EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Steve Brown	**v**	**Openreach Limited**

Heard at: London Central
On:
From 26 September - 2 October 2023

Before: Employment Judge Hodgson
Ms G Carpenter
Ms P Keating

Representation
For the Claimant: In person
For the Respondent: Mr Sam Proffitt, counsel

JUDGMENT

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

2. **The claim of direct disability discrimination fails and is dismissed.**

REASONS

Introduction

1.1 By a claim filed on 21 October 2023, the claimant alleged he had suffered disability discrimination. The claims were unclear.

The Issues

2.1 There are claims of direct disability discrimination and failure to make reasonable adjustments.

2.2 At a case management hearing on 16 January 2023, EJ Isaacson consider the issues. Her note does not record whether she accepted there were any claims identified or properly pleaded in the original claim form. She recorded the allegations "provided by the claimant at the hearing." She stated the following:

> **The claimant's last allegation of discrimination relates to an incident that occurred after the claimant had presented his claim form. The claimant made an application to amend his claim and the respondent did not object to it. I have allowed the amendment. The allegations listed … under paragraph (5)(a) to (j) are accepted as further and better particulars and an amendment to the claimant's claim. The respondent is allowed to file and serve an amended response.**

2.3 EJ Isaacson recorded the claims at paragraph 5 as follows:

> **a) On 4 May 2022 the claimant was misled before the fact-finding meeting. The claimant overheard a supervisor and manager talk about a meeting the next day with him. He asked the manager for clarification, but the manager went on to another call. The claimant then sent a text to his manager Kevin Colmer to ask what the meeting was about, and he was told it was nothing to worry about it was just a conversation. The claimant then sent another text saying that he has social anxiety with Openreach managers, so he needs to know what it is about and was told it was just a casual chat. The next day at the meeting he was told it was a fact-finding meeting for gross misconduct which could lead to a disciplinary meeting - the claimant alleges this is direct discrimination and failure to make reasonable adjustments.**
>
> **b) On 10 June 2022 he raised a grievance that Openreach management style caused him mental health illness. His grievance was ignored other than an acknowledgment from HR. In August he chased up his grievance asking what was happening but did not get a response so he was forced to raise a second grievance- direct discrimination.**
>
> **c) On 17 June 2022 the claimant received in the post a misconduct investigation report from Kevin Colmer, which contained discriminatory comments. The mitigating circumstances put by the claimant that his state of mind and mental health illness was caused by Openreach was ignored. Openreach accepted the claimant had a mental health illness but did not accept this provided any mitigation for the gross misconduct allegation – direct discrimination and failure to make reasonable adjustments.**
>
> **d) On 5 September 2022 the claimant had to attend a disciplinary hearing despite notifying Openreach that it was his son's birthday. It is alleged that Luke Sheehan, in the disciplinary hearing, said to the claimant " you worked for the company for so long, if you felt you weren't being supported, why did you work for the company for so long?" The implication being why had he not left if he was not supported – direct discrimination and a failure to make reasonable adjustments.**

e) People with mental health illness should not be suspended as it is better for them to be kept in work, so they continue to be productive. The claimant had had a good sickness record until 2009 when due to the Openreach management style he had mental health illness – failure to make reasonable adjustments.

f) The respondent breached the ACAS code of conduct by not dealing with the claimant's grievance at the same time as his disciplinary. His disciplinary meeting was in June but his grievance was not dealt with until September, despite him raising a grievance on 10 June 2022 – direct discrimination.

g) The grievance outcome was incorrect as Openreach denied breaching the Acas code and the Health and safety executive advice – direct discrimination.

h) On return to work he was excluded from the Team WhatsApp group for a month – direct discrimination.

i) The claimant was excluded from the Christmas Team event email but did go to the event – direct discrimination.

j) On 20 December 2022 the claimant attended a course where the instructor said to everyone attending, not in confidence, that anyone with learning difficulties or mental health difficulties can have extra time. The claimant felt this forced people to say in public whether they had learning difficulties or mental health issues. The claimant failed the first test twice by one question. He was told to go home but said he wanted to stay to learn. He was allowed to stay. The next day his manager was questioning where he had been in the afternoon as he had been notified that the claimant had failed the course. He felt singled out and misled by the instructor as he had been told he could go home whereas his manager questioning where he had been suggested he should have gone into work that afternoon after failing the course – direct discrimination and failure to make reasonable adjustments.

2.4 It is clear that EJ Isaacson intended this to be a definitive record of the claims and issues.

2.5 The original claim form refers to disability discrimination, but makes no attempt to identify the type of discrimination. It would appear that this was discussed at EJ Isaacson's case management discussion and the claims were put as allegations of direct discrimination. At no time at the final hearing did the claimant seek to suggest that any claim was advanced either as harassment, or discrimination arising from disability.

2.6 The claim form makes no reference to reasonable adjustments, whether directly, or otherwise.

2.7 Items a, c, d, e, and j all refer to "failure to make reasonable adjustments." There is no attempt to set out the basis for these claims, or the way in which the duty arose. No provision criterion or practice is identified. No disadvantage is identified. No proposed adjustment is identified. At the final hearing, the claimant failed to clarify any failure to make reasonable adjustments claim.

2.8 On day one of the hearing, we noted the difficulties in the way the claims were pleaded, and the lack of detail. We invited both parties to set out in writing what they understood to be the claim for failure to make reasonable adjustments. We also invited the claimant to seek to amend, should he wish to.

