EMPLOYMENT TRIBUNALS

Claimant: Mr A Wade

Respondent: Preston Bus Limited

Heard at: Manchester **On:** 26 to 30 June 2023

Before: Employment Judge Eeley
Mrs M Dowling
Mr D Lancaster

REPRESENTATION:

Claimant: Mr G Pollitt, Counsel
Respondent: Mr W Griffiths, Counsel

JUDGMENT having been sent to the parties on 7 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a claim of disability discrimination brought by the claimant, Mr Anthony Wade, who is still employed by the respondent. The issues for determination by the Tribunal were as set out at in the Case Management Order at page 52 of the bundle (reproduced as an Annex to these written reasons.)

2. This is a case which concerns three alleged disabilities, being:

   (1) Anxiety – which was conceded by the respondent as a disability for the purposes of this claim (as was knowledge of the disability.)

   (2) Depression – also conceded as a disability by the respondent (as was knowledge of the disability.)

   (3) Irritable bowel syndrome – the respondent did not concede that this met the section 6 Equality Act 2010 definition of a disability. Likewise, the

respondent did not accept that it had actual or constructive knowledge of that alleged disability.

3. The claims pursued by the claimant were claims of:

   (1) discrimination because of something arising from disability (section 15 Equality Act 2010);

   (2) breach of the duty to make reasonable adjustments (sections 20 and 21 Equality Act 2010); and

   (3) disability related harassment (section 26 Equality Act 2010).

Evidence

4. We heard evidence from the claimant, Mr Anthony Wade, and also from Mrs Alison Spencer-Scragg, the claimant's former trade union representative and his companion at the various meetings during the course of this chronology of events. We also heard from:

   - Kirsty Stewart, who was the former Group HR Manager for the respondent. She held the risk assessment meeting with the claimant;
   - Michael Brannigan, the Regional Head of Engineering for the respondent;
   - John Asquith, the former Operations Manager for the respondent;
   - Dave Leonard, the Regional Head of Service Delivery who dealt with the grievance; and
   - Mr Matthew Rawlinson, the grievance appeal officer.

5. We also received a written witness statement from Mr Ian Christian, the workshop supervisor but he did not attend the hearing to give oral evidence and answer questions in cross examination. On that basis we are bound to give the evidence in his statement more limited weight as it constitutes hearsay evidence. We give it such weight as is appropriate in those circumstances.

6. We were also referred to the relevant documents within an agreed bundle which consisted of 271 pages. We read those documents to which we were referred by the parties. The tribunal had the benefit of an agreed chronology and cast list and written and oral submissions from both counsel, for which we were grateful.

Findings of Fact

<u>Chronology</u>

7. In 2008 the claimant started his employment with the respondent as a bus driver. The respondent (as the name suggests) is a company providing a range of bus services throughout Preston and surrounding areas. It is a subsidiary of a company called Rotala PLC.

8. The claimant changed from being a bus driver to being a general labourer in around 2012.

9. It is important at this point to pause and set out some of the evidence that we heard about the layout of the depot which forms the central location for the events which are the subject matter of this case.

10. The depot in question is a large depot building dating back to circa 1908 and is the size of two to three football pitches. It is about two to three double-decker buses in height in places, certainly a minimum of one and a half double-decker buses in height. The depot is bordered by Deepdale Road, which is the main access road, and Argyle Road, which is a residential area bordering the site. Main access to the outdoor parking area was from Deepdale Road. Staff cars would be parked there, together with some of the buses accessing the site and being stored on the site. Adjacent to that open area was the chassis washing area. That was a designated area flanked by two high brick walls, but which was not enclosed. The area did not have a roof. There was a nearby small shed for the storage of relevant tools.

11. The main entrance to the enclosed building area was through a staff area. That staff area doubled as a canteen and restroom. Next to that was a signing-in office, with inspectors and engineers present. We were told that drivers would go to that office at the start of a shift to be allocated a bus. Along the same line of rooms and buildings was the vault room and some toilets. Importantly, those toilets had been 'condemned' some several years before the events with which we are concerned. Members of staff did not have access to them (for good reason, we were told) and access was barred by a steel door. Adjacent to that (but also within the building in a covered area) was the 'running repair' pits area where some tests were carried out, some torquing was carried out and, on occasion, the claimant worked from that location.

12. The main interior space of the depot comprised bus parking and a bus wash for cleaning the exterior of vehicles (similar, one might think, to a mechanised car wash that one may find at petrol stations and the like, but obviously scaled up for the vehicles in question).

13. Inside the depot there was a further internal wall with an entry to give access into it. That internal wall enclosed a further pits area and an area where buses could be left for repair. Alongside that internal section was the stores area, the electrician's office and within that location there was also the compressor room and some further toilets. Once again, those toilets were no longer in use and had been put out of service some several years beforehand. Joined onto the exterior wall (but part and parcel of the depot) was the office block. That included the only washroom and toilet facilities available to the workforce at the start of the pandemic. That area could be accessed through the enclosed pits area.

14. There was also (outside on the site) a separate outbuilding accessed from Argyle Street that housed the MOT bay. That had not been in use for several years. That outbuilding apparently housed some toilets which were not in use, and which seemed almost to have passed into folk memory by the time the pandemic started in 2020. It was only later that various members of staff remembered that

they were in fact present at that location. In order to access those toilets and to access that outbuilding a member of staff would have to go out and around the outside of the perimeter of the depot and in through the front of the separate outbuilding via Argyle Street. In order to access the office toilets (the ones that were in constant use) a member of staff would enter the building via the staff area adjacent to the office, walk through the hatch in the internal wall near the internal pits and enter the office block through a further door. Any such staff member would have to walk across many of the internal areas of the premises in order to access those toilets.

15. It is also important to note that the chassis wash which was flanked by two separate walls (which I mentioned earlier) was on the main pedestrian route from the external car/bus parking area to the inspector's office. Thus, drivers would be going to and fro, past this area, in order to collect buses during the course of a shift.

16. Furthermore, there were forklift trucks on the premises. They were parked near the pits inside the depot.

17. The Tribunal was told that from the main access to the site from Deepdale Road, there was a one-way system so that buses could be parked outside and/or inside in the depot or left in the appropriate area for repairs. Because of the flow of buses during the day there could be no absolute guarantee that a particular bus could access certain places within the premises at any given time. Space might fill up in advance and access was not necessarily guaranteed. Thus, it would be a matter of chance whether access for a particular bus to a particular part of the depot would be available at any given time, depending on vehicle movements during the preceding hours.

18. The Tribunal was also told of proposed demolition works in early 2021. This was to be an ongoing process over a series of two to three months. The depot remained in use throughout the works. All of the exterior wall was to be demolished and the roof taken down, leaving only that area which had been enclosed around the pits and the offices as a fully built and covered/roofed building. The covered parking area, the bus wash, the chassis wash, the vaults, the running repair pits, the staff area and inspector area would all be removed. Some activities would be relocated into the pre-existing office area and others would then be carried out in outdoor work areas. It was difficult to establish (with any exactitude) the point in time when these developments took place. Clearly, as we shall see, it would have had some impact on where the claimant could work. We also note that, where demolition was in progress, there would be areas which could not be accessed. In some cases, the inaccessible areas would be those where the claimant and others otherwise worked. The demolition works would also reduce the available floor space for the workforce, at least temporarily.

19. The Tribunal also heard evidence about a depot at Bolton which had a chassis wash. That was different to the wash at the Preston depot in that it was not a lance-based steam cleaner that would be used manually by an employee. Instead, it was a robot system. Essentially, the employee would set it up and then press a button. The robot/machine would then make its way under the bus

and wash the chassis. The robot chassis wash at Bolton was in use when the claimant started to carry out these sorts of tasks but it did break down around the time that his duties were changed to weeding (approximately 9 June). The Tribunal understands that it could not be repaired during the remaining period of time which forms the subject matter of this case. We were also made aware that the steam cleaner in Preston was also, for a period of time, out of order.

20. Returning to the chronology, before the Covid pandemic hit the claimant had sent in a fit note on 25 January 2018 which recorded sleep problems, anxiety and IBS (page 64). We do not know precisely who within the respondent company saw this or where it was stored, but it was provided to the respondent.

21. The Tribunal also notes that in January 2018 the claimant was dismissed and subsequently reinstated on appeal. The appeal took place around 16 February 2018. The dismissal was an ill health capability dismissal, and this provides part of the relevant background to the matters in this case.

22. Moving forward a couple of years, the pandemic started in 2020. The claimant was unable to wear a mask because of his anxiety and depression. This is now accepted by the respondent and no issue was taken with that assertion once the claimant notified the respondent of the problem. The genuineness of this problem was not questioned. However, it should be pointed out that there was no discussion between the parties about not wearing a mask during this period as it was not an active issue on the respondent's premises. The claimant got on with work and he worked without wearing a mask throughout 2020. It was only when working practices changed (as we shall see) that the situation changed, and the issue of the mask exemption was raised.

23. The respondent business was categorised as an 'essential business' during the pandemic. It continued to operate throughout the pandemic. At times it was operating at reduced capacity due to reduced demand. The respondent's employees were considered to be 'key workers.'

24. It is clear to all concerned that the respondent owed a duty of care to various stakeholders. Firstly, it had a duty of care to passengers and customers to ensure that they could be as safe as possible when travelling by bus. Just as important was its duty of care to its own staff. Whilst no guarantees could be made, the respondent had a duty of care to ensure that all staff were as safe as possible and that the risk of transmission of Covid-19 was kept at the lowest level possible within the workplace. Hence there was a need for detailed risk assessments and new ways of working. Everyone (respondent managers included) was essentially having to learn 'from scratch,' dealing with a new disease which then grew to be a pandemic. It was unlike anything that most businesses would ever have had to deal with before. Businesses had to review everything that they did in light of the pandemic, and none of the old certainties could be assumed to still be applicable.

25. It is also clear from the evidence in this case that the geographical location of the respondent in Preston was of significance. Whilst levels of Covid-19 infection fluctuated throughout the pandemic, infection rates in the North West and around Preston remained stubbornly high throughout the period in question. In addition,

we heard that the respondent lost two members of staff to Covid-19 related death towards the end of 2020 and into the start of 2021. This highlighted the need for appropriate Covid-19 measures and compliance with such measures. It also made everyone within the business aware of how high the stakes were. Even if it was hard to demonstrate where individuals had contracted the disease, it was still necessary for responsible employers to take all reasonable steps to mitigate the risk, even if they could not eliminate it.

26. The Tribunal also has to bear in mind that during the pandemic knowledge about the disease and how it was transmitted changed and improved over time. What was known by the end of the pandemic was not necessarily known at the beginning. The whole context of the Covid- 19 pandemic was one of development and evolution. The country was going in and out of lockdown. Government guidance kept changing. There were daily briefings and updates and different and specific guidance was produced for different sectors of the population (whether it be the public, workers in offices, different types of workplace or business, clinical settings and the like). Employers and employees had to try and keep on top of these developments as best they could during this time. To some extent, businesses and managers were making things up 'from scratch' as they went along. They were coming up with solutions to novel problems. Things that people had taken for granted now had to be thought about from first principles. The respondent had to take advice, which was itself evolving. The respondent (it should be said) was primarily operating as a business entity. Its primary objective was to keep the buses on the road as a key service. Arrangements for employees and ways of working have to be viewed in that context. The respondent wanted to keep the business going, provide the key service, and keep members of staff and the public as safe as possible.

27. In addition to all of the above, society had to contend with the furlough scheme, the Coronavirus Job Retention Scheme ("CJRS"). This was something else that employers and employees had to get to grips with: furlough – what was it, when could it be claimed and how should it be administered within their workplace, consistent with government rules? This was something else which developed over time. What was not permitted at the outset soon became common practice, for example, flexi-furlough became a feature of later iterations of the CJRS but did not exist from the outset. Another example was the differing percentages of a furloughed employee's pay which would be paid over time. The amount topped up by the government and by the employer varied over time. The CJRS was extended and amended over the years of its existence. It was a novel scheme that everybody had to get used to operating (and making sure that they operated it correctly within the rules.) We note that it was something that employees had to agree to. It was not imposed upon them, albeit we will say a little more about that in due course.

