



EMPLOYMENT TRIBUNALS

Claimant: Mr S Smith
Respondent: New Wave Capital Limited
Heard at: Cardiff (in public)
On: 2-4 October 2023 and 19 October 2023 (by CVP)
Before: Employment Judge R Brace
Members: Mrs J Beard and Ms B Currie

Appearances

For the Claimant: In person
For the Respondent: Mr L Fakunle (Senior Litigation Consultant)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that

The following complaints are not well-founded and all are dismissed:

1. Failure to comply with the duty to make reasonable adjustments (s.20/21 Equality Act 2010)
2. Indirect disability discrimination (s.19 Equality Act 2010)
3. Direct disability discrimination (s.13 Equality Act 2010)
4. Discrimination arising from disability (s.15 Equality Act 2010)

Reasons

Preliminary Matters

1. This final hearing was listed as a three day hearing and was conducted in person, the Claimant representing himself. The final, fourth day of the hearing was listed by video (CVP,) when the parties made their submissions and the Tribunal deliberated resulting in this reserved judgment.
2. There was an agreed bundle of documents of 306 pages ("Bundle") and reference in these written reasons to pages in that Bundle are denoted by [].

3. A case management hearing had taken place on 10 August 2023, when the claims at that point had been identified; a list of issues had been drafted. Directions had been given in relation to a possible amendment by the Claimant, for an amended ET3 to be filed and for the Respondent to write to the Tribunal to confirm whether or not it consented to any amendment application. Further directions, to get this case ready for this final hearing, included the Respondent filing an agreed chronology of events [39].
4. On 23 August 2023, the Claimant made that application to amend [59]. Such an application had not been referred to an Employment Judge prior to this hearing and the Respondent had not written in confirming whether they objected or consented to that amendment. The Respondent had filed an amended ET1 Particulars of Response pleading to the claim as sought to be amended by the Claimant [61].
5. The morning of the first day was spent with reading and further case management. The Respondent's representative confirmed that the Respondent did not object to the Claimant's amendment and had prepared the witness statements and the case generally on the basis of the amended case from the Claimant. Permission was given to amend the claim. Permission was also given to the Respondent to amend its amended ET3 Particulars of Response in relation to its justification defence to the discrimination arising from disability (s.15 Equality Act 2010) claim. Oral reasons were provided for both amendments and time was spent preparing an amended List of Issues which was sent to the parties by way of case management order on 3 October 2023. The Claimant was encouraged throughout the hearing to have a copy of that List of Issues before him during his questioning of the Respondent's witnesses and submissions.

Complaints and List of Issues

6. On 20 December 2022, the Claimant contacted ACAS as part of early conciliation that ended on 19 January 2023 [5]. On the 16 February 2023, the Claimant filed his ET1 Claim [6] bringing complaints of disability discrimination. He relied on serious depression and complex PTSD as his disabilities. He claimed that his employment had ended as he had failed his probation review, that had requested adjustments been put forward which he claimed he had frequently requested from May to September 2022, he did not believe that he would have failed the probation. He claimed that he had requested unpaid leave and that the team be advised of both his condition and a recent tragedy, the murder of his 15 years' old nephew. He complained of being shouted at by a manager known as 'Steffi' and that the Respondent had promised a support plan that had not happened.
7. Following the amendment application, it was agreed that the Claimant is making the following complaints:
 - 7.1 Direct Discrimination (s.13 EqA 2010);
 - 7.2 Indirect discrimination (s.19 EqA 2010);
 - 7.3 Failure to comply with the duty to make reasonable adjustments (s.20/21 EqA 2010); and

7.4 Discrimination arising from disability (s.15 EqA 2010).

8. It was also agreed that the amended list of issues was as follows:

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **21 September 2022** may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct disability discrimination (Equality Act 2010 section 13)

2.1 Did the Respondent do the following things:

2.1.1 Fail to make reasonable adjustments for the Claimant;

2.1.2 Steffi Carter shouted at the Claimant, that the Claimant should be asking her a question rather than another employee (before the Claimant's grievance complaint and before the Claimant went off sick,);

2.1.3 Nazir shouted at the Claimant on a late shift when the Claimant requested that he deal with a later call that Claimant had booked (before the Claimant's grievance complaint and before the Claimant went off sick,);

2.1.4 Placed the Claimant on a PiP, when threshold for PiP under Capability Policy had not been met;

2.1.5 Did not action the recommendations within PiP;

2.1.6 Dan Nettle did not process an application to overturn QA scores for calls made by the Claimant;

- 2.1.7 Dan Nettle failed to inform the team of the Claimant's disability (after bereavement);
- 2.1.8 Ignore the Claimant's request for flexible working and instead placed the Claimant on a PiP.

2.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant says they were treated worse than

- a) Kieran Crump (failure to make reasonable adjustments)
- b) Collection department staff (Steffi Carter, Nazir shouting);
- c) Other staff in Collections who had made a request for flexible working
- d) Other staff in Collections who had had a bereavement;

2.3 If so, was it because of disability?

2.4 Did the Respondent's treatment amount to a detriment?

3. Indirect discrimination (Equality Act 2010 section 19)

3.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

- 3.1.1 Not allowing flexible working requests until 26 weeks of service;
- 3.1.2 Not allowing unpaid leave requests until 26 weeks of service;

3.2 Did the Respondent apply the PCP to the Claimant?

3.3 Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic, e.g. employees without the disability of depression and PTSD, or would it have done so?

3.4 Did the PCP put persons with whom the Claimant shares the characteristic, at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, e.g. those with disability of depression and PTSD, in that they are unable to work/cope with working full hours and have additional stress and increased anxiety?

- 3.5 Did the PCP put the Claimant at that disadvantage?
- 3.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:
 - 3.6.1 Compliance with relevant legislation;
 - 3.6.2 To ensure that staff are remunerated in difficult times and to improve employee welfare.
- 3.7 The Tribunal will decide in particular:
 - 3.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
 - 3.7.2 could something less discriminatory have been done instead;
 - 3.7.3 how should the needs of the Claimant and the Respondent be balanced?
- 4. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**
 - 4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date? The Respondent admits that it had knowledge that the Claimant had the disability from 20 July 2022.
 - 4.2 A “PCP” is a provision, criterion or practice. Did the Respondent have the following PCPs:
 - 4.2.1 Not providing unpaid leave following personal trauma;
 - 4.2.2 Not disclosing to work colleagues, an employee’s personal information including health conditions, despite being requested to do so by the individual employee;
 - 4.2.3 The requirement to work full time hours of 40 hours per week;
 - 4.2.4 The requirement to carry out the responsibilities and duties, including performance targets, of a Senior Collections Officer;
 - 4.2.5 Refusing and/or failing to provide advance notice of content or nature of planned meetings with employees;
 - 4.2.6 Failing and/or refusing to follow recommendations made following grievance;
 - 4.2.7 Rota of just two late shifts per weeks.
 - 4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant’s disability, in that:
 - 4.3.1 The Claimant had to take sickness and annual leave to recuperate;
 - 4.3.2 Staff questioned why the Claimant had been off work causing the Claimant further distress and mental health including brain fog, fatigue and lack of concentration;