2.9 The claimant gave no clarification.

2.10 The respondent set out its understanding of the reasonable adjustments claim in a note from counsel as follows:

> **1. R suggests as follows regarding C's reasonable adjustments claims and its understanding of them.**
>
> **Para 5a – "misled re fact-finding"**
>
> **2. R accepts that it has a PCP of not informing employees of the reason for a fact-finding meeting in advance.**
>
> **3. R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.**
>
> **4. R denies that informing C in advance was reasonable due to the potential adverse impact on the quality of the evidence received by way of fact-finding.**
>
> **Para 5c – "discriminatory comments in report"**
>
> **5. R does not accept nor understand any PCP in relation to this issue; it appears to be a reference to specific comments made in the investigation report, with no wider application to other employees.**
>
> **Para 5d – "disciplinary hearing on son's birthday"**
>
> **6. R accepts that it applied a PCP of notifying/arranging disciplinary hearings with employees without prior agreement.**
>
> **7. R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.**
>
> **8. R denies that the adjustment sought, namely rearranging to a date not on C's son's birthday removes any disadvantage caused by disability, and was therefore not reasonable.**
>
> **Para 5e – "suspension / alternative duties"**
>
> **9. R accepts that it applied a PCP of suspending any employee where considered reasonably necessary pending disciplinary investigation.**
>
> **10. R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.**
>
> **11. R denies that it was reasonable not to suspend C in this case given the potential adverse impact on the integrity of the investigation.**
>
> **Para 5j – "instructor course adjustments"**

12. R accepts that it (through its external training instructor agent) applied a PCP of inviting employees openly to identify if they needed extra time to complete a training assessment.

13. R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.

14. R denies that not advising employees of the right to extra time if needed was reasonable.

2.11 The claimant did not dispute this characterisation.

2.12 The tribunal is not permitted to adjudicate on claims that are not pleaded. We have therefore considered the direct discrimination claims, as set out in the amendments recorded by EJ Isaacson. If it were not for the respondent's clarification as to its understanding of the claim for failure to make reasonable adjustments, there would be no particulars of any reasonable adjustments before us at all. In the circumstances, we have considered the claim of failure to make reasonable adjustments, as the respondent understands it was advanced by the claimant.

Evidence

3.1 The claimant gave evidence and relied on his witness statement.

3.2 For the respondent we heard from Mr Kevin Colmer and Mr Luke Sheehan.

3.3 We received a bundle from the respondent.

3.4 The claimant indicated he had filed a hard copy of his bundle with the tribunal. The bundle was not located.

3.5 Both parties gave written submissions.

3.6 Various further documents were filed.

Concessions/Applications

4.1 The claimant sent a hard copy of his bundle of documents to the tribunal. Unfortunately, the bundle was not made available to the tribunal.

4.2 We discussed the claimant's documents on day one. The respondent confirmed that all documents supplied by the claimant had been incorporated in the main bundle. The case management order provided for the respondent to complete an agreed bundle.

4.3 The tribunal had no objection to the claimant providing further documents. It was agreed on day one that the claimant would refer, if necessary, to his own bundle, and the page numbers within that. To assist the tribunal, respondent's counsel would identify where the relevant document was in the trial bundle.

4.4 The claimant's bundle had still not been found by the tribunal on day two. The claimant raised a number of concerns on day two. In particular he stated the following: first he had suffered disadvantage by the bundle not being found; second, he referred to an email of 14 October 2022 and an email of 18 October 2022; third, he referred to evidence concerning his joining a WhatsApp group; and fourth, he referred to case law in relation to being misled by the respondents about attendance at a fact-finding interview.

4.5 The tribunal dealt with each these matters. In relation to the first matter, it was decided the claimant did not suffer any disadvantage. He was able to refer to his own bundle. It was feasible to identify, quickly, any document he was referring to and find it in the main bundle. (The tribunal notes the claimant referred to very few documents, and the failure to locate the bundle presented no difficulty at the hearing.) As for the remaining points, the claimant was advised to raise any matters he considered appropriate, first in cross examination thereafter in summing up.

The Facts

5.1 The respondent employed the claimant from 6 November 1989. His employment continues as an SD pole tester. At the material time that concerns us, his line manager was Mr Kevin Colmer.

5.2 The claimant has had several periods of time off work and alleges that he suffers from anxiety and depression. He alleges that the cause, or the most significant cause, of his mental health issues is the respondent's approach to management and the effect it has on him. We will set out the relevant facts concerning alleged disability when we consider disability below.

5.3 Much of the claimant's work is remote, either working on his own, or working with a colleague. The respondent has various forums, including WhatsApp groups, where colleagues can interact and where messages can be posted.

5.4 The respondent has a social media policy. It covers anything done online, including "posting comments, videos (including live streaming), pictures or photos and any forms of social media." It sets out a series of dos and don'ts. Employees are expected to be respectful and avoid being "aggressive, demeaning, discriminatory, threatening or abusive." They are asked to be careful about the tone employed. The policy sets out careful guidance in clear terms.

5.5 There is a standards of behaviour procedure. It confirms any serious breaches of the standards of behaviour policy may be viewed as gross misconduct. It also confirms inappropriate behaviour involving social media will be treated under the disciplinary policy.

5.6 There is a written disciplinary policy. It provides that for initial fact-finding meetings the employee "won't necessarily be given notice of the meeting." The respondent's witnesses confirmed that the standard practice is not to give an individual prior notice that any meeting is a fact-finding meeting. The policy considers what may be considered gross misconduct; it includes "seriously breaching our standards of behaviour policy." It refers to suspension and explains when that may occur, including the potential for the employee harming his or herself or other employees, or tampering with the investigation. It sets out the formal disciplinary process.

5.7 Prior to May 2022, the claimant made a number of posts on internal social media which the respondent considered to be inappropriate. The claimant does not dispute that a number of the posts were inappropriate. Mr Colmer had a number of conversations with the claimant about his use of social media.