28. We heard evidence about the respondent's wider experience of operating during Covid times. The respondent was not operating in a vacuum but within the wider Covid 19 context. 'Reasonableness' and the reasonableness of timescales in this case therefore have to be considered within the context of the pandemic and its impact.

29. The respondent's original Covid-19 risk assessments were drafted in April 2020, were updated later in 2020 and again in early 2021. Kirsty Stewart was involved in drafting two of the risk assessments at the beginning and in early 2021. The Tribunal heard that she used her own prior qualifications and expertise but also took advice from external health and safety consultants in order to do this work. There were regular meetings with the Health and Safety Executive ("HSE") and with Public Health England. For example, we heard that the HSE issued a Contravention Notice because of the absence of screens in the respondent's buses. However, the respondent's hands were tied in this regard because the respondent required a specific exemption from the DVSA in order to modify a driver's cab in this way. The respondent had to work in conjunction with those regulatory bodies in order to get the Contravention Notice lifted. Legal action was required. We also heard that there had been public complaints about the absence of screens in comparison to other bus operators in the region.

30. We provide this background to explain that health and safety risk assessments were front and centre of the respondent's business considerations and experiences throughout the pandemic.

31. During 2020 the claimant worked through the pandemic period as a mask was not required at work. Thus, he carried out his usual job without wearing a mask. Covid concerns were increasing at the end of 2020. The government introduced a requirement to wear face masks in around July 2020 and we heard that, from that point onwards, the respondent was considering the implementation of mandatory masks as part of its risk assessment considerations.

32. In October and November, the Government started to announce more localised restrictions. The respondent's risk assessment was adapted to make face masks mandatory on company premises. This (we were told) was initially rolled out in the West Midlands area of the respondent's business and was subsequently introduced into the North West in January 2021. During the course of the process the respondent also moved away from using face visors to using face masks. This was a change made because it was thought that droplets could spread downwards from a visor which was not worn flush to the face, whereas it was thought that face masks were better able to prevent droplet spread because they fitted to the face.

33. The last revision of the risk assessment that we were referred to is dated 4 January 2021 (page 71). The changes were disseminated to colleagues. On 11 January 2021 the respondent communicated the compulsory mask policy to the claimant. On 14 January 2021 the claimant emailed the respondent regarding face masks. He notified the respondent that he had anxiety and depression which meant that he was exempt from wearing a mask. That is the email which was quoted in the document at page 133 which stated: *"Good morning- following receipt of the new covid risk assessment, I am informing you of my exemption due to hidden disability. I suffer with anxiety as my medical records will show and these masks enhance my anxiety therefore, I am unable to wear the masks without it affecting my mental health. Many thanks…"* It clearly notified the respondent of the disability.

34. We move on a couple of weeks to 28 January 2021. At this stage we find that, following on from a wider meeting, Ian Christian was deputed to have a conversation with the claimant. He was told to send the claimant home, essentially, on full pay and to tell him not to come into work at the usual time but to come in the next day at 9.00am for a meeting. We find as a fact that the word "suspension" was not referred to. That word was not used. Mr Christian was conveying a message to the claimant about whether he had to stay in work or come in to work, and at what time. His main goal in the conversation had been to reassure the claimant that he would not be losing pay. We accept that there was no need for him to say there had been a suspension and he had not been provided with the background to the case. Consequently, he did not know enough about the relevant circumstances. This is backed up by the fact that a suspension letter was never issued and that would have been the standard practice when a suspension took place. What happened was consistent with a simple instruction for the claimant to be at home on full pay and then come in for a meeting. We accept that the claimant may well have interpreted what was said and done as a suspension because that is something that often happens within a business. Given his previous history within the business and his previous experience, taken together with the anxiety and the overthinking which the claimant himself described, it is perhaps understandable that he saw what was happening as a suspension. Functionally, it was a suspension in that he was being taken out of the workplace but it was not a disciplinary suspension and would not have been seen as such. The Tribunal also heard some evidence about medical suspensions. Again, what happened to the claimant was not, strictly speaking, a medical suspension. Rather, it was an attempt to get the claimant at home on full pay pending resolution of a problem. Moving back to the relevant chronology, we are content to find that that conversation took place on 28 January 2021 because that followed on from the Thursday meeting where Mr Asquith had been given the task of dealing with this issue. He wanted that message sent to the claimant so that he did not come into work earlier than required. That conversation took place between the claimant and Mr Christian on 28 January 2021.

35. In terms of what happened with Mr Asquith, on the balance of probabilities we accept Mr Asquith's timeline of what happened as set out in his contemporaneous statement. We heard that that statement in the bundle was based on contemporaneous notes from Mr Asquith's diary. There was no reason for Mr Asquith to be anything less than truthful about that. We accept that the claimant genuinely believes the timeline to be wrong, and we accept that it would be a matter of significance to him, but on balance of probabilities the contemporaneous (or near contemporaneous) account is more reliable. We also note that, given what Mr Asquith was attempting to do, it makes sense that there would be a gap between meetings whilst he consulted with other interested parties. He needed to speak to the claimant, consult with others and then come back to the claimant with an outcome.

36. The meetings with Mr Asquith took place. At the first meeting Mr Asquith was trying to understand the situation. He was informed that the claimant cannot wear anything around his face. Following on from that meeting Mr Asquith consulted with HR over next steps. HR indicated that the next step would be to consult Occupational Health in order to further understand and see whether the claimant

would be able to wear a face mask for short periods of time and whether the support of professional help would assist. Mr Asquith went away and took advice about what to offer the claimant. The second meeting was on 1 February 2021. At that second meeting Mr Asquith came back and offered three options:

(1) A face shield that the claimant could trial;

(2) Furlough; or

(3) Sick leave pending resolution.

Given those three options the claimant agreed to go on furlough. Of the options offered, that was his preference. To that extent it was an agreement because of the circumstances, but the option of staying at work was not offered to him (for understandable reasons.) The claimant was furloughed from 1 February 2021.

37. We note that, when using the furlough scheme, this respondent company did not top up the 20% of the employee's pay (on top of the 80% coming from government) in order to provide its employees with 100% full pay whilst on furlough. The claimant, therefore, would have thought he was going to be paid 80% of his pay. It turns out that, in fact, the claimant was not underpaid during the period as a whole and he has in fact no claim for loss of earnings during furlough. There seems to have been an unexplained administrative error within the payroll system. This seems to have happened by chance rather than by design. At the time, 'in real time' so to speak, the claimant was sometimes receiving less than 100% of his pay. Indeed, that is what he had been told to expect: 80% of his pay. There would, therefore, have been a financial and psychological impact upon the claimant in real time, albeit after the event he was no worse off financially.

38. The respondent referred the matter to Occupational Health. We find, as a matter of sequencing, that the respondent could not refer the claimant to Occupational Health about this issue before they were informed via the email on 14 January 2021 that the claimant had the problem working with masks and that the implementation of masks as a mandatory requirement was going to be a difficulty.

39. In normal circumstances, outside the circumstances of a Covid 19 pandemic, it might well be reasonable to maintain the status quo (i.e. keep the employee at work whilst the employer gets the Occupational Health report). However, in the circumstances of the Covid-19 pandemic, the respondent could not reasonably be expected to do that, given that what they were trying to prevent was transmission of a disease which carried the risk of death or serious illness. The risk of transmission of Covid 19 was being taken into account and balanced against the potential damage to the claimant's mental health. However, they are two different types of risk or damage. The respondent, when put to its election, had to prioritise protection against the life-threatening illness which was being transmitted in society over the risk of damage to the claimant's mental health.

40. The claimant criticises the delay between 14 January 2021 and 28 January (14 days). On balance, we find that 14 days was not too long in the circumstances.

We heard that the claimant was not the only employee where there were Covid-related issues, albeit he was in a unique position of wanting to stay in work when the respondent wanted to furlough him. For a large part of the workforce it was the reverse situation: they wanted to be furloughed but there were some employees that the respondent could not (or would not) furlough. Lots of decisions were being taken about staffing matters during the relevant period of time and we heard evidence about the respondent having to get Occupational Health reports for several members of staff. All the while the business's operations were continuing. So, as important as the claimant's situation undoubtedly was, he was not the sole focus of the respondent's HR team or the business's managers. The Tribunal heard that there were several occupational health reports and grievances relating to other staff and which were being dealt with around this time. In that context, 14 days is not an unreasonable period of time.

41. Once the referral was made, a report from Occupational Health was produced by 11 February 2021. Again, that was a relatively speedy turnaround given the prevailing circumstances at the time. The report is at page 91 and was compiled by Dr Dann. The relevant features of the report are that the claimant was confirmed as unable to comply with mask wearing. He had tried wearing a visor but had had the same problem with the same levels of anxiety. In response to questions Dr Dann confirmed that the claimant would benefit from being permitted not to wear a face covering whilst at work. It was noted that, if mask wearing was crucial to his role, then there would be long-term implications for future workplace attendance or safety. However, it was noted that he could access lateral flow testing twice per week as recommended for NHS staff, and the doctor recommended that the claimant be asked to do this twice a week before starting his shift. It was stated that, in doing so, this would mitigate any risk associated with him not wearing a face covering to protect others. The doctor also said that, ideally, the claimant should be allowed to start work 15 minutes late as an adjustment. The report confirmed that the anxiety and depression would be covered by the Equality Act 2010 due to its longevity and severity. Dr Dann was asked whether the claimant was fit for his current role, and she confirmed that he was but was not able to wear a face covering. She indicated that specialist counselling might alleviate his difficulty, but it would take many months and it would not be available through the NHS. The doctor went on to say that the claimant was fit to return to work if lateral flow testing "would be an alternative in your current risk assessment." There was no mention within that report of the claimant's Irritable Bowel Syndrome.

42. On receipt of the report the respondent's concern was related to lateral flow testing. The respondent was concerned that it would not be sufficient to exempt the claimant from wearing a face mask as he would come into contact with a substantial number of people on a daily basis and therefore the risk of spreading the virus would be very high. On HR advice the respondent went back to Occupational Health to get some further clarity. The follow-up emails were on 5 March. The claimant's line manager, Ricky Burns, sent a series of questions to Occupational Health. He asked whether there were other adjustments which would not increase the claimant's risk whilst working. He noted that lateral flow testing was not a safety measure as it would not stop the claimant catching Covid (it would just indicate if he had it). He asked what safety measures Occupational

Health could recommend that would keep the claimant safe whilst not wearing a mask and, if there were none, he asked how the respondent could keep the claimant safe whilst he was at work? He also explained that if the claimant returned to work then he would be in daily contact with 15 engineers and could encounter 30-40 drivers. He would be using shared facilities, although there was reference to staff wearing masks and social distancing.

43. The Tribunal notes that the claimant says that not all of the staff would have been in work at the same time (because they were on different shifts, etc.). That is certainly true. However, given that some of the contamination (and the risk of contamination) arises from droplets left behind on surfaces in the workplace, all of the staff would not have to be present in the same room at the same time in order for there to be a risk of cross contamination.

44. In any event, Occupational Health responded to those questions and indicated that the main protection from mask wearing lay in protecting others against aerosol spray. The lateral flow testing ("LFT") was an alternative way of reassuring others that the claimant did not currently have Covid and was not going to infect them. The LFT protected others and not the individual taking the test. If a person cannot wear a mask Dr Dann stated that, *"clearly if they won't wear one they will be at higher risk, but it would be a legal decision whether an employer can enforce mask wearing for an individual's protection and I don't know the position on that. It may be that it is acceptable legally for an employee can accept a higher degree of risk because on balance wearing a mask is not possible for them, this would seem comparable to someone over 70 deciding not to shield against government advice because for them the harm of isolation and being off work is greater than the risk to them of being at work, but this would need HR or legal guidance I would think as the law in this area I'm sure is complex."* The Occupational Health response explained the effect of the measures and provided that information to the respondent. It did not say what the respondent could do as a business decision/in business terms, it just explained what the function of tests is and what alternatives there might be. Essentially, it was a very qualified opinion which passed the matter back to the respondent to make a decision within the context of the respondent's business and its business needs. Once the Occupational Health clinician answered the questions and the responses were received, the respondent understood that this meant that there was an increased risk of contamination from droplets from the claimant is he was not wearing a mask. The test was not a preventative measure as such, it was a warning measure, a reassurance measure. Kirsty Stewart and Ricky Burns discussed the Occupational Health information and decided it was too great a risk for the claimant not to wear a mask and that the lateral flow test would not be sufficient to protect the workforce.

