Case Number: 1802413/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Clothier	v	Nestle UK Ltd

Heard at: Sheffield **On**: 2, 3, 4, 5, 6 and 20 October 2023

Before: Employment Judge A James
Ms J Lancaster
Mr K Smith

Representation

For the Claimant: Ms L Halsall, counsel

For the Respondent: Ms C Millns, counsel

JUDGMENT

(1) The claims for detriment on the ground of protected disclosures (s.47B Employment Rights Act 1996) are not upheld and are dismissed.
(2) The claims for direct disability discrimination (s.13 Equality Act 2010) are not upheld and are dismissed.
(3) The claims for indirect disability discrimination (s.19 Equality Act 2010) are not upheld and are dismissed.
(4) The claims for failure to make reasonable adjustments (ss.20 and 21 Equality Act 2010) are not upheld and are dismissed.
(5) The claims for disability related harassment (s.26 Equality Act 2010) are not upheld and are dismissed.

REASONS

The issues

1. The agreed issues which the tribunal had to determine are set out in Annex A.

The proceedings

2. Acas Early Conciliation took place between 25 January and 8 March 2021. The claim form was issued on 6 April 2021. The claim form raised allegations of whistleblowing detriment and disability discrimination.

3. On 7 May 2021, Amended Particulars of Claim were sent to the tribunal. On 24 May 2021, the tribunal dismissed the claimant's claim of unfair dismissal, that claim having been withdrawn. The tribunal directed the claimant to make a formal application if he wanted to amend his claim and/or to add Catherine Spinks as a third respondent. A formal application was made on 9 June 2021. Further preliminary hearings took place on 22 October 2021, 4 May 2022, 2 August 2022, 31 October 2022, and 19 April 2023.

4. At the preliminary hearing on 4 May 2022, the claimant's claim against the second respondent was withdrawn. The wrongful dismissal claim was dismissed on withdrawal and the claimant's application to amend the first claim was determined. Some of the amendment applications were allowed, some were refused. The list of issues reflects the claim as amended.

5. A second claim form had been issued on 22 April 2022 claiming discrimination and unlawful deduction from wages. At the preliminary hearing on 31 October 2022, the unlawful deduction of wages claim was dismissed on withdrawal and the second claim was dismissed in its entirety on withdrawal. Further case management orders were made to ensure that the hearing could proceed smoothly on the agreed dates.

The hearing

6. The hearing took place over six days. Evidence and submissions on liability were dealt with on the first five days. The Tribunal then met in private to arrive at its decision on the remainder of the fifth day and on a further day arranged by the tribunal. Judgment was reserved.

7. The tribunal heard evidence from the claimant, Mr Robert Whitehead and Mr Andrew Chapman; and for the respondent, from Mr Gary Toes, CF-2 Shift Manager, and Mr David McGhin, (who was the Warehouse Manager during the period to be considered in these proceedings). Due to evidence given by the claimant during cross examination, the tribunal allowed the addition of a short witness statement from Neil Coote, also a Shift Manager, who then gave evidence in person too. There was an agreed hearing bundle of 834 pages and a supplementary bundle from the claimant of 38 pages.

8. A limited number of documents were added to the bundle by both parties, by agreement, during the hearing. The tribunal is grateful to the parties for their pragmatic approach to the further evidence introduced during the hearing.

Findings of fact

Commencement of employment

9. The claimant started work for the respondent on 1 June 1999 in the role of Warehouse Operative at the respondent's York site. The respondent is a well

known food manufacturing company producing confectionery products and other food products across the UK and internationally.

10. The claimant's contract entitled him to up to 52 weeks discretionary sick pay in a rolling twelve month period. Following the first Covid-19 lockdown, the company entered into discussions with the trade union and agreed temporary changes to the discretionary sick pay scheme whilst the company was providing full contractual pay for clinically extremely vulnerable people and people with caring responsibilities for clinically extremely vulnerable people at home. Factors to be taken into account in deciding whether sick pay would continue to be paid, included the employee's past sick pay record, occupational health reviews, any evidence from a GP or specialist and whether any adjustments or additional support could be put in place.

11. The disciplinary procedure states at 2.2:

    Suspension

    In serious cases where the matter may be considered potential gross misconduct, the worker may be suspended while an investigation takes place. The suspension will be with full contractual pay. If as a result of the investigation no disciplinary action is taken, then any overtime that would have been worked will be reimbursed.

Disability issue

12. In 2004 the claimant was involved in a fire at his home. This resulted in the claimant suffering severe burns and being psychologically traumatised. Over 33% of the claimant's body was subject to significant burns and he was given extensive skin grafts. The skin grafts were taken from 47% of the claimant's body area.

13. The claimant underwent a series of operations as an inpatient and had operations over a number of years as an outpatient, most recently in 2021. The claimant was diagnosed with PTSD and depression by Dr K Ford, a Clinical Psychologist, who was based at Pinderfields Hospital. He notes that the claimant was '*presenting with post-traumatic stress disorder and depression*' on 27 January 2006. The claimant received specialist treatment until the end of 2008 from Dr Ford.

14. The claimant's disability impact statement refers, amongst others, to the following symptoms which he says he has suffered since 2004:

    a) Anxiety attacks;

    b) Anxiety/fear of enclosed spaces, lack of ventilation, heat, fire safety measures and lack of safe and clear exit routes; …

    g) Poor memory/recollection;

    h) Poor attention span/concentration;

    i) Constant periods of taste/smell of smoke;

    j) Avoidance; ….

    o) Constant hypervigilance to risk;

    p) Sleep deprivation;

    q) Flashbacks; …

s) Nightmares;

t) Feelings of guilt;

u) Depression; ….

x) Severe disfigurement leading to negative, intrusive thoughts regarding appearance - think of self as a "freak";

y) Stayed away from any social and romantic relationships because of negative feelings and thoughts regarding my disfigurement for over 9 years - even after that I was very limited in terms of any social or romantic relationships. I was very self-conscious and had real difficulties in establishing relationships with new people; and

z) Lack of confidence/self-esteem and physical image of self-due to scarring chronic disfigurement.

15. The claimant used physical activities and exercise as a means of coping with the effect of the above. When outdoor exercise was restricted during the pandemic, that severely restricted the extent to which he was able to exercise outdoors.

16. As for impact on normal day to day activities, the claimant refers at paragraph 25 of the impact statement to the following (two asterisks indicating affects on the claimant's mental health, those in square brackets having been added by the tribunal):

a) Limits social and leisure activities [**] - and ;

*b) Remaining outside the house sometimes for longer periods than necessary, this is the usual status quo when not in the pandemic**;*

*c) Conversely, with the pandemic and the "risk" being outdoors, then [not] leaving the house unless necessary**;*

d) Restricting people who I meet/socialise with and have relationships [**];

*e) Unable to go to new places/areas/buildings etc without experiencing severe anxiety, needing to try and plan ahead, discuss with people what safety measures, exits etc are in place wherever possible**;*

*f) Having severe anxiety about new places where the above is not possible, avoiding going to new places because of this unless essential**·,*

*g) Must feel "secure" and safe with visible exits/exit routes/signage and unblocked exits**; …*

*i) Poor memory and recollection**;*

*j) Poor attention/lack of ability to concentrate on normal everyday tasks and social conversations -- when concerned about risks, have intrusive thoughts and how people perceive me (disfigurement)**;*

*k) Since before the accident I was confident and was a leader, and now I am reluctant to join in a conversation - I am not confident I belong or don't fit it in because of what happened, who I am and how I look I don't fit in anymore**:*

*l) Dress/wear clothes to not bring attention to me so I am not noticed and try to hide my disfigurement**;*

*m) Easily distracted by intrusive thoughts and anxiety symptoms causing panic attacks**; …*

*n) Suicidal thoughts, plans and ideas**; …*

q) Repeating myself in conversations, forgetting things people have told me which I find embarrassing [**];

v) Strong feelings of loathing regarding self, shame, embarrassment as to what occurred and how I now look and the impairments I have and **,*

*w) As a result of the above I often feel worthless, useless and generally lack self-esteem, significant debilitating feelings of guilt and lack of trust in self.***

17. The claimant took antidepressants (Sertraline) for a few years after the incident. He started taking Sertraline again in October 2020. He is currently under the care of secondary mental health services and has been allocated a Community Psychiatric Nurse. He is awaiting further EMDR therapy.

Expert report

18. The expert report of Dr Pablo Vandenabeele, Consultant General Forensic Psychiatrist [730], states:

14.10 The credibility of Mr Clothier is ultimately a matter for the Court to address. It is also the case that there is no objective test (such as a blood test or medical imaging) to confirm or dismiss the presence of a condition such as PTSD and that the making of such a diagnosis is heavily reliant upon a person's self-report.

If so, what were his symptoms?

14.11 If Mr Clothier's account is accepted then he was suffering from PTSD symptoms such as: flashbacks, nightmares, hypervigilance, avoidant behaviours, and mood disturbance (low mood, ideas of guilt and bouts of suicidal thinking).

Credibility is a matter we will return to later in this section on disability.

19. Dr Vandenabeele places some significance on the claimant reporting that he had travelled on an aeroplane on one occasion, to question whether the claimant had a fear of enclosed spaces. Further, the tribunal accepts the claimant's evidence on this issue to the effect that:

I did go on an aeroplane on one occasion for my daughter but it was a horrible experience and one that I found extremely difficult.

The claimant has not flown since.

20. Dr Vandenabeele gives a possible alternative diagnosis of the claimant having developed an adjustment disorder by September 2020 [731]. Paragraph 14.13 confirms:

An adjustment disorder is defined as a maladaptive reaction to an identifiable psychosocial stressor or multiple stressors.

Other medical evidence on disability

21. As noted above, the report of Dr Ford of 27 January 2006 [750] states that the claimant was presenting with post-traumatic stress disorder and depression at that point.

22. The claimant accepts that between 2008 and September/October 2020, he did not seek any further psychiatric treatment for PTSD. After 2008, he knew he could ask if he required further treatment but he preferred to try and manage on his own.

23. There is no formal mention of PTSD or other mental health concerns, in the claimant's GP or OH records from 2008 until the GP letter dated 8 December 2020 to the respondent.

24. An OH report following a consultation with the claimant on 15 September 2022 states [632]:

> *States he has anxiety about Covid-19 has asked for remedies to help. Has been asking for additional efforts to maintain cleanliness in workplace. Is checking his own temperature. Asked but nothing was done.*
>
> *Has anxiety going in the pod for temp check. States there is no cleaning no air circulation. Has asked for information and has requested several times.*
>
> *Has a concern about going through a space even though this takes seconds.*
>
> *Has spoken to GP about his anxiety in recent weeks. Indicative of anxiety has been grinding teeth but putting off dentist over concerns about COVID-19.*
>
> *Has provided details of alternatives. Self-checking, have someone do it. Or going to Drivers office as this is not a confined space.*
>
> *Concerned about issues of calibration.*
>
> *Concerned about leaving the house, feels very emotional all the time. Is shielding partner - does not wish to disclose her health condition and has received an NHS letter. Asked if he had furloughed as shielding but said no. Did not sign a declaration for exclusion says he was not made aware of this at any time.*
>
> *No one else at home. Cannot see his daughter as he is limiting contact. Feels he [is] 'maybe over cautious'. Is doing shopping, using facemasks. limiting time there. Is leading a quite restricted life at present - does not like to leave the house. Not going to pubs etc. Stopped sports.*
>
> *Very concerned about his health and always concerned about safety at work. ..*
>
> *With respect to the levels of anxiety Simon has described, he is able to carry out his role at work. Simon is functioning relatively normally in daily life although he has placed restrictions to manage his COVID risk. Simon was able to make his explanations and arguments without difficulty. I do not believe his judgment is impaired. In my opinion he does have an enhanced perception of his risk of contracting COVID-19 and this may be leading him into avoidance behaviours.*

25. On 1 October 2020, the claimant spoke with Amanda Sharkey of the respondent's OH department. The note records:

> *Simon has stated that he has an underlying health condition which is a 'disability' and should be taken into consideration when reviewing his request to use the Traffic Office temperature monitoring rather than the CF2 cabin designated for this purpose.*
>
> *Reviewed previous OH records and confirmed that in 2007 an OH colleague had provided a report containing the information "No restrictions required. DDA is likely to apply".*

26. A GP report dated 8 December 2020 sent to the respondent confirms that in the GP's opinion:

> *Simon has had post-traumatic stress disorder since he was involved in a house fire in November 2004 (presumably this is the "incident in 2007" that you mention in the report request).*

Claustrophobia

27. The claimant has not had a formal diagnosis of claustrophobia. The claimant says that his fear of confined spaces is linked to the 2004 house fire. The tribunal notes that the claimant is critical about the OH report which followed the meeting on 15 September 2020. He said that the discussion lasted about an hour, and there is a lot of detail that is missing. The tribunal finds that although the claimant mentioned that the portacabin was a confined space, the claimant did not specifically refer to him suffering from claustrophobia during that discussion. The claimant provided written comments in relation to the September 2020 report, but did not specifically mention in those written comments either the 2004 house fire or subsequent medical conditions.

Other witness evidence on disability

28. Mr Whitehead was the Health and Safety (H&S) representative at the warehouse from the time of the incident until 2017. He says in his witness statement, which sections were not challenged:

> *10. He was always doing risk assessments in his head; Simon would raise health and safety complaints pretty much constantly about what staff had been asked to do by Nestle and he would often refuse to complete tasks if he felt that it was too unsafe.*
>
> *11.How Simon assessed risk was very different to everyone else and it would stop him doing certain tasks at work.*
>
> *12.Simon would always take it to the extreme because of how he had been affected. By extreme I mean overthinking what could happen and what could go wrong and refusing to complete tasks where others would maybe just accept that some things have a small risk but continue. …*
>
> *14. I know that there has been a lot of change in management since I left – Phil [the claimant's previous line manager] knew previously exactly what was happening with Simon and also at the time I was there Simon and his health and safety concerns were often discussed with senior management. Everyone knew Simon was this way because of his accident and the impact it had on his health and way of thinking.*

29. Mr Chapman gave evidence to the tribunal. He told us and we accept that following the fire the claimant: '*was a changed man. He was not as sociable; he was a different character*'. We also accept the evidence of the claimant during cross examination along the following lines [EJ13]:

> *Q. So recently came to view it was still there, you did not realise you had not been right until about May 2022? A. This is because of the restrictions imposed, not able to go anywhere. [I] have struggled every day with [my] physical and mental health since the incident, it is a prison sentence for life, struggle to accept that on a daily basis, part of being a burns victim. Have more bad days than most people. Bank hours so when need time off, can use those instead of sickness.*

30. The claimant has incidents of enuresis. This is linked to nightmares about the fire. In 2020, the frequency of enuresis incidents was 3 to 4 times a month, although the tribunal notes that the claimant told us that he was still affected by the hernia operation at that stage, which also affected his bladder. We accept, on the balance of probabilities that although this is not mentioned in the impact statement, most likely because of embarrassment, the claimant does have regular incidents of enuresis.