- 4.3.3 The Claimant had an inability to function on a full-time basis with work colleagues in the work environment due to lack of rest and recuperation;
 - 4.3.4 The Claimant was unable to function at the level of responsibility and with the duties of a senior Collections Officer due to mental health including brain fog, fatigue and lack of concentration;
 - 4.3.5 The Claimant needed additional time to process and prepare as a result of brain fog and anxiety;
 - 4.3.6 The Claimant had increased anxiety and brain fog;
 - 4.3.7 Varied work patterns and inability to access gym increased anxiety levels .
- 4.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?
- 4.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:
- 4.5.1 Granting unpaid leave following such an event;
 - 4.5.2 Advising the team of his personal tragedy and of his condition;
 - 4.5.3 Reducing his hours temporarily;
 - 4.5.4 Changing his role, specifically demoting him to a role with less responsibility, namely Collections Officer and not Senior Collections Officer;
 - 4.5.5 Changed the Claimant's department e.g. Customer Services Department;
 - 4.5.6 Providing information to the Claimant about meetings, in content form and number;
 - 4.5.7 Adopting the grievance closure recommendations made by the Customer Services Manager which included reconciliation with management;
 - 4.5.8 Being allowed to work late shifts permanently (by end of June/1 July).
- 4.6 Was it reasonable for the Respondent to have to take those steps?
- 4.7 Did the Respondent fail to take those steps?
5. **Discrimination arising from disability (Equality Act 2010 section 15)**
- 5.1 Did the Respondent treat the Claimant unfavourably by:
- 5.1.1 Dismissing the Claimant?
- 5.2 Did the following things arise in consequence of the Claimant's disability:

5.2.1 Burn out including brain fog, lack of energy and exhaustion from being in work resulting in;

5.2.2 Frustration resulting in poor customer calls being made;

5.3 Was the unfavourable treatment because of any of those things? Did the Respondent dismiss the Claimant because of those things?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

5.4.1 maintaining the confidence and trust of the affected customer and also to ensure that the zero tolerance and adherence to the FCA regulations are maintained at all levels.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6. Remedy for discrimination or victimisation

6.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the Claimant?

6.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the Claimant be compensated?

6.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

6.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

6.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

- 6.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 6.9 Did the Respondent or the Claimant unreasonably fail to comply with it?
- 6.10 If so is it just and equitable to increase or decrease any award payable to the Claimant?
- 6.11 By what proportion, up to 25%?
- 6.12 Should interest be awarded? How much?
- 6.13 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?
- 6.14 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
- 6.15 Would it be just and equitable to award four weeks' pay?

Evidence

- 9. The Tribunal heard evidence from the Claimant and for the Respondent, Mr William James (Senior People Partner) and Ms Steffi Carter (Senior Collections Officer). All witnesses relied on written witness statements which were taken as read and they were then subjected to cross-examination, the Tribunal's questions and re-examination.
- 10. The Tribunal was also referred selectively to documents in the Bundle and during the cross-examination of the Claimant on the second day of the hearing an issue arose regarding the disclosure that had been undertaken by the Respondent. The hearing was adjourned for the Respondent to comply with an order for specific disclosure made and as a consequence of that order, on the morning of the third day of the hearing, a further supplementary bundle ("Supp.Bundle") of some 129 pages were permitted to be included in the evidence before the Tribunal.

Assessment of the Evidence

- 11. The Tribunal was satisfied that all three witnesses gave evidence to the best of their knowledge and belief. Findings of fact are made on the evidence before a Tribunal and based on balance of probabilities.

12. In this case, detailed findings of fact were difficult, not least because very few specific dates were included in any of the witness statements. The Claimant had little to no recall of when he claimed he had specifically asked for his adjustments, and the Respondent witnesses were equally vague on dates, having difficulty recalling when specific conversations had been held.
13. Whilst to an extent this was unsurprising, taking into account the brevity of the time period in question, both in terms of the length of the Claimant's employment and the intermittent nature of the time that the Claimant was in the office due to his own bereavement and later sickness absence and annual leave, it was not assisted by the fact that neither party had put their mind to preparing a chronology despite having been ordered to do so. As such the Tribunal found that none of the witnesses, including the Claimant, had a good recall of events. We draw no adverse inference from that, but include it within our reasoning to explain some of our findings.
14. Dan Nettle, the Claimant's line manager and the individual that the Claimant evidenced he had told of his PTSD, had not been called by the Respondent to give evidence. An explanation was provided by the Respondent that he was no longer employed by the Respondent and was unable to attend due to a surgery. The Tribunal accepted that explanation and drew no adverse inference generally from his absence.
15. Olivia Roberts, the Respondent's Operations Manager and the individual who made the decision to terminate the Claimant's employment, was also not called to give evidence by the Respondent. An explanation was not forthcoming from the Respondent despite being asked for one and it being confirmed that she was still in the employment of the Respondent. We deal with any inference that gave rise to further in our written reasons.
16. The Tribunal looks for witness evidence to be internally consistent and consistent with documentary evidence, for example is the evidence corroborated by other witness evidence and/or by contemporaneous records or documents? We also consider whether the evidence is probable. Therefore contemporaneous documentation would have been particularly helpful in this case where there was a lack of witness recall. No disclosure had been undertaken of the internal 'Slack' messages. On receipt of the further specific disclosure and an explanation from the Respondent as to the lack of any copies of the internal messages, the Tribunal was satisfied that the Respondent's data retention policy on Slack messages had been set to 180 days after which all messages, images and files sent to Slack were deleted. In those circumstances, whilst the Respondent had not in fact been asked by its instructing solicitor for copies of such messages, none were available to be disclosed in any event. We drew no general adverse inference from that failure.

Facts

17. The Respondent does not dispute that at the material times the Claimant was a disabled person by reason of his complex PTSD and depression which he has

lived with for a number of years. That the Respondent had knowledge or ought to have had knowledge of the Claimant's disability is disputed [38].

18. The Respondent is a company that provides support to businesses including financial credit. It has a London Head office and a centre in Cardiff that employs circa 260 staff.

Commencement of employment

19. After a short career break following redundancy from his previous employment, the Claimant applied and was interviewed for a role at the Respondent's Cardiff office as a Senior Collections Manager. He was 44 years old and had been employed in the finance sector for over 10 years at that time. The Claimant was interviewed by the Operations Manager, only known as 'Steven' throughout these proceedings. The Claimant felt he had a positive interview, sharing his experience successfully leading an underperforming collections team and believing that enthusiasm was shown for his training skills and their potential contribution to the Respondent's business. From what he had been told at interview the Claimant believed that Steven was impressed and that it was his intention for the Claimant to take on a Team Leader role at some point after starting with the Respondent. The Claimant believed that there was scope to progress within the new role. He was excited to work with the Respondent with, what he thought to be, fantastic prospects of promotion.
20. At some point, the Claimant was informed that the manager that appointed him, Steven, no longer worked for the Respondent and that a replacement was awaited. He was concerned that the expectations he held for promotion to Team Leader had been communicated by Steven to others within the Respondent.
21. He commenced employment with the Respondent at their Cardiff office as a Senior Collections officer on 16 May 2022 and was employed on terms and conditions set out in a Statement of Terms [88] which provided for a 6-month probationary period. Various policies were also applicable including a Probation Policy [73] a Grievance Procedure [75], Holiday and Time off Policy [Supp.Bundle 19] and Equal Opportunities Policy [Supp.Bundle 126].
22. The first few weeks were spent on induction or 'on-boarding' and training. The Claimant did not consider that the training fulfilled the need for a basic collection function, let alone a team leader role.