45. A copy of the Occupational Health evidence was sent to the claimant on 10 March with a letter from the respondent setting out the respondent's position. It noted that the risk assessment put in place by the respondent required a face covering unless the individual could sit behind a Perspex screen at work and, of course, the claimant could not do this because of the nature of his job. It noted that the 15 minute delay in the start of the shift for the claimant would not help, and that it had never really been explained what difference it would make. The twice weekly LFTs were noted by the respondent not to be preventative

measures but rather alerts to infection. They did not prevent infection or transmission and the respondent referred to the risk of false negatives depending on the viral load present at the time of testing. The respondent, therefore, drew the conclusion that there was an increased risk of transmission to colleagues. The respondent noted that it was not reasonable to close welfare facilities to general use or to clean them every time that the claimant used them. The respondent came to the conclusion that the claimant could not return to work without a mask. The respondent could facilitate a return to work if the claimant was willing to wear a face mask as a trial, for example for half a day at a time.

46. The claimant's response was that he had been seen wearing a mask when he was trialling it but that it had caused a panic attack. This made it clear to all concerned that face coverings were not going to be a possibility for this claimant in the circumstances.

47. On 15 March there was a further letter from Mr Burns to the claimant (page 100) confirming that he could see no other reasonable adjustments to allow a return to work without a mask. Following receipt of that letter the claimant's trade union representative mentioned her concerns about the issue to Kirsty Stewart, and Kirsty Stewart invited the claimant to a meeting to discuss the risk assessments around the workshop. That meeting took place on 23 March and the claimant was present with his trade union representative. The meeting was chaired by Kirsty Stewart (notes at page 114). During the course of the meeting the claimant explained the tasks which were involved in his daily job. These included: wheel torquing, wheel cleaning, steam cleaning and other general tasks. There was work that was done both inside and outside the building. There was steam cleaning at the designated exterior area (the area with no roof but two walls) That area was located where staff were walking to and from buses.

48. In the meeting the claimant explained that he cleaned the canteen. The Tribunal notes that we heard evidence that during the pandemic precautions were in place in the canteen to ensure that some of the seats were taken out of use and taped off. There were no Perspex screens between the people who were eating but the routine was for staff to wear their masks into the canteen and whilst they cleaned their tables. They could take the mask off to eat. They would then replace the mask and clean the area again before leaving. Clearly, if the claimant was present in the canteen and using the facilities without wearing a mask, he could re-contaminate the area with droplets and aerosol even if he cleaned the area after eating. Thus, there was an extra recontamination risk with the claimant that was not present with others who were wearing a mask.

49. The claimant's representative said that this was perhaps too strict a requirement. If people were cleaning before they used the facilities themselves this would be sufficient mitigation, but the Tribunal reminds itself it needs to look at the matter without the benefit of hindsight. The overarching principle is that, if there is known risk, then the respondent has to justify why that risk is not being mitigated to the best of the respondent’s ability if there were steps which could, in fact, be taken. We also observed that the respondent had to maintain confidence in its whole package of measures and therefore erred on the side of caution and had a strict enforcement regime. The respondent did what it could in the circumstances.

50. The Tribunal notes that break times were staggered so not all the staff were using the canteen areas at the same time. During the course of the meeting the claimant also explained that there were elements of his role where he would leave the premises to go out to collect parts and to help with non-technical areas of a breakdown, for example, with coolant. In addition, the claimant had a licence to drive a forklift truck as required. He worked a shift from 4.00am to 12.30pm and he recorded his tasks in a log. During this meeting the trade union representative pointed out that the claimant had, in fact, been selected for furlough in 2020 but that managers had stopped this as it was not the claimant's preference. The trade union representative referred to social distancing, increased testing, a radio to communicate with staff and a screen to be put up in the men's toilets as possible ways of mitigating risk.

51. The respondent raised concerns about the use of a steam cleaner without a mask as the respondent's view was that droplets could travel further. The respondent was concerned that there was water under pressure and spray in an area that was not enclosed and had no doors. Kirsty Stewart referred to the fact that dishwashers at the premises had had to be isolated because of the increased risk of infection if they were opened with steam present. The Tribunal notes that it was not the respondent's own idea to take the dishwashers out of service. The evidence we heard was that the respondent had been told to take those out of action by a third party. During the Tribunal hearing the claimant's side argued that the Tribunal needed some form of scientific or independent evidence to show that this theory of transmission through steam/spray applies with a steam cleaner in the same way as with a dishwasher, and we address this below. However, we note in passing that common sense principles of propulsion are what we are considering here (such as with a person with cough but on a bigger scale, using a machine.) We are also talking about a *risk* of infection rather than *proof* of *actual* infection, and we are having to consider whether the respondent (and Ms Stewart) was entitled to draw the parallel between the dishwasher and the steam washer outside. The Tribunal also notes that Ms Stewart was having to draw conclusions when she was immersed in taking advice on several fronts. The Tribunal notes that, arguably, the respondent was entitled to err on the side of caution. The question would otherwise be: does the respondent need to get an expert report every time something of this nature occurs? We do, however, note the difference between the two circumstances (indoor versus outside). We also note that Ms Stewart applied the principle arising in a dishwasher scenario across to the steam cleaner, given what she knew at the time.

52. Ms Stewart also said that there was only one toilet facility in use at Preston. She indicated that putting up a screen within the toilets created its own infection risks as there was something further to clean. Also, the claimant could not do his own cleaning after using the toilet as there was the same risk of recontamination if he was not wearing a mask. The question arose: was it practical to get someone else to come in and clean the toilets in order to ensure it was adequately cleaned by a mask wearer after every single time that the claimant used the facilities? The Tribunal tried to think of a way of organising the toilet facility that would keep the claimant and others completely segregated throughout and not raise any cleaning issue. We could not see a way of putting an impermeable barrier between the two groups so that they could all use the same facilities. If a screen was put in place it would certainly need cleaning.

53. During this meeting the claimant alleged that he was being made to feel like a leper, especially as he had been using the same facilities for the last ten months. We pause to note that, whilst the last ten months was relevant, the Tribunal has to go through the events of this case chronologically and look at the circumstances as they obtained at each relevant time. We have to look at the state of risk, the level of infection and the advice in place at the relevant time in order to determine whether the practice of the previous ten months was a good guide to what was reasonable at the time in question and going forward. It was a changing picture: it was not static. It was also unpredictable. The respondent's decisions and actions have to be judged according to the circumstances as they were at the relevant time and according to the knowledge, evidence and advice they had available to them at the time they made such decisions.

54. The trade union representative also discussed the possibility of temperature checks. During the course of the Tribunal hearing we heard evidence from Kirsty Stewart that, in fact, temperature checks were so unreliable and inaccurate that they did not provide any reassurance or good guidance to the respondent. They had tried them, and they had failed. On occasion the temperature readings were too high and on occasion they were too low. The Tribunal accepts that evidence.

55. The trade union representative also challenged what was said about the reliability of lateral flow tests. The respondent had derived its view from public health Government guidance and relied on a 70% accuracy rate. The trade union representative questioned this and put forward alternatively sourced material to indicate a much higher accuracy rate, in the region of 90%. Ms Stewart gave evidence that if there was a choice to be made between the public health guidance and information which essentially constituted marketing materials from the test manufacturer, then she was minded to follow the public health guidance. In the circumstances the Tribunal has to agree that that is the preferable course of action.

56. There was also reference in this meeting to PVR ("Peak Vehicle Requirement") – the need or demand for bus services. This related to whether the respondent (as a business) had got enough buses on the road to meet the demand at the particular time in question? Demand would fluctuate over time and according to changing circumstances. Again, this is a feature that comes back into play later on in this case.

57. The claimant complained that he should not have been furloughed and should have been on full pay. There was also an assertion during the course of the meeting that the claimant had been told he was suspended.

58. Importantly, at the end of the meeting a question was asked by the trade union representative about whether there was a possibility that all of this could lead to termination of the claimant's contract. The respondent, for its part, had not said anything about the possibility of termination of employment at this stage. The subject was raised for the first time on the claimant's part by the trade union representative. We find that this was because of the backstory to the claimant's case. The claimant had been dismissed on capability grounds back in 2018 and that dismissal had then been overturned. Given that history, the claimant had his own personal concern that if he was not at work and was furloughed there

may be scope for termination of his employment, particularly if it was his disability which was keeping him out of the workplace in some way. That was a material factor for him to consider and it was a material matter which was on his mind at the time. When the risk of dismissal was raised by the claimant's side, Ms Stewart's response is recorded as *"I will investigate all avenues based on what has been mentioned or discussed today and if that is a possibility another meeting will be held."* Whilst this was, strictly speaking, accurate (i.e. they could not rule it out), it was not received as particularly reassuring by the claimant. The claimant was not reassured that it was not going to happen even though there was nothing to indicate that this was an active possibility under consideration by the respondent. The Tribunal has to remember that the pandemic was a fluctuating situation throughout, and the respondent could not definitively rule things out ahead of time given the pace of change. However, given the claimant's anxiety condition this was always going to be a problem. There was the risk of the claimant overthinking and worrying about this particular potential outcome. The problem was that the respondent could not give him the certainty that he would like to have had. However, we do note that the respondent's phrasing could have been a lot more reassuring and could have made it explicit that, as far as the respondent could say, the claimant was not at risk of termination given the circumstances as they then stood. The respondent's language was much more equivocal than that.

59. The other point to make about the meeting on 23 March, is that no reference was made to the claimant's IBS by the claimant or the trade union representative during the meeting. Whilst the records show that he had mentioned it on a previous fit note, this does not necessarily mean that the relevant individuals within the respondent's organisation were aware of it. We heard that it could have been kept on a personnel file or forwarded to Payroll, but the respondent did not have a particularly rationalised or systemic method. Indeed, it was one of the reasons why Kirsty Stewart was involved in trying to improve the respondent's systems. We heard that HR 'kept tabs' on active disability cases but there was not a general disability register per se. However, we do note that knowledge of the claimant's IBS may be imputed to the organisation, but the claimant had not indicated that it was a disability on any form or on any declaration that he had filled in for the respondent. So, even if the respondent had seen the reference to IBS, there is a question mark about what they knew about the symptoms and the severity of the IBS and how they would impact on the claimant at work. This is particularly so if the claimant did not raise this issue again at this stage. We also understand that the claimant did not want to prompt any further difficulties in relation to getting back to work. We can understand, from a human point of view, why he would not want to be raising this as another problem, and we return to that later.

60. On 29 March Kirsty Stewart sent out a letter giving the outcome following the risk assessment meeting (page 137). She summarised the Occupational Health evidence to date, she analysed the claimant's work tasks, and she noted that steam cleaning could not be carried on outside due to demolition work, it would have to move inside. Wheel torquing could be carried on inside, cleaning the canteen was an indoor task and forklift truck driving could also be an indoor task. She explained the risk of recontamination as the claimant was not wearing a mask, and she explained the fact that tasks carried out at various locations meant

that it was difficult to contain a transmission risk to one area of the premises – there was an increased infection risk to others in the workplace. She also explained the practical difficulties of PCR tests and their shortcomings. She explained why lateral flow tests were not enough and that twice weekly tests would not solve the problem. She also indicated, again, that Perspex screens within the toilets was another cleaning issue and better dealt with by cutting down occupancy. Her conclusion was that the claimant could not return to work in his current role and would have to come to work doing deep cleaning during a night shift where there was minimum occupancy of the premises and he could stay away from shared facilities. The claimant would then carry out 'thermo-fogging' of the vehicles to avoid recontamination and the respondent would ask for seven negative LFTs before he came back to work. The claimant would have to retest before every shift. The shift in question would run from 8.00pm to 4.00am. The respondent says that during this period of time there were about eight members of staff on site. The alternative in the letter is for him to work Saturday after 2.00pm or Sunday after 11.00am when there were similarly low staff numbers present on the premises. Ms Stewart indicated and recommended a further meeting to discuss this and suggested 6 April. However, the claimant raised a grievance before this meeting could take place and so this was overtaken by events. We note that this was a letter which was detailed and contained an in-depth analysis.