31. The respondent made some ongoing adjustments for the claimant. These related to the physical affect of the fire, including the provision of special boots and warmer gloves for work in the cold room.

32. The claimant told the tribunal that he was excused from going into the NCE room, due it being a confined space, for a period of about four to five years from about 2016/2017 to 2020/2021. The claimant says he used the room for a while when it was used for meetings, but then did not need to attend the briefings. He says he was briefed separately.

33. There is no formal record of such agreement. The claimant said it was Neil Cootes who gave him permission to do so, and as a result, the respondent called Mr Cootes to give evidence. He told the tribunal, and we accept, that there was no such formal agreement. Mr Toes was not aware of any formal agreement either. They both noticed him coming into meetings late, since he clocked in on time; whereas his colleagues clocked in early so they could be there fore the commencement of the briefings.

34. There was before the tribunal an email from Neil Coote to Mr McGhin, on 6 December 2018:

> *Non-attendance of SOR - Simon mentioned that he feels that the information he receives in this meeting is not value adding for him hence why he does not attend on occasions - I then stated that talking about Safety/Compliance and running through briefs, actions and workload is an important part of the day, Simon did not agree.*

No formal action was ever taken against the claimant in relation to these issues however.

35. In the light of this conflicting evidence, the tribunal accepts that a concession was not made formally or informally by Mr Toes or Mr Cootes, for all the claimant believed there was some concession. It appears however, due to the lack of any formal action, that management gave the claimant some leeway, presumably because he was in other respects a reliable worker.

36. In the light of this conflicting evidence, the tribunal was asked to reject the evidence of the claimant as a whole, as unreliable. For the reasons set out in the foregoing paragraph, the tribunal does not consider that that is a reasonable conclusion to reach. In considering the evidence of the claimant on disability, the tribunal accepts that it needs to be treated with some caution, given that evidence is being given in relation to matters years after the event, over a lengthy period of time. The tribunal does not however conclude that the evidence of the claimant on disability is largely or wholly unreliable.

37. When the Covid-19 pandemic hit the UK and lockdowns were imposed, everyone was affected. However, the tribunal accepts that the claimant was affected more severely because of his underlying and ongoing health issues.

38. The reference in the 15 September 2020 OH report to the claimant functioning 'relatively normally' should in the tribunal's judgment be seen in the context of the overall ongoing affects that the 2004 house fire continued to have on the claimant after 2008. These matters are considered further in our conclusions section on the disability issue.

Line management of the claimant

39. The claimant was managed by Neil Coote between 2008 and the end of 2018. In or about the beginning of 2019, Gary Toes became the claimant's line manager.

40. On 23 March 2020, the first Covid-19 related lock down was announced. This formally came into force in law on 26 March 2020.

Use of thermal imaging cameras

41. The respondent says that on 20 June 2020 the claimant's shift (CF-2) was briefed in relation to thermal imaging cameras. This is disputed by the claimant.

42. A written shift brief dated 24 June 2020 states:

> *It has been agreed that Nestle will install Thermal Imaging Cameras across all its sites in the UK, including offices, factories and warehousing. PTC and Nestle House already have this set up and in use.*
>
> *For us, this will be a pair of cameras within a portacabin situated outside of CF2, and the purpose of this is that all employees walk through this area prior to coming into the warehouse. The camera uses various technologies to take a temperature reading from the individual and will alarm should that person have abnormal body temperature.*
>
> *This will help further reduce the risk of employees attending site who may be carrying a viral infection and help keep the warehouse a safe working area.*

43. Again, the claimant says he did not see or receive that briefing at that time. The respondent invites the tribunal to conclude that the claimant's evidence is not reliable, as a result. The tribunal does not consider this issue to be important. As discussed below, the claimant was aware of the need to have his temperature checked by going through the portacabin from the end of July onwards, before he was suspended and disciplinary proceedings started for not doing so. In the tribunal's judgement, the claimant genuinely believes

that he was not briefed before then; the respondent genuinely believes that he would have been. Given the unreliability of memory, the tribunal does not consider the issue to be significant. Employees were not asked to sign anything to confirm they had seen the briefings and the situation was rapidly evolving in the exceptional circumstances of the pandemic.

44. The respondent says that on 22 July 2020, the claimant's shift was briefed in relation to the thermal imaging camera process. Again, the claimant disputes he attended that briefing. He does however recall seeing the written Shift Brief dated 22 July 2020, on a table. The Brief states:

> *We have now done some initial testing on the thermal camera portacabin and it is now available to use each time you come onto site from Monday 27th July.*

The briefing describes the process for using the cabin as follows:

> *As part of the implementation period, the process is:*
>
> *1. Remove hats or face coverings etc. before entry.*
>
> *2. Sanitise your hands and enter the cabin.*
>
> *3. Walk straight towards the camera and exit the other side without stopping.*
>
> *4. If the camera alerts, please wait 2 minutes and try again.*
>
> *5. If it alerts a second time, please use the camera in the traffic office to verify the result is accurate.*

45. It was intended that employees would enter the portacabin using one door, walk through the portacabin in one direction, and exit at the other end. There is a window in the portacabin, through which it was possible to see whether the main part of the portacabin was occupied. The tribunal notes that this briefing did not say that checks were compulsory, or that failing to have your temperature checked was potential gross misconduct. Mr McGhin told the tribunal that may have been made clear at the briefings referred to; and that other briefings during this period did confirm that. We do not doubt Mr McGhin's recollection in that respect but the tribunal has not been referred to those earlier documents and we make no finding that the claimant was specifically aware through any oral or written briefings that the test was compulsory, until later.

46. The traffic office is a large open plan office, with the entrance leading into a corridor, on entry. On entering the site, drivers had to go to the traffic office. Drivers using the traffic office could be from other warehouses or other Nestlé sites; from other areas of the UK, or from overseas.

Alleged protected disclosures

47. The claimant says he made a protected disclosure to Scott Weston on 22 July 2020. This is consistent with him only becoming formally aware on 22 July 2020 about the temperature checks. The claimant says he told Mr Weston (1) that the portacabin was a confined space with limited ventilation with quick successive use so it could become a 'covid hotspot' particularly because individuals were required to remove their mask for the check; (2) there was no cleaning schedule displayed in the Portakabin; (3) there was no warning system or protocol in place to deal with positive test results; and (4)

that the Claimant could not use the Portakabin as a result of his anxiety, claustrophobia and PTSD as it was a confined space.

48. Following the meeting with Mr Clothier, Mr Weston emailed Neil Coote, Gary Toes, David McGhin and others as follows:

> *Simon Clothier has expressed some serious concerns about the process! He is concerned that it is a confined space and that if the previous person started coughing then he could be put at risk. He said that there were no control measures. I replied that the cabin in itself was a control measure and the residence time in there is a couple of seconds. I suspect that he will refuse to use it. He also suggested that there wasn't a safe, dry place to wait In the event of there being an activation and the weather being poor.*
>
> *There have also been some further points raised about going to another camera if there is an activation and the fact that this might load to a heightened risk of contamination.*
>
> *Other than that, everyone seems happy!*

49. The tribunal notes at this point what was said by Mr Clothier at the disciplinary hearing on 5 October:

> *DM: Ok, so on that point, Scott wasn't mentioned in the investigation so in the adjournment I took the opportunity to ask Scott for his recollection of the conversation. He does remember you raising a concern in July, but he said it was more the validity of the temperature checks, not anxiety.*
>
> *SC: If I didn't mention it, I didn't mention it. Whether I specified anxiety then; is that material? That was the first reason I approached him was a heightened fear of C-19.*

50. The tribunal finds on the balance of probabilities that the claimant did raise the matters set out at 47 (1) to (3) above, and that it was a confined space; but that he did not mention to Mr Weston at that time that he could not use the Portacabin as a result of his anxiety, claustrophobia and PTSD. This is on the basis that if the claimant could not recall on 5 October 2020 that he mentioned his anxiety etc, he could not be any more certain of that three years later.

51. In July/August 2020, the claimant says he made a protected disclosure to Josh Dennis, raising the same issues as in the disclosure of 22 July 2020. CWS42. However, in the grievance submitted in October 2020, the claimant states:

> *I have a problem/complaint regarding the forcible use of the Portakabin temperature test facility you have installed and for which I have raised concerns on 3 consecutive occasions (22nd July Scott Weston, 26th August Neil Coote, 8th September Scott Weston) with my line managers who acknowledged, but never supported me on my anxiety, a response which was never received and repeatedly with Andy Chapman Union Rep who also raised concerns on my behalf with the warehouse manager throughout the start of September*

52. On the balance of probabilities therefore, the tribunal concludes that the claimant did not speak with Josh Dennis about these matters at this time.

The tribunal is further driven to that finding by Mr McGhin's evidence that he does not recall the issues being raised at ROES (i.e. H&S) meetings.

GEMBA Briefing

53. On 5 August 2020, a GEMBA briefing was issued. The claimant told us and the tribunal accepts that he did not see this document before the claim was commenced. The briefing states:

> *Equipment has now been installed at all sites for temperature checking. Due to the current high temperatures being experienced across the UK we recognise that some sites are experiencing occasional issues with the temperature checking equipment and that employees who have been out in the sunshine are registering high temperatures when they pass through the scanning area. Protocols are in place to support retesting to ensure accurate testing is completed where issues are being experienced; please follow the guidance that is displayed in the scanning area on your site.*
>
> *It is a mandatory requirement for everyone to pass through the temperature check area when entering sites. Any employees found to have entered site without completing a temperature check will be subject to investigation and potential disciplinary.*

54. A similar point is made in a guidance document relating to Nestle employees in the UK & Ireland. Again, the claimant says, and the tribunal accepts, that the claimant did not see this document before the proceedings began.

Portacabin use audits

55. Following the introduction of the temperature checking requirement, audits were carried out to ensure that employees were complying. In an audit conducted on 26 August 2020, the claimant was identified as one of the people not going through the portacabin to have his temperature checked before he started his shift. The compliance tracker confirmed:

> *Simon has said he is not comfortable about entering an enclosed space where numerous staff have entered, is happy to use the camera in the traffic office. D McGhin informed.*

56. Mr Cootes was asked to speak with the claimant. He did so on 26 August 2020. The Claimant says he repeated protected disclosures 1 to 4 (PDs1 to 4).

57. A note of the conversation was made by Mr Coote. He was likely requested by HR, perhaps Catherine Spinks, to produce a note. He says in it:

> *I spoke to Simon and said to him that it is mandatory that on his arrival at site that he has his temperature checked, Simon responded that he was all for checking temperature on arrival but he was not comfortable using the cabin as he does not agree that this is safe and he feels anxious with the thought of entering where numerous others have entered, I stated that you would only be in there for a matter of seconds so the risk is very minimal, Simon responded that he would agree to use the traffic check when arriving, this was the last communication I had with Simon. After speaking to Simon I made Dave Mcghin aware of the conversation and Simon's response.*

58. On the balance of probabilities, the tribunal finds that the claimant repeated protected disclosure one in this conversation, but not the other protected disclosures.

59. On 2 September 2020 the claimant says that he made the same protected disclosure as above to Andy Chapman, trade union and shop floor Health & Safety Representative. Mr Chapman then spoke with Mr McGhin before emailing him on 8 September (see below). During that conversation, Mr McGhin told Mr Chapman that Nestle could not make an exception for one person. However, on the balance of probabilities, the tribunal finds Mr Chapman did not specifically refer back to the fire incident in 2004 and the claimant's subsequent health problems.

60. In coming to that finding, the tribunal notes that Mr Chapman was interviewed regarding the claimant's grievance on 10 March about issues due to the claimant's past injuries playing on his mind. Having referred to the claimant feeling anxious about using the portacabin, Mr Chapman was asked:

> *LC The anxiety - was that around the risk of covid or something else?*

To which Mr Chapman replied:

> *AC Not sure - I don't know if you know much of his history but he had some issues in the past due to injuries that he sustained. I don't know if that was playing on his mind - I just now [sic] that he was struggling to go through it. It has some wires stretching over the building, it's a portacabin and not a proper building - I don't know.*

61. On 8 September 2020, the respondent conducted an audit to ensure that the portacabin was being used correctly. Again it was found that the claimant was not complying with the requirement to go through the portacabin to have his temperature checked. The audit showed that the claimant had not complied on 2, 3, 7 and 8 September. The compliance audit notes, made by Scott Weston, state the following:

> *Spoke to Simon who told me that he was experiencing some anxiety just at the thought of using the cabin. After speaking to Dave McGhin I told him that the traffic office was not available and I sought his permission to refer him to occ health - and his permission was given.*

62. Mr McGhin emailed Mr Chapman at 10.05 on 8 September 2020 to ask if he had spoken to the claimant about his apparent non-compliance:

> *In Simon's case we know he has an issue with the cabin but despite conversations he continues to not use it. Andy – have you spoken to him since we last discussed this?*

63. Mr Chapman emailed, at 11.40 on 8 September 2020 to say:

> *Hi Dave, I spoke with Simon last week, he said he was not comfortable with using the box as it's to inclosed [sic] and it makes him anxious. He feels like he has offered you a few different ways of getting round this problem, going in the traffic one that he passes on the way in or even a hand held thermometer of his own. He feels the ventilation in the box is not great and it is a concern to him. He also said he has been extra vigilant around anything covid related, keeping out of pubs and restaurants when not at work because he doesn't feel safe. He is staying at home as much*

as possible. I think his fears are real and I think we need to try and help Simon feel at ease while coming to work, so if using the traffic one or using his own thermometer is the way forward with him then I think we should work with him. Thank you, Andy

64. Mr McGhin replied:

We need to restrict people using Traffic Office as we are asked to only move across different areas of the site when absolutely necessary. There is a window permanently open on our cabin to help flow of air. Hand held temperature checks have not been authorised by the business, and I think in the main this is down to effectiveness/accuracy/calibration, as well as the fact someone has to stand close to them to take the reading.

My concern is that we should not make exceptions to the rule unless absolutely necessary.

