Teams and recorded. They found that the claimant's complaints were not supported by the video evidence. Mr Richardson advised the claimant by email of 2 March 2021 (p855) that he did not propose to take any further action on the claimant's complaint and viewed part of it as vexatious.

29.74 The Tribunal was provided by the claimant with a copy of the video of the Teams hearing. The passages highlighted by the claimant as showing the alleged impropriety by certain Members (set out at p856) were viewed. The Tribunal did not find evidence in the video to support the allegations that those Members were not giving due attention to the claimant's appeal.

29.75 The claimant also raised the alleged misconduct of the Elected Members with the Local Government and Social Care Ombudsman on 3 March 2021 but a decision was taken not to investigate the complaint (p874).

The claimant's application for the post of Revenue Shared Service Manager

29.76 In approximately March 2021 the respondent advertised the role of Revenues Shared Service manager. This was a role one above in the organisational structure to Jade Fuller, who was then Enforcement Team Leader. (EB, RBp1-4). The claimant applied for the role on-line on 21 March 2021 completing the respondent's standard on-line application pack as he had done when applying for the role of Enforcement Officer. This included filling out his career history and explaining which of the council's 7 values he felt was most relevant to the role he was applying for and why. The claimant also filled out the "Person Specification" section of the form stating how he believed he met each of the criteria (EB, RB p15).

29.77 Under the "additional information" section of the form, the claimant said he wished to be considered under the Disability Confident Scheme. In answer to the question "Do you have any special requirements for interview or any other selection procedure?" he wrote "Yes please discuss with me". (EB, RB p14).

29.78 Rachael Dobson, Head of Revenues and Benefits Shared Services, carried out the short-listing for the role. Having reviewed the claimant's application, she concluded that he did not meet the essential criteria and would not be shortlisted, in accordance with the respondent's Recruitment and Selection Policy, paragraph 10 (p891). Miss Dobson reached the same conclusion in relation to the other 4 applicants for the role, which included Jade Fuller. The claimant requested feedback and Miss Dobson provided a list of the 7 areas in which she did not believe the claimant had evidenced that he met the essential criteria for the post (p862).

29.79 The post was re-advertised and the claimant applied again on 15 April 2021 (EB, RDp18). This time in the additional information section on the application form against the question about special requirements for interview the claimant wrote "*Please ask me. It is important that where questions arise that leave unexplained answers to put these at interview.*" (EB, RDp25). Miss Dobson found that the claimant again did not meet the essential criteria and he was not shortlisted. Feedback was provided by her on 15 April 2021 identifying 5 areas in which she felt that the claimant had not provided evidence in his application to show he met those criteria (p865). Miss Fuller was the only short-listed candidate on this occasion and she was appointed following interview.

The respondent's reference for the claimant (Staffordshire CC)

29.80 The claimant made a number of other job applications following his dismissal by the respondent. One such application was for a post at Staffordshire County Council. In May 2021 Staffordshire County Council sent a proforma reference questionnaire to the respondent to complete in connection with the claimant. Jess Bertram, HR officer, completed the proforma. Mrs Bertram was an HR officer working for the respondent. She was fully familiar with the claimant's employment history having supported Simone Hines at the hearing on 29 July 2020 which led to the claimant's dismissal. Mrs Bertram was also aware of the claims that the claimant had brought against the respondent at that time, which included the claimant's first claim to the Employment Tribunal (1311185/2020) which was served on the respondent council and also Miss Fuller and Mrs Bartlett personally as named respondents. Mrs Bartlett was Mrs Bertram's line manager in a small HR team who worked closely together and with Miss Fuller.

29.81 Mrs Bertram filled in the reference questionnaire (p1102). In the "reason for leaving" box, she wrote "dismissed". Question 2 on the form was "Has this person ever been under investigation?" Mrs Bertram answered "yes". The form then said "If yes, please attach a sheet with factual details". Mrs Bertram did not do so but returned the form signed and dated by her on 20 May 2021. She told the Tribunal that she did not believe she

discussed the reference with anyone before she sent it but as it was a long time ago she found it hard to recall. The Tribunal concluded on the balance of probabilities that Mrs Bertram did discuss the reference with at least one manager/ person senior to her before she sent it. This was because she was a relatively inexperienced HR professional at that time, having only commenced HR advisory work in 2020. A reference request for the claimant, given the nature of the breakdown of his relationship with the respondent by that time, the pending litigation against the council and two line managers personally, and the claimant's propensity to challenge decisions, would have been seen as a potentially explosive issue.

29.82 On 21 May 2021, Andy Edwards, Accounting Services Manager with Staffordshire County Council, emailed Mrs Bertram highlighting the absence of any supporting information regarding the highlighted investigation and stating "clearly, Raymond having been under investigation whilst at your council is a barrier to us employing him. I should be grateful for any information that you can provide on this investigation."

29.83 Mrs Bertram replied to Mr Edwards by email as follows:

"Hello Andy,

Mr Bryce was under investigation for a potential misconduct issue (p1105). The matter was not concluded at the time he finished with the authority".

29.84 Mr Edwards discussed this response with the claimant who explained that the "misconduct" in question related to where he had been parking his car, that he did not believe he was doing anything wrong parking in the Town Hall car park, a fact which the investigation report had upheld, but that there was a disciplinary hearing still pending at the time of the claimant's dismissal due to the restrictions on face to face meetings caused by Covid-19.

29.85 Mr Edwards therefore pursued the matter further with Mrs Bertram in an email on 25 May 2021 (p1104) in which he stated "I have since contacted Raymond and discussed this at some length with him. He asserts that the subject of the investigation was *an alleged breach of the Council's Level 1 car user terms and conditions"*. Mrs Bertram was asked whether she could confirm that this was correct.

29.86 Mrs Bertram replied to Mr Edwards the same day with an email that simply said "This is correct" (p1104).

29.87 The claimant was appointed to the role at Staffordshire County Council.

The respondent's contact with Elite Security

29.88 By this stage in the chronology of events, the claimant had already commenced his first Tribunal claim (1311185/2020) on 13 December 2020. Counsel for the respondent was instructed to draft the grounds of resistance to the claim. Before doing so, he carried out a search of the public Tribunal register of judgments and found a number of other cases which he concluded involved the claimant. As set out above but for ease of reference repeated here, the claimant's second claim against the respondent followed on 23 May 2021, duplicated with a third claim the following day, and the fourth claim was lodged on 30 July 2021.