61. On 5 April the claimant raised the grievance via his trade union representative (page 145). It re-emphasised the benefits of testing. It confirmed and asserted that the Equality Act 2010 applied to the claimant. There were various quotations and interpretations of what the Occupational Health evidence said. Some of it was misinterpreted, some of it misquoted, and it was represented as saying more and going further than it actually did (when one goes back to the choice of language in the document itself.) There was reference to the types of discrimination which might be happening. There was talk about suspension. There was reference to the fact that changing to a night shift was not necessary or acceptable to the claimant, and there was a reiteration of the control that could be put in place depending on the jobs which were assigned to the claimant and assuming the provision of a mobile phone or a radio to assist the claimant. In relation to the radio, the Tribunal notes that it could be of assistance, but it could not be a solution in and of itself. The other problems relating to contamination of the premises, segregation and cleaning would need to be solved before the radio would come into play as a meaningful element of the controls.

62. On 15 April there was a grievance meeting (page 151). During the course of that grievance meeting the trade union representative raised issues about the respondent's failure to pay full pay for staff self-isolating. This was not directly relevant to the claimant's case. In any event, the trade union representative and the claimant had the opportunity to raise all the points that they wished to so that the grievance officer could go away and consider what to make of them.

63. The grievance outcome was issued on 23 April (page 159). The conclusion in the grievance outcome was that the medical evidence had not been ignored. Instead, what the respondent was saying was that the medical evidence had its limitations, and that it was still the respondent who had to make the decisions based on the information available. The respondent denied discrimination and

pointed out the reasonable adjustments that had been made and what the respondent was trying to achieve. The respondent did not accept that there had been a suspension. They mentioned the fact that the steam cleaner would be out of action and also the need for demolition work (which would have an impact on the jobs that the claimant could do). The claimant would normally be working in the area affected by the demolition process. The respondent reiterated that it was looking to have the minimum number of colleagues on site at any given time. It was reiterated that, in order to avoid recontamination, thermo-fogging would be required after any steam cleaning was done by the claimant. It was noted that buses could not be made available to be cleaned during the daytime because they were generally out of the premises and in service during the day. It was noted that the radio suggestion would have no bearing as the respondent could control the number of people the claimant came into contact with by choosing the jobs he was assigned to. The respondent confirmed that the jobs assigned had been considered in the reasonable adjustments so far as was reasonably practicable to minimise the interaction and the claimant's tasks had been altered to minimise droplet spread. Therefore, within its proposals it was felt that the respondent had achieved that aim. The letter concluded by offering the claimant three options:

(1) Firstly, there was the option that Ms Stewart had given – deep cleaning duties on the night shift.

(2) A flexi-furlough option. There were not enough hours available for the claimant to be full-time but it would have a mitigatory effect on pay because when the claimant was at work he would be paid at 100% of his pay rate. The job in question would involve standing outside collating data on the morning runout between the hours of 5.30am and 7.30am. The paperwork would then be retained and sent in under quarantine whilst time was allowed for it to be decontaminated.

(3) The third option was for the claimant to stay on furlough.

The respondent indicated that options (1) and (2) would be kept under regular review dependent on developments with Government changes regarding face coverings.

64. On 29 April the claimant appealed the grievance outcome (page 164). It was asserted that the medical report was being ignored. He asserted that there was disability discrimination, that there had been a suspension and that there was a failure to make reasonable adjustments. The claimant put forward what he thought would be adequate measures, such as social distancing, working on one person jobs, the claimant being prepared to forego the use of the shared facilities, screens in toilets and work tasks being communicated by radio or mobile phone.

65. The grievance appeal meeting took place on 12 May (notes at page 166). This was an opportunity for the claimant to add anything to his points for consideration on appeal, with the assistance of his representative. The claimant stressed during the meeting that he had done nothing wrong, but then again, the respondent had never alleged any wrongdoing on his part. The claimant

gave a list of the tasks that he felt he could do at work but he did not set out how he had arrived at the conclusion that this would make up a full-time job. Mr Rawlinson was not shown a list or a timetable to demonstrate how a full shift could be accomplished using the tasks that the claimant felt he was able to do. In any event, Mr Rawlinson took the proposal away and considered it and tried to understand how it would work in practice. The Tribunal notes that he did have significant background experience. During his career he had worked as a bus driver and a mechanic and he had 30 years of industry-specific experience. Consequently, he would have about as much knowledge and experience of the business as anybody could have with which to work out whether the claimant's proposition was feasible. As noted, he had to do this without a timetable (so to speak) from the claimant.

66. During the course of the appeal meeting Mr Rawlinson made an observation about Covid testing. He indicated that testing had benefits when used in tandem with masks and that it was not a solution on its own. In the course of this meeting the claimant raised the point that someone within the respondent had said, "why are you getting the union involved?" and pointed out that this was not helpful. Indeed, Mr Rawlinson seems to have accepted that this was not particularly helpful in resolving matters. Equally, during the hearing the trade union representative accepted that, generally speaking, the respondent had implemented and handled furlough well for the majority of the workforce (i.e. those who had actually gone on furlough or who had been put through a furlough process.) It was also noted during the course of the discussion that the demolition work on site was due to start in the next ten days and that there would be disruption at the depot. Overall there would be 50% less space available for working in. There would be more people working in less space. The trade union representative was asked for information about any comparable cases that she was aware of involving other employers. No specific comparable example could be given. The hearing concluded with the respondent's manager reassuring the claimant that he was a valued member of the team.

67. On 21 May 2021 the grievance appeal decision letter was issued (page 171). Mr Rawlinson addressed the points raised on the appeal and reiterated the respondent's views about the uses and efficacy of testing. The outcome maintained that the respondent's interpretation of the relevant information was correct. The letter pointed out that furlough was itself a reasonable adjustment. In relation to suspension, the letter confirmed that Mr Christian had said that he did not refer to suspension and that that was not his role within the company. It pointed out that the claimant was paid in full and only lost money once furloughed. In relation to reasonable adjustments, Mr Rawlinson analysed the claimant's offer but noted that it still required the claimant to be in the workplace at peak times and so was still a matter of concern. Again, he referred to the fact that LFTs only really helped if the person in question was wearing a mask as well. Mr Rawlinson referred to thermo-fogging and deep cleaning during the daytime and the difficulties that presented due to buses being out of the depot in service. The letter concluded, however, by offering a new option. The new option for consideration was that the claimant would attend work at 4.00am, collect a bus, take it to the Bolton depot, put it on the chassis wash, wait outside whilst the robot completed the wash, take the bus back to Preston,

clean the cab and then tell someone at the station that the bus needed fogging. After doing this he would take a break away from the depot and then go to the bus station, use their facilities and then carry out observations on Preston Bus Station. This was a form of data collection. The Tribunal heard evidence that a lot of bus data could actually be collected by electronic means. What the claimant would be asked to do was an extra, visual check. The Tribunal also received evidence that there was nobody already doing this job at the time that it was offered as an option to the claimant. The claimant was not being asked to cover a pre-existing job, rather it was the creation of a new one. The proposition was that any paperwork completed by the claimant during these observations would then be quarantined and decontaminated over a safe period of time before being utilised. The appeal outcome letter reserved the right to review the duties proposed for the claimant as, due to the demolition work at the depot, there might be a requirement for the claimant to assist which would be a job in the open air with the demolition. Mr Rawlinson also reserved the right to review the offer in light of any Government changes regarding the wearing of face masks. It noted that further changes were anticipated on 21 June 2021.

68. On 26 May 2021 the claimant returned to work on these amended duties as proposed by Mr Rawlinson.

69. On 9 June 2021 the claimant alleges that the amended duties were changed. He says that the duties were withdrawn and he was given ad hoc labouring and gardening on site and that this made him feel unwanted. However, the Tribunal bears in mind that the respondent had reserved the right to change the duties and to keep them under review. The letter indicated that the work required might be outside of the depot. Thus, the changes suggested were in line with what had been foreseen in the appeal.

70. During this time the claimant volunteered not to use the respondent's toilet facilities and was going to use facilities elsewhere. (They were either a walk or a bus ride away from the depot where he was working.)

71. On 10 June 2021 (page 177) the claimant's trade union representative raised concerns about the claimant's access to welfare facilities. It was suggested that the claimant was prevented from using any facilities at Preston or Bolton and that his access to a toilet was a pressing issue. The representative asked for an urgent review.

72. On 11 June 2021 Mr Burns replied and confirmed that he had spoken to the claimant at 6.00am and the claimant had confirmed that he was happy with the available facilities. It was noted that it took the claimant 15 minutes to get to the facilities and so Mr Burns had proposed making a short bus journey for this purpose. The bus in question could be caught from just outside the premises. When working at Bolton the claimant had agreed to use motorway facilities. Mr Burns confirmed that the claimant had said to him that he was happy with the arrangements and that Mr Burns had shared information with the claimant about where there were other local facilities available.

73. On 11 June 2021 the trade union representative replied and disputed the accuracy of the record where it confirmed that the claimant was happy with arrangements. Rather, it was said to be better to describe it as the claimant 'tolerating' the arrangements in order to be back at work. The respondent was asked to look at the issue again.

74. There was a further trade union email to Mr Burns on 21 June 2021 (copying in Mr Rawlinson.) It was at this stage that formal notification of the claimant's IBS was made. Indeed, even the trade union representative had not known about this before. The email alleges that the respondent was already aware of the IBS and goes on to refer to the toilets in the MOT bay and asks whether they could be opened for the claimant to use. The email also notified that tasks at Bolton had been removed.

75. Following this there was a 'catch-up' between Mr Branigan and the claimant the next day (22 June 2021) (page 179). At this stage Mr Burns was self-isolating and not in work. Mr Branigan asked the claimant to talk him through his working day. The claimant referred to the chassis washes at Bolton not working and he indicated that he had been asked to do weeding at Preston. He was offered similar work in Bolton by Mr Branigan but the claimant declined on the basis that (to put it bluntly) he had 'had enough of that type of work' when he was at home. Mr Branigan also asked the claimant about toilet arrangements. The claimant explained the agreed protocol and Mr Branigan asked what other options there were to improve matters. The claimant again suggested the MOT test facilities, and also the cleaner's toilet for use when he was at Bolton. Mr Branigan agreed in principle, subject to checking the logistics. The agreement would be that the MOT bay facilities would be for the claimant's sole use, and he would have to clean them. If he needed to use the toilet at Bolton the claimant should let the Bolton management know so that it could be cleaned afterwards. During the course of this conversation Mr Branigan also checked with the claimant about equipment. He checked about the provision of gloves. The claimant complained about the provision of second-hand gauntlets. The respondent explained that latex gloves were to be used as a liner to prevent direct contact between the claimant and the gauntlets and that the previous person using the gauntlets would have done the same. The claimant updated the respondent as to his vaccination status.

76. The agreement resulting from that conversation was that the next day the claimant would go back to moving buses on the early shift. He would go to Bolton for an external wash and steam clean and then he would take his break and go on the bus station observations (as previously described.) Arrangements were made for his sole use of the MOT bay toilets (indeed a new toilet seat was purchased). The claimant confirmed that he was content with this set of arrangements. These were the arrangements that were put in place from 23 June 2021.

77. On 19 July 2021 the requirement to wear face masks was removed from the risk assessment and the claimant returned to normal duties. Ms Stewart explained how Covid restrictions across the UK were lifted and this was confirmed in terms of the claimant's work on page 181 in a document documenting his tasks.

78. The claimant presented his ET1 claim form to the Tribunal on 29 July 2021. The claimant is still employed by the respondent and has actually been promoted since the events which form the subject matter of this case.

The Law

Disability

79. Section 6 of the Equality Act 2010 states:

(1) A person (P) has a disability if-

a. P has a physical or mental impairment, and

b. The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability-

a. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

b. A reference to persons who share a protected characteristic is a reference to persons who have the same disability.

…

80. The definition set out in section 6, as supplemented by provisions in Schedule 1 to the Act, poses four essential questions:

a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

c. Is that effect substantial?

d. Is that effect long-term?

81. The activities affected must be "normal". The Equality Act 2010 "Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011" states (D3):
"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."