65. Mr Chapman replied at 13:35:

Hi Dave, I think Simon's concerns are exceptional, due to making him feel anxious and stressed over going in the box. He feels its less stressful going in through traffic as he is already there. He has no problems with the traffic one. The time he comes in on 6-2 would be about 5.30am and traffic would be very quiet. On afternoon shift it would be more busy but drivers are walking over site so I cant see why one man would be a problem as he is passing the temperature scanners anyway. Thank you, Andy

66. Mr McGhin concluded the email chain as follows on 9 September 2020 at 9.17am:

I have spoken to Richard Hastings [Mr McGhin's line manager] *and we have agreed the best next step is to refer Simon to OH with regards to him feeling anxious about using the cabin. I will ask the Shift Manager on site this morning to get Simon's agreement to do this and we can base our decisions on any report received. Deliberately not using the cabin can be considered gross misconduct as it is in place for the safety of all employees. This needs to be reiterated to all employees who do not use it on a daily basis so I will pick this up also.*

67. An OH referral was made by Gary Toes on 9 September 2020, '*to assess the claimant's fitness to participate in management procedures'*. In the referral, under other issues/concerns, it is stated:

Simon has reported ongoing anxiety through being asked to use the thermal testing pod as part of our Covid prevention strategy .

68. The tribunal finds that the claimant made similar comments to Scott Weston, prior to the referral to OH being made.

69. Catherine Spinks of HR emailed Brian Goulding and others on 9 September 2020:

The second individual [i.e. the claimant] is continuing to refuse to go through the pod on the basis of the pod inducing anxiety for them due to it being "small enclosed space." I have advised that we suspend the individual immediately on full pay pending investigation (this will be effective as of tomorrow as the individual isn't due back on shift until then). Alongside this we will conduct an OH referral to fully understand the issues

being raised by them. Based on the outcome of the OH report and the investigation, we will decide whether it is appropriate or necessary to take further action via the disciplinary process or whether this can be managed based on OH recommendations. We consider this to be a separate case to the one above based on the fact this case is based on an active refusal, not 'human error'.

70. Mr McGhin replied at 18:23:

Just to update. I have just spoken to the employee via telephone. I stated that we had made a reasonable request for all employees to go through a temperature check facility before they attend their place of work, and for CF2 this facility is the pod adjacent to the warehouse entrance. I then gave him the option of agreeing to use the camera pod from his next shift onwards, otherwise we would have to suspend pending further investigation and potential disciplinary action. Separate to this, we would progress his OH referral to get further advice regarding the issues he has raised.

71. Although this email suggests that the suspension of the claimant may not have been decided, subsequent events convince the tribunal, on the balance of probabilities, that whatever the claimant did on his return to the site on 10 September 2020, he was going to be suspended.

72. During the call with Mr McGhin on 9 September 2020, the claimant says he made the same protected disclosures as above by telephone. Again, the tribunal finds that the claimant made PDs 1 to 3, but not PD4. The claimant did not mention PTSD and claustrophobia during the call, he referred to anxiety and fear.

73. The claimant says that Mr McGhin threatened with suspension and disciplinary action if did not go through the portacabin. Mr McGhin accepted that he may have reminded the claimant that non-compliance could result in disciplinary action. In the tribunal's view that amounts to a threat. Further, the claimant asked if he could wear a mask but was told that the technology used a form of facial recognition to focus on the tear ducts as that is where it got the best temperature reading and so he could not wear a mask when going through the cabin. Mr McGhin also told the claimant during this conversation that he could 'hold his breath' whilst he was in the portacabin, since he was only in there a short time.

Suspension - 10 September 2020

74. On 10 September 2020, the claimant came in to work via the portacabin, but wore a mask. The tribunal accepts that the claimant found this an extremely unpleasant experience, which caused him to vomit, and after which he struggled to work.

75. The claimant was formally suspended later that morning by Mr McGhin. On the basis of the evidence heard by the tribunal, the tribunal accepts that the reason the claimant was suspended was not that he wore a mask when going through the portacabin on 10 September 2020, but his previous failures to go through it. As noted above, the suspension decision had in effect been made by Ms Spinks on 9 September and Mr McGhin was simply putting that decision into effect. Regardless of what the claimant did on 10 September, he was going to be suspended.

76. The suspension letter states [419]:

> *Your suspension will be on full contractual pay pending the outcome of the investigation. Please note that suspension on full contractual pay is in accordance with the Company Disciplinary Procedure, a copy of which is attached. The period of paid suspension will normally be for no more than seven calendar days and is not in itself a disciplinary measure.*

77. On 15 September 2020, the claimant attended an OH assessment with Ray Fagg which confirmed his fitness to attend management meetings. The report is quoted in the section above relating to evidence on the disability issue. The tribunal finds, for the reasons given in that section, that the claimant did not make specific mention of PTSD or other disability during that conversation.

Investigation meeting – 15 September 2020

78. On 15 September 2020, the claimant also attended an investigation meeting with Gary Toes. During the meeting the claimant said, when asked what his concerns were:

> *GT – Following an audit on 8th September, you were found not to have used the thermal imagining, can you tell me why?*
>
> *SC – Scott should have that?*
>
> *GT - I don't as I was not privy to this info. Can you repeat?*
>
> *SC – Yeah, I was waiting for feedback from Neil C on concerns raised.*
>
> *GT – can you advise what these concerns are?*
>
> *SC – confined space within the cabin, I raised some concerns a few weeks back but have not heard anything back. …*
>
> *GT - did you ask for an OH referral or did Scott decide.*
>
> *SC – Mutual, we both agreed the best course of action to support me as I have been struggling with anxiety. I am very worried about covid and the whole situation.*
>
> *GT – you have said previously that you are willing to use the traffic office, what's the difference here?*
>
> *SC – Bigger space, better consistency in terms of accuracy, this gives me more confidence*
>
> *GT – Have you been using this one instead then?*
>
> *SC – I have asked but not heard anything back, I'm a big supporter of temp checking and campaigning for the temp checks at the start, avid supporter of temp checking on whole.*

79. The investigation was adjourned until receipt of the occupational health report. Pending receipt of that, Mr Toes concluded [422]:

> *2) The CF2 testing pod was too small and this gave him anxiety and that this was the reason he did not use this. …*
>
> *4) He had requested to be allowed to use the testing pod available at the traffic office as an alternative, again claiming to have not heard back from the business.*

Although Simon claimed to be a supporter of temperature checking, he has never used the testing pod outside of CF2. He has placed the onus on other people to get back to him on the use of both cameras at the north end of site, during which he continued to disregard COVID-19 safety measures.

Simons actions pose a serious risk to the Health and Safety of others and the company's reputation, as such I would recommend we progress to a disciplinary hearing. However, should the release of the Occupational Health Report provide new evidence that mitigates the above reasons for proceeding, this situation and recommendation should be reviewed appropriately.

80. Mr Toes did not speak with Mr Weston or Mr Coote before drafting the report and arriving at these conclusions.

81. Following receipt of the OH report, Mr Toes concluded:

Following a review of Simon's OH referral report I have noted that although Simon states that he is temperature checking at home this cannot be verified at work.

Simon has been offered a range of support through work for his anxiety such as the EAP.

Some of his anxiety and concerns around the temperature testing pod may be valid but are outweighed by the potential risk to others through non-compliance with company policy surrounding temperature checking.

I am still recommending that this investigation move onto a disciplinary meeting.

Disciplinary hearing

82. Mr McGhin was appointed to conduct the disciplinary hearing. The claimant said in an email to Mr McGhin dated 26 September 2020 about the proposed venue for the proposed disciplinary hearing:

Can I also reasonably request please that you make adjustments to help me with my Anxiety/fears/Phobia not to use the Temperature check Portakabin and a more suitable alternat[ive]e to appease my concerns/Fear/Anxiety and Phobia.

83. The disciplinary hearing was originally scheduled to take place on 28 September 2020 but was postponed as the Claimant was unable to have his companion of choice present, Mr Chapman.

84. During the week commencing 21 September 2020, Mr McGhin messaged Mr Hastings to say that the claimant's disciplinary hearing would be heard at the end of that week. Mr Hastings replied at 18:39:

'I bet SC is regretting his decision!'.

Mr McGhin replied shortly afterwards:

'*Yes, indeed'*.

85. On 1 October 2020 the claimant spoke with Amanda Sharkey of OH. The notes record:

Simon has stated that he has an underlying health condition which is a 'disability' and should be taken into consideration when reviewing his request to use the Traffic Office temperature monitoring rather than the CF2 cabin designated for this purpose.

Reviewed previous OH records and confirmed that in 2007 an OH colleague had provided a report containing the information "No restrictions required. DDA is likely to apply".

Advised that DDA has been superceded by Equality Act and that decisions about whether a condition/individual is covered by the Act is a legal decision not a medical decision.

86. The disciplinary hearing was conducted on 5 October 2020. The disciplinary hearing notes record that during the meeting the claimant was shown diagrams of the traffic office and the portacabin:

DM … What I'm trying to get to is, can you help me understand why the one on the right is preferred to the one on the left?

SC: Yeah it's not a confined space. It's got a point of entry where I can wear a mask, it's regulated temperature, it's got fire points, fire safety equipment, fire call points. It's much safer and it's a lot bigger, I'm very familiar with that. It makes you very fearful when you've got a disability if the situation isn't familiar. …

87. The notes continue [Page 434]:

DM: With us doing that, you took a decision personally not to use that temperature checking point from end of July.

SC: Didn't take a decision, the decision was taken from me, I asked for permission, for a concession or a reasonable adjustment for people who have a fear who have concern about their own welfare and that of others. It was raised on 3 occasions and I feel let down. …

SC: I have a very good reason for being fearful. They [i.e. the respondent] should be fully aware of my previous history. They've sorted me throughout the years as and when required, why not now?

DM: Let's look at the report. What you're describing didn't really come out in the report?

SC: That's because it's not a relevant report, it's not concise at all, definitely not.

DM: I received 2 copies. One came from OH directly, and a slightly amended version of the report from yourself as well …

DM: You took the time to amend the report, did you not see it relevant to include these historical events in the report if you felt the information was missing?

SC: It's not something I like talking about. When you've gone through that kind of trauma it brings back some awful memories. …

DM: Seeing the layout of the traffic office, do you still see that as acceptable?

SC: Yes. I do.

DM: Can you see why I might find that difficult to understand given the concerns you've raised and the comparison of the sizes of the areas?

SC: Yes, but I'd like you to also understand from my perspective. It's about familiarity with a space. Normally, the business has been very understanding.

88. The claimant alleges that during the hearing, Mr McGhin made derogatory comments and had "an aggressive and dismissive tone and approach. The tribunal finds that derogatory comments were not made and nor did Mr McGhin Mr McGhin did not, the tribunal finds, act in an aggressive manner. No doubt the hearing would have been uncomfortable for the claimant, who was asked probing questions by Mr McGhin and was facing possible dismissal. Significantly however, Mr McGhin did not decide to dismiss the claimant at the conclusion of the hearing. The claimant having specifically referred to his historic medical issues, Mr McGhin decided that it was necessary to obtain another OH report, following receipt of a report from the claimant's GP, before making any decision. The claimant remained on suspension whilst those further reports were obtained.

Sickness absence

89. On 7 October 2020 the claimant began sickness absence for work-related stress/anxiety. Following the commencement by the claimant of sickness absence, the claimant was moved from full pay on suspension to discretionary company sick pay (see further below). This appears to contradict the clear wording of the disciplinary policy, to the effect that suspended employees are to be suspended on full pay. The tribunal was not told who made that decision, or on what basis. It may be that it is accepted custom and practice that an employee on suspension who subsequently submits a sicknote, is placed onto discretionary sick pay. However, this was not an issue that was explored on the claimant's behalf during the hearing and the tribunal does not therefore consider it necessary to explore that issue further.

90. On 7 October 2020, an email was sent to the claimant by Mr McGhin about the questions to ask of the claimant's GP. These included the following:

3. What is the effect of condition (pertaining to anxiety) on day to day functional capacity? …

7. Are there any restrictions which should apply to their employment now or in the future?

8 … Please can you advise whether Simon's condition should reasonably impact his ability to use the portakabin for the purposes of taking a temperature reading.

91. Following receipt of the disciplinary hearing minutes, the claimant asked for them to be amended, in an email sent on 12 October 2020. Amongst other additions, the claimant said:

Page:6 sc: Yes, if I was fearful I didn't have to go into the NCE room, I s[p]oke about it with my Team Leader.

Grievance – 13 October 2020

92. On 13 October 2020 the claimant says he made the same protected disclosure as alleged above to Sally Wright, in a grievance [455-9]. Amongst other things, the claimant complained about*:*

> *2: Lack of managerial support for my Anxiety expressed due to Covid-19 & Temperature Check Portakabin, anxiety due to it being a confined space/environment. …*
>
> *4: Reported the Portakabin temperature check point as a potential covid-19 hotspot, raised my concerns/fear/anxiety and no feedback ever given, not taken seriously, no cleaning schedule etc*.

93. Sally Wright identified two main complaints in the grievance – the first being a complaint regarding the disciplinary process; the second being a complaint regarding health and safety procedures in relation to temperature checks. In the grievance the claimant also stated:

> *Under the Disability Act 2010 you the business should listen, help and make Reasonable Adjustments under this Act, if a concern is brought to the attention of the business on at least 3 occasions, it's not unreasonable for the business to make those adjustments, preferably without the need to threaten Employees with Disciplinary Action. Therefore on this occasion not only have you failed to help or make reasonable adjustments and the fact I have been subjected to a Disciplinary investigation and Hearing, that I feel in itself potentially this may amount to Disability Discrimination. And that therefore I am looking to resolve this appropriately.*

94. A fit note was submitted on 14 October 2020 confirming the claimant was not fit for work due to work-related stress.

Discretionary sick pay decision

95. On or about 23 October 2020 a decision was made not to pay the claimant sick pay under the discretionary sick pay scheme which the claimant claims is a detriment because of a protected disclosure and is also an act of direct discrimination. The tribunal accepts that Mr McGhin was not involved in that decision. He was on bereavement leave from on or about 20 October 2020 and was then on planned annual leave. Ms Spinks and Sally Wright were amongst the decision makers.