5.8 On 26 April 2022, Ms Diana Roper wrote to Mr Colmer to raise concerns about posts the claimant had made on social media in the respondent's forum 'Workplace.' Mr Colmer considered this and undertook further investigations. He noted there had been previous discussions. He identified a number of posts which were of concern. He started the process of obtaining evidence. He decided it was appropriate to proceed with a fact-finding interview. On 3 May 2022, Mr Colmer sent the claimant an invitation asking him to attend a meeting. It stated "Please meet me in Minehead TE for a discussion." The claimant responded by text stating:

> **Got an email about a meeting in Minehead… What is this about?**

Mr Colmer responded

> **Just a meeting Steve**

The claimant responded

> **I get anxious mental health Issues social anxiety about meeting Openreach Management and My Life is very stressful at this Time… Finding Everything Hectic but doing a Days Work…**

Mr Colmer replied

> **Steve we will have a chat about any concerns tomorrow, you are aware of the EAP services should you feel you can make use of them. Will see you tomorrow.**

5.9 The claimant was aware of the posts he had made, and believed the meeting may relate to those posts.

5.10 The meeting proceeded. At the meeting Mr Colmer explained that he was conducting an investigation interview regarding alleged breaches of the social media policy and standards of behaviour policy. Mr Colmer asked the claimant if he was comfortable with the facilities. The claimant said

"I'm not comfortable, but carry on." The claimant did not ask for any adjournment. Mr Colmer asked the claimant about the posts. The claimant did not deny making the posts, or that they were inappropriate. He apologised.

5.11 Mr Colmer decided to suspend the claimant. The claimant had access to his work mobile phone and his work computer. He needed both in order to perform his duties. He would have been able to use the phone or laptop to change posts, and to make other posts. Previously, after there had been discussion about his behaviour, the claimant had made further posts, which Mr Colmer thought inappropriate. Mr Colmer thought it appropriate to suspend the claimant to preserve evidence and to prevent the claimant from making further inappropriate comments, while there was an investigation. Thereafter he prepared a report.

5.12 The investigation meeting took place on 4 May 2022. The claimant commenced sickness absence on 5 May 2022 citing stress and anxiety. The claimant was referred to occupational health on 7 June 2022, and undertook an assessment by telephone. On 13 June 2022, the respondent, on advice from occupational health, delayed the disciplinary proceedings. On 21 June 2022 the claimant was invited to undertake a meeting with his second line manager, Luke Sheehan. On 6 July 2022 a return to work interview took place. The claimant remained unfit for work.

5.13 The claimant attended the disciplinary hearing on 5 September 2022 and ultimately this led to a formal written warning for breaching the social media policy and standards of behaviour policy.

5.14 The claimant returned to work on 5 October 2022 under a return to work plan. This included "buddying up" duties.

5.15 The claimant raised a grievance in June 2022. It is unclear whether the grievance was sent on the 10 or 13 June. We do not need to resolve this, as it is not material to our findings. The grievance is dated 13 June 2022. We will refer to this as the first grievance.

5.16 The first grievance included a number of historical matters going back to March 2021 . (The grievance hearing identified matters going back to 2009, of which the claimant complained.) This was concerned largely with work issues, including safety matters. It included a narrative of events of 3 and 4 May 2022. It stated that he believed the meeting on 4 May 2022 was "about going live on FND pole testing systems." He was informed that the meeting was to discuss his posts on workplace. He states "I apologised to Kevin Colmer stating it wasn't personal and I have mental health problems. I had been silly and regretted my comments. I also said as a show of goodwill I wouldn't post on workplace anymore." His grievance went on to allege that "Kevin Colmer and Openreach as a collective have breached the health and safety at work act – causing myself stress and mental health illness." He then stated "The way I was

led to the fact-finding meeting was misleading and damaging to my health."

5.17 The claimant received a response from Ms Dawn Schwartz who stated she had been assigned the grievance complaint and said she would call him. The claimant accepts she did contact him. However, the grievance was not progressed. It is unclear why.

5.18 On 15 August 2023, the claimant wrote to Mrs Schwartz stating he was concerned he had heard nothing from her following his conversation on 22 June 2022. He asked for the "grievance case against me" to be "dropped."

5.19 On 21 August 2022, the claimant sent a further grievance in which he refers to "Advice from my legal representatives." He stated the three months taken was unacceptable and it had had a further detrimental effect on his mental health. He asked for the suspension to be withdrawn.

5.20 On 22 August 2022, Mrs Schwartz wrote to the claimant acknowledging the second grievance. She stated she would chase the matter up and soon a suitable person would be appointed.

5.21 The claimant's grievance was considered by a manager, Mr Jason Hume. We have not heard from him. This led to a meeting on 2 September 2022. He interviewed Mr Colmer, and Mr Ballam. He gave his decision of 13 October 2022. He accepted that no "BT passport" had been completed in June 2009, but he did not find it to be a breach. He did not consider the respondent had breached the Health and Safety at Work Act regarding the claimant's mental health and suspending him or that mismanagement had had a negative impact on his mental health. He did recommend a BT passport be put in place and that the claimant be given ongoing support with mental health issues. The report is careful and thorough. It identifies the relevant evidence, and attaches relevant documents.

5.22 To the extent we need to make further findings of fact, we will consider them in our conclusions.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

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

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Section 23 refers to comparators in the case of direct discrimination.