Bereavement

23. At some point towards the end of May 2022, whilst the Claimant was still undergoing that training, the Claimant found out that his 15-year-old nephew had been killed. The Claimant himself had previously lost a child and he tells us that the death of his nephew had a negative impact on his mental health. We accepted that such news would undoubtedly have been a terrible and traumatic time for the Claimant and his family.
24. The Claimant telephoned the Respondent and spoke not to his Team Leader, Dan Nettle, but to another Team Leader 'Jo', advising him that his nephew had

been murdered. The Claimant asked that members of his team be advised of his recent tragedy. There was no evidence from the Claimant that he disclosed to the Team Leader, Jo, that he suffered from PTSD and we found that it was probable that he did not as a result.

25. Whilst we accepted the Claimant's evidence that he also asked his own Team Leader, Dan Nettle, at some point to inform staff of his nephew's death, we did not find that the Claimant asked him at this time to inform staff of his PTSD or depression as, for reasons provided later in this judgment, we found that the Claimant had not told Dan Nettle that he had PTSD or depression until 7 July 2022. It followed that the Claimant would not have asked the Respondent to inform staff about his nephew's death *and* his PTSD at this time.
26. As a result, the Respondent informed staff that the Claimant was going through a difficult time in his personal life, that he had a bereavement and may not be himself. The Respondent considered that it was not appropriate to share the actual details of the nephew's death across the team as this could be triggering for other individuals, but that they were happy for the Claimant to share as much or as little as he wished with the team members.
27. The Claimant returned to work following the news, taking no time off. He returned expecting further continuing training, particularly for the Team Leader role. None was forthcoming. Instead, he commenced making customer calls. Whilst the Claimant was employed in a role of *Senior* Collections officer, he did not have allocated to him senior responsibilities, instead carrying out the same role and responsibilities of a Collection officer.
28. The Claimant has claimed that he requested late shifts to enable him to visit the gym but he was unable to provide any date that such a request had been made but that he guessed that it would have been before his first 1:1 in July 2022, at some time in June 2022. He also gave evidence that the reason he wished to work a late shift was so that he could then attend the gym to manage his stress levels and tells us that he was informed that he should ask other collections staff to swap shifts, which he did.
29. Whilst we accepted the Claimant's evidence that he had asked to work late shifts and considered this likely to have been in or around June 2022, we were not persuaded that the Claimant had given the Respondent any specific reason for wishing to work late shifts other than it was to manage his 'stress levels' only, as reflected in his witness statement.

Leave

30. Within his written witness statement the Claimant gave evidence that after two weeks following news of his nephew, as his '*brain fog began to dissipate*',¹. We accepted this evidence, finding that any specific impact that the bereavement had on the Claimant's own mental health did not result in any brain fog after that initial two week period following news of his nephew's death.

¹ CSSS§33

31. The Claimant broached the topic of training required for Team Leader role to his own Team Leader, Dan Nettle. Dan Nettle knew nothing of any transition for the Claimant to such a role. Likewise, the HR Manager, Will James, also knew nothing of any intention for the Claimant to become a Team Leader.
32. The Claimant was devastated at the disparity between his expectations of promotion to Team Leader and the reality of the situation, that no such prospects existed or would materialise. We accepted that the impact on the Claimant, of the job not being as he had believed it would be, was as set out by him in his written witness statement and his written grievance, a grievance he subsequently submitted on 25 July 2022 [170-172]. The Claimant also said so in live evidence.
33. The Claimant has claimed that he had not been provided with unpaid leave following the trauma of receiving the news of his nephew, further claiming that not providing unpaid leave following personal trauma was a PCP that had placed him at a substantial disadvantage compared to someone without his disability in that he then had to take sickness and annual leave to recuperate and that granting unpaid leave following such an event would have been a reasonable adjustment.
34. The Claimant had given evidence in his witness statement that he had requested unpaid leave '*after four weeks in the company*²', when he says he had approached Dan Nettle and Will James to '*discuss the possibility of taking unpaid leave*'. He says that after initial assurance that they would follow up on the request, they failed to do so and told him that the responsibility for addressing that request lay with the new Operations Manager for Collections, Olivia Roberts, who was due to commence employment on 29 June 2023. No evidence was given by the Claimant as to what he said to either beyond that, nor whether he had explained to them the reasons for asking for unpaid leave at that time.
35. In live evidence, the Claimant was questioned on whether he could assist on when, specifically, he had requested unpaid leave. He was encouraged to look at the dates of bereavement leave to ascertain if these were of possible assistance to help him recall, it not being in dispute that the Claimant had in fact been on bereavement leave on these dates. Records for the Claimant's leave, including annual leave, sick leave and bereavement leave were included in the Bundle [166] and these indicated that the Claimant had been given paid bereavement leave on 1 June 2022 (half day), 10 June (half day); and 13-17 June 2022 (5 days). The same records also indicated that the Claimant was also off work on annual leave for a day and a half over 29 June and 30 June 2022 [166].
36. He was unable to recall and a variety of responses were given by him: that it was '*following bereavement leave*', that he was '*guessing end of June*', '*middle to end of June*' and '*before bereavement leave*'.

² SSWS§49

37. The Claimant was also asked what he had actually said, the Claimant's written statement not clarifying the point. He gave live evidence that he had asked for unpaid leave as his bereavement leave had been used up and was told that such leave would be classed as sick leave or annual leave. When questioning Will James during the hearing, the Claimant said that when he was provided with *paid* bereavement leave, he 'took that as a refusal of unpaid leave'.
38. No evidence had been provided by the Respondent on if or what the Claimant had told them was the reason for requesting unpaid leave. Dan Nettle has not given evidence and Will James' statement not specifically dealing with the issue, only dealing with what the Respondent had done in giving the Claimant paid bereavement leave³.
39. Whilst Will James accepted that unpaid leave had been mentioned to him, his recall was that this had taken place before the Claimant's bereavement leave, that the Respondent had a 'loose' bereavement policy and, due to the shocking nature of the Claimant's loss, he wanted to ensure that the Claimant had paid time off to support him, which was why he had given him *paid* bereavement leave. He also gave evidence that the Claimant did not ask for unpaid leave as an adjustment for any disability and that he was not aware of any disability at that time, rather that he understood and accepted that the Claimant was facing difficulties going through a bereavement and wanted to ensure that he was supported and that he would be paid for time off.
40. The Tribunal accepted that evidence from Will James and found that more likely than not the Claimant sought unpaid leave *prior* to his bereavement leave that had commenced on 13 June 2022, rather than after that bereavement leave. The Tribunal also found that the Claimant did not indicate that he was unhappy at receiving paid leave and had not objected to taking further time off as sick leave or holiday leave.
41. Whilst we accepted that was the evidence from Will James, we also did not find that the Claimant wanted unpaid leave specifically as particular adjustment for his health. Rather, we found that the timing of the request for unpaid leave also coincided with the Claimant discovering that there was no intention on the Respondent's part for him to occupy a Team Leader or training role, further finding that it was more likely than not, that any requests for unpaid leave related to the discontent that the Claimant was feeling regarding his own job prospects and the lack of an Operations Manager rather than because of disability.
42. This was because it was of note to the Tribunal that the Claimant had also given live evidence that when asking for 'unpaid leave', he told us that he had asked to leave the business and start again after the new Operations Manager had started employment at the Respondent. The Claimant, when questioned later in cross-examination, spoke of being unhappy at this time due to his own disappointment regarding the lack of Team Leader role and feeling at that time

³ WJWS§13/14

that the Collections department was in turmoil with no 1:1 meetings and no processes in place in the absence of a departmental manager.