96. The claimant was not notified of that decision until 14 December 2020, by Mr Dan Riley. The claimant was told that the reason he had been excluded from company sick pay was that he had exceeded the absence limits. The letter which the respondent believed had been posted to the claimant on 29 October 2020 but which we accept the claimant did not receive at the time, stated:

> *We explained in an earlier communication via letter to your home address, that we have reached a decision with our Trade Union partners that a discretionary sick pay scheme would be temporarily introduced during the on-going COVID-19 situation.*
>
> *Following your application for Company Sick Pay, I can confirm that the review of your recent absence has taken place to determine if you will receive Company Sick Pay.*

Your current three-year attendance history is shown below and was considered as part of the review of your absence:

2020	*2019*	*2018*	*3 Year Average*
87.75%	*73.52%*	*99.61%*	*86.96%*

97. The claimant appealed against the decision about company sick pay on 20 December 2020. The respondent subsequently made a decision to pay company sick pay, and that decision was communicated to the claimant by letter dated 5 May 2022. The letter stated:

Please note that when the decision to exclude you was made, no information had been provided to indicate that you were experiencing anxiety as a symptom of a long term health condition. It was understood at the time of the decision that your absence was work-related stress/fear of catching covid, based on your sick notes and the occupational health reports from the time. …

The decision was made by Dave McGhin, Catherine Spinks, Kirk Foster, Richard Hastings, Lee Skelton and Sally Wright but given the prescriptive nature of the criteria, the outcome would have been the same regardless of who made the decision. This was then moderated by the NiM review panel. I do not believe that you were any way prejudiced by the choice of decision makers.

Finally, I wanted to explain which parts of your appeal I uphold:

- *The medical evidence that you have produced in December 2020 is important.*

I understand that this was received by occupational health around 16 December 2020. While there is no obligation on the decision makers to make exceptions for long term medical conditions and disabilities when applying the criteria for exclusion, I believe that an exception could have been made in your case after you provided some supporting medical evidence which attributes your absence to a long term health condition, namely PTSD.

<u>Ongoing absence</u>

98. An OH assessment was conducted on 3 November 2020 which concluded that the claimant was absent because of 'perceived work-related stress - believes workplaces not Covid safe'. The claimant was declared unfit to attend management meetings. No adjustments were recommended. Further meetings were to be postponed until a GP report had been received and discussed. The report concluded:

Having spoken to Simon at length today, I agree that [their] attempting to attend meetings at present, will likely not lead to any constructive outcomes and may impact any psychological interventions that are ongoing. I suggest postponing any meetings at least until Simon's medical report has been received and discussed with him, and then reviewing the situation. Simon is aware that this decision will apply to any workplace related meetings.

99. The Respondent subsequently received a letter from the claimant's GP dated 8 December 2020, stating that he has had PTSD since 2004. The claimant

accepts that the respondent first saw that document on 16 December 2020. The report states:

> *3. Unfortunately, he is now very disabled by the anxiety. He struggles to leave his house and because of anxieties related to COVID; he avoids others as much as possible. Before the deterioration in his mental health he was, as you are aware, able to attend work. He worked in the warehouse where there is a lot space. He has worked at Nestle for a long time so he is familiar with the areas that he normally has to visit. …*
>
> *6) The sertraline has, to date, only had a slight effect on the anxiety. He remains disabled by it*
>
> *7) I can only reply in general regarding this. Simon has managed his anxiety well in the past. He benefits from working in a large space and familiarity with the workplace. Changing his working environment without due consideration to his mental health and the extreme circumstances that caused this is to be avoided*

100. On 17 February 2021 a decision was made to cancel the psychiatric referral that the respondent had made. An email of that date confirms:

> *To confirm again, there has been a significant change in circumstances in terms of Simon's situation and as such we no longer need him to go through the Psychiatrist referral. Specifically, we were previously of the impression that Simon would need to use the temperature checking pod outside CF2 as this was the only method of temperature checking which would provide an accurate enough reading for him to safely enter the site without risk to other employees. We were requesting the referral to the Psychiatrist due to Simon's complex mental health conditions, in order to ask for their help in understanding how best to help Simon to use the pod.*
>
> *We have now discovered an alternative option for Simon to use in the form of an 'in-ear' temperature checking device which will provide the same level of accuracy as the pod, but removes the need for Simon to use a confined space he is unfamiliar with going forward, so we will be implementing this as a reasonable adjustment for him on his return.*

101. Although the respondent had by this stage agreed that the claimant could use a hand-held thermometer, a letter, sent on 9 March 2021 confirmed that the disciplinary proceedings were ongoing and the claimant remained suspended.

102. Between March and April 2021, it is alleged by the claimant that "Ms Spinks engaged in "unreasonable conduct towards the Claimant" of "badgering the Claimant to commence management meetings contrary to OH recommendation, failing to reconsider her position on that stance, failing to properly answer direct questions, and failing to make adjustments". These issues would not explored in any great depth before the employment tribunal. The tribunal has considered the email of 30 March 2021 [494], which appears to the tribunal to be friendly and contain nothing untoward. Stating that meetings would not simply 'go away' is not unreasonable behaviour. In an email sent on 1 April 2021 email to the claimant's solicitors it is said that the respondent considers that the claimant was fit to attend normal work-related meetings. Again, the tribunal finds nothing untoward in that

suggestion. The claimant disagreed with it and he was not forced to attend meetings.

Evidence regarding time limits

103. The claimant joined the GMB trade union in September 2020. He joined GMB in order to obtain support and advice about the ongoing issues with his employer. He did not discuss raising a grievance or bringing an employment tribunal claim with the GMB. The trade union did not raise the possibility of a tribunal claim with him. The claimant knew that because the issues about which he might want to complain in an employment tribunal claim were in existence prior to him joining the trade union, the trade union would not provide legal support to him in relation to such a claim.

104. As noted above, in the grievance submitted on 13 October 2020, the claimant made reference to the 'Disability Act 2010'; and to possible claims for failure to make reasonable adjustments, and discrimination claims in relation to him being subjected to a disciplinary investigation and hearing.

105. Employment Judge Evans made findings of fact in relation to the time limit issues the Judge had to determine at the preliminary hearing on 4 May 2022 (i.e. regarding the S.10 Employment Relations Act claim). Ms Halsall accepts that this tribunal cannot go behind those findings of fact. Employment Judge Evans held at 42 to 44:

42. The claimant makes clear in his witness statement that by 13 October 2020 he had received advice from Acas (see [20] of witness statement). This was after he had been signed off as unfit for work on 7 October 2020 ([19]). The claimant says he was assessed as too unwell to attend management meetings from October 2020 until 21 March 2021 ([21]). He explains that from 7 October 2020 he was taking Sertraline. The dose was increased from January 2021. The claimant self-referred to the Improving Access to [Psychological] Therapies service ("the IAPT service") and had an initial assessment on 23 September 2020 (page 183 in the supplementary bundle). There is a letter from the IAPT service at page 174 of the supplementary bundle showing sessions attended between October 2020 and January 2021 and then 14 sessions of EMDR from 18 February 2021 until 1 July 2021.

43. It is therefore clear that during the primary limitation period for the claim for a breach of section 10 ER[el]A the claimant was suffering from mental ill health. However, in his witness statement he does not address, specifically, his reasons for not presenting this claim on or before 27 December 2020. He does not address whether his mental ill health made this difficult, whether there was an inability to obtain advice, or whether there was some other reason for the non-presentation of the claim in this period.

44. The claimant was able to seek advice from Acas and subsequently raise a grievance with the respondent on 13 October 2020 ([20] of his witness statement). I therefore conclude that in the period to 27 December 2020 the claimant could have sought and obtained advice and acted upon it in relation to his claim for a breach of section 10 ER[el]A 1999, if he had wished to do so. He has not proved that whilst he was able to do this when

he contacted Acas he could not do so in the subsequent period to 27 December 2020.

45. I further find that the claimant was aware of the factual matters allegedly giving rise to this claim by the end of September 2020. I find that the substantial cause of the claimant's failure to present this claim prior to 27 December 2020 was that up to and including that date he had no intention of pursuing a claim in relation to any failure in respect of his right to be accompanied at the hearing scheduled for 28 September 2020. Consequently, he did not seek advice in relation to this matter.

106. The tribunal notes the following from the claimant's witness statement on time limits.

25 … I was unfit for work from 7th October 2020 and I became increasingly unwell. I was trying to resolve the issues with my employer but struggling to do so given my mental impairment.

26. I had contacted my Union, which I had joined in around September 2020 but I have no recollection of being told of any time limits. I contacted ACAS around October 2020 and was advised to raise a grievance, which I did on 13th October 2020 [Pages 455 to 459].

28. By January 2021, I felt that I was getting nowhere with my grievance, I couldn't cope with life, my mental health was spiralling into decline, so I contacted ACAS again for help. I was then advised to commence early conciliation which I did on 25th January 2021.

29. I brought the claim in a further reasonable period as I sought legal advice in mid-March 2021 and asked them to lodge my claim on my behalf and I was unable to. Throughout the period, I was struggling to give coherent instructions as I was so unwell. I was at this time having extensive EMDR therapy/treatment with IAPT.

107. The claimant sought legal advice. A detailed letter, running to 6 pages, was sent by solicitors acting on the claimant's behalf on 24 March 2021 (the letter is wrongly dated 2 March). A without prejudice letter sent on the same date, set out many of the claims now before the tribunal.

Relevant law

108. There was broad agreement between the parties in relation to the relevant legal principles. To keep this part of the judgment less lengthy, we have copied and pasted the legal principles referred to by both counsel in their helpful submissions, in Annex B. The tribunal has carefully considered those legal principles in deciding the issues before the tribunal. The tribunal is also satisfied that the way the issues have been set out, directs the tribunal to the correct legal principles to be applied.

109. In addition, in relation to indirect discrimination, the tribunal notes the following extract from Harvey on Industrial Relations and Employment Law:

Where the PCP is a general policy which has been adopted in order to achieve a legitimate aim, it is the proportionality of the policy in terms of the balance between the importance of the aim and the impact on the class who will be put at a disadvantage by it which must be considered

*rather than the impact on the individual. In Seldon v Clarkson Wright and Jakes the EAT said: 'Typically, legitimate aims can only be achieved by the application of general rules or policies. The adoption of a general rule, as opposed to a series of responses to particular individual circumstances, is itself an important element in the justification. It is what gives predictability and consistency, itself an important virtue.' This was approved by the Court of Appeal and by the Supreme Court (**[2012] UKSC 16**, **[2012] IRLR 590**), where Lady Hale commented on the passage just quoted: 'Thus the EAT would not rule out the possibility that there may be cases where the particular application of the rule has to be justified, but they suspected that these would be extremely rare. I would accept that where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it.' …*

*(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways **[2005] IRLR 862** at [31].*

*(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) **[1987] IRLR 26** per Lord Keith of Kinkel at pp.30–31.*

*(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardy & Hansons plc v Lax **[2005] IRLR 726** per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*

*(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardy & Hansons plc v Lax **[2005] IRLR 726**, CA."*

110. Further, in *R (on the application of Age UK) (claimant) v. SECRETARY OF STATE FOR BUSINESS, INNOVATION & SKILLS (defendant), and EQUALITY AND HUMAN RIGHTS COMMISSION and ATTORNEY GENERAL (interveners), sub nom R (on the application of the Incorporated Trustees of the National Council on Ageing (Age Concern England)) v. Secretary of State for Business, Enterprise and Regulatory Reform [2009] IRLR 1017*, the High Court held at 94:

In my judgment, the government was entitled to take the view that there is little point in developing the principle of age discrimination in the field of employment if it resulted in fewer UK jobs altogether for young and old alike, or jobs being generally offered on worse terms to accommodate the increased costs created by uncertainty. That does not mean that the

priorities and the policy may not change, or that what is considered necessary in 2006 or 2009 cannot yield to some different perception of where the public interest lies at a later date. (Our emphasis)

Conclusions

111. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.

112. In reaching our conclusions, we have considered the burden of proof under the Equality Act 2010 but have not found it necessary to use that to reach our conclusions in this case. We have considered each alleged incident of discrimination separately and we have also considered them collectively. The sub-headings below refer to the allegations under each date in the ET1.

Protected disclosures claims

113. Did the Claimant say the following things:

*Protected disclosure 1 (PD1) - to Mr Scott Weston **on 22 July 2020** that he was gravely concerned regarding the induction of temperature checks inside the Portakabin because:*

PD1 - it was a confined space with limited ventilation with quick successive use so could become a 'covid hotspot' particularly because individuals were required to remove their mask for the check

114. The tribunal has found that this was said at that time.

PD2 - there was no cleaning schedule displayed in the Portakabin

115. The tribunal has found that this was said at that time.

PD3 - No warning system or protocol in place to deal with positive test results; and

116. The tribunal has found that this was said at that time.

PD4 - the Claimant could not use the Portakabin as a result of his anxiety, claustrophobia and PTSD as it was a confined space.

117. The tribunal has found that this was not said at that time.

*1.1.2 To Josh Dennis, ROES, **on or around the end of July/ start of August 2020**, did the Claimant raise PD1 to PD4 as above and ask him to raise them in the next ROES meeting.*

118. The tribunal has found as a fact that the claimant did not make these disclosures to Mr Dennis at this time.

*To Mr Coote on **26 August 2020** (PD1 to PD4)*

119. The tribunal has found as a fact that only PD1 was mentioned to Mr Coote on 26 August 2020.

*To Mr Andy Chapman, TU Representative, on **2 September 2020 – PD1 to PD4**.*

120. The tribunal has found as a fact that the claimant mentioned PD1 and, in relation to PD4 that he mentioned that he was suffering from anxiety due to the portacabin being perceived by him as a confined space. He did not however specifically refer to claustrophobia and PTSD. In any event, only these matters were referred to by Mr Chapman at the time when speaking with and then emailing Mr McGhin.

*To Mr Scott Weston, on **8 September 2020** – PD1 to PD4*

121. The tribunal has found that only PD1 and part of PD4 was mentioned, as above. This is likely, since the conversation with Mr Chapman took place around the same time.

*To Mr McGhin, during a telephone call on **9 September 2020** – PD1 to PD4*

122. The tribunal concludes that only PD1, and part of PD4, was mentioned, as above.

*To Sally Wright on **13 October 2020**, by a grievance.*

123. Bearing in mind the content of the grievance, the tribunal concludes that PD1 and PD2, and part of PD4 was mentioned, as above.

In respect of each of the matters set out at paragraphs 2.1 did the Claimant disclose information?

124. The tribunal concludes that information was disclosed. The factual content of the disclosures amounted to more than bare allegations. Specific facts were mentioned, as to why the portacabin was not safe.

Did the Claimant reasonably believe the information disclosed tended to show that the health and safety of any individual had been, was being or was likely to be endangered?