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**
>
> **(2) The circumstances relating to a case include a person's abilities if--**
>
> > **(*a*) on a comparison for the purposes of section 13, the protected characteristic is disability;**
> > **(*b*) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.**

6.5 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> > **(a) an employment tribunal;**
> > **(b) …**

6.6 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Appendix
(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) 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.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on

the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.7 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

(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) …

(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.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) …

6.8 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

"… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that

> **duty. There must be evidence of some apparently reasonable adjustments which could be made."**

6.9 We have considered the respondents submission on the law . in Particular we note the following submissions from the respondent.

> **4. A distinction can be drawn between clinical anxiety/depression, and reactions to adverse life events and/or medicalisation of employment problems; the latter of which do not amount to mental impairments – *J v DLA Piper UK LLP [2010] ICR 1052.***
> **5. A stress reaction to perceived unfair treatment and unhappiness without evidence of a wider long term substantial adverse effect on day-to-day activities does not amount to a mental impairment nor disability; entrenchment of that perception may mean such symptoms last for a long time without there being any "long term" impairment – *Herry v Dudley Metropolitan Council [2017] ICR 610* .**

6.10 We note para 56 from **Herry**:

> **56. Although reactions to adverse circumstances are indeed not normally long- lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess.**

Conclusions

Disability

7.1 It is the respondent's position the claimant does not suffer an impairment which would constitute a disability. It states:

> **3. Where C relies on GP notes to prove disability, and those notes are not sufficient to draw safe inferences, they fail to discharge their burden – Royal Bank of Scotland PLC v Morris [2011] UKEAT/0436/10**
>
> **4. A distinction can be drawn between clinical anxiety/depression, and reactions to adverse life events and/or medicalisation of employment problems; the latter of which do not amount to mental impairments – J v DLA Piper UK LLP [2010] ICR 1052**

7.2 The respondent accepts that if there is a mental impairment, the causation is irrelevant.

7.3 We note the following extract from paragraph 56 **Herry**:

> **…Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment Tribunal to assess.**

7.4 It is therefore necessary to consider what is said to be the impairment and to review the relevant evidence, including any medical evidence. It is not for the tribunal to make a diagnosis. There may be underlying conditions which cause or contribute to depression. In the case of impairment such as depression, it is the fact of the depression which is important, not necessarily any underlying condition.

7.5 A tribunal may be satisfied that there is an impairment, even when there is no medical diagnosis.

7.6 If there is an impairment, it is necessary to consider whether it has a substantial adverse effect on day-to-day activity and whether the effect of the impairment is long term. It may be long-term if it has lasted for at least 12 months, is likely to last at least 12 months, or it is likely to last the rest of a person's life. If the impairment ceases to have the substantial adverse effect, it will be treated as long-term if it is likely to recur. Where a person receives treatment, an impairment is to be treated as having a substantial adverse effect if it would have that effect, but for the measures taken to treat it.

7.7 The GP notes do not predate 2011. We accept that the notes are incomplete, but those are the notes supplied by the GP. We accept the claimant's evidence that in 2009 he attended his GP with symptoms of depression. He had difficulty concentrating. His sleep pattern was badly affected including sleeping too much and too little. His work was affected. His partner noted that his personality had changed. He was prescribed antidepressants (citalopram). We accept the claimant's evidence that he was suffering what he termed depression, and that this was accepted by his doctor.

7.8 It is claimant's case that he continued to take antidepressants until around 2020. It appears to us that he may be mistaken, as there appears to be in a gap. However, the GP notes do not in this case, as sometimes they do, have a section recording all medication received.

7.9 The GP's record on 8 February 2011 records "anxiety with depression (first)[patient history] and suicidal ideation made worse by redundancy threat." We note that the claimant had changed his GP.

7.10 On 6 June 2015, he consulted his doctor and referred to ongoing work related stress problems; the record states "had citalopram before which

helped." Citalopram was prescribed again. The GP records the claimant did not want to take time off work. In 2015 there are various notes which appear to relate to repeat prescriptions of citalopram.

7.11 The GP note from 23 October 2015 states "struggling with stress and depression, concentration poor and feeling fatigued. Asking if he can have something 'stronger' than the citalopram he is taking." It is noted that work was organising counselling and he was "not fit to work at present." He was issued with certificates recording "work related stress/depression and fatigue."

7.12 There are various other entries which we do not need to record in detail. It is apparent that he started to take sertraline round 2016. There does not appear to be any attendance from 2016 to 2020. It appears that he stopped taking sertraline in 2020 but has since resumed.

7.13 It is the respondent's case that the claimant has "self-diagnosed a host of mental impairments, including post-traumatic stress disorder." The respondent states there has been no diagnosis from a medical practitioner. The claimant refers to psychological rumination and anger rumination and social anxiety with Openreach management. The respondent notes that it is not for the ET to "fill in evidential gap through assumption." The submissions go on to say the respondent "submits that … the only safe inference to draw from the medical evidence is that C was having stress reactions to work, and has not proven that he was ever suffering from underlying clinical mental impairment."

7.14 We have considered the evidence carefully. We are satisfied that his GP has referred to depression stress and anxiety at various times. The claimant has been treated for depression. This is consistent with his absence record, which records absences for sickness/anxiety on 26 June 2015, 16 October 2015 – 14 January 2016, and from 5 May 2022, to the date of the report. The claimant has since returned to work.

7.15 There is no doubt the claimant has negative feelings about his employer, and its managers. He describes them as "institutionalised." The claimant's negativity is consistent with a hostility, as exhibited before us, and as illustrated by his various posts about the respondent. It is clear that he largely blames management for his mental health problems, albeit at times, at least before the tribunal, he was prepared to accept that the respondent had acted reasonably at times.

7.16 At paragraph 56, Herry states

> **There is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities.**

7.17 This description does not characterise the claimant's condition.

7.18 The claimant has a history of depression going back to 2009. In 2011 there was suicidal ideation. He had further problems in 2015. He had significant time off work in October 2015.

