Case Nos: 3313907/2021
3321310/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr C Jones

Respondent: NHS Blood and Transplant

Heard at: Watford
On: 20-24 November 2023
(Panel Deliberation: 27 and 29 November 2023)

Before: Employment Judge Caiden
Mr D Wharton
Miss M Harris

Representation
Claimant: Mr S Martins (Employment Law Consultant)
Respondent: Mr O Lawrence (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. At the relevant times the Claimant was a disabled person as defined by section 6 Equality Act 2010 because of the mental impairments of anxiety and depression.

2. The Claimant's complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

3. The Claimant's complaint of victimisation is not well-founded and is dismissed.

REASONS

A) Introduction

1. The Claimant commenced the relevant claims in separate ET1s presented on 23 July 2021 and 17 October 2021 which were consolidated and heard together by this Tribunal. Whilst these ET1s included numerous claims, by the stage of this Tribunal only two remained live: (i) failure to make reasonable adjustments (as defined by s.20-21 Equality Act 2010) and (ii) victimisation (as defined by s.27 Equality Act 2010).

2. The Claimant was represented at the hearing by Mr S Martins, an Employment Law Consultant, and the Respondent by Mr O Lawrence, counsel. At the commencement of the hearing the Tribunal was provided with an agreed bundle which ran to 915 pages including index. The page references in these Reasons are to this bundle. Other documents were also provided to the Tribunal during the proceedings by the parties including a photograph of a "POD" (the working area for those doing the Claimant's job), changing hours request form, a 275-page employer handbook, various emails. With the exception of one chain of emails dated 21 June 2021 (referred to below at paragraph 40), it was agreed by the parties that none of these required inclusion in the agreed bundle.

3. The Tribunal received and read witness statements from the Claimant, Ian Symonds, Simon Jennings, Adrian Hernandez, Farai Katsande, Kim Wheeler and Karen Beardsell. All took their respective oath or affirmation before confirming their respective statements and giving live evidence (although Mr Hernandez was not in fact cross-examined by Mr Martins nor asked questions in live evidence by either Mr Lawrence or the Tribunal).

4. At the conclusion of the hearing on Friday 24 November 2023, the Tribunal received written submissions from Mr Martins and Mr Lawrence, which were supplemented by oral submissions.

5. The Tribunal confirms that it considered all the documents that had been provided to it and took particular care on pages within the hearing bundle which it was referred to during live evidence and were referred in the witness statements and in closing submissions.

B) Procedurally matters and issues

6. The Respondent had conceded the disability of anxiety, and the Claimant had the week prior to the hearing made an application for a postponement on health grounds. That application was rejected by an Employment Judge and when repeated the Regional Employment Judge directed it would be dealt with at the commencement of the hearing before this Tribunal. In fact, the Claimant indicated he was not pursuing any postponement at the start of the hearing. The Tribunal checked this with Mr Martins and the Claimant, and it was repeated that he wished the hearing to go ahead, and all were prepared for the hearing to go ahead. The Tribunal during this initial discussion made clear that it would make reasonable adjustments to aid the Claimant. The only identified adjustment was more frequent breaks and these occurred during the

Claimant's evidence either when called for by him or when the Tribunal felt one may be necessary. At various points the Claimant also wished to address the Tribunal directly, given that Mr Martins and Mr Lawrence did not object to this (they were invited to make any representations), the Tribunal allowed this to occur and considered this a further reasonable adjustment.

7. It was agreed at the commencement of the hearing that the Tribunal would only consider liability, and the list of issues produced at pp.178-181, for which particulars of the protected acts were set out at pp.112-115 and detriments at pp.123-128, was discussed and refined. In fact, by the stage of concluding evidence it had been further refined as both parties had conceded or withdrew various aspects. The result was that the agreed issues that required determination were as follows (this is using largely the wording found at pp.178-181 but with the amendments made following withdrawal or concessions made by the parties and setting out the relevant particulars):

Disability

7.1. The Respondent conceded that the Claimant was disabled by virtue of the impairment of anxiety. The Claimant did not pursue a separate impairment of "*panic attacks*" but did maintain that he was disabled by virtue of a separate impairment of "*depression*". As the Respondent disputed the disability of "*depression*" at the events of the claim were about, the Tribunal had to decide:

7.1.1. Did he have a mental impairment depression?

7.1.2. Did it have a substantial adverse effect on his ability to carry out day to day activities?

7.1.3. If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

7.1.4. Would the impairment have had a substantial adverse effect on his ability to carry out day to day activities without the treatment or other measures?

7.1.5. Were the effects of the impairment long term? The tribunal will decide:

7.1.5.1. Did they last at least 12 months, or were they likely to last at least 12 months?

7.1.5.2. If not, were they likely to recur?

Reasonable adjustments

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

7.3. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

7.3.1. A requirement and/or expectation that employees would be mentally fit to carry out their contractual duties to suit the business.

7.3.2. The requirement and/or expectation that employees would carry out duties to full capacity on return from sick leave.

7.4. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

7.4.1. The Claimant became fatigued.

7.4.2. The Claimant could not cope with full duties.

7.4.3. The Claimant had to work without breaks.

7.5. Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

7.6. What steps could have been taken to avoid the disadvantage? The Claimant suggests:

7.6.1. Conducting a Stress Risk Assessment on the claimant (the claimant's case is that this was recommended by OH in January 2021 and that he requested it at the investigation meeting on 5 July 2021 with Kim Wheeler and Karen Beardsell)

7.6.2. Allowing the claimant to work shorter hours (as requested in the meeting on 5 July 2021).

7.6.3. [There was an allegation in the earlier issues at the commencement of the trial that allowing the Claimant a phased return to work was an adjustment, but this was no longer pursued as it was accepted that in fact phased returns did occur and the victimisation detriment that mirrored this, then labelled Detriment 9, was equally withdrawn]

7.7. Did the respondent fail to take those steps?

Victimisation

7.8. The Claimant relies upon the following protected acts (in chronological order) which are accepted by the Respondent as being protected acts within s.27 Equality Act 2010:

7.8.1. A tribunal claim against the Respondent alleging race discrimination and sexual orientation harassment which between 2005-2006 (the Tribunal had before it the ET1 presented on 10 November 2006 at pp.222-231).

7.8.2. Two further tribunal claims against the Respondent alleging race discrimination between 2012-2013 (the Tribunal had before it the ET1s presented on 10 December 2012 and 27 March 2013 at pp.245-252 and pp.298-305).

7.8.3. An Equality Act 2010 – Discrimination and Prohibited Conduct Questionnaire dated 28 December 2012 and served on Donna Hussey (part of the Respondent's Human Resources department). The questions and the completed answers to it were at pp.258-271.

7.8.4. A grievance against Jan Makowski sent by email of 28 September 2013 to Ian Symonds.

7.8.5. A complaint of discrimination sent by email of 21 July 2020 to Betsy Basis and Katherine Robson (copying in the Claimant's Trade Union representative).

7.8.6. A further complaint of discrimination send by email of 28 September 2020 to Betsy Basis and Katherine Robson (copying in the Claimant's Trade Union representative).

7.9. Did the Respondent do the below things and if so did these amount to detriments (these 11 alleged detriments are placed in chronological order and use the "*Detriment*" number that was given in an earlier list of issues and was consistent with how the parties presented the case):

7.9.1. Detriment 7:Continuous failure to carry out stress risk assessment having raised the matter with Simon Jennings on 1 November 2013,

26 April 2015, 22 May 2015, 24 March 2020, 10 May 2021, 18 August 2021.

7.9.2. Detriment 6: Deliberately denied the Claimant's annual leave stating it is fully booked in relation to a request for leave on 30 April 2019.

7.9.3. Detriment 4: Unfair treatment such as refusing to action reasonable requests including suitable PPE to be used by the Claimant at work which would avoid the need to suffer allergic reactions in the middle of covid pandemic, namely during April 2020 not providing alcohol hand gel with aloe vera instead of soap to clean the Claimant's hands despite a written request.

7.9.4. Detriment 5: Hostility/oppressive behaviour by Simon Jennings saying "*shut up*" to the Claimant in a conversation on 23 March 2020 and repeating this in an email of 24 March 2020.

7.9.5. Detriment 12: Peter Basham continuously instigated and encouraged his manager to build an absence management/capability case against the Claimant, namely the emails of 30 April 2019 and 17 April 2020.

7.9.6. Detriment 11: Peter Basham constant blackmailing and harassing the Claimant in emails to other managers, namely in an email of 24 February 2021 at 16:51 and 25 February 2021 at 02:23.

7.9.7. Detriment 2: Being micromanaged, namely on 10 May 2021 by Adrian Hernandez after noting everything the Claimant was doing screaming at him "*You can not seat down* [sic] *and get paid for doing nothing, go and find another job you can do at your own pace*".