43. He was asked whether it was fair to say that the main reason he sought unpaid leave at this time was because he wanted to wait for the new Operations Manager to start to discuss his role. The Claimant did not deny this, confirming that he felt that a new manager would have brought stability to the department and that he envisaged being 're-inducted' and expectations of the role being reset, but felt that this was not in isolation to dealing with his nephew's murder and his own PTSD.
44. The Claimant's evidence, both given live in cross-examination and in his witness statement, reflected to the Tribunal a deep-rooted unhappiness and discontent with his own position and what he perceived to be an absence of departmental process and procedure as well as lack of a readily available manager to address his concerns regarding the Respondent's procedures. All matters wholly unrelated to his disability and we found that these were the reasons why he wanted a time of unpaid leave.
45. At some point after 29 June 2022, after Olivia Roberts had started her own employment with the Respondent and after she had completed her own induction, the Claimant met with her. We found that this would have been more likely than not in around the second or third week of July 2022, taking into account those dates and her own period of induction. In that discussion, the Claimant tells us that he told her of his own personal tragedy, his ongoing mental health challenges, his desire to change his work situation, such as unpaid leave, part-time work, changing his hours, or possibly leaving the company entirely. She reassured him that she had positive plans for him which she would action when she returned from honeymoon, which she commenced on 15 July 2022.
46. What specifically the Claimant told her was not before the Tribunal and we decline to make any findings regarding whether the Claimant told her at that meeting of anything beyond a general discussion about his employment and his bereavement.
47. At around the same time, on 7 July 2022, the Claimant had his first 1:1 with Dan Nettle. In live evidence the Claimant gave evidence that this was likely to be the first time that he told Dan Nettle of his PTSD and his depression. Dan Nettle has not given evidence and we accepted that evidence from the Claimant. As a result, we found that the earliest the Claimant had informed one of the managers at the Respondent that he had PTSD and depression, was on 7 July 2022 and that he had not disclosed his PTSD or depression prior to that date.

Quality Audit scores

48. The Claimant has claimed that Dan Nettle did not process an application to overturn a quality audit, or 'QA', score for calls made by him.
49. He was unable to provide any evidence or basic information however of which QA he had sought to overturn or the timing of such a request. From the

framework of the Claimant's witness statement, which the Tribunal found had been set out in a chronological order, we found it more likely than not that this had taken place at some point in early July.

50. The Tribunal was not satisfied that the Claimant had provided any credible or reliable evidence to prove that Dan Nettle had not processed an application to overturn a QA score for him. Rather he had just referenced a meeting that Dan Nettle had attended with him.
51. Even if we had, we further found that the Claimant did not believe that Dan Nettle's lack of involvement in any meeting to discuss overturning of such a score to be in any way related to the Claimant's disability as, in his own witness statement, the Claimant had given evidence he had considered that Dan Nettle's lack of involvement '*...seemed to be as a result of his limited experience in handling such matters*', further complicated by the absence of, in the Claimant's opinion, '*well-defined processes*' within the Respondent organisation⁴.

Reduction in hours request and performance plan - 21 July 2022

52. On 19 July 2022, the Claimant sent a message to Will James via the Respondent's internal messaging system 'Slack', in which he requested a reduction in his hours '*ideally 20-24 hours per week*' [158]. Will James responded stating '*When Olivia has returned to leave we shall sit down for a formal flexible working meeting. In the meantime should you need additional support, do get in contact.*'
53. At some point after receiving this request, Will James and Dan Nettle spoke. We were unable to make any findings on the what was said save that Will James accepted that he became aware at that point, that the Claimant was still struggling with his mental health, he believed still flowing from the Claimant's bereavement.
54. Will James was asked in cross-examination whether he placed his mind at this point to whether there was a possibility of the Claimant being a disabled person. He did not. He believed the Claimant's mental health and any depression suffered was because he was still struggling with his loss. He tells us that was not aware that the Claimant suffered with PTSD until 25 July 2022, when he read the Claimant's grievance, as Dan Nettle had not informed him.
55. We accepted that evidence of his own personal knowledge of the Claimant's PTSD and found that he believed that the Claimant was suffering bereavement that was impacting on his mental health.
56. It also appears that on the morning of 21 July 2022, the Claimant and Will James spoke, although what was discussed was far from clear from the evidence before us beyond Will James knowing that the Claimant was wanting to work part-time for a short period and that he told the Claimant again that it was best to await for Olivia Roberts' return from honeymoon to discuss any reduction in

⁴ CWS§40

hours.⁵ There was no evidence within the statements from either the Claimant or Will James as to what had been discussed at that meeting, and neither gave any clear live evidence on the discussion.

57. Later that day, the Claimant was asked by Will James to a meeting. The Claimant believed that it was to discuss the reduction in hours that he had been looking for. It was not.
58. By this time the Claimant had been in work for a number of weeks. The Respondent were concerned about the Claimant's QA scores and that he was failing to achieve his targets. The Claimant accepted in live evidence that the QA feedback and coaching notes in the Bundle reflected such reviews held with the Claimant [97-99] which in our view reasonably supported those concerns. His managers approached Will James for advice on how to deal with his performance and Will James suggested placing the Claimant on an informal performance improvement plan or PiP. No explanation was provided of when such a conversation had taken place.
59. Rather than a meeting to discuss his hours, the meeting that afternoon was a meeting with Dan Nettle and Steffi Carter, another Team Leader to tell him that they wanted to discuss providing a performance improvement plan to support him.
60. The Claimant has complained that he was told that the criteria for being put on a PIP was typically triggered if an employee did not achieve 80% QA score over three months, that the QA had not evaluated all his calls for each of the three months and that after challenging and overturning the incorrect assessments, he would likely have met the 80% threshold. He felt that he had not been work for the full review period, only having started the role at the beginning of June.
61. We accepted Steffi Carter's evidence that at that meeting the Claimant had challenged his scores and that she formed the opinion that the Claimant had not accepted that his QA audits were below the expectation required of an individual with prior financial service and that he was not receptive to feedback that there were concerns regarding his behaviour. She was not challenged on her evidence that the QA for the Claimant was below expectation. We found that the Respondent did find that they were below expectation.
62. The Claimant was placed on a performance improvement plan ("PiP")[159]. That reflected that the Claimant was to achieve over 80% of expected target in respect of QAs and that the Claimant's tone and manner in which he spoke to colleagues and peers could at times be abrupt and not taking on feedback. The additional support was to be put in place for the Claimant to be given an additional 2-3 hours per week to improve his QA. He was asked to be more receptive to feedback.