7.19 The claimant focuses so strongly on what he perceives to be the responsibility of the respondent that he has failed to spell out his difficulties as clearly as he might. There may be many reasons for this, which we do not need to explore. We are satisfied that the claimant has suffered from depression and that this is an impairment. We are satisfied it has had a substantial adverse effect on day-to-day activity going back to 2009. It has affected the claimant's ability to concentrate. It has affected his ability to attend work. It has affected his concentration and performance at work. He has had general symptoms of depression, including lethargy, sleeping too much, and sleeping too little. It has affected his interpersonal relations and his ability to function generally. We are therefore satisfied that the impairment has had a substantial adverse effect.

7.20 We have no direct medical evidence on the effect of antidepressants. However, the normal effect of antidepressants is to mask the symptoms of depression and allow a person to function. This is consistent with the medical notes. Absent the medication, we find the symptoms would be significantly worse and he would continue to have substantial adverse effects on day-to-day activity.

7.21 We accept that the impairment is long-term. It is the claimant's case that it has continued since 2009. There is a strong argument for that. Absent the antidepressants, the impairment would have continued for a year after it first started. In any event, if it ceased at any stage after 2009 to have substantial adverse effect on day-to-day activity, it is clear that it is recurring, there having been further episodes in at least 2015 and 2016. Having reoccurred on those dates, in our view it is likely to recur again. The depression worsened again in 2022. We find it was long-term either because it lasted more than the year, or it was likely to recur. The exact date is of little relevance to this case. On the balance of probability, we find that it was long-term by no later than 2010, and in any event was likely to recur. Certainly, by the time there was a further episode no later than 2015, it was likely that it would recur after that. This put the final possible date for disability 2015.

<u>Direct disability</u>

7.22 When considering direct disability discrimination, it is necessary to have in mind the characteristics of the comparator as defined by section 23 Equality Act 2010. In the case of disability discrimination, the material circumstances of the comparator must include the person's abilities. The abilities are likely to include limitations caused by the disability itself. It follows that the nature of direct discrimination, for the protected characteristic of disability, may be narrow. The reverse burden of proof

applies. For the burden to shift, there must be facts, whether established by the claimant or otherwise, from which we could conclude that it was the disability which caused the treatment said to be less favourable. We bear in mind that if the reason for the treatment is a matter arising in consequence of disability, the claim would be pursued as section 15 Equality Act 2010 claim, but there is no such claim before us.

7.23 If the burden shifts, it is for the respondent to show that it did not contravene the relevant provision. In so doing, it must prove its explanation on the balance of probability. We may expect the respondent to produce cogent evidence, where it does or should exist.

7.24 We will now deal with the various allegations. For convenience we will set them out in chronological order, as far as is practicable.

5(a) On 4 May 2022 the claimant was misled before the fact-finding meeting. The claimant overheard a supervisor and manager talk about a meeting the next day with him. He asked the manager for clarification, but the manager went on to another call. The claimant then sent a text to his manager Kevin Colmer to ask what the meeting was about, and he was told it was nothing to worry about it was just a conversation. The claimant then sent another text saying that he has social anxiety with Openreach managers, so he needs to know what it is about and was told it was just a casual chat. The next day at the meeting he was told it was a fact-finding meeting for gross misconduct which could lead to a disciplinary meeting - the claimant alleges this is direct discrimination and failure to make reasonable adjustments.

7.25 The claimant failed to establish in what way he was misled. Mr Colmer declined to tell him he was attending a fact-finding meeting. He did not tell him that the meeting was of a different nature. The claimant was not misled. He was not told it was a "casual chat." He was told it was "just a meeting." This is not misleading. He was not told it was nothing to worry about.

7.26 Not giving advance warning that a meeting is a fact-finding meeting is consistent with the respondent's policy and practice. There is nothing to suggest that a comparator, being a person in the same material circumstances, including abilities, would have been treated differently. There is no fact which turns the burden.

7.27 In any event, the respondent establishes its reason. There is clear evidence that the claimant had breached the social media and behaviour policies. He had been spoken to previously. Further concerns had been raised. Further information had been obtained. There were clear and rational grounds for believing that the claimant could seek to interfere with the evidence if he were given advance notice. Mr Colmer took the approach he did because that was the approach that he always took, and he believed it to be consistent with the respondent's policies. The claim of direct discrimination fails.

5(e) People with mental health illness should not be suspended as it is better for them to be kept in work, so they continue to be productive. The claimant had had a good sickness record until 2009 when due to the Openreach management style he had mental health illness – failure to make reasonable adjustments.[1]

7.28 The respondent suspended the claimant because there was clear evidence that he had made inappropriate posts. Previously when spoken to about previous inappropriate posts, he had made further inappropriate posts. There was a concern that the claimant may tamper with evidence, and in any event make further posts.

7.29 Mr Colmer thought it appropriate to remove the claimant's laptop and work phone. It follows the claimant would not be able to work. Therefore, the claimant was suspended. There is no fact that would suggest this has anything to do with the claimant's disability. We have to consider the motivation, whether conscious or subconscious, of Mr Colmer. Mr Colmer establishes his explanation on the balance of probability. The claim of direct discrimination fails.

5(b) On 10 June 2022 he raised a grievance that Openreach management style caused him mental health illness. His grievance was ignored other than an acknowledgment from HR. In August he chased up his grievance asking what was happening but did not get a response so he was forced to raise a second grievance- direct discrimination.