7.9.8. Detriment 10: Isolation and lack of support from HR and the upper management who continuously supported the action of its managers on 26 April 2021 and 5 July 2021 by refusing to disclose the email of 24-25 February 2021 in following a Subject Access Request and the refusal to allow the Claimant to make amendments to grievance notes during working time.

7.9.9. Detriment 8: failure to provide reasonable adjustments as set out in the reasonable adjustments claim and made on 5 July 2021 (in other words to the extent the Tribunal concludes there has been a failure to provide reasonable adjustments the cause of that was an earlier protected act(s)).

7.9.10. Detriment 14: Suffering prejudice and miscarriage of justice, namely most recent example; Peter Basham complained about "*my* [Claimant's] *behaviour*" in his email of February 2021. However, Kim Wheeler and Karen Beardsell investigated the Claimant's sickness absence and found that enough reason to justify his comments and instigating emails sent, without considering the Claimant's complaint of failure to carry out stress risk assessment and failure to provide reasonable adjustment as the mitigating factor to the Claimant's ill health. This was clarified at the hearing as the outcome of the grievance in August 2021 being a detriment (that being the alleged miscarriage of justice) along with the use of the word "*fine*" in response to Peter Basham's amendments in an email of 23 July 2021. The relevant report was at pp.698-719.

7.9.11. Detriment 15: NHSBT does not adhere to its internal polices in matters related to me. Namely, the stress risk assessment / workplace assessments which the Claimant alleged should have been carried out per the Stress Management Policy and Health & Safety Risk Management Policy, and carry out Occupational Health recommendations which should have occurred per the Attendance Policy and delay in providing an outcome to the grievance contrary to what should have occurred in the Grievance Policy.

7.10. If so, was it because the Claimant did a protected act?

Time limits

7.11. Given the date the claim form was presented in the first case and the dates of early conciliation any complaint something that happened before 21 March 2021 may not have been brought in time.

7.12. Were the victimisation complaints made within the time limit in s.123 Equality Act 2010? The Tribunal will need to decide:

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

7.12.2. If not, was there conduct extending over a period?

7.12.3. If so, was the claim made to the tribunal within three months plus early conciliation extension) at the end of that period?

7.12.4. If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide (i) Why were the complaints not made to the tribunal in time and (ii) in any event, is it just and equitable in all the circumstances to extend time?

8. Before considering the facts, the Tribunal raises one procedural matter. Although the Tribunal administrative service sought to record the audio of the full five-day hearing, that is evidence and submissions:
   8.1. there were only three microphones in the Tribunal room and so it may well be that some of the audio is not clear (the Tribunal did its best to ensure sharing and different placement of microphones during the hearing to minimise this);
   8.2. owing to technical faults the 21 November 2023 was not recorded at all. The Tribunal and parties were made aware of this before starting on the relevant day and although there was a delay to see if this could be resolved that proved impossible. Accordingly, the Tribunal's notes amount to the official record for that particular day.

C) Findings of fact

9. The Tribunal heard and considered much evidence. It made the following findings of fact on the balance of probabilities of those areas that were material to the decision it had to make.

Claimant's jobs, management line of Claimant and some key characters

10. The Claimant is employed by the Department of Transport as a Vehicle Examiner (prior to 2016 he was employed in a lower grade role doing statutory testing for lorries and buses) during the day Monday-Friday, with his hours being 08:00-17:00. In the evenings, on Monday, Tuesday, Wednesday and Friday, the Claimant is employed by the Respondent as a Health Technical Officer. His working hours for the Respondent being 19:00-23:00 (so 16 hours per week). Accordingly, the role he has for the Respondent is in effect a 'second job' as he already works full time in his 'main job' for the Department for Transport.

11. It is common ground that the Claimant had several periods of sickness and was therefore absent from his role at the Respondent. As at the time of the Tribunal hearing the Claimant had been off sick on full pay for the past two years, although the Claimant's position is that, put neutrally, if 'issues' are sorted out he would be able to return to work. The Tribunal during live evidence asked him if his sickness absence with Department for Transport matched precisely that of the Respondent (ie if unable to work for the Respondent were you also unable to work for the Department for Transport). He stated that "*sometimes I would be able to work even if there were issues with having attacks*" stopping him and he had been working for the Department for Transport during the last two years. The Tribunal accepts this evidence and concludes that were plainly times he was able to work for the Department for Transport but not the Respondent. It is fair to also record that the Claimant was at pains to point out that the Department for Transport was a sympathetic employer who made many adjustments for the Claimant and the Tribunal is not making any finding that there was anything improper with the Claimant being able to work for one employer (the Respondent) and not the other (in this case the Department for Transport).

12. Returning to the job the Claimant held at the Respondent, at the relevant time he was a Health Technical Officer, Band 2, working in its Colindale location. Earlier in his working with the Respondent he had a disagreement with the then Production Team Manager, Peter Basham, which led to a claim being made to an Employment Tribunal. This claim is the protected act set out at paragraph 7.8.1 above (with the claim being found at pp.221-231). Relevant to this claim is that it is stated in it "*I am still suffering from anxiety and depression…..As a result of these incidents I am unable to return to work and I believe that I am now suffering from anxiety and depression*" (p.231).

13. As the bulk of the Claimant concerns events from 2012 onwards, the Tribunal notes and finds as a fact:
    13.1. Simon Jennings was the Claimant's line manager at Colindale location of the Respondent during this period (save perhaps for a period where he was seconded in August 2015 for a few months to Cambridge but there is nothing relevant in that time period for the present claim). He worked predominately in the day but would be on shift 1 in every 6 nights. The Tribunal notes that although Simon Jennings has been employed as a Processing Team Manager since 2003, he was not mentioned in the 2006 ET1 (the protected at set out at 7.8.1 above). Moreover, Mr Martins never put or suggested during cross-examination that Simon Jennings had any involvement in this 2006 case;

13.2. Ian Symonds was the Regional Manufacturing Manager for Colindale site from 2010-July 2017. He was therefore Simon Jennings' line manager. From July 2017 to March 2020, Peter Basham was the Regional Manufacturing Manager in Colindale, and thereafter in April 2020 until March 2021, Ian Symonds returned to take over as Regional Manufacturing Manager. It was at this time that Farai Katsande took over the role.

The protected acts in 2012-2013

14. The Claimant did another protected act on 10 December 2012 and again on 27 March 2013, namely bringing Employment Tribunal claims. This is protected act set out at paragraph 7.8.2 above. The claims were before this Tribunal at pp.245-252 and pp.298-305. Relevant to the present case the Tribunal finds the following:
    14.1. nearly a month prior to the ET1 of 10 December 2012, on 16 November 2012, Ian Symonds made an Occupational Health referral which referred to the Claimant being stressed at work and a workplace dispute in relation to the Claimant, and others, not working to their full job description. It was an agreed by the parties that the respective dispute as it were the Respondent asserting that Agenda for Change had brought into effect since 2006 certain reception duties for those undertaking the Claimant role and the Claimant asserting that the union had advised them to refuse to undertake those duties which previously were part of a higher banded role;
    14.2. the 10 December 2012 claim does not mention Simon Jennings at all. It also does not seem to mention Peter Basham. The main antagonist in this ET1 appears to be Jan Majkowski, although many other individuals are also mentioned and potentially alleged to have been wrongdoers. Ian Symonds is mentioned in this ET1. It also refers to "*this resulted in me be*[ing] *sick with depression and anxiety (a sickness that I had since 2006/2007 due* [to] *another discriminated related issue whilst at work*" (p.251).
    14.3. the 27 March 2013 claim once again does not mention Simon Jennings at all. It also does not mention Peter Basham. This ET1 concentrates on the Respondent seeking to commit the Claimant, and others, to the reception duties. It refers to several individuals, including Ian Symonds.

15. Between the dates of his ET1s of 10 December 2012 and 27 March 2013 the Claimant did another protected act by sending an Equality Act 2010 questionnaire to Donna Hussey on 28 December 2012. The Tribunal had the benefit of the questions and answers in relation to it at pp.258-271. In relation to this document the Tribunal notes:
    15.1. it largely, and unsurprisingly repeats or makes allegations that are contained in the ET1 of 10 December 2012;
    15.2. Mr Martins during cross-examination put that Simon Jennings had been influenced by this questionnaire, to which Simon Jennings response was to deny such an allegation. The Tribunal asked Simon Jennings if he had seen this document and he answered, "*I don't recognise it*". Mr Martins during cross-examination suggested that it was question 5 at p.262 that had caused him, Simon Jennings, particular embarrassment meaning he did not undertake a stress risk assessment (one of the detriments – Detriment 7). Simon Jennings denied this. The Tribunal explained to Simon Jennings that the Claimant's case was that there was a link between

the Questionnaire and his failure to undertake a stress risk assessment, to which he denied any such link and explained later that stress risk assessments were undertaken by the Health & Safety department, him not being trained to do them, and he had made the necessary requests of them;

15.3. Question 5 at p.264 states "*5) On 30th of May 2012, I with 2 member of staffs was bullied, intimidated and harassed by Gus Norville and Ian Symonds in to accepting duties that are outside the scope of our job description which we rejected, David Agbley was excluded from this meeting or during the conversation even though he is one of the people not under taken this task, Do you think their actions at the time is not a case of Direct discrimination, victimisation and harassment?*". This is the question that Mr Martins placed reliance on in cross-examination, as stated above. This question does not mention Simon Jennings.