⁵ WJWS§32 and SSWS§55

63. The Claimant informed them that he had requested reduction in hours and again the Claimant was advised that he would need to await the return of Olivia Roberts the following week when she returned to work.
64. We were not persuaded that there was any evidence before us to make any substantive findings that the threshold for a PiP under the capability had not been met or that the Respondent had not actioned subsequently the recommendations within the PiP as alleged by the Claimant.

Sick leave and grievance

65. The following day, on 22 July 2022, the Claimant submitted a sick note for stress related problems and depression and commenced a period of sick leave that was to last until 22 August 2022 [161]. The Claimant did not return to work until 31 August 2022, after a further period of annual leave from 22 August to 30 August 2023.
66. Shortly after commencing that sick leave and on 25 July 2022, the Claimant submitted a grievance [165/170]. The Claimant complained that the Respondent had not made reasonable adjustments after he had informed the Respondent that the murder of his nephew had triggered his PTSD.
67. Will James gave evidence that whilst he was aware that the Claimant had been struggling with his bereavement and that his mental health had been impacted by that loss, this was the first time that he was personally aware that the Claimant had PTSD or depression. We accepted that evidence.
68. In that grievance, the Claimant stated that he wished to raise a grievance for not making a reasonable adjustment after he had informed them that the murder of his nephew had triggered his historical PTSD. He stated that he had often chosen to limit the information about these tragic events as they impacted on others and that he had requested to take unpaid leave *'for a week or two to allow the new collections manager to return from leave and settle back in'*. He referred to his pending request for a reduction in hours on a temporary basis. He stated that he had asked that the team be aware of the murder and his PTSD but that this had not happened. He complained that he had been shouted at by 'Nas' and 'Steffi'. He attached some further information regarding the cause of his sick leave highlighting his surprise at having his performance discussed at a meeting after he had requested unpaid leave and part time hours [171].
69. He ended the written grievance that he had hoped to have a discussion with Olivia Roberts after she had created her *'vision of the department, on my role etc'* that he would assess if it were something that he was interested in or able to perform. He repeated that he had offered *'unpaid leave to accommodate you'*.
70. Whilst we found that the grievance initially raised concerns regarding failure to make reasonable adjustments, we also found that the Claimant again focussed on his 'unsettling introduction' to the team, his own concerns at how the Respondent was managing its business and how he felt his role was not as described at interview. He considered as a result of Olivia Roberts' appointment,

he may now be surplus to requirements and asked for discussions on an exit package.

71. Following receipt of that grievance and on 26 July 2022, Katerina Koleva, People Partner from the London office, emailed the Claimant confirming that she was to be his point of contact and support indicating that he was to contact her if he had any questions.
72. In response to that email and on 27 July 2022, the Claimant sent an email thanking her and asking if any meeting could be deferred until 2 August ending the email with *'If we can arrange call before any meetings are booked that would be great'*. An email was sent back, telling the Claimant that if he wanted to discuss anything prior to that meeting to put it in writing and email it to her [163].

Grievance hearing

73. On 11 August 2022, a grievance hearing took place to discuss the Claimant's concerns. The meeting was conducted by Julian Spiller, Manager for the Respondent. Notes of that meeting were included in the Bundle which the Tribunal accepted as a note of the matters discussed [177].
74. Again, the notes of the meeting reflect that focus of the Claimant's concerns related to his discontent regarding his role expectations and the departure of the previous Collections Manager. He spoke of an altercation that had taken place between him and two other managers the week prior to his sick leave, again focussing on the lack of manager and the business being unsettled.
75. He felt that the team leaders, including Steffi had been *'eager for him not to shine.'* He felt that being placed on the PiP had *'something to do with Steffi'* and indicated that a good outcome would be a *'bit more time off'* and to understand what his actual role was going to be, repeating that after his interview, expectations had been set.
76. He referred to a complaint that had been made against him by a colleague, 'Nas'. Again he confirmed that he was not looking for an outcome to that but that what he was looking for was the same opportunities as others and a *'little bit of clarity over my position'*. He stated that Nas was opposed to him moving to a Team Leader post.
77. The Claimant indicated that he was now *'happy to close the complaint'* and that he was not looking for an outcome.
78. Again, we found that the focus of the Claimant's complaint was on his discontent with the role and not his disability and that his complaints regarding other work colleagues, including any interactions with Steffi Carter and Nas or Nazir, were related to the Team Leader roles. This finding was also supported by the Claimant's own written statement evidence when he stated that *'it appeared that the departure of Steve could have made them unsettled and insecure in their roles due to no supervision and a lack of experience in managing staff and*

financial services products.’ No reference was made to his own disability or indeed mental health.

79. The meeting ended with the Claimant suggesting that he could move to another department, if that was an issue for the Respondent. He was told that this was not necessary and a further meeting was arranged for any follow-up actions.
80. With regard to the specific issues involving Steffi Carter and Nazir, or Nas, matters that the Claimant relies on for his direct disability discrimination complaints, we made the following findings.
81. With regard to the complaint that the Claimant had been shouted at by Steffi Carter, we found that this had not been proven. The Claimant provided little statement evidence to support this claim and whilst Steffi Carter had not expressly disputed the allegation in her written evidence, she did attend to give live evidence and was questioned on this allegation. She gave live evidence that whilst there had been a discussion between her and the Claimant, she had not raised her voice or shouted at the Claimant. That was not disputed by the Claimant. Her further evidence, which we also accepted, was that save for knowing that the Claimant had lost his nephew, she had not at any point been aware that the Claimant had any mental health difficulties. We accepted her evidence.
82. Despite the lack of any specific evidence from the Claimant regarding the allegation that Nas or Nazir had shouted at him, this was not in issue in dispute. We had accepted Will James’ evidence, that whilst there had been a disagreement between the Claimant and Nazir, and a complaint from Nazir regarding the way he had felt that the Claimant had spoken to him, *both* the Claimant and Nazir had raised their voices, and both had agreed to keep their distance.

15 August 2023 Meeting

83. A further meeting took place on 15 August 2022 and again notes of that meeting were in the Bundle [188] which the Tribunal accepted as an accurate summary of what had been discussed.
84. The Claimant opened the meeting confirming that his ‘issue’ had been with the ‘onboarding, orientation and not being prepared for the manager’s departure’ and mediation, between the Claimant and Dan Nettle, was discussed to facilitate good working relationships. That the Claimant would return to work on a phased basis and that when Olivia Roberts returned there would be a clear role profile for the Claimant, was also discussed. The Claimant was informed that no steps would be taken to move him to another team. The Claimant returned to the issue of whether he would be given a Team Leader role, complaining that the role he was in was very different from what he had been led to believe it would be. The Claimant again asked if he could work part-time and it was suggested to him that he discuss that with Olivia Roberts as part of his phased return to work.

85. Again, we found that the Claimant's focus in this meeting related to his expectations and in turn his discontent with his role and not his disability.
86. We found that the grievance closure recommendations were, that:
- 86.1 the Claimant would return to work on a phased basis;
 - 86.2 when Olivia Roberts returned there would be a clear role profile for the Claimant;
 - 86.3 no steps would be taken to move him to another team; and
 - 86.4 the Claimant would discuss part-time work with Olivia Roberts as part of his phased return to work.
87. On 16 August 2022, the Claimant was sent a letter confirming the outcome of the grievance which was that as the Claimant had closed his grievance, no decisions had been made and there was no right of appeal [193].
88. On 31 August 2022, the Claimant returned to work on a phased return from sick leave, not having contact with any customers working full time after his phased return. No evidence was before us as to what, if anything, the Claimant discussed with Olivia Roberts at that stage save that in September 2022, the Claimant again asked for flexible working for 20 hours per week to allow him caring responsibilities for his sister and niece and to manage his own health and treatment for a 'few months' [Supplementary bundle 48]. Will James gave evidence that this email was timed just after a phone call that ultimately led to a review of the Claimant's employment.