7.30 It is agreed the claimant raised a grievance on or about 10 June 2022. His grievance was acknowledged by HR. It is unclear why there was delay in taking action. Action was taken, and the grievance resolved. Prior to then, a second grievance was sent. The fact that there was delay, and the fact that the claimant is disabled, is not enough to shift the burden. We have not received a specific explanation for why it was delayed. It is apparent that there were ongoing difficulties. The claimant was absent. The disciplinary process was proceeding, which had been delayed by way of reasonable adjustment. This was consistent with the occupational health report. There is nothing in the background facts which would indicate that the reason for delay was the claimant's disability. The claimant must be compared to someone in the same material circumstances, which would include and individual who was absent, who was facing disciplinary proceedings, and for whom disciplinary proceedings had been delayed following an occupational health report. The comparator would also have the same abilities of the claimant. No fact indicates that the comparator would have been treated differently. There is no fact from which we could find the burden shifts. This claim fails.

5(c) On 17 June 2022 the claimant received in the post a misconduct investigation report from Kevin Colmer, which contained discriminatory comments. The mitigating circumstances put by the claimant that his state of mind and mental

[1] This refers to the suspension on 4 May 2022.

health illness was caused by Openreach was ignored. Openreach accepted the claimant had a mental health illness but did not accept this provided any mitigation for the gross misconduct allegation – direct discrimination and failure to make reasonable adjustments.

7.31 The claimant identified, during evidence, the alleged discriminatory comment. The report has the following words, "While it is accepted that Steve has ongoing mental health issue this does not provide mitigation for his actions." This appears under a section which is a summary of the facts and the investigation manager's recommendation.

7.32 We find that this statement could have been worded more appropriately. However, it was legitimate for Mr Colmer to give his opinion by way of recommendation. The matter was ultimately heard by Mr Sheehan and he made his own decision.

7.33 Mr Colmer was entitled to come to a view as to whether the claimant's mental health condition caused him to breach policy by writing inappropriate posts, including comments about Mr Colmer.

7.34 The claimant's evidence before us fell short of suggesting that he did not know what he was writing, or that he had no responsibility for it. The claimant has a negative view of the respondent and its management. There is no evidence to suggest that the posts arise out of the impairment, being depression. Mr Colmer was not bound to accept the claimant's assertion that, in some manner, the post made by the claimant were because of his disability.

7.35 To succeed on the direct discrimination case, there would have to be facts from which we could conclude that the comparator, being someone in the same material circumstances, including the same abilities, would have been treated better than the claimant. Put another way, Mr Colmer would refrain from making the comment for the comparator. There is no fact which would suggest that. The burden does not shift.

7.36 In any event, Mr Colmer establishes his explanation. He genuinely believed that the post made by the claimant was not caused by his disability.

5(d) On 5 September 2022 the claimant had to attend a disciplinary hearing despite notifying Openreach that it was his son's birthday. It is alleged that Luke Sheehan, in the disciplinary hearing, said to the claimant " you worked for the company for so long, if you felt you weren't being supported, why did you work for the company for so long?" The implication being why had he not left if he was not supported – direct discrimination and a failure to make reasonable adjustments.

7.37 There appear to be two allegations. The first is unclear and relates to the claimant attending a disciplinary hearing, despite it being his son's birthday.

7.38 When the disciplinary hearing date was set, Mr Sheehan did not know that the date was on the claimant's son's birthday. The claimant accepted the invitation, but noted that it was his son's birthday. The claimant did not request an adjournment or postponement. Had the claimant requested a postponement, Mr Sheehan would have allowed two postponements as of right, regardless of reason.

7.39 It is unclear what the claimant says is less favourable treatment. The meeting date was random. It proceeded because the claimant did not object. This has nothing to do with the claimant's disability. The burden does not shift. The explanation is established.

7.40 The second element relates to the specific words used. Mr Sheehan asked why the claimant had worked for the company for so long, given that he appeared to be unhappy. Mr Sheehan accepts those words were use. It was part of a longer conversation. He was exploring the claimant's general unhappiness. That exploration took place because the claimant put it in issue. There is no reason why Mr Sheehan should not have explored the position. The claimant's overall view of the respondent was relevant to the reason why he made the posts, then relevant to what sanction, if any, should be applied. There is no fact from which we could find that the reason was the claimant's disability.

7.41 There is no fact from which we could conclude a comparator in the same material circumstances, including the same abilities, would have been treated differently. In any event, the explanation is made out.

5(f) The respondent breached the ACAS code of conduct by not dealing with the claimant's grievance at the same time as his disciplinary. His disciplinary meeting was in June but his grievance was not dealt with until September, despite him raising a grievance on 10 June 2022 – direct discrimination.

7.42 The claimant was unclear as to which provision of which code he was referring to. We have considered the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 (the Code). Paragraph 46 provides:

> **Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with a grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.**

7.43 There is no obligation to deal with them together, or to suspend a disciplinary procedure

7.44 There was little if any overlap between the grievance and the disciplinary cases factually. Undoubtedly, the two were linked in the claimant's mind.

7.45 The allegation fails on its facts. There was no breach the code.

7.46 The respondent establishes it explanation. The grievance and disciplinary were dealt with by separate managers. Mr Sheehan was not, at any time, made responsible for the grievance, so he simply proceeded with the disciplinary. The allegation fails.

5(g) The grievance outcome was incorrect as Openreach denied breaching the ACAS code and the Health and safety executive advice – direct discrimination.

7.47 The claimant was unable to identify at any time what was said to be the breach of the ACAS code. He explained to us that he believed the grievance should commence within five days. That is not contained within the ACAS Code 2015. There is a reference in the ACAS Guide: Disciplinary and Grievances at Work 2019 at 4.25. This suggests that, ideally, meeting should be arranged in five working days. That is not part of the Code; it is unclear what the claimant envisages by "health and safety executive advice." He never identified this adequately.