15.4. The answer to question 5, the one Mr Martins was placing reliance on, at p.264 "*The meeting on 30th May – for which we have been trying without success to follow up with a formal meeting with these individuals, HR and Staff side, was an informal meeting to understand why these individuals were refusing to work to the NHSBT Band 2 job description. It was neither Bullying nor Harassing in it's nature or conduct, although both Gus and I were clear that these individuals have this task described in their job description (JD) and will need to undertake them into the future. The position taken by the individuals concerned was that they felt that they did not need to undertake any duties that they were not undertaking pre-agenda for change, having misunderstood the phased change from their pre-agenda for change job description to the post agenda to change one. The follow up meeting which we have been trying to arrange to formally confirm that the reception task was part of their JD and that we would be arranging for these staff to be trained in this procedure. David Agbley was not at work on the day or at the time that this meeting was held. At no point did we intentionally exclude David as a person or union representative from this meeting. David has been invited to all of the follow up meetings. There was no discrimination, victimisation or harassment as part of this process, indeed we have been very patient with dealing with this group of staff*". The Tribunal finds as a fact that the "*I*" in this answer is Ian Symonds. This is because it was Ian Symonds who was part of this meeting, he was having to deal with the issue of the alleged refusal of staff to do the reception duties, he is the also the person who is labelled in the question as being an alleged 'harasser'. It follows that the Tribunal concludes that Ian Symonds was provided at the very least with the question at issue, if not the entire questionnaire, as this related to his involvement and the answer is drafted in the first person.

15.5. Simon Jennings is not mentioned at all in the questionnaire it appears, either in the questions or answers. The questionnaire was provided to Donna Hussey of HR and there is no reason, given the lack of mention of Simon Jennings, for him to have been provided with the questionnaire or any specific questions.

15.6. Given all the above, the Tribunal finds as a fact that Simon Jennings was not provided with the questionnaire or any of the questions.

Disability, Stress and other risk assessments and Occupational Health–2013 – 18 August 2021 – Detriment 5 and Detriment 7

16. Much of the case concerned the Claimant's referrals to Occupational Health and their recommendations. In particular there was the matter of the engagement with the requirement for a stress risk assessment, and the separate issue as to whether the Claimant was disabled by virtue of depression (and not merely the conceded disability of anxiety). This is the factual context of the failure to make reasonable adjustments claim and Detriment 7 of the victimisation claim. All of this covered the time period of 2013-18 August 2021. It seems sensible for the Tribunal to set out all the relevant findings of fact in relation to this time period separately rather than just dealing with all the facts chronologically. For clarity, the facts that are found and pertinent to this 'section' are still set out in chronological order.

17. On 15 March 2021, a GP entry records that an appointment occurred where it was stated "*stress at work, can't sleep, taking citalopram for depression*" (p.776). As an aside, it can be seen that these had been issued to the Claimant previously in 2006 (p.794).

18. On 16 July 2013, so after the protected acts of the ET1s made in 2012-2013 and the Equality Act questionnaire sent at the end of 2012, Simon Jennings made an Occupational Health referral. As well as ticking a box enquiring if there are any temporary/permanent adjustments to be considered in preparation for his return to work, it also stated the following (p.310):

    Christian has had a number of absences over the last few years (see details below) due to stress in the work place. He is on medication from his doctor. He has also been unable to complete back to work meetings with his line manager due to stress caused by the meeting. We need to know what are the trigger factors that cause him stress. What can we do, if anything, to reduce the level of the stress that he is experiencing? Is the level of stress he is experiencing seriously detrimental to his general health and wellbeing? Is it best practice for him to be going home when he feels stressed? Should he be going home for his medication or can we expect him to have it with him instead of going home when he feels stressed? Is there a particular way we should be handling him when he reports feeling stressed. If he takes his medication at work is he fit to remain in work i.e will he still be able to operate machinery and will he be able to drive home at the end of his shift. Will he need time for the effects of the medication to kick in and how long might this be?

19. Following the above referral and an assessment on 24 July 2013, Occupational Health produced a report which stated amongst other things:

    19.1. the Claimant reported that he was "*diagnosed with Depression by his GP in 2006 who prescribed him anti-depressant medication…That the condition resolved after 12 months…That he was diagnosed with Work Related Stress in July 2012…*[for which he was] *prescribed Citalopram* [he now has been given] *sleeping tablets*" (p.313);

19.2. that the Respondent should "[c]*onsider a Stress Risk Assessment on Mr Jones' duties*" (p.315 and p.316).

20. During this period there were complaints about working in a one person POD. That was not something that concerned solely the Claimant (as can be seen from the email on p.341). In short, the POD is the workplace for a Health Technical Officer. It is a work area that is 3.5 metres squared containing a bench for data entry, 2 centrifuges which spin the blood taken, an octopress to separate the bloods, a heat sealer and weigh station and a cart containing hooks on wheelbase to hang the bags. There are approximately 9 or so PODs within a room. The Tribunal were shown a picture of a POD and could see the items described in evidence and that from one POD one would be able to see colleagues in another POD. Returning to the issue of whether only one person could work in a POD, the Tribunal accepts the Respondent's evidence on this point which is that there could be anywhere from 1-3 people working in a POD. If there is only one person, that person would do each element of the work, from data entry, putting blood in the centrifuge and so on. If there were 2 or 3 each person would work on one-two aspects and then pass the blood to their colleague to continue the process, although they may swap roles after a period of time so that one is not always doing data entry for example. The difference between 1, 2 or 3 people in the POD purely be down to the staffing (and for a time the situation of COVID requiring greater social distancing) and the more people in the POD would mean greater efficiency. In short, with more in a POD more blood could be prepared so it could be used for transfusions and so on in patients. With only one it would mean that person would get through less of this in the same time. However, there were no 'targets' as such and no one was disciplined for working too slowly in a POD.

21. On 1 November 2013, Simon Jennings and the Claimant had a meeting. A note of this meeting on p.343 indicates that Simon Jennings carried out a "*risk assessment*". The Tribunal notes that this is <u>not</u> the same thing as a stress risk assessment. It was agreed by the parties that a stress risk assessment was not formally completed by the Respondent (in the sense that no one discussed the Claimant's answers to a stress risk assessment questionnaire that the Claimant filled out). The note of the 1 November 2013 meeting states, amongst other things…

> *Christian tells me he has no problem meeting with any other line managers* [so it is only Jan Majkowski and Steve Durgacharan he has an issue with]. *Occ Health also recommended a Stress Risk Assessment be carried out. I am endeavouring, with the help of HR, to find a person qualified to carry out such an assessment or possibly find a generic assessment that can be modified for the purpose.*
> *Christian's doctor has recommended a phased return to work, altered hours, and work place adaptations. We can support a phased return to work; 3 days for two weeks and then Christian and myself will meet again to review the situation. Christian will take his night off on the night he has his counselling. This will save Christian needing to try to get back to work as soon as possible after the counselling.*

22. The Claimant's witness statement at paragraph 22-23 largely corroborates this save that he makes clear that his contracted hours needed to be reduced on a permanent basis from 4 hours to 3 hours to "*take my medications, which was likely to impact on my ability to operate equipment or drive home. Simon told me that he would not be given a reasonable adjustment to reduce my contracted work hours until a Stress Risk Assessment had been carried out*". During live evidence, Simon Jennings repeated his belief that a stress risk assessment was necessary before any reduction in hours. He gave the example of having reduced hours for a diabetic employee, or rather sending them home when they had an episode to only be told by HR or Health and Safety department that was wrong and the lesson he drew from this was that any reduction in hours on health grounds had to have a stress risk assessment first, or be sanctioned by HR or Health & Safety. Other witnesses disagreed with this being correct and as a position in law, let alone the Tribunal's industrial practice, Simon Jennings position is incorrect. However, as a matter of fact the Tribunal accepts that in this meeting what is set out in italics above by the Claimant did occur as that is consistent with Simon Jennings oral evidence.

23. Following the 1 November 2013 meeting, Simon Jennings had another meeting on 11 November 2013 with the Claimant to do the risk assessment. At this meeting there was an allegation made against the Claimant that he has said "*I don't' care, you can shove it up your arse*" and complaints by the Claimant about such an allegation. The Tribunal does not need to resolve this dispute and so does not make a finding on this. Following this period however the Claimant had more absences for long term ill health shortly after this, namely on 16 December 2013-12 January 2014 and 5 February 2014 – 30 November 2014 (p.740). Following the January 2014 absence an agreed phased return to work was noted on the Return to Work form (p.359). As a result of the absence another Occupational Health referral was made which stated "*At the last Occ Health meeting it was suggested that a Stress Risk Assessment be made for Christian. We have no one who is trained to carry this out. We need Capita* [the Occupational Health provider being used] *to come to this department to carry out a Stress Risk Assessment of Christian for us*". (p.357). That resulted in a report of 29 January 2014 that once again noted that a "*stress risk assessment should be conducted within the work place*" (p.368) and it referred to standard stress areas that "*HSE recommends*" (p.369). It did not however engage with the request for Capita to carry out the stress risk assessment.