Probation Review

89. On 21 September 2022, the Claimant was invited to attend a probation review to be held the following day to discuss '*a complaint raised by a customer regarding how their query was handled*' [222]. The meeting was conducted by Olivia Roberts. Will James attended as note taker and again notes of that meeting were accepted by the Tribunal as an accurate summary of the likely matters discussed [223].
90. The Claimant was played the call in question. The Claimant was challenged on talking over the customer, disregarding what they were saying and raising his tone. He was told that the customer had raised a complaint, advising that the customer had indicated that he had felt the Claimant intimidating.
91. He was told that he should have raised the issue after the customer had complained about that and asked why he had not escalated the matter himself. The Claimant indicated that he had not picked up that the customer has complained and accepted that the payments had not been explained correctly to the customer. The Claimant raised that he had not had call coaching.
92. The meeting was adjourned and on return the Claimant was advised that his challenge that he had not had call coaching was not accepted and that he had failed in basis customer service, in talking over the customer, not matching their tone. He was informed that he had not demonstrated suitability in the role and

that his employment would be terminated and that his last day of employment would be 22 September 2022. This was confirmed in writing on the same date [226].

93. After his employment ended, the Claimant indicated that he wished to re-open his grievance regarding failure to make reasonable adjustments in relation his request for flexible working [228]. Will James responded on 18 October 2022 that employees were only eligible following 26 weeks of service and that on termination of employment, the Claimant only had 18.5 weeks of service.

Submissions

94. Both parties relied on written submissions which the Tribunal will not attempt to summarise but incorporates them by reference.
95. However, the Respondent's position on date of knowledge was far from clear and indeed contradictory, at §9 (page 3) in relation to §2.1.1 of the list of issues, conceding that it was the Respondent's case that it had no knowledge of the Claimant's disability until 20 July 2022, yet at page 4, in relation to §2.1.4 of the list of issues, submitting that as of 21 July 2022, the Respondent had no knowledge of the Claimant's PTSD and so the decision to consider the Claimant for the PiP was not because of his disability.
96. Despite seeking clarification from the Respondent's representative on a number of occasions and indicating a willingness to permit the Respondent to amend the written submissions, the only change that the Respondent's representative was prepared to indicate was that reference to 'until 20 July' should be amended to 'in or around 20 July 2022'.
97. The Respondent's representative drew no distinction between knowledge of the impairment and knowledge of disability despite being asked if that was their position.

The law

S.2021 EqA 2010 Duty to make reasonable adjustments

98. Section 20 EqA states that: ...

(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.

99. Section 21 EqA states that:

(1) A failure to comply with the first ... 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.

100. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29) and the EAT in **Environment Agency v Rowan** [2008] ICR 218, set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:
- 100.1 the provision, criterion or practice applied by or on behalf of an employer, or the physical feature of premises occupied by the employer;
 - 100.2 the identity of non-disabled comparators (where appropriate); and
 - 100.3 the nature and extent of the substantial disadvantage suffered by the claimant'.
97. PCP is not defined within the EA 2010. EHRC Code of Practice (6.10) states that the phrase should be construed widely and could include informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.
98. Laws LJ in **Newham Sixth Form College v Saunders** [2014] EWCA Civ 734 noted that *"the nature and extent of the [claimant's] disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot ... make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP"*
99. S.212 (1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis (EHRC CoP, 6.15). It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because of disability. In order to do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a non-disabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage (**Newcastle Upon Tyne Hospitals NHS Trust v Bagley** (2012) UKEAT/0417/11/RN, para 72).
100. Finally, the duty to make adjustment arises by operation of law. It is not essential for the claimant himself to identify what should have been done (*Cosgrove v Ceasar and Howie* [2001] IRLR 653, EAT). Indeed, the EAT held in *Southampton City College v Randall* [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

S.19 EqA 2010 – Indirect Discrimination

101. S.19 of the Equality Act 2010 is in the following terms:-

(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 15 relevant protected characteristic of B's.

(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant characteristic of B's if –

(a) A applies, or would apply, if the person to 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 person 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.

s.13 EqA 2010 Direct Disability Discrimination

102. In the Equality Act 2010, direct discrimination is defined in Section 13(1) as follows:

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

103. The provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 120. The concept of treating someone “less favourably” inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 “*there must be no material difference between the circumstances related to each case.*”

104. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed** [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; **Bahl v Law Society 2004 IRLR 799.**

S.15 EqA 2010 - Discrimination arising from disability

105. Discrimination arising from disability is defined in s15 EA 2010:

(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.

102. As for the correct approach when determining section 15 claims we refer to **Pnaiser v NHS England and others** UKEAT/0137/15/LA at paragraph 31. The relevant steps to follow are summarised as follows:

102.1 the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

102.2 the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the “something” must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

102.3 motive is irrelevant when considering the reason for treatment;

102.4 the tribunal must determine whether the reason is “something arising in consequence of disability”; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

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

102.6 this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

102.7 knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the “something” leading to unfavourable treatment is a consequence of disability;

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

104. With regard to the burden of proof, section 136 provides that:

(2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions.

105. Guidance as to the application of the burden of proof was given by the Court of Appeal in **Igen v Wong** 2005 IRLR 258 as refined in **Madarassy v Nomura**

International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination.

Conclusions

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

Knowledge of disability

106. We deal first with the claims that there has been a failure to comply with the duty to make reasonable adjustments and initially on knowledge - Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability, and from what date?
107. Whilst the Respondent's representative drew back from identifying 20 July 2022 as the specific date of knowledge in oral submissions, suggesting rather that it would have been a date '*on or around this date*', the Respondent has conceded that it had knowledge that the Claimant had the disability from some point in July 2022. The Respondent's representative did not seek to argue that knowledge of PTSD itself did not necessarily mean that knowledge of disability was also established, or argue that the Respondent did not have constructive knowledge.
108. The Tribunal found from 7 July 2022, the Claimant informed Dan Nettle, his Team Leader, of his PTSD. We concluded that it could be said that the Respondent could reasonably have been expected to know that the Claimant was a disabled person from that date.
109. Taking into account the impairment disclosed on 7 July 2022 was PTSD, and as the Claimant was bereaved and indicating that he was having mental health issues as a result and needed some time off, we concluded that it was reasonable for the employer at that stage to discuss with the Claimant whether his on-going difficulties were related to his underlying PTSD.
110. As Dan Nettle was the Claimant's line manager, the EHRC Code makes it clear that such knowledge is imputed to the employer and the duty to make reasonable adjustments will still apply even if Dan Nettle kept that information confidential (EHRC Code para 6.11,) which we had found that he had.
111. However, even where the employer could be said to know that the Claimant had a disability, the question of whether the Respondent knew or could reasonably be expected to know that the Claimant would likely be placed at a disadvantage because of any provision, criterion or practice ("PCP") was separate issue. We deal with this separately in relation to each reasonable adjustment claimed where appropriate.
112. We turn to the individual reasonable adjustment claims.