29.89 At or about the same time, Ruth Bartlett and Jade Fuller were each served personally with the first claim, being named as respondents to the claimant's harassment complaint. On receipt of the proceedings, Miss Fuller made her own enquiries about the claimant's litigation history, telling the Tribunal that she "googled" it and discovered that the claimant had been involved in other Tribunal claims. Mrs Bartlett became involved in researching the other parties to litigation with the claimant, and it was she who telephoned Elite Securities, at counsel's suggestion, and spoke to Greg Kelly initially.

29.90 Ms Pittam, the respondent's solicitor, sent an email to Greg Kelly of Elite Security on 18 August 2021 (p1110). It read as follows:

> "Dear Mr Kelly
>
> I am writing to you regarding a potential ex−employee of yours, Raymond Bryce.
>
> From looking at the number of claims on the Tribunal website we believe that Mr Bryce may be a career litigant and we are questioning whether the claims brought against us have been brought in good faith. We understand that it is quite common for people to be reluctant to give evidence in these cases because they do not want to breach confidentiality or be seen to be victimising someone. We are therefore seeking for the Tribunal to make witness orders for information of those cases to be disclosed.
>
> On that basis, should you feel you may be able to assist us in this matter, I would be extremely grateful if you would be able to provide us with an email confirming the following points:
>
> 1. That you have been asked to give evidence.
> 2. That you understand that in our claim we are calling into question whether Mr Bryce is acting in good faith in his discrimination claims.
> 3. That (if this is the case), you have also been the subject of allegations by Mr Bryce of disability discrimination.
> 4. That you believe you can give relevant evidence on that issue and produce relevant documents.

5. That you would prefer to give evidence pursuant to a tribunal witness order so that issues of confidentiality and/or victimisation can be avoided."

29.91 Mr Kelly replied to Ms Pittam by return email indicating that Elite Security had also been taken to the Employment Tribunal by the claimant for disability discrimination (failure to make reasonable adjustments) and that they too believed he may be a career litigant and acting in bad faith. He gave evidence to this Tribunal in which he stated that he believed the claimant was a career litigant based on the fact that he had "taken out many more claims than the average person", that litigation appears to be the claimant's first recourse when he gets an unsatisfactory outcome but adding that these were is personal opinions.

The claimant's litigation history and motivation

30. The Tribunal received a lot of evidence from the respondent, both oral and in documentary form about other claims that the claimant had been involved in. The claimant made it clear that he did not consider it appropriate that the respondent should be in possession of or call such evidence and believed it to be an infringement of his right to privacy.

31. As set out above, EJ Dean determined the admissibility of this evidence at the first preliminary hearing in the case when she defined the issues and ordered disclosure of documentation relating to the claimant's litigation history. The basis of that decision was that it was potentially relevant evidence because the respondent argued that the claimant engineered his own dismissal by the respondent so as to be able to bring a claim in the Tribunal (see paragraph 8 of EJ Dean's Order, p343).

32. At the hearing, counsel for the respondent asked the claimant whether he had made claims which had settled before or during conciliation via ACAS. The claimant said he could not discuss them. He said there were legal reasons why he could not say more, namely confidentiality and his own privacy, and added that it was a criminal offence to breach a restricted reporting order. The claimant accepted that he had issued claims in the Employment Tribunal which were the subject of restricted reporting orders. He disagreed with His Honour Judge Martyn Barklem's observations that he would not be breaching a restricted reporting order if he was complying with a court order in providing details of them (p1248).

33. The claimant also declined to provide details of how many claims he had ongoing in the Employment Tribunal or to give figures in response to counsel's suggestion that he was making £30-40,000 per annum out of what was termed his "venture." The claimant strongly objected to the characterisation of his activity by the respondent as "running a litigation factory" saying that he was merely

recovering his losses. The Tribunal heard no evidence to suggest that the claimant had a lucrative income stream from his litigation and counsel gave no basis other than conjecture for the figure of £30-40,000.

34. The claimant was adamant in his evidence that he had genuinely wanted the job of Enforcement Officer with the respondent and to succeed in that role. He denied applying for the role and then failing in it deliberately in order to secure his dismissal so as to commence proceedings for disability discrimination in order to make money in compensation, as the respondent alleged.

35. After careful collective analysis, the Tribunal accepted the claimant's evidence in this regard for the following reasons. The role of Enforcement Officer was a logical position for the claimant to apply for given his professional background and work experience. His application form was completed with some care as by someone who wanted the job. Secondly, it did not cross Jade Fuller's mind at any time during the claimant's employment, nor was it something suspected by the claimant's support worker, David Stewart, that the claimant was not genuine and trying his best in the role. These two persons worked very closely with the claimant during the period of his employment and in the Tribunal's view would have been most likely to at least have suspected something untoward. Third, the claimant's problems with performance were consistent with the medical evidence and his own account of the impact of his disabilities. Fourth, the claimant had never done work in housing enforcement before. The Tribunal rejected counsel's argument that the claimant's experience should have produced readily transferable skills, accepting the evidence of Mr Stewart that it was not unusual for someone with the claimant's disabilities for him to struggle with work of a new type in a wholly new environment with new management, even though he had held a more senior position in enforcement services with a previous employer. Fifth, there were personal issues in the claimant's life at the time of his employment by the respondent, including his personal litigation caseload, which were both a distraction and a source of stress for him and were likely, the Tribunal found, to have adversely impacted on his job performance. Last but not least, the Tribunal assessed the claimant as an honest witness. He did not dissemble during his evidence, answering questions directly and sometimes making concessions that did not assist his case. In the Tribunal's judgment, the claimant was certainly quick to litigate if he felt a decision taken was wrong or unfair. However, his reason for doing so was to put right the perceived wrong and was not simply a cynical attempt to make money out of essentially false allegations brought about by a devious process of claim instigation akin to entrapment. The Tribunal found the claimant to be a person who strongly believes in the rule of law and the judicial process. This is partly why he resorts to it so frequently.

36. The Tribunal considered separately the facts relating to the claimant's decision to apply for the role of Revenue Shared Services Manager and found that on that occasion also, he had applied for the role because he believed he was

appointable – not simply to create a reason to litigate. At the time of his applications, the claimant firmly believed he had been unreasonably deprived of the role of Enforcement Officer. He told OH in March 2020 he was performing perfectly competently in that role, and genuinely believed that. The claimant had previous management experience in a revenues setting which he believed made him suitable for the Revenue Shared Services Manager role. Although a neuro-typical person might have concluded that they did not wish to work for an organisation that had just dismissed them in their view unfairly, the Tribunal did not find any evidence that the claimant processed the situation in that way. His demeanour throughout the hearing and when cross-examining the respondent's witnesses suggested that there was, for him, nothing personal about the decisions that had been taken by the respondent. He just passionately believed them to be wrong and contrary to the law as he has researched and understood it.