24. On 4 March 2014, the Claimant had an investigation meeting in relation to a complaint that he made against Simon Jennings. This related to the alleged incident of the 11 November 2013 and his denial of the warning that followed it. At this point, the Tribunal stresses that that complaint was not one of the protected acts relied upon in the victimisation claim. However, this meeting was referred to during live elements and the Tribunal notes and accept as a fact that the Claimant stated in this meeting "*there was a long delay before I had my review meeting with Simon. I was signed off from my GP with anxiety and depression, but SJ refused to put this is the reason on my return to work interview*" (p.371). It also stated that during September 2013 the Claimant stated:

I asked to reduce my working hours by 1 hour a day from 7 pm-10 pm (rather than 11 pm) this would help me to take my medication and I was also advised to do physical exercise. If I left at 10 pm, would enable me to eat early and then do my exercise before bed. (p.372)

25. During this period, 5 February 2014-30 November 2014, the Claimant was signed off on long term sick (p.740), following which he had a period that was marked as Annual leave for the entire of December 2014. He had various fit notes extending his absence and further input of an occupational health nature. This included:
    25.1. a fit note dated 27 May 2014 which set out the condition as "*stress at work depression*" (p.380);
    25.2. on 22 September 2014, Simon Jennings provided the Claimant with a copy of the "*Stress Risk Assessment Tool that has been suggested in the last Occupational Health assessment* (p.388). The Claimant completed this within a month or so after he was provided it;
    25.3. a further Occupational Health report of 11 December 2014 was provided to Simon Jennings. It noted that the Claimant had been "*off work since February 2014 with work-related stress that developed into depression. He is under the care of his GP had management of his condition on medication… He reports he has treatment plan for 11 months and he has had four months out of the 11. From my assessment today there is evidence to suggest his symptoms are ongoing though some improvement has been noted. He reports improved sleep pattern, but says his concentration and long-term memory are still affected. This has implications for his ability to undertake his role that requires that he is unaffected concentration.*" (p.389). In the outlook and disability advice section of the report, p.390, it is stated

> *Mr Christian Jones has a history of depression. This condition is likely to flare up from time to time especially when he perceives circumstances to be stressful. I'm unable to advise on frequency or duration of any sickness absence with this condition*.
> … *Mr Christian Jones's condition is likely* [in my opinion based on my interpretation of the legislation] *condition is likely to be considered a disability because it: has lasted longer than 12 months, is likely to recur,* [and] *would have significant impact on his normal daily activities without the benefit of treatment*.

26. At a return to work meeting conducted by Simon Jennings it is noted in the form that "*will consider phased return to work when Occ Health report is seen. Risk assessment will also be done then*" (p.395). Shortly after this period there was continued management of the Claimant under the absence procedure which he objected to. On 30 March 2015 there as another Occupational Health report which referred to the Claimant being "*anxious and dressed in 2012*", him restarting medication, and having counselling that now included Cognitive Behavioural Therapy (p.401). Once again, this report set out that "*I think his mental health problems….would be seen as meeting disability criteria in the Equality Act 2010*".

27. On 26 April 2015, in an email to Ian Symonds the Claimant repeated that Simon Jennings had told him that no adjustments could occur until after a Stress Risk Assessment had been carried out (p.403). He asserted that "*Failure to address*

the issue at the time led to deterioration of my health…Can I know what you are doing regarding my request about the reason adjustment". This was followed up on 22 May 2015 with an email to Simon Jennings, which copied in Ian Symonds stating "*have told you on numerous occasions in the past that I require a workplace adjustment, You have always maintained that you can not do this until a Stress risk Assessment is carried out. I am waiting for the recommended Stress risk assessment as a matter of urgency as I require a work place adjustment*" (p.404).

28. During 2017, the Claimant attended Cognitive Behavioural Therapy sessions for "*depression and work related issues*" (p.729).

29. A return to work meeting occurred on 7 September 2018 which noted that the current issue was a "*shoulder injury*" (p.417). From this period there continued to be many absences from work, some marked as annual leave and dependant leave and it appeared some form of absence management process was being done or further considered. On 3 December 2019 until 15 January 2020, the Claimant had another period of long-term absence owing to his mental health (p.742). The result was another referral was made and Occupational Health on 6 January 2020 stated that
    29.1. "*Levels of depression are 0 and anxiety is currently low….I would suggest that Mr Jones be offered a stress risk assessment to identify the areas that are of concern to him. This will enable discussion between him and yourself to identify solutions and ways forward in the areas of concern. I would suggest this is carried out immediately as my impression is that work concerns are the only issue for him (excepting the new knee problem)*" (p.447);
    29.2. "*How best can we help him back to work? Stress risk assessment whilst off work, so that he can plan to return to work once solutions have been discussed*" (p.448)

30. Having received the above Occupational Health report, Simon Jennings emails Phil Tanner (Assistant Director – Safety, Well-Being and Governance) noting the recommended "*stress risk assessment. See attached OH assessment. What are your thoughts on this?*" (p.452),

31. Once more sickness absence triggers were passed and Simon Jennings sought to arrange a stage 1 absence meeting – which the Claimant was informed of by letter of 13 February 2020 (p.456). Shortly after this, on 18 February 2020, the Claimant answered a stress risk assessment that he had been provided earlier in the year (p.458). It was accepted by the parties that there was no follow up meeting following this and so whilst the template had been provided to the Claimant and filled in, the stress risk assessment process has never actually been concluded. There was however a meeting that was schedule to take place on 23 March 2020 with the Claimant, Simon Jennings and Katherine Smith from Health and Safety to review the stress risk assessment that had been completed by the Claimant, and Jasmin Gill from HR (p.511 and p.513). This meeting that was not effective led to Detriment 5 the pertinent facts of which as set out directly below.

32. On 23 March 2020 the Claimant and Simon Jennings met at work. The Claimant's case was that he calmly enquired why the return to work had not

been conducted to which Simon Jennings "*started shouting at me in front of my colleagues, 'You Shut up and go and do your work'! I was left shaken due to his aggression and rude behaviour; I also became severely irritated and suffered a panic attack. I remained assertive and insist it was his duty, and when I request that what about my reasonable adjustment. He walked away from me, eventually another manager Jan called me in office and carried out the return to work after I recovered from the panic attack.*" (paragraph 58 of the Claimant's witness statement). In contrast Simon Jennings account was it was the Claimant "*shouted that he had been off work sick and that no body was doing his back to work meeting. He then ranted that there was no personal protective equipment, so he and his family were at risk from COVID-19. He paced up and down the lab shouting this and said that he would expose this on Facebook. I told Christian jones to quieten down, or words to that effect, as he was disturbing and upsetting colleagues who were already working. I deny using the phrase "shut up". Christian Jones then went home.*" (paragraph 49 of Simon Jennings). The Tribunal concludes that in fact the following occurred:

32.1. the Claimant was agitated and aggressive when he saw Simon Jennings and in that sense, it accepts Simon Jennings account. This is because the Claimant was awaiting a stress risk assessment for quite some time and there were numerous emails complaining about it. He would therefore naturally in sense be aggrieved and his own account was that he remained "*assertive*". The Tribunal concludes that in fact he was "*assertive*" at the start of the conversation, which Simon Jennings interpreted as the Claimant being aggressive and he was disturbing his colleagues. This is also corroborated by Simon Jennings near contemporaneous account at p.514;

32.2. Simon Jennings however did tell the Claimant to "*shut up*". The Tribunal does not accept his version on this, namely he never used the phrase, because it was even in his own written account on p.514. His assertion that it was just paraphrasing does not seem to make sense in this regard. There being no need to paraphrase something in an otherwise suitably detailed note. It also is believable given the manner he perceived the Claimant was in and he was disturbing people;

32.3. the Claimant left and was offended by Simon Jennings telling him to "*shut up*" and go back to do work, and soon after left to go home. Equally, Simon Jennings considered the behaviour inappropriate, hence writing down the incident and the result was that no meeting was able to take place.

33. The Tribunal pauses to note that one of the allegations is that "*shut up*" was used in an email of 24 March 2020. The Tribunal did not see before it any such email in the bundle. There was mention of it at p.439 which may have been an email but it referred to lots of messages that were extracted and the wording of it suggests it came from the Claimant and it in relation to "*shut up*" incident was the same as Simon Jennings written account at p.514 – so it appeared it was merely the Claimant copying and pasting the account along with other matters he was aggrieved by.