Unpaid leave

113. We had found that the Claimant had requested unpaid leave some time in the middle of June 2022, prior to informing Dan Nettle of his PTSD, and in turn prior to any knowledge (constructive or otherwise) that the Respondent was a disabled person. In any event, we did not find that the Respondent had such a PCP.
114. On that basis, this specific complaint fails.
115. In any event, whilst it was not in dispute that the Respondent did not provide the Claimant with unpaid leave, we were not persuaded that the Claimant had demonstrated any substantial disadvantage compared to someone without a disability as any additional time that was not paid, but taken as sick leave did not place the Claimant at any particular disadvantage compared to someone without his disabilities. Others too would also have had to take sick leave if still unable to return to work.
116. It also appeared to the Tribunal that part of the disadvantage that the Claimant felt, was not as much having to take sick and annual leave, but of having feelings of guilt being paid whilst off. The Tribunal concluded that the Respondent was not aware of such a concern until receipt of the grievance on 25 July 2022, such that it could not be said that the Respondent had any knowledge of that particular disadvantage in any event or that this was any disadvantage compared to someone without the Claimant's disabilities.
117. The complaint was not well-founded and is dismissed.

Disclosing personal information

118. Again, we found that the Claimant had asked that the team be told of his personal loss prior to the Claimant's notification of his PTSD and in turn, prior to any knowledge on the Respondent part that the Claimant was a disabled person. On that basis, this complaint is not well-founded and is dismissed.
119. Further, even if the Tribunal's conclusion on knowledge was wrong, in any event we had not found that the Claimant had asked that the team be told of his personal loss *and* his disability at the time and were further not persuaded that the Claimant had proven that there was a PCP of not disclosing to work colleagues, an employee's personal information including health conditions, despite being requested to do so by the individual employee. Rather this was a one-off act, if undertaken at all, that was not capable of amounting to a PCP and the specific complaint would also fail even if it could be said that the Respondent had knowledge.
120. The complaint was not well-founded and is dismissed.

Requirement to work full time hours

121. We accepted that there was a PCP of working full time hours of 40 hours per week. However, we were not persuaded that the Claimant had proven that this PCP placed him at a substantial disadvantage compared to someone without his disability.
122. We concluded that the Claimant had not proven that he was unable to function on a full-time basis with work colleagues in the work environment due to lack of rest and recuperation, having found that any brain fog had dissipated by the date of the request on 19 July 2022. We had also found that the reason the Claimant wished to reduce his hours temporarily, was because of the lack of presence of the new Operational Manager and a consequent inability and frustration on the Claimant's part to be able to discuss his role and potential development in the organisation, matters not related to his disability such that it could be said that he was at a substantial disadvantage compared to someone without his disability in that regard.
123. The complaint is not well founded and is dismissed

Requirement to carry out duties of a Senior Collections Officer

124. We accepted that there was a PCP of carrying out the responsibilities and duties, including performance targets, of a Senior Collections Officer, but we were not persuaded this PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant had not proven that he was unable to function at the level of responsibility and with the duties of a Senior Collections Officer due to his mental health.
125. We were not persuaded that the Claimant's mental health had caused anything but brain fog, which on his own evidence had lifted within around two weeks after the death of his nephew. This finding tied in with his evidence that around the time his brain fog started to dissipate he had asked about his promotional prospects and became disappointed, if not disillusioned in our judgment, with his employment with the Respondent.
126. We accepted the Respondent's evidence that the role that the Claimant was undertaking was that of a collections officer and that any change in department for him or indeed manager, was a response to the Claimant's general discontent with his role in Collections, and not an adjustment to avoid any disadvantage relating to his disability.
127. This complaint is therefore not well-founded and is dismissed.

Refusing and/or failing to provide advance notice of content or nature of planned meetings with employees

128. We did not find that the Respondent had such a PCP or that it was applied to the Claimant. The only evidence that we had before us was that which related to one email string from Katerina Koleva following receipt of the grievance in which she confirmed that she was to be his point of contact for his grievance inviting him to contact her if he had any questions.

129. Whilst we had found that the Claimant had asked if they could 'arrange a call' before any meetings, and was told that if he wanted to discuss anything before his grievance meeting, he should place it in writing, we did not consider that this evidenced any PCP of refusing or failing to provide advance notice of content or nature of planned meetings with employees.

130. This claim is not well-founded and is dismissed.

Failing and/or refusing to follow recommendations made following grievance

131. Again we did not consider that the Claimant had proven that the Respondent had a PCP of failing and/or refusing to follow recommendations made following grievance and on that basis the claim fails. In any event, we did not find that the Claimant had proven that the Respondent had refused or failed to follow any recommendations. We had found that the Claimant had withdrawn his grievance.

Rota of just two late shifts per weeks.

132. Whilst we accepted that the Respondents did have a PCP of two late shifts per week, we had found that the Claimant had requested late shifts some time in June, prior to informing Dan Nettle of his PTSD and prior to any knowledge that the Respondent was a disabled person. On that basis, this specific complaint fails.

133. In any event, we did not conclude that the Claimant had demonstrated that any such a PCP had put the Claimant at a substantial disadvantage compared to someone without his disability, in that he had not demonstrated that varied work patterns and inability to access gym in the mornings increased anxiety levels and/or that the Respondent could have reasonably been expected to know that he was likely to be placed at the particular disadvantage, the Claimant indicating only that he wanted to go to the gym to manage his 'stress'.

Direct disability discrimination (Equality Act 2010 section 13)

Failure to make reasonable adjustments

134. We did not find that the Respondent had failed to make the reasonable adjustments relied on by the Claimant and on that basis, the complaint that the Respondent had treated the Claimant less favourably by failing to make reasonable adjustments for him, is not well-founded and is dismissed.

Steffi Carter shouted at the Claimant

135. We did not find that the Claimant had proven that Steffi Carter had shouted at him and on that basis that claim is not well-founded and is dismissed.

136. In any event, we had accepted her evidence that she was not personally aware of his disability. We had also noted matters raised by the Claimant in

his grievance (also reflected in his written witness statement) that the Claimant believed that she was '*unsettled and insecure*' in her role. Even if we had accepted that there had been an altercation such that Steffi had shouted at the Claimant, we would not have concluded that the Claimant had proven facts from which we could find or infer that the reason for that treatment was the Claimant's disability – Steffi Carter did not know that the Claimant was disabled and the Claimant himself believed that the reason for any treatment from her related to her experience in her role. Any reason for such treatment was therefore not because of the Claimant's disability even on his own case.

Nazir had shouted at the Claimant

137. We had difficulty making clear findings as to what exactly had taken place between the Claimant and Nazir, but it was accepted by the Respondent that the Claimant at some point had been shouted at by that work colleague.
138. However, having accepted that the evidence from Will James, we had also found that the Claimant had also shouted, and on considering what the Claimant had said about the issue in his own grievance, again we were not persuaded that the Claimant had proven facts from which we could find or infer that Nazir shouting at him was because of his disability.
139. Rather, it seemed to us on the Claimant's own case, that he believed that Nazir had shouted at him as he was opposed to the Claimant moving to Team Leader, a reason wholly unrelated to the Claimant's disability. The complaint was therefore not well-founded and was dismissed.