37. The facts found by the Tribunal relating to the claimant's other litigation are set out below, grouped for convenience by reference to the other party to that litigation.

Corps Security (UK) Limited & Birmingham City University
(EB, AF1 and DLT1)

37.1 The claimant was employed by Corps Security (UK) Limited (Corps) as a relief Security Guard. He was assigned to work at a site occupied by Birmingham City University (BCU) on 1 October 2018. After conducting approximately 10 shifts at that site, BCU asked Corps to remove the claimant from the contract, alleging that a break-in had occurred on site during one of the claimant's shifts and that CCTV apparently showed he had not been patrolling correctly or at all.

37.2 The claimant hotly contested the allegations made by BCU and raised a grievance. He then brought claims in the Employment Tribunal against both Corps and BCU alleging, amongst other things, that he had been discriminated against because of his disabilities, that reasonable adjustments had not been made and that he was being harassed and victimised for raising health and safety concerns.

37.3 The claims were fully case managed by Employment Judge Findlay (as she then was) and EJ Dean and listed for a 10 day hearing.

37.4 In September 2020 both respondents to the claims reached COT3 agreements with the claimant to settle the claims for £2,000 (BCU) and £7,000 (Corps) respectively. Corps required the claimant to resign his employment with them as a condition of the COT3 agreement (p1677).

37.5 On 2 June 2021 the claimant requested that the judgment in this (and 4 other cases brought by the claimant) be removed from the public record

"as they serve no purpose i.e. they have been withdrawn following ACAS conciliation" (EB, DLT1 p77). REJ Findlay declined to do so, explaining that the Tribunals do not have the power to remove judgments from the register (EB, DLT1 p79).

AMS Securities Limited (PC bundle, tab1)

37.6 The claimant was employed by AMS Securities Limited (AMS) as a door supervisor at various venues in Staffordshire and Cheshire from 8 July 2016 until he was dismissed on 30 January 2018.

37.7 To borrow the wording of Employment Judge Connolly's Order following a preliminary hearing on 19 July 2019, "central to the claimant's case [was] his contention that, as a matter of good or best safe working practice and as an adjustment to reduce the effects of his disability, he should be permitted to wear a stab vest and body camera and carry and use handcuffs and UV spray during the course of his work as a doorman".

37.8 The claimant brought 2 claims in the Tribunal alleging that he had been subjected to detriments and/or dismissed because of his protected disclosures about these matters and that he had been dismissed because of something arising from his disabilities of Asperger's syndrome and Dyslexia.

37.9 Following a fully contested hearing, EJ Connolly declined to strike out any of the claims on the grounds either that they had no reasonable prospect of success or that the claimant had not complied with Tribunal orders. She made deposit orders in relation to some of the claims on the ground that, as put forward, they had little reasonable prospect of success but these did not include the disability discrimination claims, or the claim of automatic unfair dismissal. The claimant did not pay the deposits and the remaining claims were due to be heard in June 2020. The Tribunal heard no evidence about the ultimate outcome of these proceedings.

Elite Securities (NW) Limited (PC bundle, tab3)

37.10 From the information provided to the Tribunal it found that the claimant brought proceedings in 2019 in the Manchester Employment Tribunal against this company, for whom he worked again as a security officer/doorman from at least January 2017. The claim included an allegation of failure to make reasonable adjustments and detriment due to making protected disclosures.

37.11 The claimant was required to supply further particulars of his claims and, when he failed to do so, Unless Orders were made. On 9 March 2020 Employment Judge Howard gave judgment declaring that the claims were dismissed as the claimant had materially failed to comply with the Unless Orders. On 30 November 2020 the claimant's application for relief from

sanction was rejected and Employment Judge Holmes declined the claimant's further application for that judgment to be reconsidered.

Dukes Bailiffs Limited (PC bundle, tab7; KW1p1-37)

37.12 The claimant worked for Dukes Bailiffs Limited ("Dukes") as an Enforcement Officer for 2 years from November 2005. In August 2018 he applied for employment as a Bailiff and as a Bid manager and was unsuccessful. He brought complaints of direct and indirect age and disability discrimination and failure to make reasonable adjustments. The respondent defended the claims on the basis that it was unaware of his disabilities of Asperger's syndrome and Dyslexia and that in any event his applications were rejected on their merits and/or due to their non-re-employment policy.

37.13 Following a preliminary hearing in private on 8 April 2019 Employment Judge Woffenden struck out the age discrimination complaints as having no reasonable prospect of success. An application to strike out the remaining claims was due to be heard at a preliminary hearing in public on 11 July 2019 but the claimant withdrew the claims shortly before that hearing.

Eagle Specialist Protection Limited (PC bundle, tab 9)

37.14 EJ Woffenden also held a preliminary hearing in private on 8 April 2019 in a claim brought by the claimant against Eagle Specialist Protection Limited. The claimant withdrew his claims of direct disability discrimination and automatic unfair dismissal and EJ Woffenden dismissed those claims on withdrawal. The claimant later applied for reconsideration of the rule 52 judgment on withdrawal but was unsuccessful. The Tribunal had no evidence as to the outcome of the rest of those proceedings.

Sentry Consulting Limited (PC bundle, tab 4)

37.15 The claimant was employed by Sentry Consulting Limited from 25 December 2020 to 8 January 2021 as a relief security officer. He was not given any more shifts after 8 January 2021 and brought proceedings in the Nottingham Employment Tribunal on 25 February 2021 alleging disability discrimination and breach of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

37.16 Following a fully contested 4-day hearing in October-November 2022, by a reserved decision dated 2 February 2023, the claimant was successful in his claims for disability-related discrimination and failure to make reasonable adjustments. The balance of his claims were dismissed. The Tribunal expressly found that the claim before it was not misconceived or vexatious (paragraph 486 of the Reasons).

37.17 Mr James Nason was the Managing Director and owner of Sentry Consulting at the time of the claimant's employment. The respondent applied for and was granted a witness order by EJ Flood for him to be

compelled to attend this Tribunal hearing. On the first day of the hearing, however, the respondent asked for that witness order to be discharged and indicated that he would not be called as a witness by the respondent.