125. The tribunal concludes that, due to the ongoing affect of the 2004 fire on the claimant's mental health, he genuinely and reasonably believed this.

Did the Claimant reasonably believe it was in the public interest to make the disclosure?

126. Since these disclosures were made in the midst of the pandemic, the tribunal concludes that the claimant reasonably believed that it was in the public interest to raise these issues with the respondent.

127. There is no dispute that the disclosures were made to the claimant's employer. Therefore, the tribunal concludes that the claimant did make protected disclosures, as set out above.

Detriments

128. The tribunal must decide whether the Respondent did the following, and if so, was that detrimental treatment? At the same time, the tribunal has concluded what the reason was for the respondent's action, in relation to each of the alleged detriments.

*Detriment 1 - Mr McGhin threatening the Claimant with disciplinary action on **9 September 2020** in a phone call*

129. The tribunal has found as a fact that the claimant was threatened with disciplinary action during the phone call. However, the reason had nothing to do with the claimant making the protected disclosures. The respondent

introduced a blanket policy in relation to temperature checking, in order to try to keep workers safe. Pending receipt of occupational health advice, the respondent was not convinced that the claimant had a justifiable reason for refusing to go through the portacabin. The claimant was being treated no differently to other colleagues who were also failing to comply with the requirement at that time.

*Detriment 2 - Mr McGhin dismissing the Claimant's concerns on **9 September 2020** in a phone call*

*Detriment 3 - Mr McGhin making the following derogatory comments with words to the effect: 'hold your breath' and 'you are only in there a short time' on **9 September 2020** in a phone call*

130. The tribunal has considered it proportionate to deal with these two allegations together. The tribunal has found as a fact that the 'hold your breath', 'you are only in there a short time' comment, was made during the phone call. The tribunal understands why the claimant was upset by those comments, and on reflection, Mr McGhin accepted that the remarks could be seen as flippant. The tribunal concludes however that the reason Mr McGhin made those comments was because he was not convinced, on the basis of the information before him, that the fears expressed by the claimant gave a reasonable justification for refusing to go through the portacabin to have his temperature checked. The fears expressed by the claimant were the context of the remark made; they were not the reason why Mr McGhin, in the heat of the moment, made flippant remarks in response.

*Detriment 4 - the Claimant being suspended from work on **10 September 2020** pending disciplinary investigations*

131. The claimant was suspended, as a matter of fact. However, the tribunal concludes that the claimant was suspended because he had not gone through the cabin on five previous occasions. His suspension had nothing to do with the protected disclosures he had made by that stage. The decision to suspend the claimant was made because at that point, the respondent considered that the application of the temperature checking policy, without exception, was the best way of keeping workers at the site safe.

*Detriment 5 - on **15 September 2020** the Claimant was subjected to a flawed 'standard' investigation procedure because Mr Toes failed to consider and disclose material evidence showing he had knowledge that the Claimant had raised the disclosures relating to health and safety)*

132. This allegation is not made out on the facts. In any event, the tribunal notes that when asked during cross-examination, the claimant was not able to say what the possible link was between the protected disclosures, and this alleged detriment.

*Detriment 6 - on **15 September 2020** Mr Toes made derogatory comments in the investigation report setting out that the Claimant appeared disingenuous despite his knowledge of disclosures raised*

133. Mr Toes did use the word 'claimed' in the investigation report. This was however because he was not convinced by the claimant's explanation for refusing to go through the portacabin. It was not because of the protected disclosures that the claimant made, but despite them.

Detriment 7 - taking an unreasonable amount of time to complete the disciplinary investigation from suspension to decision contrary to the ACAS Code of Practice

134. There was some debate at the hearing as to whether or not this alleged detriment related only to the initial disciplinary investigation, or to the ongoing disciplinary process. Following consideration of that overnight, Ms Halsall conceded that since the claim form was submitted in March 2021, the allegation referred to the ongoing disciplinary process, but only up to that point. The tribunal considers that is the most reasonable interpretation of the term 'disciplinary investigation'.

135. The tribunal concludes however that the fact that the disciplinary process had not been concluded by the time the claim form was submitted, had nothing to do with the protected disclosures that had been made. There were numerous reasons why, including the claimant's ongoing ill health; the claimant was too unwell to engage with the disciplinary process further; and it took a long time to obtain the report from the claimant's GP and subsequent updated OH report.

*Detriment 8 - subject to formal disciplinary proceedings on **5 October 2020***

136. This occurred as a matter of fact, but again the tribunal concludes that the reason for the disciplinary investigation leading to the continuation of the disciplinary process, was because Mr Toes was not convinced, on the basis of the information before him at that stage, including the 15 September 2020 OH report, that the claimant had reasonable grounds for refusing to go through the portacabin.

*Detriment 9 - during disciplinary proceedings on **5 October 2020** Mr McGhin made derogatory comments about the Claimant*

137. The claimant was not able to say during cross-examination what the alleged derogatory comments were. This allegation therefore fails on the facts.

*Detriment 10 - on **5 October 2020** Mr McGhin lied about the contents of the investigation report and the Claimant's explanation of what occurred despite him having knowledge of the disclosures*

138. Fundamentally, this claim fails on the facts. The tribunal concludes that Mr McGhin did not have knowledge of the possible effect of any ongoing mental health issues arising from the 2004 fire on the claimant, until the conclusion of the disciplinary hearing on 5 October 2020. As the claimant said during the meeting:

> *SC: It's not something I like talking about. When you've gone through that kind of trauma it brings back some awful memories. …*

139. When that issue was raised, then instead of concluding the proceedings then, Mr McGhin quite properly adjourned the proceedings, so that further medical evidence could be sought. From the evidence of the claimant, Mr Chapman and Mr Whitehead, it appeared that to them, the ongoing difficulties the claimant suffered following the fire were self-evident. That was not however the case for the claimant's managers, who were not aware of all the details; and when the claimant had not requested any further adjustments, in relation to PTSD, after 2008. He just did his best to get on with his life, both at work, and at home.

*Detriment 11 - the Claimant was not paid sick pay under the discretionary sick pay scheme in place at the time he was certified unfit to work (**7 October 2020**)*

140. As a matter of fact, a decision was made to take to stop the claimant's entitlement to discretionary sick pay. The tribunal concludes however that the reason for this decision had nothing to do with the protected disclosures that the claimant had made, including those disclosures made in the grievance, which Ms Wright, one of the decision makers, would have been aware of. Rather, the decision was made in line with the temporary changes to the discretionary sick pay scheme which the company had agreed with the recognised trade union GMB, during the pandemic, because of the potential financial implications for the business in the exceptional circumstances which existed at that time. The decision was made by applying the terms of the agreed changes; in particular, the claimant's attendance record and sickness absence record.

141. As noted above, it is not clear why a decision was made to move the claimant from full pay on suspension to sick pay, but that argument has not been pursued by or on behalf of the claimant and it is not therefore necessary to reach any further conclusions in relation to it.

If the Claimant made any of the alleged protected disclosure(s), was this the reason for the treatment complained of?

142. The reason why question has been considered above. The tribunal has concluded that none of the detriments which occurred as a matter of fact were on the ground of the claimant having made protected disclosures.

Time limits – protected disclosure claim

143. The tribunal must decide whether the claim was brought within the time limit set by section 48(3)(a) of the Employment Rights Act 1996? This gives rise to the following sub-issues.

What was the date of the act/failure to act to which the complaint relates? Did the act to which the complaint relates extend over a period? If so, what was the last day of that period?

144. None of the allegations have been upheld.

Was the act/failure to act to which the complaint relates part of a series of similar acts/failures? If so, what was the date of the last of those acts/failures?

145. See above.

Insofar as the complaint relates to a deliberate failure to act, when did the Respondent decide on it?

146. Not applicable.

If not, was it reasonably practicable for the complaint to be presented within the time limit set by section 48(3)(a) of the Employment Rights Act 1996

147. Acas Early Conciliation was not commenced until 25 January 2023. This means that any allegations pre-dating 26 October 2020 are out of time. This means all of the allegations, save possibly, to the extent that the disciplinary proceedings were still ongoing at the time the claim form was submitted. Had

it been necessary to reach a conclusion on the reasonably practicable issue, the tribunal would have concluded, like Employment Judge Evans, that it was reasonable practicable for the claimant to commence Acas Early Conciliation in time.

If not: within what further period would it have been reasonable for the complaint to be presented?

148. Not applicable.

Was the complaint presented within that further period?

149. Not applicable.

Disability discrimination claims

150. The tribunal first needs to decide whether the Claimant was a disabled person. In particular:

Did the Claimant have a physical or mental impairment at the material time, namely: Post-Traumatic Stress Disorder, claustrophobia and anxiety and a mental impairment in respect of confined spaces, ventilation, safety, fire safety?

151. The tribunal concludes that the claimant has continued to suffer with PTSD since the fire incident in 2004. Further, the tribunal concludes that the claimant's anxiety and hypervigilance about enclosed spaces are a symptom of the PTSD, not a separate impairment. The tribunal concludes that the claimant does not have a separate impairment of claustrophobia, no such formal diagnosis ever having been made.

At the material time, did the Claimant's impairment have an adverse effect on his ability to carry out normal day to day activities?

152. The tribunal concludes, on the basis of the extracts from the claimant's disability impact statement, as set out above, that the impairment did have an adverse impact on his ability to carry out normal day-to-day activities. In reaching that conclusion, the tribunal has borne in mind the generic nature of the matters complained of, and that, without intending to do so, there may have been some exaggeration. Nevertheless, there was still an impact. The tribunal is reinforced in that conclusion by the evidence of Mr Chapman and Mr Whitehead, to the effect that the claimant was, after the incident, 'a changed man'.

At the material time, was the effect of the impairment on the Claimant's ability to carry out normal day to day activities substantial?

153. For the same reasons, the tribunal concludes that the impact on normal day-to-day activities was indeed substantial. It was a lot more than minor or trivial. The tribunal concludes that the claimant's PTSD symptoms continued after 2008, although the effects were less pronounced. The claimant tried to get on with life as best as he could after the formal treatment ended. But he is nevertheless is reminded every single day of the fire incident, as a result of his having to apply medical cream to areas most affected by burns. It is, as he graphically told the tribunal, 'a life sentence'. The adverse effects continued after 2008, and were sufficient to amount to a disability.

At the material time, had the effect of the impairment on the Claimant's ability to carry out normal day to day activities lasted for a period of at least 12 months or was it likely to do so?

154. See above. The impairment has continued since 2008 and is long term.

*Did the Respondent have actual or constructive knowledge of the disability at the material time (namely from **22 July 2020**) and if so when?*

155. Bearing in mind the contents of the email from Scott Weston to managerial colleagues and Mr Toes' evidence, the tribunal accepts that they did not, in September 2020, have actual or constructive knowledge of the claimant's disability. The claimant had not required any adjustments for PTSD since 2008. They were not aware, due to the claimant's stoicism, and decision to just get on with life as much as possible, that he was still suffering from PTSD.

156. The tribunal has found that the claimant did not specifically mention the fire incident or PTSD until the disciplinary hearing. For understandable reasons, he did not like to talk about it. Scott Weston, Mr Toes and Mr McGhin, understood the claimant's issues to be related to anxieties about getting Covid, rather than being related to the fire incident. For example, in relation to the email of Scott Weston, Mr Toes told the tribunal and we accept that he thought the reference to the space being confined was linked to Covid - since the smaller a space, the greater the chance of infection spreading. Similarly, the notes on the compliance tracker reflect that understanding.

157. Given that a referral had been made to Occupational Health, the tribunal concludes that there was no obligation on Mr Toes to ask for further details during the investigation meeting. The claimant himself was not forthcoming about the link between his concerns about the portacabin and the 2004 fire incident.

158. Up to 1 October 2020, there is no record of the claimant making specific mention about PTSD or a mental health disability. Up to that point, the respondent's managers thought that the claimant was particularly anxious about Covid. This did not cause them to think what might be behind that. It was consistent with the claimant being known to especially health and safety conscious, verging on the extreme.

159. This is consistent with the tribunal's findings of fact that the claimant did not ask for any adjustments for PTSD from 2007 when the OH report confirmed that no adjustments were needed. It is not in dispute that the claimant did ask for adjustments for physical issues arising out of the burns, such as warmer gloves and special boots. There may have been an understanding between the claimant and Phil Tinsley about his attendance at meetings but that was not agreed with or communicated to other Team Managers.

160. The link between the claimant's concerns about Covid, the portacabin, and the 2004 incident was obvious to the claimant who lived his disability day in day out. It was clear to Mr Chapman, given his knowledge of the claimant. In the absence of ongoing issues at work linked to PTSD however, it was far from obvious to the team managers or to Mr McGhin at that time. Only after the meeting on 5 October 2020 did the possible link between the fire and the anxiety about using the portacabin become apparent to Mr McGhin, at which stage the disciplinary proceedings were put on hold and further medical

evidence was sought. The tribunal concludes that the date of knowledge is therefore 5 October 2020.

Disability related harassment: Equality Act 2010 s26

161. The Claimant alleges that the Respondent engaged in the following conduct which constituted disability related harassment. The tribunal must decide whether that conduct happened.

*Allegation 1 - on **2 September 2020** Mr McGhin stated that there were "no exceptions for one person" and dismissed the Claimant's request for adjustments;*

162. As a fact, this happened.

*Allegation 2 - during a telephone call on **9 September 2020** Mr McGhin threatened the Claimant with disciplinary action;*

163. This allegation is made out on the facts.

*Allegation 3 - during a telephone call on **9 September 2020** Mr McGhin informed the Claimant to 'hold your breath' and 'you are only in there a short time';*

164. This allegation is made out on the facts. We have concluded that the remarks were somewhat flippant, made in the heat of the moment and were not intended to be offensive. The claimant reasonably perceived them in that way however.

*Allegation 4 - Mr Gary Toes including the word 'claimed' in his investigation report dated **15 September 2020** (as reviewed on the 21st September 2020);*

165. This allegation is made out on the facts.

*Allegation 5 - Mr McGhin referred the Claimant to a diagram of the same portacabin during the disciplinary hearing on **5 October 2020** and refused to accept his explanation about his symptoms of his disability;*

166. This allegation is made out on the facts, in relation to the diagram, not the refusal to accept the claimant's explanation about the symptoms of his disability. In relation to the latter, the tribunal concludes that Mr McGhin properly and recently sought clarification from the claimant during the disciplinary hearing about his medical issues. At the conclusion of the hearing, Mr McGhin requested further medical evidence, due to him having listened carefully to what the claimant told him at that meeting.