34. On 29 June 2020, there was a GP entry that indicated the Claimant's history as being "*on sertraline for anxiety and depression symptoms, wants to restart medication*" (p.757).

35. In October-November 2020, the Claimant had shoulder pain upon return from work from an 11 day absence that ended on 5 October 2020 (p.744). He informed the Respondent and had two periods of absence of 3 days and then 23 days which concluded on 11 December 2020 (p.744). During this period, on 19 November 2020, a risk assessment in relation to the pain in his right arm was undertaken (p.557). A further Occupational Health report was organised.

36. On 7 January 2021, the Occupational Health report was produced (p.566). It stated amongst other things that:
    36.1. "*He reported he had discussed adjustments such as finishing early with management, to help him get home and take medication*" (p.567);
    36.2. "*Management will need to conduct a stress risk assessment and explore measures that could be considered that would help him reduce the ongoing symptoms.*" (p.567);
    36.3. "*Disability advice / My interpretation of the relevant UK legislation is that Mr Christian Jones' mental health condition is likely to be considered a disability but not the musculoskeletal conditions*" (p.568).

37. The Claimant's witness statement at paragraph 81 asserts that "*Furthermore, as the service as failed to provide me with a reasonable adjustment of reducing my working day by on hour since I have been requesting it in 2013, the only alternative I had was to forgo my Tea Break to be able to close 20 minutes early to be able to take my medication before 11.00 pm I reluctantly took this decision under duress and notified the OC health assessor to report this back to the management as failure meant I may not be able to take my medication which causes a relapse of my conditions. The Occupational Health expert advised the service against this. The Occupational Health Advisor in her report stated "he requested support at work with taking a break before he leaves due to the on-going symptoms. Although it's his important to consider nis views in my clinical opinion I would recommend that he takes a break in the middle of his shift rather than at the end as he has musculoskeletal symptoms. Working without a break could be detrimental to his musculoskeletal symptoms, especially considering he reported the pain to be high today*". The Tribunal therefore finds as a fact that it was around the 7 January 2021, that the Claimant had altered his working hours from 19:00-23:00 with a 20 minute break in the middle of a shift, which Ian Symonds explained and the Tribunal accepted was to allow principally a break from the POD to take a drink as no open containers were allowed in the POD area, to 19:00-22:40 with no break as the Claimant left early rather than having any. The Tribunal also notes that the quotation is correct that the Occupational Health report did advise against working without a break as it could be "*detrimental to his musculoskeletal symptoms*" (p.568). On this same point, there is a Return to Work meeting form that is signed by the Claimant on 1 June 2021 that states in the adjustment section:

> *"Christian will be leaving 20 minutes early, at 22:40, so as to be able to take his medication for stress. This is instead of taking his 20 minute break*" (p.600).

38. The Claimant from 1 February 2021-31 May 2021 had another period of long term sick leave which was more or less continuous (save for the short return

on 10 May 2021, see paragraph 59 below), and included some annual leave (p.744). This led to a further Occupational Health report being produced on 19 April 2021, which noted:

38.1. "*Mr Jones reported anxiety depression for several years. This has been exacerbated by an incident at work. He was informed by management 2-3 weeks ago there will be an investigation. He is concerned how he will be treated when he returns to work*" (p.586);

38.2. "*I completed an online psychological assessment and he is vulnerable to sever depression and moderately sever anxiety*" (p.586).

39. On 11 May 2021, he emailed Farai Katsande (Regional Manufacturing Manager) expressing his disappointment that there had still been no stress risk assessment as recommended by Occupational Health (p.590). Following his return to work on 1 June 2021, there was an assessment carried out with Simon Jennings that led to tasks being ascribed colour coding, denoting what he could and could not do because of his frozen shoulder and so adjusting his usual duties (p.601).

40. On 21 June 2021, the Claimant was provided with information that was to be attached to an Occupational Health referral and invited to comment. The Claimant replied making amendments relevant to the present dispute as set out below (the underlined sections being his changes):

    a) *Working Hours: Mon to Thurs 19:00 to <u>22:40 - Work till 23.00 (however closes at 22.40 due to agreed locally agreed reasonable adjustment as a result of years of ongoing work-related-stress)</u>.*

41. The Tribunal pauses to note that this change is consistent with the earlier recording of the times in the Return to Work interview set out at the end of paragraph 37 above.

42. There were further periods of absence for ill health from 20 July 2021 – 17 August 2021 (p.744). There was also some annual leave taken shortly thereafter (p.744). During this time on 3 August 2021, the Claimant indicated he would be happy to have a stress risk assessment when he was fit enough to attend work (p.691).

43. From 21 September 2021 onwards the Claimant has been off work (p.745).

44. On 6 October 2021, an Occupational Health report noted that the Claimant had "*sever*[e] *depression and anxiety*" (p.726). This is consistent with the GP entry that records a fit note for "*Depression and work related stress*" that is dated 21 July 2021 – 4 August 2021 (p.750). The Tribunal notes there is an entry the next day that covers a fit note for the same period with "*Anxiety and work related stress*" as the diagnosis (p.750).

45. The Tribunal interposes to note that the Claimant's disability impact statement, which was not materially challenged in this regard by Mr Lawrence during cross examination stating the following points, which the Tribunal therefore accepts:

45.1. "*My understanding of conditions like anxiety and depression is that they never really go away and are very likely to be*" (p.117);
45.2. "*The scale of my depression is affected from lack of sleep and anxiety. I have a tendency to avoid other people.*" (p.117);
45.3. "*When the symptoms of anxiety and depression recur, which effect my daily life, I have general feeling of worthlessness and very low self-esteem*" (p.118);
45.4. "[find it] *it hard to concentrate on anything including work*" (p.118);
45.5. "*find it difficult to sleep due to racing thoughts and feelings of dread about the day…I have trouble getting back to sleep*" (p.119);
45.6. "*The combination of all the symptoms of anxiety and depression would leave me feeling physically exhausted and generally run down*" (p.119).

46. The Tribunal below now continues to set out other factual findings in relation to discrete incidents that are relevant to the claims of failure to make reasonable adjustments and victimisation detriments below.

Leave request and Peter Basham Email– April 2019 – Detriment 6 and 12

47. On 30 April 2019, the Claimant's mother, for whom the Claimant is a carer, had a hospital appointment for an eye condition. Accordingly, the Claimant wished to take annual leave to attend it with her. That same day he received a phone call from Ritesh Patel enquiring where he was as he was on shift. Ritesh Patel and the Claimant had a dispute over the phone but ultimately the Claimant stated he had to be with his mother.

48. This incident is one of the alleged victimisation detriments and the Claimant asserts that he was deliberately denied annual leave and told that the reason for that was that it was fully booked. This is rejected by the Tribunal as a matter of fact. This is because it appears that on 30 September at 19:37 the Claimant's annual leave was approved by a manager (p.424). It is correct that there was a phone call and some dispute, but the reason was the Claimant's online form requesting the leave was not in fact authorised and the Claimant had assumed he had been granted the leave. Ritesh Patel was therefore working off the rota but ultimately the Claimant holiday was approved.

49. Notwithstanding the above, Ritesh Patel was obviously aggrieved by the conversation on the phone and informed Peter Basham his line manager that the Claimant was not in today and there had been a dispute over the phone (p.426). This led to Peter Basham replying on 30 April 2019 at 20:05, p.426, which is one part of Detriment 12:
Time to start looking at his attendance a bit more closely I think.

Globis Report

50. In March 2020 there was the Globis Report that was produced. The Tribunal had a full copy of that at pp.477-511. This report had been commissioned by

the Chief Executive to look into matters at the Respondent in Colindale. The report had several findings that shed the Respondent's Colindale department in a very negative light or in simple terms were critical of it. It set out several statements of non-White staff in support of this.

51. The Globis Report received some media attention, and the Tribunal were shown a headline in the Guardian that stated "*NHS Blood unit systemically racist, internal report finds*" (pp.544).

Request for hand gel and Peter Basham's email – April 2020 Detriment 4 and Detriment 12

52. In April 2020, there was no hand sanitizer station or supply of it for those working in the Colindale laboratory. The Claimant complained of this lack of sanitizer and stated that owing to his Dermatitis constant hand washing was causing issues to his hand. He believed that hand sanitizer with Aloe Vera would be a more suitable solution and sent pictures of the state of his hands on 16 April 2020. That same day he had a disagreement with Adrian Hernandez, a Processing Team Manager, in relation to the lack of hand sanitizer. Adrian Hernandez explained to the Claimant that the advice from Health & Safety Department was that washing hands with soap was better in terms of hygiene and dealing with a Covid-19 risk and that hand sanitizer that is repeatedly used would also cause problems. Adrian Hernandez suggested the use of Softaskin soap which the Respondent provided would help with the issue of dry hands and enquired what soap the Claimant used at home. The Claimant was insistent on hand sanitiser and failed to answer what soap was used at home. The Claimant was aggrieved by the response and wrote an email that same day. Likewise, Adrian Hernandez recorded his version in an email sent to the managers to which Peter Basham at 00:12 replied to Ian Symonds, p.516:

> *Up to you if you want to rein this in or not. Me being me would push it so he takes time off with 'stress'. Adds to the substantial case we have already regarding his attendance and we follow it up when this is over. Keep pushing the PTMs to keep records and if you need more agency to cover his hours, it's easily sorted.*

53. On 16 April 2020 at 23:11, the Claimant emailed Jasmin Gill of HR, with Ian Symonds copied in amongst others, with a lengthy email of complaint but part of which dealt with noticing that since he had been washing his hands more often with the soap provided his skin had become discoloured and he had try and blistered skin (p.519). He noted in this message that Adrian Hernandez had informed him there was special soap, Softaskin, but that is what he, the Claimant, was using and it had still led to his hands being in a poor state. He alleged the soap had caused this damage and that sanitizer was required as a matter of urgency.