Active Security Solutions Limited & others (PC bundle, Tab 5)

37.18 The claimant worked for this organisation on a zero hours contract as a licensed door supervisor. On 1 August 2021 an incident occurred between the claimant and a member of the public when the claimant was working as a door supervisor at a venue run by Stonegate Pub Company Limited. During the incident the claimant activated a CCTV body camera and sprayed a UV/smart spray at the member of the public. This led to the police attending and to the Security Industry Authority suspending the claimant's license.

37.19 The claimant brought claims in the Employment Tribunal for wages, holiday pay, discrimination arising from disability and failure to make reasonable adjustments, health and safety and public interest disclosure detriments following the incident. He initially sued Active Security and the Stonegate pub company and also the SIA and Chief Constable for Staffordshire, although the claims against the latter two were struck out at a preliminary hearing in September 2022.

37.20 On 7 February 2023 Employment Judge Edmonds also struck out a number of the claims against the first two respondents, permitting the holiday pay claim to proceed and ordering deposits to be paid if the claimant wanted to proceed with his failure to make reasonable adjustments and wages claims. The Tribunal was not told what the outcome of these remaining claims was.

Trident Group Security Limited (PC bundle, Tab 11)

37.21 The claimant brought proceedings against this company in the Employment Tribunal on 17 April 2018 following two shifts he worked for them as a door supervisor. After what the EAT described as a "long and tortuous procedural history" the case was eventually struck out on the basis that the claimant had failed to comply with an Unless Order. The claimant successfully appealed against that strike out to the EAT (Gavin Mansfield KC, deputy Judge of the High Court, presiding) on 8 February 2022. The case was remitted but the Tribunal was not provided with any information about its subsequent outcome.

Birmingham City Council

37.22 Daljinder Dhillon, a solicitor in the employment litigation team at Birmingham City Council, attended the Tribunal pursuant to a witness order and produced a 142-page bundle of documents, inserted in the EB as Exhibit DD1. This bundle had been prepared by her colleague, Stephen Hopkins, who had conduct of the relevant litigation at the time.

37.23 Exhibit DD1 comprised a series of 6 Tribunal claims of disability discrimination that the claimant lodged against the Council in relatively

swift succession in 2021 following his unsuccessful applications for jobs as a Revenue Officer, Neighbourhood Officer, Statutory Penalty Investigation Assistant, Attendance Support Officer and Legal Assistant. The claimant's basic premise in these cases was that the Council had failed to make reasonable adjustments to the recruitment process, which disadvantaged him because of his disabilities.

37.24 The claimant relied in his claim forms on the case of **The Government Legal Service v Brookes** (UKEAT/0302/16) in which the EAT upheld the decision of an Employment Tribunal which found that the claimant, who has autism, had been discriminated against because she was required to sit a multiple choice test as the first stage of a recruitment process. The GLS failed in its duty to make reasonable adjustments in that case.

37.25 On 9 May 2022 the claimant entered into a COT3 agreement with Birmingham City Council in which he settled his 6 claims for £1,200.

The law

Striking out claims

38. Rule 37 of the Employment Tribunal Rules of Procedure states as follows:

    37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

    (a) that it is scandalous or vexatious or has no reasonable prospect of success;

    (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

    …

39. A claim can be struck out as an abuse of the process of the court at the final hearing or, even, after judgment: **Summers v Fairclough Homes** [2012] 1 WLR 2004, SC.

40. The Tribunal considered the definition of "vexatious" set out by Lord Bingham in **Attorney-General v Barker** [2000] 1 FLR 759, which has been cited with approval by the Employment Appeal Tribunal in a number of subsequent cases, including **AG v Kuttapan** UKEAT/0478/05/RN and **AG v Taheri** [2022] EAT 35. This definition reads as follows:

    > ""…"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis): that whatever the intention of the

proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant: and it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way that is significantly different from the ordinary and proper use of the court process."

41. Vexatious litigation may involve claims arising from repeated job applications as it did in **Kuttapan** and **Taheri,** both cases involving applications for orders under section 33 Employment Tribunals Act 1996 restricting individual litigants from bringing further proceedings because of a history of allegedly vexatious litigation.

42. The Tribunal accepted the proposition underlined in **Keane v Investigo** UKEAT/0389/09/SM that a claimant who is not considered for a job in which he was never genuinely interested could not be said to have suffered a "detriment" for the purpose of a later discrimination claim. A similar point was made by Underhill P in **Berry v Recruitment Revolution** UKEAT/0190/10LA.

Discrimination arising from disability

43. Discrimination arising from disability is defined in section 15 EqA as follows:

> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

44. The "something" that causes the unfavourable treatment need not be the main or sole reason but it must have at least a significant (or more than trivial) influence on the unfavourable treatment; motives are irrelevant : **Pnaiser v NHS England** [2016] IRLR 170, EAT.

45. Something "arising in consequence of" a disability may involve a series of causal links. It is a question of fact in each case whether something can properly be said to arise in consequence of a disability; the more links there are between the disability and the reason for the treatment, the harder it will be to establish the factual connection, however :**Pnaiser** (para 31); **Sheikholeslami v The University of Edinburgh** (UKEAT/0014/17/JW). At this stage, it is an objective question.

46. The defence in subsection (2) relates only to the disability itself. It is not a defence for A to show that he did not know that the "something" leading to the unfavourable treatment was a consequence of the disability.

47. In relation to what is known as the "justification defence", a Tribunal should first establish the nature of the "legitimate aim" relied upon by the respondent. Only then is it possible to weigh up whether or not the respondent has adopted a proportionate means of achieving it. This weighing up process involves an analysis of the outcome of the measure adopted, not the decision-making process: **Chief Constable of West Midlands Police v Harrod** [2015] IRLR 790. A Tribunal should consider where the balance should reasonably be struck between the effect of the discriminatory measure and the reasonable need of the undertaking applying it.

48. It is not necessary that the justification was actually considered at the time: **Cadman v Health and Safety Executive** [2004] IRLR 971,[2005] ICR 1546.

Indirect disability discrimination

49. The law relating to indirect discrimination focuses on systems or practices which appear on their face to treat everyone the same but which, in reality mean that protected groups are worse off – in other words, it addresses "hidden barriers which are not easy to anticipate or spot".[1] The statutory definition of indirect discrimination (section 19 EqA) sets this out as follows:

> (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.