Allegation 6 - In September 2020 a comment "I bet SC is regretting his decision!" made in an email (that was not sent to or shared with the Claimant save for his discovery of it as a result of a data subject access request).

167. This allegation is made out on the facts.

Was the conduct in question unwanted?

168. The tribunal concludes in relation to all six allegations that the conduct was unwarranted.

Was the conduct in question related to the Claimant's alleged disabilities?

169. Allegation 1 – 'no exceptions'. The tribunal concludes that this comment was not related to the claimant's disability. Mr McGhin was not aware of the claimant's disability at that stage, so it could not have been so related.

Rather, the comment arose from Mr McGhin's view at that time, that the safest approach was for the temperature checking policy to be followed without exception. He was not convinced at that stage that any adjustments to that clear policy were justified.

170. Allegation 2 – threat of disciplinary action. The claimant says that this allegation is was related to the claimant's disability in that he was unable to go through the cabin because of his disabilities. That does not make the conduct related to disability in the way envisaged by the Equality Act 2010 however (although it may well have been sufficient in relation to s.15 claim). The question is what was in the mind of Mr McGhin. Mr McGhin did not have in mind that the claimant had a disability – he had in mind that the claimant was refusing to enter the cabin, due to Covid-related anxiety.

171. Allegation 3 – comments during 9 September 2020 phone call. Again, the tribunal concludes that this comment was not related to disability. It was an unhelpful comment and Mr McGhin, to his credit, conceded that. But it was not said because Mr McGhin had in mind that the claimant had a disability. Again, see the reasoning above.

172. Allegation 4 – the use of the word 'claimed'. This was not related to disability. Mr Toes did not have knowledge of disability at that time, so it could not be so related.

173. Allegation 5 – reference to a diagram. Mr McGhin was trying to understand the difference between the two rooms, which on paper seemed to him to be similar in layout, at least in relation to the entrance area. The questions were not related to disability but were down to Mr McGhin genuinely struggling to understand the difference. Having listened to the claimant's explanation, the tribunal understands the difference, in the claimant's own mind. But it is only because we have listened to his explanation that we can readily see the difference. It would not have been obvious otherwise.

174. Allegation 6 – 'I bet SC is regretting his decision'. This was an unfortunate and inappropriate unguarded comment by Mr Hastings but the tribunal concludes that it was not related to disability. See the above reasoning in relation to allegation 2 and knowledge. Managers at the respondent may wish to reflect on the need to ensure that managers avoid the use of such unguarded comments in future, which can come to light as a result of a subject access request and/or during the disclosure process in legal proceedings.

Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

175. It is not necessary to reach conclusions on this issue, but we would in any event have concluded that this was not the purpose of the treatment in relation to any of the allegations.

If not, did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

176. It is not necessary or proportionate to reach conclusions on this issue.

Direct discrimination: Equality Act 2010 s13

177. The Claimant alleges that the Respondent did the following things which constituted direct disability discrimination. Again, the tribunal must consider whether this conduct happened. In relation to each alleged detriment, the tribunal has considered it reasonable to consider the 'reason why' question at the same time.

*Allegation 1 - on **2 September 2020** Mr McGhin made derogatory comments by claiming there would be "no exceptions for one person" in respect of the temperature checking requirement*

178. This happened as a matter of fact, that Mr again did not have knowledge of disability at this stage. Further, the claimant was taken to the pleaded case on this issue at page 30 where it is said: '*the comments were made in connection with his request for reasonable adjustments and thus are "because of" his disability*'. The claimant stood by the pleaded case; that however could give rise to an allegation do victimisation, not direct discrimination.

*Allegation 2 - on **9 September 2020** Mr McGhin made derogatory comments during a telephone call with the Claimant by stating that the Claimant could hold his breath; in the portacabin, stating he was 'only in there for a short period of time'*

179. This incident happened as a matter of fact. Again, the claimant stood by the pleaded case which is that: '*the comments were made in connection with his inability to use the Portakabin due to his health condition and his request for reasonable adjustments and thus are "because of" his disability'.* The tribunal can see how the pleaded case would be a relevant to a *S*.15 claim; it does not give rise to a direct discrimination claim however. The tribunal is satisfied that the comments had nothing to do with the claimant's disability, which Mr McGhin was not aware of, at that time.

*Allegation 3 - suspending the Claimant on **10 September 2020***

180. It is not in dispute that the claimant was suspended. The tribunal concludes that the reason for the claimant's suspension was Covid safety, as a result of the claimant's refusal to follow what management considered at the time was a necessary and reasonable management instruction, to help keep all workers on the site safe. In any event, the respondent did not have knowledge of disability at this time.

*Allegation 4 - in his investigation report dated **15 September 2020** (reviewed 21 September 2020), Mr Gary Toes included the word "claimed"*

181. this occurred as a matter of fact, Mr Toes was not aware that the claimant had a disability at that stage. The comment was not therefore made because of disability. It was made because Mr Toes doubted the claimant's defence, in the absence of such knowledge.

*Allegation 5 - Mr McGhin made derogatory comments and had "an aggressive and dismissive tone and approach" towards the Claimant during the disciplinary hearing on **5 October 2020***

182. This allegation fails on the facts.

*Allegation 6 - the Respondent's decision not to pay the Claimant sick pay under its discretionary scheme in place during the Covid-19 pandemic following him being certified unfit for work on **7 October 2020***

183. This allegation is made out on the facts. However, the tribunal concludes that the decision was due to the reasonable application of the amended discretionary sick pay policy. It was not because of disability. Claimant was being treated no differently to any of his colleagues.

*Allegation 7 - In **March and April 2021** Ms Spinks engaged in "unreasonable conduct towards the Claimant" of badgering the Claimant to commence management meetings contrary to OH recommendation, failing to reconsider her position on that stance, failing to properly answer direct questions, and failing to make adjustments.*

184. The tribunal has found that this allegations is not made out on the facts.

*Allegation 8 - in **September 2020** a comment "I bet SC is regretting his decision!" made in an email (that was not sent to or shared with the Claimant save for his discovery of it as a result of a data subject access request). [Note, text message, Mr Richard Hastings, Head of Logistics to Mr McGhin*

185. For the same reasons as set out in relation to the harassment allegation on the same facts, this allegation not succeed.

In doing the acts complained of, did the Respondent treat the Claimant less favourably than it treated the hypothetical comparator relied upon, being "someone with the same characteristics as the Claimant other than his disability" [paragraph 28 of the amended particulars of claim] in comparable circumstances?

186. See above.

If so, was there any material difference between the circumstances relating to the Claimant and the hypothetical comparator?

187. See above.

If the Respondent treated the Claimant less favourably, was this because of disability?

188. See above. The tribunal is satisfied that none of the treatment alleged was because of disability.

Indirect Discrimination: Equality Act 2010 s19

189. The Respondent admits that it had a PCP of 'requiring employees to use a portacabin for temperature checks'. Further, the Respondent admits it applied that PCP to the Claimant and that it would have applied that PCP to persons who did not have the same alleged disability as the Claimant.

Did the PCP in question put, or would it have put, people who have the same disability as the Claimant at a particular disadvantage when compared with people who do not have the same disability as the Claimant?

190. The tribunal concludes that other individuals suffering from PTSD, arising from similar circumstances to the claimant, would also have been put to a particular disadvantage by the PCP.

Did the PCP in question put, or would it have put, the Claimant at that disadvantage?

191. The claimant was placed at that disadvantage.

Was the PCP a means of achieving a legitimate aim? The Respondent states that its legitimate aim was safeguarding the health and safety of colleagues and visitors on site.

192. The legitimate aim relied on is the safeguarding of health and safety of colleagues and visitors on site. The tribunal concludes that this is a legitimate aim and remained so during the pandemic.

If so, was it a proportionate means of achieving that aim?

193. The tribunal concludes that at the time the policy was introduced in June/July 2020, it corresponded to a real on the part of the respondent to look after the health and safety of staff and visitors to the site, and was reasonably necessary to achieve that aim. The introduction of the policy needs to be understood in the context of the fast moving and unprecedented nature of the pandemic during 2020. The employer was aware of a few people who were failing to comply with the policy, all of them, apparently, without good reason. One of the individuals was subsequently dismissed for non-compliance.

194. At the time of the claimant's suspension in September 2020, the substantial disadvantage of the PCP on him was not known to the employer. The tribunal accepts of course that lack of knowledge is not a reason to reject an indirect discrimination claim.

195. Nevertheless, in the context of this case, and in the absence of the respondent properly understanding the claimant's reasons for not wishing to comply with the policy, until that became clearer at the disciplinary hearing on 5 October 2020, it was in the tribunal's judgement reasonable of the employer to insist on the blanket application of a policy which was simple in intent, and simple to administer.

196. After the 5 October 2020 meeting, it was necessary for the respondent to reconsider whether the blanket application of the policy was reasonably necessary, in relation to the claimant, in the light of possible alternatives. At the time of the suspension, the tribunal concludes that it was not reasonable to rely on the alternative of the claimant taking his own temperature, since that was necessarily as reliable, and would have required somebody to stand close to the claimant, in order to verify his temperature. Further, the tribunal concludes that the traffic office was not a reasonable alternative, given that the respondent had a reasonable policy of restricting movement between 'bubbles" of workers within the site.

197. Unfortunately for the claimant, he was not able to return to the site, even after the respondent confirmed that it was willing to change the policy in relation to him, by the use of an in-ear check. Since he was never able to return, it is not necessary to consider when it would no longer have been proportionate to apply the PCP to the claimant.

Duty to make reasonable adjustments: Equality Act 2010 s21

198. The tribunal must decide whether the Respondent had the following PCPs.

PCP1 - requiring employees to use a portacabin for temperature checks.

PCP2 - requiring employees within [CF-2] ~~the same work bubble as the Claimant, including the Claimant~~, to use the portacabin for temperature checks.

199. The tribunal concludes that PCP2 is made out, as amended above, which incorporates PCP1. The Respondent in any event admits that it applied the PCP of requiring employees in CF-2 to comply with a health and safety requirement in place during the Covid-19 pandemic, namely that they pass through a portacabin on entering site to have their temperature checked.

PCP3 - not assessing employees via occupational health prior to conducting disciplinary and grievance procedures and prior to making decisions about whether to grant discretionary sick pay under the applicable company policies.

200. The tribunal notes that when the claimant was asked about this during the hearing, he said he was referred to OH but not for the purposes of the disciplinary hearing. This is not how the PCP is put. The respondent argues that it had no such policy and the tribunal accepts that. As a matter of fact, an OH report was obtained prior to the investigation report being concluded. This part of PCP3 is therefore not made out on the facts.

201. As for the grievance, the respondent says this was put on hold pending OH advice. Again, the claimant complains the referral was not for the purpose of the grievance procedure; again, this is not how the claim is pleaded. This part of PCP3 is not made out on the facts.

Did the PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? & Was the disadvantage in relation to employment by the Respondent?

202. It became apparent during the hearing that the substantial disadvantage had not been identified in the list of issues. Both counsel helpfully agreed that evidence in chief could be given by the claimant in relation to this issue. The claimant's evidence was to the effect that he was not able to use the facility, because the nature of the portacabin led to him being triggered. This was because it was a confined space and the claimant is hypervigilant, constantly scanning for safety issues in his daily life, including at work. The claimant feared entering the portacabin would cause a panic attack; following the one occasion the claimant did enter the portacabin, he subsequently vomited. The tribunal concludes therefore that the claimant did suffer a substantial disadvantage in relation to PCP1/2.

Did the Respondent know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

203. The tribunal refers to its conclusions above in relation to knowledge of disability, that the respondent did not have knowledge until 5 October. Only when the respondent had knowledge of disability was the disadvantage arising from that potentially known to the respondent as well.

If not, could the Respondent reasonably have been expected to know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

204. No, see above.

Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP?

205. The adjustments the Claimant suggests are as follows:

Step 1 - permitting the Claimant to take the temperature check in the Traffic Office and/or via a handheld thermometer

206. the tribunal notes at this stage the evidence given by Mr McGhin during the hearing that the respondent took its responsibilities seriously, and that there were very few positive Covid cases at the workplace during the pandemic. After the meeting on 5 October the respondent obtained further medical evidence and advice. The claimant was on suspension then so that step was not required until he was able to return to work. Sadly, he was never able to do so. The claimant was told on 17 February 2021, that he could use an in-ear temperature check but has never able to return to work after that date.

Step 2 - sending the Claimant to occupational health prior to conducting disciplinary and grievance procedures and prior to making decisions about whether to grant discretionary sick pay under the applicable company policies

207. The respondent did refer the claimant to OH, and this claim therefore fails on the facts. In any event, it would have failed on the question of knowledge too.

Step 3 - referring the Claimant, immediately, to Occupational Health for assessment at the time he raised concerns regarding his mental health when using the temperature checking pod

208. The tribunal has found that that the claimant did not refer to his mental impairment, until 1 October 2020, to occupational health, and then in more detail during the disciplinary hearing on 5 October 2020. This claim therefore fails on the question of knowledge. It was not reasonable to make the adjustment as soon as concerns were raised, in light of what the claimant was saying at that point.

Time limits

209. Has the Claimant brought his claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

What was the date of the act to which the complaint relates?

Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?

Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?

If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

210. Since none of the discrimination claims have been upheld, it is not possible or necessary to reach any conclusions in relation to time limit issues.

Concluding remarks

211. Although the tribunal has not upheld any of the claimant's claims, the tribunal feels empathy towards both parties. As for the claimant, he suffered serious injuries in 2004, which have continued to have a major adverse impact on his life ever since. It is tragic that the claimant has, as a result of these matters, been unable to return to work, and has subsequently been dismissed as a result of that. The claimant has lost a job that he enjoyed. The respondent has lost a reliable and conscientious worker, whose attitude towards health and safety risks ultimately benefitted all employees at the site.

Employment Judge James
North East Region

Dated 1 December 2023

ANNEX A – LIST OF ISSUES

1. Detriment for making a protected disclosure

1.1 Did the Claimant say the following things:

1.1.1 To Mr Scott Weston **on 22 July 2020** that he was gravely concerned regarding the induction of temperature checks inside the Portakabin because:

1.1.1.1 It was a confined space with limited ventilation with quick successive use so could become a 'covid hotspot' particularly because individuals were required to remove their mask for the check

1.1.1.2 There was no cleaning schedule displayed in the Portakabin

1.1.1.3 No warning system or protocol in place to deal with positive test results; and

1.1.1.4 The Claimant could not use the Portakabin as a result of his anxiety, claustrophobia and PTSD as it was a confined space.