54. On 17 April 2020, Jasmin Gill suggested that as an interim measure the Claimant could bring the soap, he used at home for which he could claim back on expenses (p.523). She also stated to the Claimant that same day that a Datix record of the incident would be taken and repeated her advice to bring his own soap for which the Respondent would pay back the amount as

expenses (p.528). Additionally, the email to the Claimant gave other advice to remedy the situation such as use of a moisturiser and hand gloves.

55. On 29 April 2020, the Claimant wrote an email to Ian Symonds expressing his dissatisfaction and noting that the hand sanitizer was only to be used during the shift, not the beginning or end which is when he intended to use soap (p.531).

56. Eventually the Claimant did organise the purchase of the hand sanitizer he sought, and he was recompense for it (p.535). The reimbursement occurred soon after 4 June 2020.

Peter Basham emails of 24 February 2021 and 25 February 2021 – Detriment 11

57. On 24 February 2021, Peter Basham sent an email to several people that were in management. It had the subject heading "*Colindale Report*" (p.575). This email was relied upon by the Claimant as being a detriment, Detriment 11. The email is lengthy but contains the following material points:
    57.1. It opens by stating "*Just like Christina, I apologise for the huge email* [Christina Whittington having said an email which complained that the as set out at p.577: 'report is not a factual report. It is based on lived experiences of some of the staff at Colindale. It was released without an opportunity for me or Peter to refute the claims it contains']*. I hope you all understand once you have read it. I would just like to echo Christina's utter disappointment regarding the Globis report and the treatment of myself, Christina, Manufacturing Colindale and the tarnish the report has put on Colindale in general. For almost a year now, I have kept my mouth shut about the report with the faith that NHSBT would do the right thing and either investigate myself I regards to the report or as Christina has stated, release a statement with the truth about the allegations made. I do feel we have been 'strung along' with the promise of this statement as I finally received a letter in November saying that NHSBT were not willing to make such a statement which may undermine the report. I have therefore been demoted, exiled from my department of 26 years without any investigation while being repeatedly told by Directors, Assistant Directors, BAME taskforce members etc that they knew I was not guilty of the events mentioned in the report*" (p.575);
    57.2. it attempts to deal with specified examples and rebut them;
    57.3. it never mentions the Claimant by name but states "[The Globis Report states] *A number of BAME colleagues commented that when they say hello to line managers in manufacturing, they (the managers) do not respond although they reply to white colleagues.* [In my opinion this] *is reference to a complaint by a BAME member of staff who all Colindale Management (including Kevin) and HR were aware of. This claim was investigated at length and dismissed without any substance. Unfortunately the individual who was again paid to leave after the production of the report and his ongoing ET and repeated grievance was a major contributor to the Globis report in his claims of being treated like a slave. Kevin would be aware of this individual and his influence in the department for some time*." (p.576). This may well be a reference to the Claimant as he had used the term "*slave*".

57.4. It concludes by stating "*All I can say is I genuinely believe I have done nothing wrong to be punished how I have been. I'm hurt, I'm broken and I've definitely fallen out of love with NHSBT over this. I was so proud to become the Department Manager and so happy to have such an encouraging and supportive bunch of people around me. To lose that role and the friends I have made over the 20 odd years of service without any chance to answer accusations which I know are false has damn near killed me. It pains me to have to be so blunt with you all but I think you deserve to know the truth behind what has happened to both me and Christina and the company we work for. I believe in fairness and equality. I believe everyone should be allowed to stand up for what is right and have a voice. I also believe that both I and Christina have not been given that right. Some of you may wish to take up Kevins offer and speak to him about the report but I can honestly say that speaking to Kevin hasn't really helped me to date. It has only served to frustrate and hurt me as he knows the truth regarding the contents of the report. Thanks and again, sorry for the huge amounts of honesty.*" (p.577).

58. At 02:33 on 25 February 2021, Peter Basham sent a further email along the same subject, it ended by stating a reference to the Claimant in the following terms, p.579:

From a personal point of view, you all have been amazing in working with me when I was made department manager to start changing years of issues. I believed we started that with the faith it was the way forward. I was firm in that you all should be treated with the same respect and equality as anyone. You shouldn't have to take crap because you were 'managers' as I had to as a PTM and that was the norm. The very fact I decided to challenge J and Christians behaviour has created the same issues that you now have to deal with. I do feel that the report has set us as a department back by many years, and the simple fact is that when I took over from Ian in 2017, they wanted to close us down. I was offered a big golden handshake deal to help close us, but I refused and changed Kevin and Gregs mind. I really don't want to regret doing that. I'll be in Colindale on Friday at 14:00. I'd like to see you if you're around. Please read below if you are not familiar with the truth of the Globis report.

<u>Incident with Adrian Hernandez – 10 May 2021 – Detriment 2</u>

59. On 10 May 2021, the Claimant returned from sick leave having had COVID. On 11 May 2021, the Claimant was on shift and the Processing Team Manager was Adrian Hernandez. Owing to a lengthy period of time off the Claimant was required to complete mandatory training on the computer. The Claimant however was unable to do this owing to some fault. Adrian Hernandez approached the Claimant, who was speaking to a colleague to enquire and was told that the Claimant could not do the mandatory training. There was then an exchange where Adrian Hernandez asked the Claimant what work he could carry out and the Claimant got annoyed. The claim before this Tribunal is that the Adrian Hernandez stated, "*You can not seat down* [sic] *and get paid for doing nothing, go and find another job you can do at your own pace*". Similar words are stated in the Claimant's email complaining of this of 13 May 2021

(p.591). However, this email does not state that Adrian Hernandez shouted or screamed at the Claimant. The Tribunal finds as a fact that:

59.1. Adrian Hernandez asked the Claimant to do tasks he was able to do given that he was unable to do mandatory training, so could not therefore do certain work, and he had been signed back to work and was not able to do the full ambit of his role. This is more or less consistent with both Adrian Hernandez witness statement, which was not challenged by Mr Martins, and the Claimant's;

59.2. Adrian Hernandez did not shout or scream such an instruction, which is consistent with his account in his witness statement and also consistent with the Claimant's own email complaining of the matter which merely says "*he said*" despite using other language in the same email that may be viewed as a more heightened nature (such as referring to matters as "*toxic*", p.592). He did reference however that the Claimant was being paid to do work (this being consistent with what he stated during the grievance process, p.709).

Grievance

60. On 31 March 2021, the Claimant raised a grievance (pp.581-585). Karen Beardsell, someone independent from the Respondent being a Principal Transformation Consultant at TCM Group, was appointed to investigate it. The main point about the grievance related to Peter Basham's one matter was the email of 24-25 February 2021 (which is Detriment 11 in this claim, see paragraphs 57-58 above), and an allegation that he was trying to build a substantive case against the Claimant, as well as allege bullying and harassment of Adrian Hernandez (which is Detriment 2 in this claim, see paragraph 59 above). There was a short delay before Karen Beardsell met the Claimant owing to his sickness absence and him making a subject access request which he wanted resolved first. A meeting with the Claimant, who was accompanied by his Trade Union rep did occur on 5 July 2021.

61. Returning to the wording of the grievance and the main alleged antagonist being Peter Basham, at p.582 the Claimant stated, "*I am also stunned that my name was mentioned by Peter Basham that he was managing my behaviour, as I had no issues with him through the years he spend deputising as Production Manager*". As set out at paragraph 13.2 above those years or rather time period would have been July 2017-March 2020.

Matters post grievance being raised – Detriment 10 and some matters relevant to Detriment 14

62. As noted above, paragraph 60, the Claimant made a subject access request and in relation to Detriment 10 complained in part that the emails of 24-25 February 2021 which he had received by an "*informant*" in June 2021 were not disclosed as part of the subject access request. The Tribunal were not shown the actual details of the subject access request.