7.48 There is no fact from which we could find that any reason for delay was because of the claimant's disability. The comparator would be in the same material circumstances, which would include being someone who was facing the same disciplinary procedure, and who was absent from work due to ill-health, and who had been referred for an occupational health report. The logic of the claimant's case is that the comparator would have had a grievance hearing arranged within five days. There is no fact from which we could find that. There is no breach of the Code.

7.49 The grievance proceeded when an individual was appointed. There is no fact from which we could find direct discrimination.

5(h) On return to work he was excluded from the Team WhatsApp group for a month – direct discrimination.

7.50 There were a number of WhatsApp groups. Only one of those groups was set up by Mr Colmer, and that related to individuals performing the claimant's role. He set up the group in July 2022. At that time the claimant's phone, on Mr Colmer's unchallenged evidence, was not registered, and Mr Colmer was not added when the group was set up. The claimant returned to work in October. There was a delay of approximately three weeks before the claimant was added. The claimant was added immediately it was brought to Mr Colmer's attention by a colleague that he was missing from the group.

7.51 There is no fact which could turn the burden. In any event, the claimant's explanation is a complete defence.

5(i) The claimant was excluded from the Christmas Team event email but did go to the event – direct discrimination.

7.52 The claimant clarified the email in question was sent on 18 October 2022. The claimant had previously been made aware of the Christmas party by

email dated 14 October 2022, albeit that was not the primary purpose of that email. The claimant was not in the lengthy distribution list for the email of 18 October. The email of 14 October was sent by Mr Colmer. The email of 18 October was sent by Mr Jackson. We have not heard from Mr Jackson. The fact that the claimant was not on the distribution list, and the fact the claimant has a disability is not enough to turn the burden.

7.53 The claimant attended the Christmas party. His diary was blanked out so that he could do so. It is clear that it was always intended that he should attend. This is inconsistent with some deliberate attempt to not invite him. It would have been possible for the claimant to ask Mr Jackson why he was not on the list, or to request that he be included on the distribution list. The claimant was aware of the email as a colleague sent it to him, on the claimant's evidence, within two days. The claimant has refused to give details of who disclosed it, or any correspondence relevant to that disclosure.

7.54 This allegation fails; the claimant was not excluded.

5(j) On 20 December 2022 the claimant attended a course where the instructor said to everyone attending, not in confidence, that anyone with learning difficulties or mental health difficulties can have extra time. The claimant felt this forced people to say in public whether they had learning difficulties or mental health issues. The claimant failed the first test twice by one question. He was told to go home but said he wanted to stay to learn. He was allowed to stay. The next day his manager was questioning where he had been in the afternoon as he had been notified that the claimant had failed the course. He felt singled out and misled by the instructor as he had been told he could go home whereas his manager questioning where he had been suggested he should have gone into work that afternoon after failing the course – direct discrimination and failure to make reasonable adjustments.

7.55 The respondent accepts that the instructor stated those who needed extra time would be allowed to take extra time.

7.56 Making an adjustment, where appropriate, to allow extra time to complete an exam was standard procedure; it reflects a wish to make reasonable adjustments. The facts are consistent with the instructor raising its because that was the standard procedure. It is arguable that it was insensitive, but we have limited evidence.

7.57 The claimant's evidence was that he did not mind asking for extra time or referring to his disability in front of others.

7.58 There is no fact from which we could find that the instructor would have behaved differently towards the comparator in the same material circumstances of the claimant, including abilities. In any event the explanation is established. The questions was asked as it reflected the policy respondent make reasonable adjustments.

7.59 It follows all claims direct discrimination fail.

7.60 We next turned to the allegations of failure to make reasonable adjustments.

Failure to make reasonable adjustments

7.61 As noted, the claimant failed to set out anywhere, in any document, the basis of his claim of failure to make reasonable adjustments. The case management order of EJ Isaacson, in relation to a number of the allegations, simply refers to failure to make reasonable adjustments. It is unfortunate that the PCPs and the disadvantage caused were not identified.

7.62 It is the respondent's understanding, to the extent that the claim can be understood at all, that the claimant is relying on provisions,, criteria or practices (PCPs).

7.63 It is necessary to establish the provision, criterion or practice, and the substantial disadvantage when compared with persons who are not disabled, and the proposed reasonable adjustments. We need to consider whether it is reasonable for the respondent to have to make those adjustments.

7.64 In relation to each claim, we will consider each of those elements. We have regard to the respondent's note on reasonable adjustments. We will set out the respondent's note on reasonable adjustments for ease of reference.

Para 5a – "misled re fact-finding"
2. R accepts that it has a PCP of not informing employees of the reason for a fact-finding meeting in advance.
3. R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.
4. R denies that informing C in advance was reasonable due to the potential adverse impact on the quality of the evidence received by way of fact-finding.

7.65 The respondent accepts that it had a PCP of not informing employees in advance that a meeting would be a fact-finding meeting. To the extent the claimant identifies any disadvantage it is the raising of social anxiety. However, he does not say that it was the lack of knowledge of the purpose of the meeting that caused anxiety to rise. It was the fact of the meeting. It is unclear whether he would have faced greater anxiety knowing it was a fact-finding meeting. He gives no evidence on the point, so we cannot find it as a fact.

7.66 In any event, there is no evidence on which we could find that the comparator would have suffered less anxiety in relation to being asked to attend a meeting, the purpose of which was not made clear.

7.67 The claimant has not set out what adjustment should have been made. It may be implicit that the adjustment would have been telling him the nature of the meeting. It is far from clear that this would have alleviated any anxiety. It may have increased anxiety.