50. The Supreme Court in **Essop v Home Office** [2017] UKSC 27 considered this section of the EqA in detail, explaining how direct and indirect discrimination differs. With indirect discrimination there is no express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared to another. Second, there need not be a causal link between the less favourable treatment and the protected characteristic – rather, the link needs to be between the PCP and the protected characteristic. Third, the reason for the disadvantage need not be unlawful in itself. Fourth, there is no requirement that every member of the group sharing the protected characteristic needs to be disadvantaged by the PCP. Fifth, it is common for statistics to be used to establish the disparate impact. Sixth, the respondent has the option to justify the PCP.

[1] Per Lady Hale, para. 25 - Essop v Home Office [2017] UKSC27

Failure to make reasonable adjustments

51. The duty to make reasonable adjustments is described in section 20 EqA as follows:

> "20(2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Section 21 EqA goes on to say:

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

52. The words "provision, criterion or practice" are broad and overlapping and are not to be narrowly construed or unjustifiably limited. However, PCPs do not cover every act of unfair treatment of a particular employee; one-off acts and decisions which are not capable of being applied to others are unlikely to qualify as PCPs : **Ishola v Transport for London** [2020] EWCA Civ 112.

Harassment

53. Harassment has a special definition in discrimination law which is to be found in section 26 EqA. This states that

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> ….

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

54. The Tribunal must consider whether the conduct occurred as alleged and, if so, whether it related to the protected characteristic (or was related to some other reason). The EHRC Code at paragraph 7.9 states that ‘related to’ should be given a broad meaning - ‘a connection with the protected characteristic’. As explained by Underhill P in **Amnesty International v Ahmed** [2009] ICR 1450, "The fact that a Claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of a sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

Victimisation

55. The primary object of the victimisation provisions in the EqA… is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so”[2].

Victimisation is defined in section 27 EqA as follows:

(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.

To bring this type of claim therefore the claimant must show that there has been one of the 4 types of “protected act”. Then the Tribunal goes on to consider whether the claimant has been subjected to a detriment and if so, whether that was because of the protected act.

56. The Tribunal considered the case of **West Yorkshire Police v Khan** [2001]UKHL 48 as applied in **BMA v Chaudhary** [2007] EWCA Civ 788. In

[2] Lord Nicholls in *Chief Constable of the West Yorkshire Police v Khan* [[2001] UKHL 48]

those cases, action taken by the respondent to protect itself in relation to proceedings was found not to be an act of victimisation in the sense described by section 27 (or its predecessors).

57. In relation to the victimisation claim the respondent also relied on **South London & Maudsley NHS Trust v Dathi** [2008] IRLR 350 in which the Employment Appeal Tribunal held that letters written to the claimant's solicitors by the respondent's representatives in connection with a claim of race and religion or belief discrimination were covered by absolute immunity and could not therefore form the basis of a second claim of discrimination and victimisation.

58. In discrimination, victimisation and harassment claims the burden of proof is to be allocated between the parties in accordance with section 136 EqA which states as follows:

> "(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."

Applying this provision, the Tribunal asked itself first and foremost whether there was evidence from which it *could conclude* that the alleged discrimination, victimisation or harassment had occurred, before considering whether it was necessary to look at the respondent's explanation, if any, for the treatment in question.

Legal immunity

59. The principles relating to immunity for legal proceedings were stated by Devlin LJ in **Lincoln v Daniels** [1962] 1 QB 237. To paraphrase, there are three categories. The first category covers all matters done in the course of proceedings by judges, parties, counsel and witnesses and includes the contents of documents put in as evidence. Secondly, is everything that is done from the inception of proceedings extending to all documents brought into existence for the purpose of the proceedings. The third category relates to the proof of evidence that a witness gives, including what is said by a person who may or may not become a witness in the proceedings in the course of an interview by a solicitor.

Unlawful deduction from wages

60. Section 13 of the Employment Rights Act 1996 prohibits deductions from the wages of a worker unless the deduction is required or authorised by a statutory provision or a provision of the worker's contract, or the worker has previously agreed in writing to the deduction. The non-payment of wages is treated as a deduction for these purposes, including the situation where a worker receives less than they should be paid under their contract.

Conclusions

61. Having found the facts set out above and considered the applicable law, the Tribunal concluded as follows, taking each claim in turn as set out in the list of issues.

Discrimination arising from disability

62. The Tribunal was satisfied that the claimant was treated unfavourably when he was dismissed and when his appeals were rejected. These decisions caused him to lose and/or not to regain remunerated employment. The Tribunal rejected the respondent’s contention that this was not unfavourable treatment because the claimant sought to engineer his dismissal, because that was not borne out by the facts found by the Tribunal, as set out above.

63. Problems with communication, writing, reading, memory, arithmetic, personal behaviours and communication skills were things arising in consequence of the claimant’s disabilities of Asperger’s syndrome and Dyslexia. This much was not controversial.

64. The claimant’s dismissal was because of those problems, in the sense that the claimant’s performance at work was adversely affected by them, and his poor performance was the reason for his dismissal. These simple links in the chain of causation, on the facts of this case, the Tribunal found were consistent with the treatment being caused by the matters arising from the claimant’s disability.

65. The dismissal of the claimant’s appeals was not because of the things arising in consequence of the claimant’s disability as set out above at paragraph 62. The appeals were dismissed because Mr Davis and the Appeals Committee concluded that the decision to dismiss had been taken in accordance with the respondent’s procedures and they could find no reason to impugn it.

66. The respondent had a legitimate aim – the proper performance of a public service. In this case the service in question was primarily the recovery of rent arrears for a public-funded authority in a lawful and just manner with due consideration for the rights and vulnerabilities of the tenants in question.

67. The measure adopted by the respondent to achieve this legitimate aim was to dismiss the claimant. The Tribunal noted that the effect of that measure on the claimant was significant - depriving him of his livelihood and potentially adversely affecting his prospects of obtaining alternative employment. In view of this the Tribunal considered that, to outweigh the claimant’s needs, the respondent’s needs would have to be very significant. The Tribunal considered carefully whether the respondent had discharged its duty of finding a less discriminatory way to achieve its needs than dismissing the claimant.

68. Having carried out this weighing up exercise, the Tribunal concluded that, based on the detailed evidence it had heard about the way in which the claimant’s performance was supported during his period of employment, the respondent had shown that dismissing the claimant was a proportionate means of achieving a legitimate aim.