63. Separately, following the 5 July 2021 meeting in relation to his grievance, he was provided with notes taken by Karen Beardsell. These notes were taken at the time by her typing them on a laptop. The Tribunal had a copy of these notes

at pp.623-p.634. These were provided to the Claimant on 14 July 2021 (p.670). Prior to this, Karen Beardsell held other investigatory meetings with individuals that she thought were relevant to interview as part of the grievance. The Claimant in the email of 14 July 2021 was provided until 19 July 2021 to make any amendments to the notes and confirm his approval, and it was made clear that if no response was received it would be assumed he was happy with the notes. The reason for this deadline and phrasing was because Karen Beardsell had been told that by Simon Jennings that the Claimant often refused to sign notes and she did not want an issue with the content of the notes later being disputed. The Tribunal accepts this evidence and so finds as a fact that was her belief and reason for providing the deadlines in the terms she did.

64. On 18 July 2021, the Claimant stated that he needed more time to make amendments and wanted time off work to do so (pp.669-670). His wording is somewhat curious as it states "*I am afraid this is not a through reflection of the meeting we had. Most answers are has not been clearly stated has I intended them to be. You mentioned that it will not be verbatim, however it seems that is exactly is it is as some side comments that I made just as an example or otherwise has found its way it the investigation report. I do not want my case to be lost out of content, or fundamentally weakened by this*". Simon Jennings stated the Claimant had to attend his ordinary shift and could not have the day off to make amendments of notes (pp.682-682).

65. An extension of time was given by Karent Beardsell until 21 July 2021 and in relation to having time off to make amendments she stated "*I have never come across any policy or had any one ask for time off for this reason before but there may be local arrangements in place that I am not aware of. I would therefore contact David for advice before you make any decision about attending work today*" (p.669). Kim Wheeler (HR Consult Team Manager) also confirmed to the Tribunal that she had not come across an employee being paid to make amendments to notes during working time, and the Tribunal accepted that evidence. It does not accept the email of David Agbley (Trade Union rep) that seems to suggest this occurs and notes that "*protected time during working time to complete NHSBT related investigations reports and amendments if required*" does not provide any specific examples or relate expressly to grievances (p.680). He did not provide any witness evidence before this Tribunal and nor did he respond in an email in relation to this matter asking in effect for further information on this by Karen Wheeler (p.679).

66. On 23 July 2021, Peter Basham provided his amendments to the notes to which Karen Beardsell emailed the same day which the first two lines stating "*Thanks for getting back to me. Those changes look fine*" (pp.677-678).

67. A further request for extension was made by the Claimant to amend the notes and that was granted until 26 July 2021 (p.681). This made clear that it was not a reasonable request to ask for amendments to be made during working time and this had not been supported for any other colleagues.

68. The Claimant did eventually provide his amendments within the requisite time frame, and these were before the Tribunal at pp.634-654. One of the amendments made included stating at p.639:

As result of 2nd of July 2012 incident, HR colluded with Jan to issue me a written warning (despite the fact that he abused me at the meeting). This made me fell the lowest I have been in in my life. I developed sever anxiety, and depression, and I was placed on higher dosage of anti-depressants and anti-anxiety medication.

Grievance outcome – Detriment 14

69. Karen Beardsell produced her report in August 2021. It was before this Tribunal at pp.698-719. In short, it rejected the grievance. It concluded amongst other things that the 25 February 2021 email was, in Peter Basham's own words, a "*rant and frustration at a situation that I found myself in. It was a goodbye to my management team. To say sorry it doesn't work out for us*" (p.705). It noted that the Claimant's attendance was 30% of the time since January 2019 which included Covid related absences (p.707).

D) Relevant legal principles

Disability

70. The Equality Act 2010, s.6 provides

> *(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.*

71. Schedule 1 of the Equality Act 2010 at para 2, makes clear that:

> *(1) The effect of an impairment is long-term if—*
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected.*
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

Failure to make reasonable adjustments and identification of issues

72. The Equality Act 2010 set out ss.20-21 and s.212 the duty to make reasonable adjustments in the following terms

> *s.20 Duty to make 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.

…

s.21 Failure to comply with duty

(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.

…

s.212 General interpretation

(1) In this Act—

"substantial" means more than minor or trivial;

73. At Schedule 8,
Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b)…that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

74. In terms of relevant case law, the Tribunal had particular regard to the following:
    74.1. Tribunals are advised to identify and make factual findings of the 3 relevant elements of reasonable adjustments claims, that is PCP, person who are not disabled with whom comparison is made, nature and extent of any substantive disadvantage suffered from the PCP found, any step or steps it would have been reasonable to take by employer: *Secretary of State for Work and Pensions (Job Centre Plus) v Higgins* [2014] ICR 341 (EAT) at [29]-[31]);
    74.2. the duty on establishing both the PCP and the substantial disadvantage is on the claimant, there is no 'reversal of the burden of proof' at this stage: *Bethnal Green & Shoreditch Educational Trust v Dippenaar* UKEAT/0064/15 [40]-[42];
    74.3. it is important for a Tribunal to start with the PCP rather than 'reverse engineer' it from the disadvantage perceived, but the identification of the PCP should, because of the protected nature of the legislation follow a liberal approach and a Tribunal should widely construe the statutory definition: *Ahmed v Department for Work and Pensions* at [2022] EAT 107 [25].
    74.4. the terms PCP are not terms of art but ordinary English words, however the phrase should be construed widely: *Ishola v Transport for London* [2020] EWCA Civ 112; [2020] ICR 1204 at [35];
    74.5. the substantial disadvantage of the disabled person in comparison to those who are not disabled must be caused by the disability: *Newcastle upon Tyne Hospitals NHS Trust v Bagley* UKEAT/0417/11 at [76];
    74.6. in the event that an employee shows a relevant PCP and substantial disadvantage, the issue of whether a sought after adjustment

is needed falls to be determined by the Tribunal assessing, objectively, whether practical step/steps (the adjustment) is reasonable: *Smith v Churchill Stairlifts plc* [2005] EWCA Civ 1220; [2006] IRLR 41 at [44]-[45];

74.7. an employer is not required to select the best or most reasonable of a selection of reasonable adjustments, nor is it required to make the adjustment that is preferred by the disabled person; rather the test is an objective one meaning "[s*]o long as the particular adjustment selected by the employer is reasonable it will have discharged its duty*": *Linsley v Revenue and Customs Commissioners* [2019] IRLR 604 at [38];

74.8. failure to consult or deal with requests for adjustments is not in and of itself a breach (ie the reasonableness in how an employer dealt with a request or process is not relevant as the question is about objective steps to address the substantial disadvantage): *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664 (EAT) at [71]-[72] and *Ministry of Defence v Cummins* EAT/0240/14 at [25]-[26]

75. In terms of this claim there was during the course of submissions a great deal of discussion as to the interpretation of the PCP and the wording of the list of issues. As far as the law is concerned on that, the Tribunal reminded itself of the an agreed list of issues in general means that matters are limited to the list, however it is important that a Tribunal conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: *Parekh v The London Borough of Brent* [2012] EWCA Civ at [31].

Victimisation

76. In terms of victimisation, s.27 Equality Act 2010 states

> *s.27 Victimisation*
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
> *(a) B does a protected act;*
> *(b) A believes that B has done, or may do, a protected act.*
> *(2) Each of the following is a protected act—*
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*
> *(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

77. As for the present case, victimisation would be unlawful by virtue of s.40(1)(a) Equality Act 2010. The burden of proof provisions at s.136 Equality Act 2010 apply, these state at s.136(2) Equality Act 2010

> *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.*

78. In terms of relevant case law, the Tribunal had particular regard to the following:
    - 78.1. the definition of detriment is widely construed and all that is necessary is whether a reasonable worker would or might take the view that treatment was in all the circumstance to their disadvantage (*Shamoon* at [34]-[35]);
    - 78.2. the test of causation for victimisation is in effect similar to discrimination in general in that it is a 'reason why' question, that is was the protected act in the mind of the person responsible for the alleged detriment (whether conscious or unconscious) and that it need only be a reason for it (not requirement for it being the principal or main reason) – see *Khan v Chief Constable of West Yorkshire* [2001] UKHL 48; [2001] IRLR 830 at [29] and [77] for the former principle and *Villalba v Merrill Lynch* [2006] IRLR 437 (EAT) at [81]-[82] for the latter principle;
    - 78.3. the case of *Igen v Wong* [2005] EWCA Civ 142, [2005] IRLR 258 which has detailed consideration of the burden of proof provisions (see [76] and Annex of its judgment in particular), which has been approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37; [2012] IRLR 870 and expressly found to still apply to s.136 EqA in *Efobi v Royal Mail* [2021] UKSC 33, [2021] IRLR 811. It is clear however that merely establishing a protected act and a detriment is not sufficient to transfer the burden under s.136 Equality Act 2010: *Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425 at [29];
    - 78.4. notwithstanding the burden of proof provisions and case law in relation to it, the emphasis in *Hewage* at [32] that their role is often for cases where there are doubts as the facts necessary to establish discrimination and it is having little to offer in cases where a tribunal can make positive findings one way or the other.
    - 78.5. whether approached as a two-stage shifting burden of proof or straightforward reason for the treatment it must be established that the alleged perpetrator of the victimisation had knowledge of the protected act, which may be by way of primary facts from which actual knowledge can be inferred, as absent this the claim must fail: *Scott v London Borough of Hillingdon* [2001] EWCA 2005 CA at [19] and [24]. Whilst *Scott* appears to suggest that the burden is on the claimant to establish knowledge and that s.136 Equality Act 2010 reversal of burden is not relevant, the case of *Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN at [30], [91] and [98], suggests that s.136 Equality Act 2010 does apply to knowledge of the protected act. In respect of knowledge for a protected act under s 27(2) Equality Act 2010 where the case is one made an actual complaint of a contravention (which is the present case), it must be established that the alleged discriminator knew

that the complaint amounted as a contravention and not merely that there had been a complaint in general (*South London Healthcare NHS Trust v Dr Al-Rubeyi* UKEAT/0269/09 at [21], [26]-[28]).