Placed on a PiP when threshold had been met / Not action the recommendations within the PiP

140. We deal with these complaints together. We did not find that the Claimant had proven that he had been placed PiP, when threshold for PiP under Capability Policy had not been met, or that there was evidence to demonstrate that the Respondent had not actioned the recommendations within PiP. On that basis, these complaints were not well founded and is dismissed. The complaints were therefore not well-founded and were dismissed.

Dan Nettle did not process an application to overturn QA score

141. We found that the Respondent had not proven that Dan Nettle had not processed an application to overturn QA scores for calls made by the Claimant as claimed.
142. Even if that finding was wrong, and Dan Nettle had not processed an application to overturn QA scores, on the basis of the Claimant's own evidence, any reason for that was likely to be because of the Dan Nettle's experience in handling such processes and a possible lack of '*well-defined processes*' within the Respondent organisation and not the Claimant's disability.

143. The complaint was therefore not well-founded and was dismissed.

Dan Nettle failed to inform the team of the Claimant's disability (after bereavement)

144. This complaint was not well-founded and was dismissed for reasons as set out in relation to the reasonable adjustment claim.

145. The Tribunal concluded that the reason for the team not being informed of the Claimant's disability following the Claimant's bereavement is because we had found that Dan Nettle did not know of the Claimant's disability at that point and was not informed of the Claimant's PTSD until the beginning of July, over 5 weeks later. In any event, the Claimant had not proven facts from which we could find or infer that any such treatment was because of the Claimant's disability.

146. The complaint was therefore not well founded and is dismissed.

Ignoring the Claimant's request for flexible working and instead placing the Claimant on a PiP

147. In relation to the last claim of direct discrimination, that the Respondent had ignored the Claimant's request for flexible working and instead placed the Claimant on a PiP, we were persuaded that the Claimant had proven facts from which we could find or infer discrimination in such treatment.

148. Only that morning the Claimant had discussed a move to part-time hours. At that time, Dan Nettle was aware of the Claimant's PTSD and in turn it was the Tribunal's conclusion that it could be said that he was on notice of the Claimant's disability. Dan Nettle did not tell Will James of the Claimant's PTSD despite seeking his advice on implementation of a PiP. That PiP meeting took place that afternoon.

149. The timing of such a discussion was sufficient in our view to draw an inference of discrimination for the burden of proof to move to the Respondent to prove the reason for the treatment. We were not persuaded that we should draw any adverse inference from the lack of any investigation into the Claimant's grievances. We concluded that once the Claimant had indicated that he no longer wished for his grievance to proceed, the Respondent reasonably did not take the matter further. This was particularly the case as the focus of the Claimant's grievances was not on the failure to make adjustments, but on the Claimant's unhappiness with the role.

150. The Tribunal concluded that the Respondent had demonstrated that reason. We had found that at that time, Will James did not have personal knowledge of the Claimant's disability, even if Dan Nettle did, and was concerned that the Claimant was still struggling with his bereavement. We had accepted Will James' evidence that he was concerned that if the Claimant was not well enough to return, he should go on sick leave until Olivia Roberts returned and,

at the same time looked to place him on an informal PiP to further support and assist the Claimant whilst he was in work.

151. We had found that the PiP that was put in place, was supportive and reasonable for the Claimant and we concluded that it was probable that the intention at that stage was to support the Claimant and not for a reason that related to the Claimant's disability.
152. On that basis, we concluded that the Respondent had demonstrated the reason for the treatment which was not the Claimant's disability, but further support for the Claimant during this time.
153. The claim was not well-founded and was dismissed.

Indirect discrimination (Equality Act 2010 section 19)

154. We concluded that the Respondent did have a PCP of not allowing flexible working requests until 26 weeks of service, as provided for within its Flexible Working Policy, we concluded that this PCP had not been applied to the Claimant.
155. Whilst Will James had written to the Claimant after his employment had ended making reference to that policy, we had found that at no time had that PCP, that flexible working policy or the requirement to have 26 week's service before a flexible working request would be considered, been applied to the Claimant.
156. Rather, the Respondent had simply not addressed the Claimant's request, deferring it to the return date of Olivia Robert's honeymoon and subsequently, not processing any application in light of the Claimant's withdrawal of his grievance.
157. On that basis, this complaint was not well founded and is dismissed.
158. Likewise, whilst the Respondent has conceded that the PCP in relation to unpaid leave, again, we did not conclude that this PCP had in fact been applied to the Claimant. The Claimant was not refused unpaid leave due to lack of service of 26 weeks. Rather we had found that the Claimant was offered *paid* bereavement leave as being more beneficial to paid leave.
159. This complaint too was not well-founded and is dismissed.

Discrimination arising from disability (Equality Act 2010 section 15)

160. The Tribunal found that the Claimant had been subjected to unfavourable treatment by Olivia Roberts when he was dismissed on 22 September 2022, a time when the Respondent including Will James and likely Olivia Roberts had knowledge of the Claimant's PTSD and depression and, in turn disability.

161. We then considered the cause of the treatment, which involved considering whether there was any conscious or unconscious thought processes and whether the reason was “something arising in consequence of disability”.
162. Whilst the Claimant sought to undermine the Respondent’s position that there had been a ‘complaint’ about the Claimant’s handling of the customer call, the Tribunal was not persuaded by the Claimant’s arguments that there were errors or suspicious discrepancies in the Respondent’s records and the Tribunal concluded that the Respondent had reasonably held a concern that the Claimant had failed to escalate a concern from the customer that he had found the Claimant to have been ‘intimidating’, that he had failed in basic customer service in talking over the customer and not matching their tone.
163. Whilst, we did draw an adverse inference from the lack of evidence from Olivia Roberts, we were persuaded by the evidence from the Respondent, from the evidence from Will James that had attended that meeting and the supporting documents, that the Claimant’s conduct in that call was the reason for the termination of the Claimant’s employment.
164. The Claimant’s case was that had the reasonable adjustments been made for him, he would not have had burn out, brain fog, lack of energy and exhaustion that resulted in frustration and poor calls being made.
165. We were not persuaded that the Claimant had demonstrated that he was suffering with any of these symptoms at this point, or that any frustration had arisen from his disability. Rather, we concluded that it was more likely that if the Claimant had been frustrated in that call, that frustration had been caused not by the Claimant’s disability, but by his own discontent at his role and in turn prospects at the Respondent. This was not something arising from the Claimant’s disability.
166. We therefore concluded that the Claimant’s claim that his dismissal was discrimination arising from disability also was not well-founded and is dismissed.

Time

167. Finally, with regard to time, we had no submissions from the Respondent’s representative on time despite Mr Fakunle at the outset of the hearing indicating that it was the Respondent’s position that the whole claim was out of time.
168. The Tribunal found that the Claimant, having been dismissed on 22 September 2022, had entered into early conciliation on 20 December 2022 that ended on 19 January 2023. He had submitted his claim on 16 February 2023. The complaints were in time.

Case Number: 1600367/2023

Employment Judge Brace

Date - 26 October 2023

Sent to the parties on 30 October 2023

For the Tribunal Office Mr N Roche