82. Tribunals are entitled, in appropriate circumstances, to take into account the effect on an employee of circumstances which arise at work. Work performed by an employee may include some normal day-to-day activities (*Law Hospital NHS Trust v Rush [2001] IRLR 611; Cruickshank v VAW Motorcast [2002] IRLR 24*).

83. "Substantial" means "more than minor or trivial" (section 212).

84. "More than minor or trivial" is a relatively low standard (*Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19.*) In Leonard, the EAT gave the following guidance:

- The focus should be on what an employee cannot do or can do only with difficulty, and not on what they can do easily.
- The decision-maker should look at the whole picture but should not attempt to balance what an employee can do against what they cannot do.
- The statutory Guidance should not be used too literally and, in particular, its examples are illustrative only. They should not be used as a checklist.
- The fact that an employee is able to mitigate the effects of an impairment, for example, by carrying things in small quantities, does not prevent there being a disability.

85. An impairment will have a long-term effect only if:

- It has lasted at least 12 months;
- The period for which it lasts is likely to be 12 months; or
- It is likely to last for the rest of the life of the person affected. (*Paragraph 2(1)(a)-(c), Schedule 1, Equality Act 2010*.)

The Equality Act 2010 Guidance on disability states: *"Likely should be interpreted as meaning that it could well happen." (Paragraph C3.)*

86. In McDougall v Richmond Adult Community College [2008] IRLR 227 the Court of Appeal confirmed that the likelihood of the recurrence must be assessed as at the 'relevant time', the date of the alleged act of discrimination. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out day-to-day activities, it is to be treated as having that effect if that effect is likely to recur (paragraph 2(2), Schedule 1, Equality Act 2010). The test is whether the particular effect is likely to recur. In Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540, the EAT suggested that four questions should be asked:

- Was there at some stage an impairment which had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- Did the impairment cease to have such an effect and, if so, when?
- What was the substantial adverse effect?
- Is that substantial adverse effect likely to recur?

87. Where a substantial adverse effect is deemed to exist because it is likely to recur, the tribunal will take into account the whole period (whether the substantial adverse effect is deemed or actual) in assessing whether it is long-term.

88. An impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if:
    - Measures are being taken to treat it or correct it; and
    - But for the measures, the impairment would be likely to have that effect.

    (Paragraph 5(1), Schedule 1.)

Disability and Knowledge of Disability

89. The issue of knowledge of disability arises in both reasonable adjustment claims and section 15 discrimination arising from disability claims.

90. Paragraph 20(1) of Schedule 8 to the Equality Act 2010 indicates that the employer will only come under the duty to make reasonable adjustments if it knows, not just that the relevant person is disabled, but also that the relevant person's disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). The EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

    (1) Did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?
    (2) If not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

    It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

91. In Wilcox v Birmingham CAB Services Ltd EAT 0293/10, the then President of the EAT, Mr Justice Underhill, took the view that the effect of the knowledge defence in the predecessor Disability Discrimination Act was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the disability in the way set out in section 4A(1)

(i.e. by a PCP or physical feature of the workplace). The second element of this test will not come into play if the employer does not know the first element.

92. An employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser, HR officer or line manager) knows in that capacity of the disability. The EHRC Employment Code indicates that such knowledge is imputed to the employer (see paragraph 6.21). The duty to make reasonable adjustments would still apply even if the disabled person asked the agent or employee to keep the information confidential. This means that employers must have a suitable confidential means of collating information about employees to ensure that they adhere to their duty to make reasonable adjustments. However, the Code confirms that information will not be imputed to the employer if it is gained by a person providing services to employees independently of the employer, even if the employer arranged for those services to be provided (see paragraph 6.22). The case law also shows that, depending on the particular circumstances of a given case and the way in which the adviser was instructed, there may be circumstances where the information/knowledge passed to the adviser will not be imputed to the respondent *(* Hammersmith and Fulham London Borough Council v Farnsworth [2000] IRLR 691, EAT, Q v L EAT 0209/18 and Hartman v South Essex Mental Health Community Care NHS Trust and other cases [2005] IRLR 293)

93. When considering whether an employer is to be regarded as having constructive knowledge of a worker's disability so as to trigger the duty to make reasonable adjustments, it is irrelevant that a formal diagnosis has yet to be made, so long as there are other circumstances from which a long term and substantial adverse effect of a mental or physical impairment can reasonably be deduced. While knowledge of the disability places a burden on employers to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for doing so (*Ridout v TC Group 1998 IRLR 628, EAT,*)

94. A failure by an employee or job applicant to cooperate with an employer's reasonable attempts to find out whether he or she has a disability could lead to a finding that the employer did not know, and could not be expected to know, that the employee or job applicant was disabled.

95. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage (paragraph 20(1)(b), Schedule 8 Equality Act)

96. In the context of a claim of discrimination because of something arising from disability, section 15(2) means that an employer will not be liable for section 15 discrimination if it did not know and could not reasonably have been expected to know of the employee's disability. The EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (paragraph 5.15). What is reasonable will depend on the circumstances. This is an objective assessment. It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' (paragraph 5.14)

97. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know if it had made such an enquiry. A Ltd v Z [2020] ICR 199 shows that determining whether an employer had constructive knowledge involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that he had a disability, namely that he was suffering a physical or mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. In *A Ltd v Z* the tribunal had failed to apply the correct test, asking itself only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know. Given the tribunal's finding that Z would have concealed her disability, if the employer had taken the additional steps that the tribunal considered would have been reasonable, it could not reasonably have known of the employee's disability. The burden is on the respondent to make reasonable enquiries based on the information given to it. It does not require them to make every possible enquiry even where there is no basis for doing so. The failure by an employee to co-operate with the employer's reasonable attempts to find out whether the employee is disabled could lead to a finding that the employer did not know and 'could not reasonably be expected' to know.

98. The employer must have the requisite knowledge of disability *at the time it treats the employee unfavourably*. If the treatment complained of is made up of a series of distinct acts occurring over a period, it is necessary to consider not only whether the employer had the requisite knowledge at the outset but also, if it did not, whether it gained that knowledge at any subsequent stage when the treatment was ongoing.

99. While lack of knowledge of the disability itself is a potential defence to a section 15 claim, lack of knowledge that a known disability caused the 'something' in response to which the employer subjected the employee to unfavourable treatment is not (*City of York Council v Grosset [2018] ICR 1492, CA).*

100. The employer will not avoid being under the duty unless it "could not reasonably be expected to know" that the applicant or employee is disabled or that there was a substantial disadvantage (Schedule 8).The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information, although it emphasises that "when making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially" (paragraph 6.19).

Reasonable adjustments: sections 20 and 21

101. Section 20 (so far as relevant) states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(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.

…

102. Section 21 states:

(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.
(3) …

103. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

(a) Identify the PCP applied by or on behalf of the employer,

(b) Identify comparators (if necessary),
(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

104. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

105. The phrase "provision criterion or practice" should be construed widely and the EHRC Code indicates that it can include "one-off" decisions and actions. In Ishola v Transport for London [2020] EWCA Civ 112 it was noted that the phrase PCP should be construed widely but remarks were made about the legislator's choice of language (as opposed to the words "act" or "decision".) Simler LJ stated, *"I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs…. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice." It is just done; and the words "in practice" add nothing….The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee…To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply…. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. …In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP of "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one. …in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of an element of repetition about it."*

106. A 'substantial disadvantage' is one which is 'more than minor or trivial.'

107. In regard to comparators, The EHRC Code states:
"The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly – and unlike

direct or indirect discrimination – under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's." (Paragraph 6.16.)

108. In Archibald v Fife Council [2004] ICR 954, Lady Hale and Lord Rodgers held that there was no requirement in the legislation for a "like for like" comparison, (see paragraphs 38 and 64 of the judgment).

109. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

110. Where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer (Rakova v London Northwest healthcare NHS trust [2020] IRLR 503. It cannot be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. The fundamental question is what steps it was reasonable for the respondent to have to take in order to avoid the particular disadvantage not what ought 'reasonably have been offered.'

111. If there are no adjustments which would enable the employer to return to work, it would not be reasonable to make them (Conway v Community Options Ltd UKEAT/0034/12).

112. Whilst case law indicates that it is open to a tribunal as a matter of law to find that an employer ought to have constructed a new role for an employee as a reasonable adjustment this may be unusual and will be dependent on the particular facts and circumstances of the case (Chief Constable of South Yorkshire Police v Mr M D Jelic UKEAT/0491/09/CEA, Southampton City College v Randall UKEAT/0372/05/DM)

113. An employer can satisfy the duty to make reasonable adjustments even if the adjustments adopted are not the adjustments preferred by the employee (Garrett v Lidl Ltd UKEAT/0541/0).

114. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry.

Discrimination because of something arising in consequence of disability: Section 15

115. Section 15 Equality Act 2010 states:

(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.

116. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability.' The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

117. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

118. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

119. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability.' That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(e) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).
(f) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability.' Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

120. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability," which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

121. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

122. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

123. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

124. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

125. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

126. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Harassment: Section 26

127. Section 26 states:

> (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.

128. 'Unwanted' conduct is essentially the same as 'unwelcome' or 'uninvited' conduct.

129. Harassment will be unlawful pursuant to section 26 if the unwanted conduct related to a relevant protected characteristic had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

130. The harassment has to be "related to" a particular protected characteristic. The tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. In Unite v Naillard [2017] ICR 121 the EAT indicated that section 26 requires the tribunal to focus upon the conduct of the individual(s) concerned and ask whether their conduct is associated with the protected characteristic. In that case it was not enough that an individual had failed to deal with sexual harassment by a third party unless there was something about the individual's own conduct which was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction. So long as the tribunal focuses on the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic. As stated in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, "there must still … be some feature or features of the factual matrix identified by the tribunal, which properly leads it

to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found have led to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be."

131. The test as to the effect of the unwanted conduct has both subjective and objective elements to it. The subjective element involves looking at the effect of the conduct on the particular complainant. The objective part requires the tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had that effect. Whilst the ultimate judgement as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered. So, whilst the victim must have felt or perceived her dignity to have been violated or an adverse environment to have been created, it is only if it was reasonable for the victim to hold this feeling or perception that the conduct will amount to harassment. Much depends on context. See the guidance Richmond Pharmacology v Dhaliwal [2009] ICR 724 revisited in Pemberton v Inwood [2018] IRLR where Underhill LJ stated:

In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

The context of the conduct and whether it was intended to produce the proscribed consequences are material to the tribunal's decision as to whether it was reasonable for the conduct to have the effect relied upon. Chawla v Hewlett Packard Ltd [2015] IRLR 356.)

132. As stated in Dhaliwal:

'If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the

section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.

Burden of proof

133. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act including direct discrimination, harassment, indirect discrimination, discrimination arising from disability under section 15 and the failure to make reasonable adjustments under section 20. Although similar principles apply, what needs to be proved depends, to a certain extent, on the nature of the legal test set out in the respective statutory sections.

134. The wording of section 136 of the act should remain the touchstone.

135. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

136. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

137. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

    a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
    b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
    c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.

d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

138. The shifting burden of proof rule only applies to the discriminatory element of any claim. For example, it is not for the respondent to prove that the claimant has the particular protected characteristic. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof. The shifting burden of proof rule only applies to the discriminatory element of any claim.

139. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind

the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation.

140. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

141. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

142. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory.

143. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

144. In a case of harassment under section 26 of the Equality Act the shifting burden of proof in section 136 will still be of use in establishing that the unwanted conduct in question was "related to a relevant protected characteristic" for the purposes of section 26(1)(a). Where the conduct complained of is clearly related to protected characteristic then the employment tribunal will not need to revert to the shifting burden of proof rules at all. Where the conduct complained of is ostensibly indiscriminate the shifting burden of proof may be applicable to establish whether or not the reason for the treatment was the protected

characteristic. Before the burden can shift to the respondent the claimant will need to establish on the balance of probabilities that she was subjected to the unwanted conduct which had the relevant purpose or effect of violating dignity, creating an intimidating etc environment for her. The claimant may also need to adduce some evidence to suggest that the conduct could be related to the protected characteristic, although she clearly does not need to prove that the conduct *is* related to the protected characteristic as that would be no different to the normal burden of proof.

145. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

146. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

Conclusions

147. The Tribunal worked through the issues in our List of Issues at page 52 of the bundle.

Was IBS a disability for the purposes of the Equality Act 2010?

148. The first matter for consideration is whether the claimant's IBS (Irritable Bowel Syndrome) constituted a disability for the purposes of the Act. We had received

evidence in documentary form about this. (The disability of anxiety and depression was conceded by the respondent, so I put that to one side.)

149. The evidence we had before us was some medical records which refer to IBS dating back over a period of time to 2010. There are consultations relating to IBS or indications of flare ups of the IBS on 25 January 2018, 14 June 2016, 3 May 2016, 24 January 2014, 19 April 2011 and various consultations in 2010 with medication prescribed.

150. Page 243 of the hearing bundle referenced a telephone consultation on 15 March 2021. The active subject matter of the consultation seems to have been the claimant's anxiety state but a past medical history is noted as part of the entry and this includes IBS, hernia, appendectomy. The claimant also provided an impact statement which was not really challenged in evidence during the Tribunal hearing (page 260). It indicated that he was currently taking medication for IBS in the form of Apoteket. We do not know if this is referred to as a medication which the claimant was taking at the time of the alleged discrimination or whether it referred to the time at which the impact statement was written in 2022. It indicated that the claimant had trialled various medication. We can deduce from the evidence that this is a fluctuating condition where stress is a particular trigger. When symptomatic it has a substantial adverse effect on the claimant's ability to do normal day-to-day activities. The adverse effect is more than minor or trivial. The claimant describes how he avoids long journeys and has to avoid some social occasions. There is an impact on how long he can be away from the house walking and away from toilet facilities. It impacts upon his ability to drive, which is important as he is the key driver within the family. It also impacts on his timetabling of his day and his need to be rigid with what and when he eats.

151. Taking account of the fact that the claimant does take medication at various stages, it is relevant to deduce the effect that that medication is having. What would the situation have been if he did not take medication/have treatment? None of the treatment is said to have been curative. The treatment was either masking or improving symptoms. In cross examination he said that he was managing it with non-prescribed medication. There was some suggestion that he may have weaned himself off the prescription medication, but either way the Tribunal has to draw the conclusion that there is still an ongoing, underlying condition which is likely to recur. So, it is a condition with a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities, which is long-term. It has been ongoing for over 12 months and if left untreated is likely to recur. On that basis we accept that the claimant's IBS met the definition of disability within the meaning of section 6 of the Equality Act 2010.

<u>Knowledge of IBS disability</u>

152. We turn next to the issue of knowledge of the disability. We know that the respondent knew about the claimant's anxiety and depression from (at the very latest) 14 January when he raised his need for a mask exemption. We look at the IBS matter separately and note that the respondent had medical certificates about IBS from 2018. This arguably could and should have triggered further questions and enquiries by the respondent up to (and including) an Occupational Health referral. The respondent ought reasonably to have known about the IBS

if it had asked the appropriate questions and explored the matter. If it had taken these steps, it may well have been furnished with more information about it. The case law and the Code indicate that the respondent cannot benefit by not asking the relevant questions and closing its eyes to the possibility of the disability. Whilst we do not necessarily accept that individuals in this case had *actual* knowledge of the disability, there was certainly constructive knowledge within the organisation which suffices for the purposes of this case. They should have been put on notice from 2018. There are also the GP records that we have at page 104 which were sent in in the March. They also note and record IBS as an active problem rather than a past problem.

153. The Tribunal concludes that it is not actual knowledge but it is constructive knowledge of the disability. (I will revisit the other element of knowledge in a moment, i.e. how it interrelates with the provision, criterion or practice (PCP) in the reasonable adjustments claim.)

Reasonable Adjustments: section 20/21

154. The claimant relied on a number of PCPs. The first was the requirement to wear a face covering at work. The Tribunal accepts that there was an ongoing requirement to wear a face mask at work over a significant period of time. The requirement remained in place until the claimant was allowed to return to work later in the chronology without the need for a face mask. That was a provision, criterion or practice. It was not just a "one-off" event.

155. Likewise, there were shared toilets and shared canteen facilities in the workplace. These were also a continuing state of affairs. 'But for' the adjustments and changes to the claimant's own particular circumstances, in the normal course of events he would need to use shared facilities for both toilet and canteen. One set of toilets was available to all employees on site, and in the normal course of events the claimant would use them. Likewise, he would attend the shared canteen. Prior to the Covid pandemic that is certainly what he would have done.

156. The claimant also relied on a PCP of "being fit to physically attend the workplace." Claimant's counsel rightly conceded that this was intimately related to the PCP of being required to attend work and wear a mask. They are two sides of the same coin. The Tribunal is not convinced that this second PCP actually adds anything to the PCP relating to the requirement to wear a mask. In essence, the claimant saying that he needs to be fit, he needs to be able to attend work and he needs to be able to wear a mask whilst he does it.

157. The next element of the legal test is 'substantial disadvantage.' The List of Issues sets out the substantial disadvantages relied upon by the claimant. They include that he was suspended, that he was furloughed with loss of earnings and that he was unable to use toilet and canteen facilities at work leading to damage to his health and wellbeing. Thus, there are several elements to the substantial disadvantage.

158. Taking those issues in turn, the furlough was clearly because of his inability to attend and comply with the PCPs, particularly wearing the mask. 'But for' those PCPs there would be no reason to send the claimant home. Someone without

the claimant's disability was unlikely to have been furloughed in the circumstances. Being furloughed did have some financial adverse effect in the short-term (although not in the long-term, given that he was overpaid). It also meant that he was without the benefit of the routines associated with attending at work. These work-related routines helped with his anxiety disability. The Tribunal also considered whether someone who was unable to wear a mask for reasons which were not related to a disability (e.g. someone struggling with their glasses 'fogging up') would be furloughed and whether they would be in the same position as the claimant financially. Did this undermine the claimant's assertion that the PCPs put him at a substantial disadvantage as compared to non-disabled employees? However, we concluded that, whilst such a person would be in the same position financially, they would not experience the extra psychological impact and the damage to health and wellbeing that the claimant specifically relies upon in this case. He experienced an extra element of disability related disadvantage that the non-disabled comparator on furlough would not have. Thus, we are satisfied that that element of the legal test is met by the claimant.

159. In relation to the suspension issue, we have found that the claimant was not suspended. In any event, we are not convinced that suspension would add any substantial disadvantage. It made no financial difference. We do not accept that it would increase anxiety as the claimant was not at risk of disciplinary action. Even if the word "suspension" had been used, it was not a disciplinary suspension.

160. Later on, when the claimant did return to work, he could not use the shared facilities. This increased his stress levels because he was worried about accessing facilities in time/quickly enough. That was also a substantial disadvantage. However, this is where the issue of knowledge becomes relevant again. Should the respondent reasonably have known that, not only was the claimant disabled by reason of IBS, but also that the PCP in question put the claimant at a substantial disadvantage in relation to the IBS? We conclude that no, it did not give the respondent constructive knowledge of this. This is because of the way that the claimant explained his position at the time. He agreed (and indeed, at times, suggested) the proposal of using offsite toilets. The Tribunal heard evidence that he was anxious to reassure the respondent that he was content with this arrangement. He wanted to remove any remaining obstacles to coming back to work. It is asking too much to expect the respondent to look behind what the claimant was saying to them and the reassurance that he was giving to them. The respondent could not reasonably have been expected to say that it did not accept what the claimant was saying about the adequacy of the toilet provision and conclude that, contrary to the claimant's representations, the was a problem relating to the claimant's IBS and that the PCP put him at a substantial disadvantage.

161. In order to trigger the duty to make reasonable adjustments in this part of the claim, the respondent needs to have had constructive knowledge of the disability *and* of the substantial disadvantage. The claimant had, noticeably, not mentioned the IBS at all. It was only when the IBS is brought up in June (and made an issue at that point) that the situation changes. At this point the 'penny drops' for the respondent that the offsite toilet is a problem. At that point, however, the

chronology tells us that the claimant was given access to his own personal facilities. Could or should the respondent have known that, despite what the claimant was saying to them, he was actually being disadvantaged by the requirement to use offsite facilities? Was the duty to make adjustments triggered by the PCP? Yes, but very late in the chronology.

162. The Tribunal then moves on to look at the reasonable adjustments themselves. The duty to make adjustments in relation to toilets is not triggered until the issue is raised in June, and there is the formal reference to the IBS. That is flagged up on 21 June. Up to that point it has not been clear that there is an issue or that the claimant is actually having difficulties with the arrangements that he has assured the respondent he is content with. As of 21 June, the position changes. The need for a separate toilet is highlighted and it is said to be related to the claimant's IBS. By 23 June the claimant was given the key to the separate toilet facility. The Tribunal therefore finds that the reasonable adjustment was made as soon as reasonably practicable after the duty was triggered. Consequently, that element of the reasonable adjustments claim fails.

163. The Tribunal also considered the adjustment to exempt the claimant from wearing a face mask at work. As a matter of fact, we accept that the claimant was exempt from wearing a face mask. However, we do not accept that the respondent necessarily had to let him back into the workplace unless it could reasonably control the risks to the other interested parties. The Tribunal is not just looking at what is conceivably possible or some 'counsel of perfection.' The Tribunal has to be guided by what is reasonable as an adjustment. The Tribunal is considering the imposition of a legal duty upon the respondent, and we have to look at it both as a question of substance and of timing.

164. The exemption from mask wearing can only constitute a reasonable adjustment once the respondent can identify and impose other mitigatory steps to reduce the risk of transmission/contraction of the disease to a low enough level that the respondent can afford to take the risk of not having the mask as an extra protection. Having heard all the evidence, we do not think that there was an unreasonable delay on the respondent's part in considering this issue. The duty to look at this only arose once the mandatory requirement was communicated to the claimant and the claimant claimed his exemption. As previously indicated, the respondent could not do more without Occupational Health evidence. They obtained that reasonably quickly and took note of its contents. It was not reasonable to require the claimant to be at work without a mask whilst that Occupational Health evidence was obtained. In normal day-to-day circumstances it might have been reasonable, but this was during the Covid pandemic and the respondent had every right to err on the side of caution in order to keep everyone safe until it was reassured by the evidence that it was safe to remove the mask requirement. The respondent had to balance the risk of a potentially deadly disease against the risk to the claimant's mental health and finances. The respondent was entitled to prioritise the need to preserve life and avoid the deadly disease. The fact that this had not been considered as such an acute problem in 2020 (so that the claimant could work without a mask) does not automatically mean that it was unreasonable for the respondent to send him home in early 2021. The tribunal has to look at the context. There was a need to react to changes during the pandemic, including increased infection rates

and the deaths in the business. The respondent was not necessarily required to allow in 2021 what it had deemed reasonable in 2020. The respondent was not required to perpetuate or persist with a known health risk whilst reasonable adjustments were considered. In some ways, the reasonable adjustment in this case was the provision of furlough for the claimant. Thus, the claimant was sent home from work on 80% of his pay. The furlough scheme was reasonably applicable and was designed to be used in this way. Indeed, if the Government did not require employees to be furloughed on 100% pay the Tribunal is not convinced that it can, in effect, impose that requirement by the back door.

165. The Tribunal also notes some observations which are contained in the claimant's written submissions at paragraphs 74-76. We say, having read the evidence, that the Occupational Health evidence does not say that lateral flow tests are sufficient as a way to mitigate risk. They are a reassurance to others, but they do not prevent transmission. The reference to the comparator aged over 70 deciding not to shield against government advice is, we think, the wrong comparison. Of course, that individual is free to choose not to follow Government shielding advice and is free to associate, to go out and about, and to leave the house. However, that does not impose a corresponding duty on an employer to take them back into the workplace during the recommended shielding period. What the concept of 'shielding' achieved was to prevent employers from forcing employees back to work against their will and against their best interests (in terms of health.) That is the reverse of the situation in this case. The respondent is not denying that the claimant can claim a mask exemption or leave the house without a mask and take the associated risks by choice. The employer is just denying that the claimant can *force* his way back to work *with* the exemption and stay in the workplace *without* the mask. The exemption does not require employers to allow employees back to work, rather, it stops employers enforcing mask wearing whilst still requiring attendance at the workplace.