1.1.2 To Josh Dennis, ROES, **on or around the end of July/start of August 2020**, the Claimant raised the same issues (as set out at paragraphs 1.1.1.1 - 1.1.1.4 inclusive) and asked him to raise them in the next ROES meeting.

1.1.3 To Mr Coote on **26 August 2020** (as set out at paragraphs 1.1.1.1 – 1.1.1.4 inclusive)

1.1.4 To Mr Andy Chapman, TU Representative, on **2 September 2020** what he had told Mr Coote and Mr West (as set out above).

1.1.5 To Mr Scott Weston, on **8 September 2020**, a repetition of matters set out at paragraphs 1.1.1.2 – 1.1.1.4 inclusive

1.1.6 To Mr McGhin, during a telephone call on **9 September 2020** a repetition of matters set out at paragraphs 1.1.1.2 – 1.1.1.4 inclusive.

1.1.7 To Sally Wright on **13 October 2020**, by a grievance.

Whether the Claimant made a qualifying disclosure

1.2 In respect of each of the matters set out at paragraphs 2.1 did the Claimant disclose information?

1.3 Did the Claimant reasonably believe the information disclosed tended to show that the health and safety of any individual had been, was being or was likely to be endangered?

1.4 Did the Claimant reasonably believe it was in the public interest to make the disclosure?

Whether qualifying disclosure was protected

1.5 In respect of each alleged disclosures set out at paragraph 2.1 was each disclosure made in accordance with section 43C of the Employment Rights Act 1996? In particular:

1.5.1 Was the qualifying disclosure made to the Respondent or to any person falling within section 43C(1)(a), (1)(b) or (2). The

Claimant alleges that he made all of the qualifying disclosures were made to his employer.

Detriments

1.6 Did the Respondent do the following, and if so, was such detrimental treatment?

1.6.1.1 Mr McGhin threatening the Claimant with disciplinary action on **9 September 2020** in a phone call;

1.6.1.2 Mr McGhin dismissing the Claimant's concerns on **9 September 2020** in a phone call;

1.6.1.3 Mr McGhin making the following derogatory comments with words to the effect: 'hold your breath' and 'you are only in there a short time' on **9 September 2020** in a phone call ;

1.6.1.4 The Claimant being suspended from work on **10 September 2020** pending disciplinary investigations;

1.6.1.5 On **15 September 2020** the Claimant was subjected to a flawed 'standard' investigation procedure because Mr Toes failed to consider and disclose material evidence showing he had knowledge that the Claimant had raised the disclosures relating to health and safety);

1.6.1.6 On **15 September 2020** Mr Toes made derogatory comments in the investigation report setting out that the Claimant appeared disingenuous despite his knowledge of disclosures raised;

1.6.1.7 Taking an unreasonable amount of time to complete the disciplinary investigation from suspension to decision contrary to the ACAS Code of Practice;

1.6.1.8 Subject to formal disciplinary proceedings on **5 October 2020**;

1.6.1.9 During disciplinary proceedings on **5 October 2020** Mr McGhin made derogatory comments about the Claimant;

1.6.1.10 On **5 October 2020** Mr McGhin lied about the contents of the investigation report and the Claimant's explanation of what occurred despite him having knowledge of the disclosures;

1.6.1.11 The Claimant was not paid sick pay under the discretionary sick pay scheme in place at the time he was certified unfit to work (**7 October 2020**)

Reason for treatment

1.7 If the Claimant made any of the alleged protected disclosure(s), was this the reason for the treatment complained of?

Whether claim(s) in time

1.8 Was the claim brought within the time limit set by section 48(3)(a) of the Employment Rights Act 1996? This gives rise to the following sub-issues:

1.8.1 What was the date of the act/failure to act to which the complaint relates?

1.8.2 Did the act to which the complaint relates extend over a period? If so, what was the last day of that period?

1.8.3 Was the act/failure to act to which the complaint relates part of a series of similar acts/failures? If so, what was the date of the last of those acts/failures?

1.8.4 Insofar as the complaint relates to a deliberate failure to act, when did the Respondent decide on it?

1.9 If not, was it reasonably practicable for the complaint to be presented within the time limit set by section 48(3)(a) of the Employment Rights Act 1996?

1.10 If not:

1.10.1 within what further period would it have been reasonable for the complaint to be presented?

1.10.2 was the complaint presented within that further period?

Remedy for protected disclosure complaint

1.11 Is it just and equitable to award compensation?

1.12 What loss has the Claimant sustained in consequence of the treatment complained of?

1.13 Has the Claimant taken reasonable steps to mitigate his loss?

1.14 Was any qualifying disclosure made by the Claimant in good faith? If not, is it just and equitable to reduce any compensatory award and to what extent?

1.15 Did the Claimant unreasonably fail to follow the ACAS Code of Practice? If so, is it just and equitable to reduce the award and, if so, by how much?

1.16 Did the Claimant cause or contribute to the treatment to which the complaint relates? If so, to what extent should any compensation be reduced?

<u>Claims under Equality Act 2010 s120</u>

Disability discrimination

2. Whether Claimant was a disabled person

2.1 Did the Claimant have a physical or mental impairment at the material time, namely:

2.1.1 Post-Traumatic Stress Disorder, claustrophobia and anxiety and a mental impairment in respect of confined spaces, ventilation, safety, fire safety?

2.2 At the material time, did the Claimant's impairment have an adverse effect on his ability to carry out normal day to day activities?

2.3 At the material time, was the effect of the impairment on the Claimant's ability to carry out normal day to day activities substantial?

2.4 At the material time, had the effect of the impairment on the Claimant's ability to carry out normal day to day activities lasted for a period of at least 12 months or was it likely to do so?

Whether the Respondent had knowledge of disability

2.5 Did the Respondent have actual or constructive knowledge of the disability at the material time? (namely from **22 July 2020**)?

3.5.1 PTSD, claustrophobia and anxiety and a mental impairment in respect of confined spaces, ventilation, safety, fire safety and if so, when?

3. Direct discrimination: Equality Act 2010 s13

The Claimant alleges that the Respondent did the following things which constituted direct disability discrimination:

3.1 On **2 September 2020** Mr McGhin made derogatory comments by claiming there would be "no exceptions for one person" in respect of the temperature checking requirement;

3.2 On **9 September 2020** Mr McGhin made derogatory comments during a telephone call with the Claimant by stating that the Claimant could 'hold his breath' in the portacabin, stating he was 'only in there for a short period of time'

3.3 Suspending the Claimant on **10 September 2020**;

3.4 In his investigation report dated **15 September 2020** (reviewed 21 September 2020), Mr Gary Toes included the word "claimed;"

3.5 Mr McGhin made derogatory comments and had "an aggressive and dismissive tone and approach" towards the Claimant during the disciplinary hearing on **5 October 2020;**

3.6 The Respondent's decision not to pay the Claimant sick pay under its discretionary scheme in place during the Covid-19 pandemic following him being certified unfit for work on **7 October 2020**;

3.7 In **March and April 2021** Ms Spinks engaged in "unreasonable conduct towards the Claimant" of badgering the Claimant to commence management meetings contrary to OH recommendation, failing to reconsider her position on that stance, failing to properly answer direct questions, and failing to make adjustments.

3.8 In **September 2020** a comment "I bet SC is regretting his decision!" made in an email (that was not sent to or shared with the Claimant save for his discovery of it as a result of a data subject access request).

Whether treatment was less favourable

3.9 In doing the acts complained of, did the Respondent treat the Claimant less favourably than it treated the hypothetical comparator relied upon, being "someone with the same characteristics as the Claimant other than his disability" [paragraph 28 of the amended particulars of claim]?

3.10 If so, was there any material difference between the circumstances relating to the Claimant and the hypothetical comparator?

3.11 In doing the act complained of, did the Respondent treat the Claimant less favourably than it would have treated others in comparable circumstances?

Reason for less favourable treatment

3.12 If the Respondent treated the Claimant less favourably, was this because of disability?

Whether claim(s) in time

3.13 Has the Claimant brought his claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

3.13.1 What was the date of the act to which the complaint relates?

3.13.2 Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?

3.13.3 Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?

3.14 If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

4. Disability related harassment: Equality Act 2010 s26

The Claimant alleges that the Respondent engaged in the following conduct which constituted disability related harassment:

4.1 On **2 September 2020** Mr McGhin stated that there were "no exceptions for one person " and dismissed the Claimant's request for adjustments;

4.2 During a telephone call on **9 September 2020** Mr McGhin threatened the Claimant with disciplinary action;

4.3 During a telephone call on **9 September 2020** Mr McGhin informed the Claimant to 'hold your breath' and 'you are only in there a short time';

4.4 Mr Gary Toes including the word 'claimed' in his investigation report dated **15 September 2020** (as reviewed on the 21st September 2020);

4.5 Mr McGhin referred the Claimant to a diagram of the same portacabin during the disciplinary hearing on **5 October 2020** and refused to accept his explanation about his symptoms of his disability;

4.6 In September 2020 a comment "I bet SC is regretting his decision!" made in an email (that was not sent to or shared with the Claimant save for his discovery of it as a result of a data subject access request).

Whether incidents/events complained of occurred

4.7 Did the Respondent do the acts as alleged above?

Whether conduct unwanted

4.8 Was the conduct in question unwanted?

Whether conduct related to disability

4.9 Was the conduct in question related to the Claimant's alleged disabilities?

4.10 Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.11 If not, did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

Whether claim(s) in time

4.12 Has the Claimant brought his claim within the time limit set by Section 123(1) of the Equality Act 2010? This gives rise to the following sub-issues:

4.12.1 What was the date of the act to which the complaint relates?

4.12.2 Was the act to which the complaint relates an element of conduct extending over a period? If so, when did that period end?

4.12.3 Insofar as the complaint relates to a failure to do something, when did the Respondent decide on it?

4.13 If not, is it just and equitable for the Employment Tribunal to extend time for the presentation of the complaint pursuant to section 123(1)(b) of the Equality Act 2010?

5. Indirect Discrimination: Equality Act 2010 s19

5.1 The Respondent admits that it had a PCP of:

5.2.1 Requiring employees to use a portacabin for temperature checks

5.2 The Respondent admits it applied that PCP to the Claimant and that it would have applied that PCP to persons who did not have the same alleged disability as the Claimant.

5.3 Did the PCP in question put, or would it have put, people who have the same disability as the Claimant at a particular disadvantage when compared with people who do not have the same disability as the Claimant?

5.4 Did the PCP in question put, or would it have put, the Claimant at that disadvantage?

5.5 Was the PCP a means of achieving a legitimate aim? The Respondent states that its legitimate aim was safeguarding the health and safety of colleagues and visitors on site.

5.6 If so, was it a proportionate means of achieving that aim?

Whether claim(s) in time (see 4.12 and 4.13 above – the same issues apply)

Duty to make reasonable adjustments: Equality Act 2010 s21

6. Did the Respondent have the following PCPs:

6.1 Requiring employees to use a portacabin for temperature checks.

6.2 Requiring employees within the same work bubble as the Claimant, including the Claimant, to use the portacabin for temperature checks.

6.3 Not assessing employees via occupational health prior to conducting disciplinary and grievance procedures and prior to making decisions about whether to grant discretionary sick pay under the applicable company policies.

7. Whether Claimant disadvantaged by a PCP

7.1 The Respondent admits that it applied the PCP of requiring employees to comply with a health and safety requirement in place during the Covid-19 pandemic, namely that they pass through a portacabin on entering site to have their temperature checked.

7.2 Did the Respondent apply the PCPs set out at 6.2 & 6.3, above?

7.3 Did the PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

7.4 Was the disadvantage in relation to employment by the Respondent?

Whether Respondent had knowledge of disadvantage caused by PCP

7.5 Did the Respondent know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

7.6 If not, could the Respondent reasonably have been expected to know that the PCPs in question put the Claimant at a substantial disadvantage, in comparison with persons who are not disabled, in relation to employment by the Respondent?

Whether Respondent took reasonable steps to avoid disadvantage caused by PCP

7.7 Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage caused by the PCP?

7.8 The adjustments the Claimant suggests are as follows:

7.8.1 Permitting the Claimant to take the temperature check in the Traffic Office and/or via a handheld thermometer.

7.8.2 Sending the Claimant to occupational health prior to conducting disciplinary and grievance procedures and prior to making decisions about whether to grant discretionary sick pay under the applicable company policies.

7.8.3 Referring the Claimant, immediately, to Occupational Health for assessment at the time he raised concerns regarding his mental health when using the temperature checking pod.

Whether claim(s) in time (see 4.12 and 4.13 above for the issues)

8. Remedy

8.1 Is it just and equitable to award compensation?

8.2 In the case of any indirect discrimination, was the PCP applied with the intention of discriminating against the Claimant?

8.3 What amount of compensation would put the Claimant in the position he would have been in but for the contravention of the Equality Act 2010?

8.4 Has the Claimant taken reasonable steps to mitigate his loss?

8.5 Was the Claimant guilty of contributory fault and, if so, to what extent should any compensation be reduced?

ANNEX B – LEGAL SUBMISSIONS

1. The following submissions are made on the claimant's behalf in relation to the relevant legal framework.

2. Under Section 47B a worker has a right not to suffer any detriment for raising a protected disclosure;

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A) (a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b) from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).**]**

(2) . . . This section does not apply where—

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of **[**Part X**]**).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker”, “worker’s contract”, “employment” and “employer” have the extended meaning given by section 43K

3. Section 6 of the EQA 2010 defines a disability:

(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.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect

4. The Claimant could be directly discriminated against as identified 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3)I f the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

5. Indirect Discrimination is defined in Section 19 EQA 2010:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;
- religion or belief;
- sex;
- sexual orientation.

6. Section 20 and 21 EQA 2010 details the duty to make reasonable adjustments:

(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.

(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) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

(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) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

7. Harassment is defined in Section 26 EQA 2010:

(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

8. The respondent makes the following submissions on the relevant legal principles.

Definition of disability

9. "A person (P) has a disability if P has a **physical or mental impairment**, and the impairment has a **substantial** and **long-term adverse effect on his ability to carry out normal day-to-day activities**". (Section 6, Equality Act 2010 – EqA 2010).