69. The Tribunal considered that Miss Fuller wanted the claimant to succeed. She invested an enormous amount of personal time and effort into training him.

The respondent engaged Mr Stewart to support the claimant and Miss Fuller and the latter listened to Mr Stewart's advice about how to get the best out of the claimant, and worked hard to implement that advice. A significant number of reasonable adjustments were made to assist the claimant and those further adjustments that had not yet been implemented, such as the purchase of a sit/stand desk for the office or wider team training about Asperger's and Dyslexia would not, in the Tribunal's judgment, have positively impacted the claimant's performance bearing in mind the nature of the performance issues that were present and the fact that the claimant was in any event working from home full-time from March 2020. The respondent is publicly funded. The claimant's performance was not improving despite being 10 months in post at the time of dismissal. The respondent needed the post to be filled by a person able to work accurately and autonomously in the role in order to recover rent arrears for the public purse and to meet the needs of a vulnerable group of service users. Cases needed to be prepared for court. Accuracy and due process was essential. There was a very small margin for error. By the time of the claimant's dismissal, in the Tribunal's judgment, the respondent had done enough. Extending the claimant's probation further would have been unlikely to have produced a different outcome. Whilst the claimant is clearly an intelligent and capable man able to carry out many tasks effectively, at that moment in his career and personal life, the Tribunal concluded that unfortunately, he was not able to pick up the respondent's housing work, with its complex processes, within a reasonable time-frame and it was proportionate to end his employment so as to fulfil the legitimate need of properly performing a public service in some other way. The claim of disability related discrimination was not made out.

Indirect discrimination

70. Looking at each of the provisions, criterion or practices (PCP) relied upon by the claimant as founding his indirect discrimination claim, the Tribunal concluded as follows. The application of the respondent's Probation Policy was a PCP. It was a policy designed to be applied as such to all staff.

71. Secondly, the claimant did not prove that the respondent had a policy requiring all staff to park other than behind the Town Hall unless they had a disabled blue badge. The evidence showed that the Town Hall car park was primarily for members of the public with the respondent's executive team having passes which allowed them also to park there. Staff with mobility issues might be given permission to park there as a reasonable adjustment, although the Tribunal did not hear any evidence about specific cases in this regard, and specifically heard no evidence that such staff were required to have a disabled blue badge to receive that adjustment. The claimant's discussions with the respondent centred upon whether the claimant's particular disabilities created a disadvantage that would be mitigated by granting him permission to park at the Town Hall. The respondent was not satisfied that this was so based on the advice received from OH and the discussions that took place with the claimant before he started work. It was in this context that reference to the government's disabled blue badge scheme was raised, the inference being that if the claimant obtained a blue badge, then that would be persuasive evidence of the need to park at the Town Hall.

That is not the same as proof of a PCP requiring staff to have a blue badge in order to park at the Town Hall, or, as the claimant formulated it, requiring all staff to park elsewhere unless they had a disabled blue badge.

72. Third, the claimant relied on a PCP described as "a policy of refusing to hear a disability discrimination grievance prior to the completion of the probationary period". The Tribunal found that the respondent had no such policy. The respondent's Grievance Policy and Procedure (p997) states that its scope does not extend to complaints relating to dismissal or disciplinary decisions which are to be addressed during the appeal process. The policy makes no distinction between grievances about disability discrimination and anything else. The Tribunal heard no evidence to suggest that disability discrimination grievances were treated differently in practice. What it did find was that, by way of a one-off act or decision, the respondent decided that the claimant's grievance about how he had been managed during his probationary period in light of his disability should be heard at the time when his probation was to be reviewed. Applying **Ishola,** and on the facts found**,** the Tribunal concluded that this was not evidence of a PCP.

73. Fourth, the claimant alleged that the respondent used an algorithm to monitor and/or review performance indicators. The Tribunal did not place undue weight on the word "algorithm". What it was clear that the claimant meant by his use of that word, and the respondent did not dispute this, was that Miss Fuller had a system for measuring performance which she used to create the percentage scores denoting accuracy levels which were referred to during the review of the claimant's performance and in her management report considered at the claimant's dismissal meeting. The respondent's evidence was that Miss Fuller used the same or a similar system to measure the performance of other staff. The Tribunal concluded that this could be described as a PCP.

74. The Probation Policy (PCP 1) and the performance measures (PCP 4) were applied to the claimant. They were also applied to staff who did not share the claimant's disabilities. The Tribunal was not satisfied, however, that either PCP 1 or PCP 4 put or would put persons with Asperger's syndrome and Dyslexia (the group) or put the claimant at a substantial disadvantage. The claimant alleged that the Probation Policy put him and the group at a disadvantage because "they did not have time to learn and develop". That was not the effect of the Probation Policy, however, in the Tribunal's judgment. The Policy was described (paragraph 3.1, p1621) as being "designed to help and encourage [new employees] to achieve and maintain standards of conduct, attendance and job performance." It provided for regular reviews of performance and discussion about any shortfalls so that these could be addressed. It was common ground that probation could be extended. Indeed in the claimant's case it was extended from 6 to 12 months. The claimant did not prove that the mere application of a time within which performance was under review would place persons with Asperger's Syndrome and Dyslexia at a substantial disadvantage and the claimant had a working history which showed he had been successful in previous similar roles in relation to which he did not claim that probation policies had been disapplied to him.

75. In relation to PCP 4, the Tribunal concluded that the measuring of performance in the way that Miss Fuller described it did not create an individual or group disadvantage for the claimant or those who shared his disabilities. Measuring performance can identify gaps in knowledge and understanding leading to additional support and training. Miss Fuller's performance measures would also capture improvements in performance. The claimant alleged that the "algorithm was designed for non-disabled people and did not take account of disabilities". The way in which Miss Fuller described the performance measures she used was that she excluded minor errors and only counted as an error a substantive mistake on a file. She adjusted the levels of accuracy she required from the claimant to take account of his disabilities and provided him with no targets whatsoever regarding the volume of work he was to undertake. The mere measure of accuracy levels did not put the claimant at a disadvantage, nor was there evidence that the group would be so disadvantaged.

76. In the circumstances it was not necessary for the Tribunal to consider the respondent's objective justification of PCPs 1 and 4. However, the Tribunal simply records that it would have found the PCPs justified had it been necessary to reach a formal conclusion on those matters. The claim of indirect discrimination was not made out.