166. To the extent that mental health considerations are found to carry less weight than the risk to life associated with Covid-19, then we conclude, on balance, that the respondent is reasonably entitled to weigh the competing factors in this way. We do not wish to understate the traumatic impact of the experience on the claimant's mental health, but that is damage which can be treated and hopefully reversed. The same is not true should the worst happen in relation to Covid-19, which has sadly proved fatal in so many cases. The respondent (as a reasonable employer) was entitled to do all it reasonably could to avoid such outcomes.

167. The Tribunal concludes that the delay of five days before the respondent wrote to the claimant was not unreasonable given the other competing calls on the respondent's time during the pandemic and the fact that other employees were also going through furlough-related issues. In many disability discrimination claims which come before the Tribunal in 'normal' non-Covid times, the claimant in the case is the only employee that the employer has to focus on. However, this case does not concern 'normal times.' It concerns the reasonable approach to take during a global pandemic. This is a case where lots of employee-related issues of this nature were being determined at around the same time. It was not 'business as usual.' The respondent cannot be required to treat the claimant as

though he was the only employee facing such issues at that time. In short, what might be considered too long a delay in normal times was not too long to wait in the circumstances of the pandemic.

168. The claimant criticises the respondent for sending out the original decision to keep him at home without further discussion but at this point the claimant had consented to furlough and the respondent was entitled to send out a decision and to see how the claimant reacted to it. It would be setting too high a standard to require a meeting every time a decision is sent out. There is no material disadvantage to the claimant insofar as he knew that he could come back to the respondent with his representations. The respondent had not closed the door to him, particularly as he had trade union representation. This is not one of those cases where the working relationship had broken down and the employee was effectively precluded from challenging an employer's decision.

169. Social distancing was one of the factors that the Tribunal needed to look at in relation to reasonable adjustments in order to see whether the mask exemption was necessary. Taking all the evidence into consideration, we find that in order to ensure adequate social distancing the respondent would effectively be required to completely re-engineer the claimant's job. The claimant's work was not confined to one area. He had to work inside and outside the building. The restructuring would relate to all of his work tasks and also to the business as a whole in order to create a job which would put the claimant in an area where he was not in close contact with others. The claimant was not comparable to an employee working stationary at a desk. There would have needed to be a wholesale re-evaluation and reorganisation of the workplace in order to ensure that the claimant did not come into close contact with others.

170. The Tribunal also had to consider PPE in this case. The claimant says that PPE in his case would be cleaning materials. However, we note that cleaning would not do an adequate job in circumstances where the claimant could reinfect the surroundings because he is not wearing a mask and is breathing into the atmosphere. The only cleaning method which could take this risk out of the equation is thermo-fogging. However, the Tribunal heard that this can only be done in an enclosed area and the area then has to be left unoccupied for a certain period of time. This effectively takes the area out of bounds to other employees. This would require the respondent to re-timetable work to facilitate thermo fogging and the question arises as to whether the respondent would be able to do that without getting in the way of its main business operations which were done by reference to a timetable. There were certainly questions as to how practical this would be.

171. The claimant argued that other people could clean down everything that they used before they touched it and that this would reduce the risk of transmission from him to others. Indeed, the respondent certainly expected tools to be cleaned before use, but it would be perhaps a step too far to expect employees to clean every single item in the workplace before it is touched or used in some way. It is a matter of degree, but it would get in the way of an effective and efficient workplace. So, for example, we heard that an employee might clean tools before working on a wheel but evidence from one of the witnesses indicated that you could not also expect them to clean down all parts of the wheel area and the

relevant parts of the vehicle before starting work. Indeed, that might well make the task as a whole much more difficult.

172. None of these issues admits of an easy 'yes or no,' 'black or white' answer. The Tribunal has to consider the reasonableness of requiring every single employee in the premises to clean everything before they touch it on the off chance that the claimant has been in the vicinity and may have left droplets in the vicinity. That has to be compared to the option of taking the claimant out of the workforce and paying for him to be at home. It has to be concluded that the latter is more reasonably practicable than the former, even if it may be physically possible to do the former with a lot of work and a lot of changes within the business as a whole.

173. Regular Covid testing as a reassurance would not make a great deal of difference to the risk of transmission itself. We have heard the evidence about false negatives, viral load and the fact that someone can become infectious during the course of a shift having had a negative test at the start of the shift. It is an extra reassurance, but it is not making a substantive difference to the level of risk of disease transmission. We accept that the respondent was entitled to take on board the 70% efficacy data that it had from public bodies rather than the data from manufacturing companies which suggested a higher level of accuracy.

174. The Tribunal accepts that handwashing and social distancing were some of the best preventative measures, but they were not necessarily sufficient in any given case and are not necessarily easy to accomplish in this case if the claimant was going to be able to do his normal job. There was no one 'knock-out' measure in this case. It is a case of carefully weighing the available options. The Tribunal also has to look at the available options over a period of time because the respondent did not just adopt a no mask/no entry policy and stick to it.

175. Once the claimant made it clear that he was not happy, there were further consultations and other options were offered. He was offered the nightshift weekend work doing deep cleaning of buses. That would minimise his presence on site when there was a high footfall. It would also eliminate recontamination because of the thermo-fogging and shared facilities could be thoroughly cleaned. The timing would mean that buses were not out of commission during the bus timetable's operative hours. It was a sensible proposition. We accept the respondent's evidence that, although numbers of employees would fluctuate throughout the day and the night, the nightshift and late on weekends would be the least busy times. Even though 8.00pm would be busier than midnight, it would still be less busy than first thing in the morning when buses were being allocated at the start of a busy day. The reality is that there are no absolutes regarding the number of staff on premises. The respondent needed to pick the optimum choice of shift to minimise overall contact and exposure. Was that an ideal option from the claimant's point of view? No, because of his childcare issues. It does not mean that it was not a reasonable adjustment from a disability point of view or a business point of view. It met the Covid risk problem, and it got the claimant back to work full-time. It might not have been his preference, but it was an option that better accommodated both parties' needs and the safety of the rest of the workforce. Thus, it was not a failure to make reasonable adjustments and it did not require the claimant to stay off work. Rather, it was a

failure to make the claimant's preferred or chosen adjustment. That is a different matter. We know from the evidence that we heard, that the claimant refused the shift and said that it was partly because of his family commitments. However, we do not know whether he could or could not have compromised and possibly worked the weekends that are referred to. There was nothing in the evidence to indicate that the respondent offered this option to the claimant knowing that it would be unacceptable to him. We have to conclude that the respondent was entitled to offer the option and see if the claimant was happy with it before moving on to more complex adjustments which required more re-engineering of the business.

176. The Tribunal also accepts that the respondent could not be expected to offer deep cleaning and thermo-fogging as a full-time day shift because there were not enough buses in the depot to occupy him. The buses were generally out on the road and the thermo-fogging needed to be done far enough before the start of the shift for the driver to be able to pick up the bus and take it out without delay. We heard that it took 90 minutes for the thermo-fog to disperse so that the bus was safe to use.

177. The night shift deep cleaning role was not the end of the matter. Further alternatives were offered. They included the flexi-furlough in the early morning collating data (again outside of the building), capped at two hours to reduce the risks of inclement weather. Also, there was no indication that there was enough work involved in this to make up a full shift for the claimant. It is apparent to the Tribunal that the respondent did not really have a business need to have this job done by anybody. Nobody was doing it at the time, a lot of the information could be obtained electronically, and there is more than a little element of 'job creation' about it. The benefit of the flexi-furlough, of course, was that it would mitigate some of the loss of earnings for the claimant. When the claimant was at work he would be paid at full rate. That was an option that had become available under the furlough scheme as it operated at that point in time. So, again, it balanced the interests of the parties. It reduced the pay but it mitigated that for the claimant to some extent. The offers of these options were subject to review. Again, it was not a static option. The claimant did not want to accept that, and we understand why. The respondent pointed out that the demolition work had started so the steam cleaning area was likely to be out of action even if the tool was functioning. That actually removed some of the options as to where the claimant could work on the premises because, even if the respondent was happy with him doing it, the claimant could not work in the demolition areas. The claimant could avoid using the toilets and canteen using the options offered by the respondent.

178. The claimant took the matter to appeal. The respondent pointed out that there was a 50% reduction in the available working area. The respondent looked at the matter again and offered a further option, which is the one that the claimant took with the Bolton chassis wash arrangement. The respondent had created a job by 21 May. To some extent it created a job which it did not really need to have done, certainly in terms of the observations at Preston Bus Station. The Tribunal does not accept that the respondent could have been required to create that job earlier in the chronology. The fact that it did create the job does not mean that it was legally required to do so. Could the job involving the chassis wash at Bolton have been offered earlier? We have found on the evidence that it needed

to be proposed by someone with an overview of the different sites. In the circumstances of this case that was Mr Rawlinson. His role was above the operational level and when the matter got to him, he had a higher awareness of what was going on away from Preston. We conclude that it was not unreasonable for the respondent to take the matter through the various levels of management so that this option only became apparent once it got to Mr Rawlinson's stage. We also note even with the job that was designed for the claimant, where the bus was being moved to and from Bolton, there was an issue with re-dirtying the bus that had just been cleaned. This job was never going to be a complete answer to both parties' needs. There was also a limit on the times of day when this could be done so that it would not interfere with bus services. It was not going to provide a full shift of work for the claimant.

179. We find that the fact that the respondent kept looking for creative solutions is a point in their favour rather than a criticism of them. There was no blanket "no." There was a continuing effort to reach a mutually acceptable solution.

180. Could or should the observations at Preston Bus Station have been offered earlier? As previously stated, this was 'job creation.' It did not need to be done, the claimant was not replacing someone else in the role, and the respondent was entitled to work through the other options which were more acceptable from a business point of view to see if they were equally acceptable to the claimant.

181. I refer next to the arguments we heard about the steam cleaner and the dishwasher argument. We do accept that there is a difference between internal and external – the dishwasher inside, and the steam cleaner outside – but we also observe that the respondent was drawing conclusions from the advice it was getting during the pandemic from external sources. We accept, on the evidence, that the respondent was told to take the dishwashers out of action. We have evidence of the HSE notice. The consistent feature of all the evidence and advice available to the respondent at this point in time was the reference to droplets and the carriage of the virus. Hence the need for "hands, face, space;" hence the need to avoid coughing and the propulsion of particles, etc. Was it unreasonable for the respondent to read the information it already had across from one area to another in order to decide that there was a risk in relation to the steam, using the same logic? On balance, we conclude that they were entitled to read this across from one area to another. Indeed, they could have been criticised for ignoring other applications of the advice if they had not done so. We note that this was an old building with heavy footfall and no roof on the area, and we accept the evidence about a fine mist in the vicinity. It was not an unreasonable conclusion to draw, it was a prudent one, particularly if people were going past while the task was being undertaken. We also note that the area was due to be demolished and so it would be even more open to transmission without barriers. In relation to Bolton, we do not have precise details as to whether there was more space, whether it would be close to others or not, so we cannot say that the steam cleaning in Bolton in June was comparable to steam cleaning in Preston during the course of the demolition for infection control purposes. Taking a step back, the Tribunal risks getting into the realms of the 'theoretically possible' as opposed to the 'reasonably practicable.' Everything may be theoretically possible but is it reasonable? Plus, the respondent was entitled to look at the development of

options to try which would still keep the job as close to the claimant's core duties as possible.

182. Was there an obligation to offer the claimant gardening work any earlier than the respondent did? Again, the respondent did not have a gardener so there is a question mark as to whether there was an existing job to be done which the respondent needed someone to do. We find, on balance, that it was offered at an appropriate stage when the work actually arose to be completed.

183. What about amendments to wheel torquing? What could be done about that process? Admittedly it would not make a full day's work, but it might help to make part of a job for the claimant. The difficulty there was that we heard evidence about the organisation of vehicular access to ensure that the torquing was always carried out outdoors. There are difficulties and limitations in the respondent's ability to do that and maintain its business operations. There was a one-way system in place at the premises. Parking spots filled up according to the needs of the business. Would it have been it reasonable to stop this practice and rearrange all vehicular movements to ensure that torquing was done outside? On balance, we consider that this would be asking too much.