10. An employer's knowledge of disability, actual or constructive, is not a relevant factor in determining whether a person is disabled under the EqA 2010[1]. However, what an employee has (or has not) told people (which may include colleagues, their manager or HR) about their abilities could be relevant as a matter of fact in determining the answers to the four key questions, where these matters are in dispute.[2] There is no rule of law that the fact that a claimant does not refer to ongoing symptoms can never be relevant to the question of disability. In a case in which an individual has previously openly spoken about an impairment, the fact that there is a significant period during which no mention is made of the impairment could potentially be relevant to the issue of disability. In ***Cruickshank*** the EAT concluded that the issue is not a matter of law, but of fact and degree.

11. The date of determination of disability status is at the date of the alleged act[3]. In this case the relevant period is from 22 July 2002- Mid September 2022. The tribunal must consider whether the impairment had a substantial adverse

[1] Lawson v Virgin Atlantic Airways Ltd UKEAT/0192/19
[2] Seccombe v Reed in Partnership Ltd EA-2019-000478-OO
[3] Cruickshank v VAW Motorcast Ltd [2002] I.C.R. 7291

effect on day-to-day activities at that point, and whether that effect was likely to be long term at that point.

12. In **J v DLA Piper UK LLP UKEAT/0263/09** the EAT drew a distinction between symptoms of low mood and anxiety caused by clinical depression and those that derived from a "medicalization of work problems" or "adverse life events". While the former was likely to be a disability, the latter was not.

13. The impairment will only amount to a disability if it causes a substantial adverse effect on the individual's ability to carry out "normal day-to-day activities". The activities affected must be "normal". The EqA 2010 Guidance states

> "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." (*Paragraph D3*)

14. Modification of behaviour: avoidance strategies. The EqA 2010 Guidance suggests that if a person can **reasonably** be expected to modify their behaviour to reduce the effects of an impairment on their normal day-to-day activities, they might not be considered disabled. In some cases, a coping or avoidance strategy might alter the effects of an impairment to the extent that they are no longer substantial. If so, the person will no longer meet the definition of disability. (*Paragraph B7*.)

15. Long-term effect. The effect of an impairment will be **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, EqA 2010*.)

16. An impairment must have long-term effect at the time that the alleged acts of discrimination are committed. Therefore, if the claimant's condition has not lasted at least 12 months at the time of the alleged discriminatory act (or, if there is more than one act, at the time of each act), the claimant will not meet the definition of disability unless they can instead show that, at the time of the alleged discriminatory act (or acts), their condition was likely to last 12 months or for the rest of their life.

17. In **Royal Bank of Scotland plc v Morris UKEAT/0436/10** the EAT reiterated the importance of expert medical evidence where an alleged disability takes the form of "depression or a cognate medical impairment". It stated that, in such cases, the issues will often be too subtle to allow a tribunal to make proper findings without expert assistance. The EAT thought that a statement in **Morgan v Staffordshire University [2002] IRLR 190** that "the existence or not of a mental impairment is very much a matter for qualified and informed medical opinion" was still valid, and did not relate specifically to the now-defunct requirement that a mental impairment be "clinically well-recognised".

Duty to make reasonable adjustments

18. Section 20 (3) of the Equality Act 2010 (EqA) provides that:

> (3)…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.

19. A failure to comply with the requirement is a failure to make reasonable adjustments and an employer will be regarded as having discriminated against the disabled person (section 21 EqA).

20. C relies on the application of a provision, criteria or practice (PCP) by R when contending that the duty under section 20 EqA has been breached.

21. A one-off flawed disciplinary procedure did not amount to a PCP in **Nottingham City Transport Ltd v Harvey UKEAT/0032/12**. It was common ground that the flawed procedure was not a "provision" or "criterion". Further, in EAT's view, it was not a "practice", since a practice must have some element of repetition. There was no indication that the employer consistently conducted its disciplinary procedures in a flawed manner.

22. Further guidance on what amounts to a PCP was given by the Court of Appeal in **Ishola v Transport for London [2020] EWCA Civ 112**. A claimant was dismissed for incapacity while his grievance was outstanding. He alleged that there was a PCP of requiring him to return to work without a proper investigation into his complaints. The employment tribunal and EAT both found that this had been a one-off decision in the course of dealings with one employee and that there was no PCP. The Court of Appeal found that a one-off decision could amount to a PCP, as had been the case in **BA v Starmer**. However, not all one-off acts would amount to a PCP. As the EAT had emphasised in **Harvey**, for a PCP to be established, there must be some form of continuum in the sense of how things generally are or will be done by the employer. No PCP will be established in relation to a one-off act in an individual case where there is no indication that the decision would apply in future.

The concept of substantial disadvantage

23. A ‘substantial disadvantage’ is something that is ‘more than minor or trivial’ – section 212 (1) EqA. The nature and extent of the disadvantage suffered must be clearly identified. Without such a finding, the tribunal will be unable to determine properly what adjustments would have been reasonable.

24. It will be important for the tribunal to provide an objective assessment of the effect of a claimant’s disabilities on the relevant aspect of work – in this case, Mr Clothier’s ability to use the temperature testing portacabin.

25. There must be some causative nexus between disabilities relied upon and the substantial disadvantage.[4]

[4] Thompson v Vale of Glamorgan Council [2021] 5 WLUK 362 applying Environment Agency v Rowan [2008] I.C.R. 218

Comparators

26. Section 20(3)-(5) of EqA 2010 requires the employee to show that they have suffered a substantial disadvantage because of the employer's PCP, compared with persons who are not disabled. The duty to make reasonable adjustments will only be triggered if it is established that the relevant PCP causes greater disadvantage to the disabled claimant than it does to non-disabled people, not generally but in relation to persons to whom the requirement is applied. To show that a disabled person suffers a substantial disadvantage, it is necessary to establish a comparator group of non-disabled people who are not disadvantaged (or who are substantially less disadvantaged than the disabled person).

Employer's knowledge

27. An employer has a defence to a claim for breach of the statutory duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the disabled person is disabled *and* is likely to be placed at a substantial disadvantage by the PCP compared with persons who are not disabled (paragraph 20 of Schedule 8 EqA).

28. In **Secretary of State for the Department for Work and Pensions v Alam UKEAT/0242/09** the EAT set out two-part test to be considered when assessing knowledge:

- Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?
- Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?

29. The second part of the test will not come into play unless the first part of the test is not satisfied.

30. The second part of the test relates to the matter of constructive knowledge and the question is what objectively the employer could reasonably have known following reasonable enquiry. Employers do not have to make every possible enquiry in circumstances where there is little or no reasonable basis for so doing.

31. In **Thomson v Newsquest (Herald & Times) Ltd ET/121509/09** an employer knew about a claimant's mental illness and that her ability to concentrate was impaired. However, the tribunal held that the employer could not reasonably have been expected to know about her specific problems with regard to letter opening, or that by corresponding with her by post it would place her at a significant disadvantage in a disciplinary process. Accordingly, the duty to make reasonable adjustments in respect of the requirement that she respond to mail did not arise.

Reasonableness of adjustments: a fact sensitive question

32. An employer will not breach the duty to make reasonable adjustments unless it fails to make an adjustment which is 'reasonable'. The test is an objective one for the tribunal.[5]

33. The tribunal will need to identify the 'step' or 'steps', if any, R could reasonably have taken to prevent the claimant suffering the disadvantage in question.

34. C should identify in broad terms the nature of the adjustment that would ameliorate the substantial disadvantage. Having done so, the burden then shifts to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

35. The reasonable adjustment provisions are concerned with practical outcomes and the focus must therefore be on whether the adjustment itself can be considered reasonable rather than on the reasonableness of the process by which the employer reached the decision about the proposed adjustment.

36. In determining the reasonableness of any such step, regard should be had to its likely efficacy, practicability and cost, and the extent of the employer's resources, the nature of its activities and the size of its undertaking. In respect of efficacy of any proposed adjustment, it is only necessary to establish that there was a real prospect of the adjustment avoiding or reducing the relevant disadvantage.[6]

Indirect discrimination

37. Indirect discrimination occurs where:

- A applies to B a provision, criterion or practice (PCP).
- B has a protected characteristic.
- A also applies (or would apply) that PCP to persons who do not share B's protected characteristic.
- The PCP puts or would put persons with whom B shares the protected characteristic at a particular disadvantage compared to others.
- The PCP puts or would put B to that disadvantage.
- A cannot show the PCP to be a proportionate means of achieving a legitimate aim.

(Section 19, EqA 2010.)

38. Objectively justification (section 19(2)(d), EqA 2010). The burden is on the respondent to prove justification, and it is for the court or tribunal to undertake a "fair and detailed analysis of the working practices and business considerations involved" so as to reach its own decision as to whether the treatment was justified.

[5] Smith v Churchill's Stairlift plc [2006] IRLR 41
[6] *Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10*

Direct Discrimination

39. Section 13 EqA 2010 provides that:

> '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.

Harassment

40. Section 26 of the EqA defines harassment under the Act as follows:

> (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

41. The requirement that the conduct in question be "related to" a relevant protected characteristic. This can cover conduct, meted out to an individual by reason of their own protected characteristic, or conduct that is otherwise related to a protected characteristic because of the form it takes. The test of conduct "related to" a protected characteristic is wider than the test for direct discrimination, which requires treatment "because of" a protected characteristic. However, the tribunal will take into account the context in which the conduct takes place. The EHRC guidance on harassment gives the following example:

    - A Muslim worker has a conversation with a colleague about so-called "Islamic State" fighters. The worker relays to the colleague some comments made by a journalist about Islamic State fighters which are of a positive nature. Later that month the colleague approaches the worker and asks, "Are you still promoting Islamic State?". The worker is upset at the allegation that he promotes Islamic State and brings a claim of harassment related to religion or belief. The tribunal finds that the colleague asked that question because of the worker's previous comments, not because the worker is a Muslim or because of anything related to the worker's religion. The question was therefore not harassment. (*Paragraph 2.18, EHRC guidance on* ***harassment***.)

42. In determining whether particular conduct is "related to" a protected characteristic, an employment tribunal must make a clear finding of fact,

based on the evidence before it (**Tees Esk and Wear Valleys NHS Foundation Trust v Aslam UKEAT/0039/19**)

Burden of proof in discrimination claims

43. Section 136 EqA provides that 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.

44. One of the leading authorities on the burden of proof in discrimination cases is **Igen v Wong 2005 IRLR 258**. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

45. Lord Nicholls in **Shamoon v Chief Constable of the RUC 2003 IRLR 285** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

46. In **Madarassy v Nomura International plc 2007 IRLR 246** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

47. In **Hewage v Grampian Health Board 2012 IRLR 870** the Supreme Court endorsed the approach of the Court of Appeal in **Igen Ltd v Wong** and **Madarassy v Nomura International plc**. The judgment of Lord Hope in **Hewage** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

48. Showing that conduct is unreasonable or unfair is not, of itself, enough to transfer the burden of proof - **Bahl v Law Society 2003 IRLR 640 (EAT**).

Time limits for discrimination complaints

49. Section 123 EqA provides that:

> (1) ……proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.

50. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

51. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in **Hendricks v Metropolitan Police Commissioner 2003 IRLR 96**. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

52. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

53. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected. (See **Lyfar v Brighton and Susses University Hospitals Trust [2006] EWCA Civ 1548** - ET grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time).

54. Where allegations are linked by a common personality they do not stand in isolation. In **Veolia Environmental Services UK v Gumbs UKEAT/0487/12**, two different allegations of discrimination, over an extended period, were linked by the employee's manager, a common personality, who had made adverse decisions against the employee on both occasions.

55. Each individual act alleged to form part of the continuing act must actually be discriminatory. If any of those alleged acts are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act (**South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168**).

56. In **British Coal Corporation v Keeble 1997 IRLR 336** the EAT said that in considering the discretion to extend time:

    - It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –
    - the length of and reasons for the delay;
    - the extent to which the cogency of the evidence is likely to be affected by the delay;
    - the extent to which the party sued had cooperated with any requests for information;
    - the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
    - the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

57. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather that the rule - see **Robertson v Bexley Community Centre 2003 IRLR 434.**

Whistleblowing detriments

58. In the case of a detriment, the tribunal must be satisfied that the detriment was "on the ground that the worker has made a protected disclosure" (**section 47B(1), ERA 1996**).

59. Whether detriment is "on the ground" that the worker has made a protected disclosure involves an analysis of the mental processes (conscious or unconscious) of the employer when it acted as it did. This point was reiterated by the EAT in **Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust [2019] 9 WLUK 556.** It is not sufficient to demonstrate that, "but for" the disclosure, the employer's act or omission would not have taken place.

60. In **NHS Manchester v Fecitt and others [2012] IRLR 64**, the Court of Appeal held that the test in detriment cases is whether

> "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

61. Therefore, where a worker has made a protected disclosure and their employer has subjected them to a detriment, to avoid liability the employer must show that the protected disclosure did not "materially influence" their detrimental treatment.

62. If the employer does not prove an admissible reason for the treatment, the tribunal is entitled (but not obliged) to infer that the detriment was on the ground that the worker made a protected disclosure (**Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14).**

Time limits in whistleblowing detriment cases

63. Subject to the rules on early conciliation, a claim for detriment under **section 47B ERA 1996** must be presented "*before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them*" (**section 48(3)(a), ERA 1996**). Where an act extends over a period, the date of the act means the last day of that period (**section 43(4)(a), ERA 1996).**

64. In deciding whether a detriment case is brought in time, tribunals must focus on the date of the act giving rise to a detriment, not the consequences that follow (**Unilever UK plc v Hickinson and another UKEAT/0192/09).** In **Vivian v Bournemouth Borough Council UKEAT/0254/10**, the EAT held that an employee's detriment claim should have been brought within three months of her being placed in a redeployment pool (the act giving rise to detriment); it was not sufficient that the claim was brought within three months of some of the detrimental consequences of that act.

65. For alleged acts of detriment to form part of "a series of similar acts", there must be "some relevant connection between the acts" (**Arthur v London Eastern Railway [2006] EWCA Civ 1358, per Mummery LJ).** It is essential

that each of the acts forming part of the alleged series is, in itself, unlawful (**Oxfordshire County Council v Meade UKEAT/0410/14**).

66. The tribunal can extend time for submitting a detriment claim where it is satisfied that it was "not reasonably practicable" for the claim to be presented in time **(section 48(3)(b) and 111(2)(b), ERA 1996)**. The claim must still have been presented "within such further period as the tribunal considers reasonable".

67. Having an illness or medical condition during the relevant time will not in and of itself mean that an employee was reasonably prevented from presenting their claim in time or that the employee's condition meant that ignorance of the relevant time limit was reasonable (see **Cygnet Behavioural Health Ltd v Britton [2022] EAT 108** - the facts of Cygnet are of assistance when considering Mr Clothier's application for an extension of time).