Failure to make reasonable adjustments

77. The respondent did have a PCP of requiring applicants to complete an online application form for the post of Revenue Shared Services Manager. The claimant's problems with communication, writing, reading, memory, arithmetic and communication skills related to his disabilities might have placed him at a substantial disadvantage compared to someone without his disabilities. However, as a matter of fact on the evidence that the Tribunal had before it, it found that the claimant was not placed at that disadvantage because of his disabilities. The evidence showed that the claimant had filled in an online application form for the role of Enforcement Officer which was in the same or a very similar format to that for the post of Revenue Shared Services Manager. He did so successfully gaining an interview for that post which led to his appointment. Further, the claimant demonstrated to the Tribunal through his working history, the Tribunal process and his conduct during the hearing an ability to understand written requirements for information and to select and articulate evidence to meet those requirements. That is not to say that such information processing isn't more difficult for him, or that it does not require considerable thought, energy and effort, but the claimant can clearly perform to a high standard on paper when he has time, motivation and the right environment in which to do so.

78. In any event, the Tribunal was not satisfied that the respondent could reasonably have been expected to have known that the claimant was likely to be placed at the alleged disadvantage in circumstances where he had successfully obtained employment with the respondent before by navigating the same online application process. The claimant highlighted on both application forms that he may have special requirements at the interview or other selection procedure stage but he filled in the online application form both times in full and raised no issue with being required to do so. The respondent

provided contact details for candidates to use to raise any queries about the post or the application process and the claimant did not use them to flag any problems he was encountering with completing the online application form. This remaining claim of failure to make reasonable adjustments was not made out.

Harassment related to disability and victimisation

79. It is convenient to consider the claims of harassment and victimisation together as they are based upon the same two factual allegations. In relation to the victimisation claims, the respondent accepted that the claimant had done protected acts when he commenced his claims in the Employment Tribunal. The contact with Elite Security took place at a time when all four claims had been lodged by the claimant. The reference given to Staffordshire County Council was given after the first claim had been lodged with the Employment Tribunal and served on all three respondents on 1 February 2021 (p102-107).

(a) Contact with Greg Kelly, Elite Security

80. The respondent did communicate with Mr Kelly and "communicate to him that they had doubts about the claimant's good faith in bringing proceedings against them". This was in the letter from the respondent's solicitor Amy Pittam to Mr Kelly dated 18 August 2021 (p1110).

81. The Tribunal concluded that this was not harassment because it was not conduct that was related to the claimant's disabilities, notwithstanding that the term "related to" needs to be given a broad meaning. The enquiry from Miss Pittam was linked to the claimant's Employment Tribunal litigation. His disabilities formed part of the background to that litigation but the ground for the treatment could not be said to be his disabilities, applying **Amnesty International v Ahmed**.

82. The Tribunal also considered that the contact was not victimisation in the sense described in section 27 EqA. The **Khan** and **Chaudhary** cases were instructive here. Like those cases, the Tribunal found here that the respondent's conduct in contacting Elite Security, and in what it said when it did, was action taken in an attempt to protect itself in relation to the proceedings, not an act of victimisation of the claimant for bringing them.

83. In any event, the Tribunal was satisfied that the correspondence from Ms Pittam was subject to legal immunity. It fell within category 3 of the **Lincoln v Daniels** categorisation being an email from the respondent's solicitor seeking to solicit a proof of evidence from a witness in the proceedings. If Mr Kelly had been interviewed face to face by Miss Pittam in order for her to prepare a proof of evidence for him, that would have fallen squarely within the description of category 3 conduct. This correspondence was by extension the same process, only carried out in writing, in the Tribunal's judgment. The claims of harassment and victimisation related to the contact by the respondent with Mr Kelly were not made out.

(b) The reference to Staffordshire County Council

84. The claimant described this act of harassment as the respondent giving a "bad character reference" to Staffordshire County Council. The Tribunal looked

carefully at the facts of Mrs Bertram's interaction with Staffordshire County Council and having done so concluded that this was not an unreasonable characterisation of the reference she gave.

85. The Tribunal found this aspect of the respondent's conduct in this case troubling. It seemed to the Tribunal, relying on its combined experience of recruitment and reference-taking, that the respondent was not supportive of the claimant's application for employment to Staffordshire County Council and the reference reflected this. First, Mrs Bertram stated that the claimant's reason for leaving was "dismissed". She could have said "failure to pass probation" or "poor performance" but she chose the word dismissed which has potential connotations of fault. By itself the Tribunal could have accepted that this was not unduly significant. But Mrs Bertram then went on to answer simply "yes" to the question whether the claimant had been under investigation, omitting to provide any further detail or information despite being asked for this expressly on the reference form. The over-arching effect of the reference was therefore negative. As it stood, it said that the claimant had been dismissed and had been under investigation. It left the recipient to speculate relating to the reasons for both. This was the impression the reference gave to Mr Edwards, whose response "clearly…a barrier to us employing him" the Tribunal found significant. The Tribunal concluded that the word "clearly" was used in the sense that something was an obvious conclusion. In other words, Mr Edwards was inferring that Mrs Bertram must have known that the effect of the information she provided on the reference form, without more, would have meant the claimant's application for employment with Staffordshire County Council would not have been progressed.

86. Despite being given the chance to put matters right, perhaps by indicating that the claimant had not been able to meet the standards of performance required during probation and had not been investigated for any very serious misconduct - but a parking violation, Mrs Bertram simply replied "Mr Bryce was under investigation for a potential misconduct issue" once again leaving the recipient's mind to boggle, as it were, as to what that misconduct might have been. The third written response from Mrs Bertram to Staffordshire County Council did nothing to allay the suspicion that she or the Council might for some reason not be supportive of the claimant in obtaining future employment, when she simply and somewhat curtly replied to Mr Edwards' further email "this is correct".

87. The Tribunal accordingly found that the reference from the respondent to Staffordshire County Council was a "bad reference" and it was therefore a detriment to the claimant, regardless of the fact that the claimant was able to overcome it and obtain the job in question. The claimant gave evidence to the Tribunal that he was humiliated by the reference and found the conversations that he had to have with Mr Edwards about what had happened during his employment with the respondent embarrassing.

88. The Tribunal did not find that there was evidence from which it could conclude that the terms of the reference related to the claimant's disabilities, however. There was no reason to think that Mrs Bertram or the respondent had taken against the claimant because of his disabilities, consciously or unconsciously.