184. Could the claimant have done thermo-fogging? The claimant was already being offered as much of this as there was time for him to do, consistent with the needs of the business. We have also already dealt with the issue of bus inspection work. The claimant was doing it at an appropriate stage. The respondent had exhausted the other options which were more closely linked to business requirements.

185. We also heard argument about the public toilets which the claimant used at the bus station. We understand that they were outside of the respondent's direct control. We heard some evidence that they were slightly bigger facilities and had a lower footfall. This issue has to aspects to it:

    (1) the risk to the claimant of him contracting the disease; and

    (2) in relation to transmission to other employees.

    Whilst using the public toilets might not assist the claimant's own health, it would maximise control of the risk for the rest of the workforce as they would not be sharing facilities with someone who was not wearing a mask. It is something of a utilitarian argument, but it is the sort of argument and measure that was being taken throughout the pandemic to protect as many people for as much of the time as possible.

186. Moving on to the canteen, that was not really the stumbling block in this case. The claimant said that he could sit in the car for lunch. The canteen facilities were not the reason why the respondent did not have the claimant back to work. There were ways around that.

187. We heard further argument in relation to the forklift truck. There was still a cleaning issue there. It was still ad hoc work. There was no suggestion that forklift trucks could be thermo-fogged. We do not accept that the claimant was the only employee licenced to drive a forklift truck. We heard that there was a

list on the back of the truck as to who was permitted to drive it and, on balance, we are prepared to accept that this was derived from a list of licences and reflected who was licensed to drive it. We note how compliant the respondent was in other areas of its regulatory systems, and there is nothing to suggest that the respondent was playing fast and loose with the licence requirements for forklift trucks. We also heard evidence that Ian Christian was licenced.

188. In terms of ad hoc tasks, the respondent put something together as best they could, as soon as they could.

189. Where that leaves us is that either individually or in combination, we do not accept that there was a breach of the duty to make reasonable adjustments. The respondent actively revisited this issue repeatedly. Options were offered which the claimant refused, and we have to look at it in context. Just because something might be physically possible if you re-engineer the business does not mean that it is a reasonable thing for us to require the respondent to do. We have to look at the Covid context which made adjustments more difficult in lots of ways. We have to look at the increased demand on the decision makers at the respondent during the pandemic. We have to look at the evolving knowledge of the risks attached to the disease over the course of the pandemic. We have to look at the background level of demand from other staff for HR decisions. As I indicated, it is not the only disability related issue or furlough related issue under contemplation by the respondent at the time in question. Guidance from the Government evolved over time and the matter came much closer to home when there were deaths within the business. We cannot look at what is potentially possible in a vacuum. We have got to look at reasonableness in context and on that basis we do not find a breach of sections 20 and 21 of the Equality Act 2010. The respondent did not breach a duty to make reasonable adjustments.

<u>Section 15 discrimination</u>

190. The Tribunal has already found that there was no suspension of the claimant albeit he was required to go home. To that extent in the claimant's view that would be unfavourable treatment, but it was not a suspension.

191. The second alleged element of unfavourable treatment was: not allowing the claimant back to work between 1 February and 26 May. That is not strictly what has been proved in this case because the respondent did not stop the claimant coming back to work. They offered him work but it was not acceptable to him for various reasons. The respondent did permit the claimant to return to work but he did not take those options, sometimes for disability related reasons and sometimes for family related reasons. So that bald assertion has not been proven. However, the claimant has proved that he was not allowed to return to work on his own terms, and that would be unfavourable treatment.

192. The third alleged element of unfavourable treatment was furlough. The claimant has proved that he was furloughed and that it was unfavourable. It had potential financial and psychological adverse consequences.

193. The fourth alleged element of unfavourable treatment was the claimant not being given set and clear duties between 9 June and 19 July. We found that there was

a shorter period of time where the claimant was not given clear set duties: between 9 and 22 June. We accept that, although it is of relatively minimal impact, it can be considered as unfavourable treatment. Essentially, the claimant did not have the tasks that he would prefer but that is not quite unfavourable treatment, strictly speaking.

194. Finally, the claimant had his own facilities from 23 June and he could use the cleaner's toilet at Bolton. So, the period when he had to use off-site facilities was shorter than alleged, but we are prepared to accept that that caused discomfort and inconvenience and was therefore unfavourable treatment.

195. Where we have found the elements of unfavourable treatment proven we accept that they are 'because of something arising from disability' i.e. the inability to wear a mask. We do not accept that they are because of the alternative 'something arising from disability' (i.e. the need to be near toilet facilities.) That would be to put the cause and effect the wrong way around. There is no suggestion that the respondent has imposed any of these requirements on the claimant because he needs to be near a toilet. Rather, the difficulties arising from some of the treatment are linked to his need to be near a toilet. It describes the impact on the claimant rather than the reason for the unfavourable treatment.

196. The real crucial point in this case is objective justification.

197. The legitimate aim relied upon by the respondent is protection of life and health of employees and the public. It is a legitimate aim in the circumstances.

198. In terms of the objective justification, I refer to the case law in the respondent's submissions at paragraphs 23 and 24. The measure does not need to be the only way of achieving the aim in order to be proportionate, although the existence of other options might make it harder to show proportionality on the facts of the given case.

199. Essentially, the claimant is arguing that the respondent was overly cautious in its approach to risks arising from Covid, and that it set the bar too high in trying to eliminate known risks. We do not accept that in the circumstances there was an acceptable level of risk that the respondent was required to take, particularly when society was living through a pandemic and the respondent had already had deaths in the business. It is also important that they were *known* risks. It may be impossible to eliminate *all* risk but if a risk has been identified and there are steps that an employer *can* take then the employer probably *should* take those steps in the circumstances. Otherwise, the respondent would be having to answer very difficult questions as to why it ignored such matters if things subsequently went wrong. We also note that the respondent was operating in a sector where risk assessment was particularly important during the pandemic and the respondent had clearly been acting in conjunction with outside agencies in order to assess and mitigate risk throughout the pandemic.

200. Was the unfavourable treatment a proportionate means of achieving the legitimate aim? The Tribunal notes that the respondent did not dismiss the claimant. They did not force him to stay at home altogether. They tried to get him back to work. They kept trying to make offers which would achieve that and which

eventually *did* achieve that. Those offers were further tweaked and improved once the claimant came back to work. They were not the claimant's preferred option, but we find that, weighed in the balance, that does not mean that they were disproportionate. The respondent continued to engage and built the process of review into the offers made. It did not ignore the claimant. When balancing the severity of the risks (if things went wrong) against the degree of interference with the claimant's rights (which was not complete or absolute) the balance falls in favour of the respondent and the defence is made out. We have concluded that the unfavourable treatment *was* a proportionate means of achieving a legitimate aim. The section 15 claim fails and is dismissed.

Harassment – section 26

201. The list of issues set out the alleged acts of harassment which we will address in turn in the following paragraphs. We consider whether the conduct of the respondent was unwanted conduct relating to disability and whether it had the relevant purpose or effect as set out in section 26.

202. The Tribunal did not accept that the claimant was suspended.

203. In relation to the negative comments made by Ricky Burns regarding the claimant engaging his union to assist with the situation, we do accept that some comment to this effect was made, but we have to look at it in context when assessing whether it constitutes harassment within the meaning of section 26 Equality Act 2010. The respondent had been trying to resolve the issue without overly formalising it. The claimant may well have been upset by the tone of the comment but we do have to assess it using all the limbs of the section 26 test. Even if the claimant felt that it had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, viewed objectively and taking into account all of the relevant circumstances, we do not conclude that it meets this necessary threshold when viewed in its proper context. The claimant was still in a process of negotiating with the respondent. It was not a welcome comment, but the meaning of the words 'intimidating, hostile, degrading, humiliating or offensive' should not have their significance cheapened. Trivial acts causing minor upsets should not be caught by the concept of harassment. The concepts set out in section 26 require something more than an unwelcome comment. If the claimant really was upset by the comment, then we consider that he was, unfortunately, displaying a degree of hypersensitivity when the matter is considered in the context of the surrounding circumstances.

204. In relation to not being allowed to return to work between 27 January and 26 May the Tribunal reiterates the points it has already made in relation to that. It was unwanted conduct certainly, but does it meet the relevant threshold within the meaning of section 26? We do not believe so, for the reasons already stated. Likewise with furlough, the claimant would prefer it to have been otherwise, but did it meet the threshold of the section 26 test? No.

205. In relation to giving the claimant clear and set duties between 9 June to 19 July we note that he had not been misled into thinking that he was going to have a very specific set of duties. A degree of flexibility was built into the whole system.

206. In terms of using toilet and canteen facilities outside of his place of work, given that the claimant had indicated that he was content with this and given that he had not indicated any particular difficulty with it, on balance it could not reasonably be seen to meet the section 26 test threshold.

207. For the avoidance of doubt, the Tribunal is not satisfied that the alleged acts of harassment had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, particularly taking into account the matters set out in section 26(4) of the Act.

208. The Tribunal therefore regrets to conclude that all three of the legal claims brought by the claimant for disability discrimination, on the facts of this difficult case, fail and are dismissed.

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Employment Judge Eeley

Date:15 November 2023

REASONS SENT TO THE PARTIES ON

17 November 2023

FOR THE TRIBUNAL OFFICE

ANNEX
LIST OF ISSUES

Disability

1. Is the claimant's condition of irritable bowel syndrome a disability within the statutory meaning under section 6 of the Equality Act 2010?

2. If so, did the respondent have knowledge of the disability at the relevant times?

Claims

Failure to make reasonable adjustments- section 20 Equality Act 2010

3. Was the respondent under a duty to make reasonable adjustments?

4. If so, did the respondent fail to comply with that duty?

5. Specifically, did the respondent apply the following PCPs:

    - The requirement to wear a face covering at work.
    - Being fit to physically attend the workplace.
    - Shared toilets in the workplace.
    - Shared canteen facilities in the workplace?

6. If so, did the PCPs place the claimant at a substantial disadvantage when compared to non-disabled employees?

7. The substantial disadvantages relied upon by the claimant include being that he was suspended, furloughed with loss of earnings and unable to use the toilet and canteen facilities at work, leading to damage to his health and wellbeing.

8. [Were the PCPs a proportionate means of achieving a legitimate aim?] (not applicable in section 20/21- included in the List of Issues by the parties through error)

9. Did the respondent take reasonable steps to avoid the substantial disadvantage? The claimant asserts that the following (all or any) steps would have been reasonable for the respondent to take:

    - Exempting the claimant from wearing a mask.
    - Modifying his duties from 12 January 2021 to allow him to remain at work.
    - Providing him with suitable toilets and canteen facilities.
    - Provision of PPE
    - Covid testing.

Discrimination arising from disability- section 15 Equality Act 2010

10. Did the respondent treat the claimant unfavourably by:
    - Suspending him on Friday 29 January 2021;
    - Not allowing him to return to work between 1 February 2021 to 26 May 2021;
    - Furloughing him between 1 February to 26 May 2021;
    - Not giving him set and clear duties between 9 June to 19 June 2021;
    - Having him use toilet and canteen facilities outside of his places of work between 26 May and 19 July 2021.

11. If so, was that treatment because of something arising in consequence of the claimant's disability? The "something" being his inability to wear a face covering because of his mental health disability as well as his need to be near toilet facilities due to his IBS.

12. If so, can the respondent show that the treatment is a proportionate means of achieving a legitimate aim?

Harassment- section 26 Equality Act 2010

13. Was the following conduct of the respondent unwanted conduct relating to the claimant's disability?

    - Being suspended?
    - Negative comments made by Ricky Burns on 10 March 2021, regarding claimant engaging his union to assist with his situation;
    - Not allowed to return to work between 27 January to 26 May 2021;
    - Being furloughed between 1 February 2021 to 26 May 2021;
    - Not being given set and clear duties between 9 June to 19 July 2021;
    - Having to use toilet and canteen facilities outside of his places of work between 26 May and 19 July 2021.

14. Did this unwanted conduct have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Remedy

15. To what compensation, if any, is the claimant entitled?

16. Should the Employment Tribunal make any recommendation and if so, what would be appropriate?