7.68 In any event, we do not find that it was reasonable for the respondent to have to make the adjustment of telling him, in advance, that the meeting was to find facts for the purposes of a possible disciplinary investigation. The respondent has given rational grounds for why it was concerned that the claimant may tamper with evidence or send further inappropriate posts. It was clearly in Mr Colmer's mind that he may need to suspend the claimant and remove his telephone and laptop. This reflected an appropriate business need, and there was no reason to believe that telling the claimant in advance that it was a fact finding hearing would alleviate anxiety; it may have done the opposite.

7.69 This claim of failure to make reasonable adjustments fails.

Para 5c – "discriminatory comments in report"

1. R does not accept nor understand any PCP in relation to this issue; it appears to be a reference to specific comments made in the investigation report, with no wider application to other employees.

7.70 The respondent does not understand what is said to be the PCP. It is equally unclear to the tribunal. It is possible that a single act could be a practice. To the extent there is any PCP, it appears there is general practice of putting the report in writing, and making recommendations. Mr Colmer rejected the claimant's mitigation. It is unclear why that put the claimant at a substantial disadvantage when compared to people who are not disabled, who may have had their reason for mitigation rejected. Rejecting the reason for mitigation may cause stress, whether the person is disabled or not.

7.71 It is unclear what the claimant says is the proposed adjustment.

7.72 The claimant's evidence suggested that Mr Colmer should not have made any comment at all and/or he should come to a different conclusion. To the extent any of that can be seen as a request for an adjustment, is it reasonable for the respondent to have to make that adjustment? It appears the claimant disliked Mr Colmer's conclusion.

7.73 Mr Colmer was entitled to make recommendations. Mr Sheehan was free to reject them. It may be that Mr Colmer could have worded it better, but it would neither be reasonable to have to make no suggestion, or to be constrained to come to a different answer. This allegation fails.

Para 5d – "disciplinary hearing on son's birthday"

2. R accepts that it applied a PCP of notifying/arranging disciplinary hearings with employees without prior agreement.

3. *R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.*
4. *R denies that the adjustment sought, namely rearranging to a date not on C's son's birthday removes any disadvantage caused by disability, and was therefore not reasonable.*

7.74 The respondent accepts there is a PCP of notifying/arranging disciplinary hearings with employees without prior agreement. The particular disadvantage is unclear. The claimant may have been distressed by the appointment being on his son's birthday. There is no evidence that his distress would be greater than a person who is not disabled. Making the initial appointment was not a breach of duty. However, if it were a breach of duty, we cannot accept the respondent has failed to make reasonable adjustments. The claimant did not ask to move the date. Had he done so, he would have been granted the right, regardless of disability. Effectively, the adjustment would have been made. It is not reasonable to have to make an adjustment in a situation where the claimant could have asked for a different date, but chose not to, and confirmed that the hearing should proceed.

Para 5e – "suspension / alternative duties"

5. *R accepts that it applied a PCP of suspending any employee where considered reasonably necessary pending disciplinary investigation.*
6. *R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.*
7. *R denies that it was reasonable not to suspend C in this case given the potential adverse impact on the integrity of the investigation.*

7.75 The respondent accepts there is a PCP of suspending any employee when it is considered reasonably necessary prior to a disciplinary investigation. The particular disadvantage alleged by the claimant is unclear. He stated that it is important for disabled people to work. That is undoubtedly true. However, it is far from clear that a suspension from work, would have caused any greater alarm, distress, or difficulty for the claimant than for a comparator.

7.76 The adjustment requested appears to be refraining from suspension. We find it is not reasonable for the respondent to have to make that adjustment. The respondent wished to ensure that evidence was preserved, and that the claimant did not make any further comments by making inappropriate posts whilst the disciplinary procedure ran its course. The respondent had proper grounds to believe the claimant may make inappropriate posts, as he had done so before when his behaviour had been discussed. It was reasonable to seek to preserve evidence. We note that the period of suspension was quite prolonged; the claimant did not return until October. However, it is likely that the period would have been shorter had the claimant not started sickness absence the following day and had there been no need for an occupational health report, which led to further delay by way of reasonable adjustment. It is far from clear that the claimant developed stress at that time because of the suspension,

as opposed to his facing disciplinary proceedings. It cannot be assumed that he would have continued working had he not been suspended. In the circumstances we find it is not reasonable for the respondent to have to make that adjustment.

Para 5j – "instructor course adjustments"

8. *R accepts that it (through its external training instructor agent) applied a PCP of inviting employees openly to identify if they needed extra time to complete a training assessment.*
9. *R denies that C was at a particular disadvantage, or that it knew of any such disadvantage.*
10. *R denies that not advising employees of the right to extra time if needed was reasonable.*

7.77 The respondent accepts that the instructor applied a PCP of inviting employees to identify if they needed extra time completing a training assessment. It appears to be the claimant's case that, in theory, this may cause distress to disabled employees who may request extra time.

7.78 As to the adjustment, the claimant appears to say that the question should have been asked more discreetly, perhaps before the course. There is some force in this. However, on the facts of this case the claim cannot succeed. The claimant's evidence is that he did not mind either disclosing his disability or asking for extra time. He was at no substantial disadvantage compared to a comparator. In the circumstances, the respondent did not breach the duty as regards the claimant. As regards the claimant, it was not reasonable for the respondent to have to make that adjustment, as the claimant clearly did not object to being asked openly, or to giving his answer openly.

7.79 It follows that all claims of failure to make reasonable adjustments fail.

7.80 For the reasons we have given, we dismiss the claims.

_____

Employment Judge Hodgson
Dated: 24 November 2023

Sent to the parties on:

24/11/2023

For the Tribunal Office