On the contrary, the respondent confirmed the claimant's appointment as an Enforcement Officer in full knowledge of his disabilities and, as the Tribunal found, worked hard to try and support him to succeed in his post taking them into account. Accordingly, the Tribunal did not find evidence from which it could conclude that the bad reference related to the claimant's disabilities such as to found a potential claim of disability-related harassment.

89. However, the Tribunal did consider that there was evidential material from which it could conclude that the reason for Mrs Bertram's choice of words (or absence of them) in the reference to Staffordshire County Council was influenced, consciously or unconsciously, by the fact that the claimant had sued the respondent and Mrs Bertram's two colleagues Jade Fuller and Ruth Bartlett personally in the Employment Tribunal. Aside from the terms of the reference itself, which was circumspect at best, Mrs Bertram did not impress the Tribunal as a credible witness. The Tribunal was not persuaded by her evidence that she did not recall whether she discussed the reference with anyone, for the reasons already given. Staffordshire County Council followed up the reference with Mrs Bertram on not one but two further occasions, further marking it out from the norm and giving rise to the likelihood of internal discussions about how to respond. The Tribunal heard evidence that Employment Tribunal claims were a rare occurrence for the respondent and therefore noteworthy. Mrs Bertram was aware of the claimant's history and of his Tribunal claim.

90. The Tribunal considered, applying the burden of proof in section 136 EqA that it was therefore appropriate to look to the respondent for an explanation for the terms of the Staffordshire reference that showed it was not caused by the claimant's protected act. The explanation given by Mrs Bertram in her witness statement was sparse. She said she had looked at the claimant's personal file and completed the form accurately. Her evidence included a blanket assertion that her answers would have been the same whether an employee had been dismissed or commenced claims against the respondent or not but the respondent produced no documentary or other evidence to substantiate that assertion. This might have included a written policy on the giving of references and how much information to provide or what terminology to adopt, evidence of how HR staff are trained to deal with third party enquiries about ex-employees, or anonymised samples of references provided for other staff that were similar. No such evidence was forthcoming. An adequate reason for the reference was not forthcoming. The Tribunal concluded that the respondent had not discharged the burden of proof upon it to explain why the reference (including the follow-up emails) to Staffordshire County Council were framed as they were. In any event, on the balance of probabilities, the Tribunal was satisfied and found that it was so written because of the claimant's protected act of commencing proceedings in the Employment Tribunal. The claim of harassment related to disability was not made out but the claim of victimisation was.

Unauthorised deduction from wages

91. The claimant did not suffer a deduction from his wages for 24 June 2020. He was not given a credit for flexi-time beyond 2 hours for travel on that day. It was not necessary for the Tribunal to decide whether the flexi-time allowance

granted was reasonable or not therefore. The claimant did not prove that he was paid less than he should have been under his contract of employment for the day in question and therefore the claim to unauthorised deduction from wages could not succeed. For the sake of completeness, the Tribunal concluded that the respondent's position in relation to this flexi-time was not unfair or non-contractual. There had already been flexibility in the respondent's practice to allow travel to the office time to be counted towards working time and it was not unreasonable to expect staff to travel by the most direct and efficient route time-wise.

The application to strike out

92. As set out above, the respondent sought to persuade the Tribunal to strike out the claimant's claims under rule 37 of the Tribunal Rules of Procedure on the grounds that they were vexatious. The basis of this application is articulated above but, to summarise, the respondent argued that this litigation was brought by the claimant as part of a wider and coordinated practice on his part of engineering Employment Tribunal claims in order to obtain monies from former employers and others in compensation settlements or awards. Put another way, that he was running a "litigation factory".

93. The Tribunal considered and applied Lord Bingham's definition of "vexatious" in **Barker**. Whilst focussing on these proceedings only when considering rule 37, and looking at each of the four claims separately, the Tribunal took account of the wider evidence about the claimant's litigation behaviour involving other employers in deciding whether, taken in the round, the respondent's assertions had merit. A number of the Tribunal's conclusions on these issues are already set out elsewhere in these reasons but for the sake of completeness, they will be summarised here.

94. The Tribunal concluded that these proceedings were not vexatious. The proceedings lacked what Lord Bingham described as "the hallmark of a vexatious proceeding" namely little or no basis in law. The claimant's claims were all capable of being understood both legally and factually. They could on their face have succeeded if the evidence had gone the claimant's way. One of them did – namely the claim of victimisation. They were not struck out by EJ Flood at a preliminary stage despite the respondent's application that they should be. This was true of the claimant's other litigation, which the Tribunal noted had been successful on occasion. The most notable example of this being the recent decision of the Employment Tribunal sitting in Nottingham in his case against Sentry Consulting Limited. That the claimant "appeals everything" does not, per se, make him vexatious. Sometimes his appeals are successful – see the decision of the EAT in the claimant's case against Trident Group Security Limited. That the claimant brings claims when he considers he has been wronged when others would not do so, is also not in itself enough to merit a finding that these proceedings are vexatious. The Tribunal noted that a number of the respondent's witnesses raised the volume of his litigation as the principal reason why they concluded that the claimant was behaving vexatiously in his claim against the respondent.

95. The Tribunal did not consider that the claimant's unwillingness to disclose documents or provide information about other litigation he was involved in showed him to be vexatious at a time when he had raised a correctly

constituted appeal about those matters in the EAT which had yet to be finally determined.

96. The Tribunal also did not find that the claimant had subjected the respondent to "inconvenience, harassment and expense out of all proportion to any gain likely to accrue to him". He ran his claims. He wrote letters, sometimes lengthy ones, to the Tribunal or the respondent when he wanted to raise issues or make applications but he did not abuse the Tribunal system by doing so in an oppressive way to cause aggravation and promote a desire to settle.

97. The claimant's conduct of the proceedings was also consistent with compliance with, not abuse of, the Tribunal system. One example of this was his willingness to submit to the court's fairly strict time-tabling of his cross-examination during the hearing, asking regularly "how long have I got?" so as not to overrun the time allotted to him. He was also willing to consent to late disclosure of documents by the respondent throughout the proceedings and took little, if any, point on what the Tribunal found was the rather unwieldy way in which the respondent had produced the documentation. The evidence was heard within its time estimate and the Tribunal was not inhibited by the claimant's conduct of the proceedings in being able to create and maintain a fair trial.

98. The Tribunal did not consider that these claims should be struck out under rule 37. They were not in the Tribunal's judgment vexatious.

99. The parties are thanked for their patience whilst the Tribunal completed its deliberations and produced this Judgment and Reasons.

Employment Judge J Jones
8 August 2023