E) Analysis and conclusions

79. The Tribunal sets out its analysis and conclusion on the claims, having regard to the agreed issues which are set out at in the sub-paragraphs to paragraph 6 above.

(1) Disability of Depression

80. As set out at paragraph 7.1 above, it was accepted that the Claimant at the relevant time was a disabled person by virtue of the impairment of "*anxiety*", with the Claimant stating that "*panic attacks*" were not separately pursued as an impairment but were a symptom of the accepted disability of "*anxiety*". The Respondent however maintained that a separate impairment of "*depression*" was still disputed, and the Claimant maintained that he wanted this determined. There is some force in the Respondent's observation that the issue is likely to prove "*academic*" and that in effect the degree of overlap and in effect the overlap of symptoms (its closing submissions at paragraph 7). However, as both parties had not agreed the issue, the Claimant not wanting to abandon the impairment and the Respondent not wanting to concede it, the Tribunal had to determine this point.

81. The Respondent's main point was that whilst the Claimant had depression in the past, before the material time, there was nothing to support him having it at the material time. It pointed to the medical records to support the contention that there was nothing to support the Claimant suffering from depression "*for 12 months or was likely to last for 12 months*" (its closing submission sat paragraph 7). The Tribunal disagrees with that analysis. All the Claimant need show was that they were likely to recur as set out in the issue at paragraph 7.1.5.2. above. The Claimant on the balance of probability has established that for the following reasons:
    - 81.1. he had previously been diagnosed with depression, that was part of his claim in 2005-2006 (paragraph 12 above), and the Respondent accepted that, its case was he was 'cured' or rather it was not something 'effective' at the material time;
    - 81.2. there was evidence of a reoccurring episode in 2012, it being stated in that ET1 (paragraph 14.2 above). It is acknowledged that this may be inconsistent with the Occupational Health report of 24 July 2013 that stated he had been diagnosed in 2006 and prescribed medication, citalopram, suggested that it had resolved after 12 months (which presumably would mean it had resolved before 2012 given that wording), see paragraph 19.1 above;
    - 81.3. there was in fact evidence in a GP entry in March 2021 that the Claimant stated he was taking "*citalopram for depression*" (paragraph 17 above). That is before the May 2021-17 August 2021 that the Respondent is asserting as being the material time. Thus, it is incorrect

to state, as Mr Lawrence did in his written submissions that the "*GP records rebut the Claimant's contention that he suffered from depression at the material time*";

81.4. the Claimant had a fit note on 27 May 2014 which set out stress at work depression, with the Claimant repeating this in his meeting of 4 March 2014 (see paragraphs 24 and 25.1 above). This supports that there was a later reoccurrence of a depressive episode, or rather the impairment of depression having a substantial adverse effect again in 2014 if there was a need to be signed off long term sick;

81.5. importantly on 11 December 2014, the Occupational Health report actually stated that the Claimant had a history of depression and that *that* impairment was likely to amount to a disability because it was "*likely to recur…would have significant impact on his normal daily activities without the benefit of treatment*" (see paragraph 25.3). In making this observation the Tribunal is well aware that it is the one tasked to make that assessment and should not merely rubber stamp. However, given the way the Respondent refuted the disability of depression, this medical type of evidence of likely recurrence is accepted. The Claimant is not in any better position than that medical advisor and there was nothing said by the Respondent during the trial that challenges this assessment either. Moreover, the fact the Claimant had a level of depression of 0 as scored in 6 January 2020 (see paragraph 29 above) does not alter this. This type of mental health impairment, as the Claimant himself put forward, is one that comes and go, and a score of zero does not demonstrate there being no likelihood of future reoccurrence (see paragraph 45.1 above);

81.6. indeed, a few months after on 29 June 2020 the Claimant's GP entry indicates the Claimant wanting to resume "*sertraline*" for his depression symptoms (paragraph 34 above);

81.7. on 19 April 2021, so well within the material time on the Respondent's own case, Occupational Health were stating that following its assessment he is "*vulnerable to sever*[e] *depression*" (see paragraph 38.2 above). A reasonable reading of this means he is either in a depressive episode, or at least that it is likely that he will have one. As likelihood for all aspects of disability in the Equality Act 2010 simply means 'could well happen' (*SCA Packaging Ltd v Boyle* [2009] UKHL 37 [2009] ICR 1056) which seems indistinguishable from the medical speak of 'vulnerable to'.

82. The Tribunal points out that all the above is done by ignoring anything that has occurred *after* the relevant time period.

83. Accordingly, on the narrow ground that the Respondent refuted disability its argument is rejected. There was evidence *prior* to the relevant period of likely reoccurrence that his depression impairment would recur and lead to substantial adverse effect on his ability to carry out normal day to day activities. For completeness the Tribunal addresses the phrasing of the issues at paragraphs 7.1.1-7.1.5:

83.1.1. Did he have a mental impairment depression? Yes, the Claimant had a mental impairment of depression. There was evidence of medical diagnosis of this and whilst the test is not 'medical' as such, given the Respondent not putting forward any case that there was no impairment of depression (rather it was arguing it was not present at the 'later' relevant time), the Tribunal finds he had the impairment of depression.

83.1.2. Did it have a substantial adverse effect on his ability to carry out day to day activities? If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment? Would the impairment have had a substantial adverse effect on his ability to carry out day to day activities without the treatment or other measures? The Tribunal addresses these aspects together as the Claimant undertook both Cognitive Behavioural Therapy and took medication (sertraline and citalopram, both of which in the Tribunal's experience are commonly prescribed for those with depression). It appears both with and without the medication the Claimant was sustaining sufficient adverse effects. Once again, the Respondent did not challenge this. Of course, being signed off sick for long periods of time is not in and of itself conclusive. It is right that also the fit notes do not always used the word depression. But it is the case that there were occasions when they did. That is in any event not the only evidence, the Occupational Health reports which are referred to above support this and the Claimant's own disability impact statement on this, which was not materially challenged in cross-examination by Mr Lawrence in that respect (see paragraphs 45.2-45.6). This would fall within difficulty going outdoors and difficulty with concentrating to name simply two categories of normal day to day activities for which there is a substantial adverse effect.

83.1.3. Were the effects of the impairment long term? The tribunal will decide: Did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur? This has been dealt with above, the evidence satisfies the Tribunal that at the material time there was evidence of a likely recurrence of the Claimant's ability to carry out day to day activities being substantially adversely affected.

84. Therefore, the Tribunal concludes the Claimant was disability by virtue of his impairment of "*depression*" within the meaning of s.6 Equality Act 2010 at the material time (ie at least before May 2021).

(2) Failure to make reasonable adjustments

85. The Tribunal now turns to deal with the claim of failure to make reasonable adjustments for which the agreed issues are set out at paragraph 7.2-7.7 above.

86. It makes sense, given the overlap, to take the issue of the Respondent having knowledge of disability first (that is paragraph 7.2 above). In respect of "*anxiety*" this was not seemingly in dispute but in any event the Tribunal concludes that the Respondent at the very least ought to have known, that is it could reasonably have been expected to have known, before May 2021 of both the "*anxiety*" and "*depression*". This is because the Claimant had extensive sickness absence, Occupational Health on 11 December 2014 stated he was likely to be disabled by virtue of depression which was likely to reoccur (see paragraph 25.3 above), 30 March 2015 (see paragraph 26), and on 19 April 2021 it stated he was "*vulnerable to sever vulnerable to sever depression*" (see paragraph 38.2 above).

87. Given the observations on going through each of the elements of reasonable adjustments in turn and not reverse engineering matters (*Higgins*, see paragraph 74.1, and *Ahmed*, 74.3, the Tribunal will deal with each of the PCPs in issue in turn and deal any aspects that flow from each under the heading for that PCP.

<u>PCP 1: A requirement and/or expectation that employees would be mentally fit to carry out their contractual duties to suit the business.</u>

88. The first PCP is set out as being (see paragraph 7.3.2 above), "*A requirement and/or expectation that employees would be mentally fit to carry out their contractual duties to suit the business*". The onus on establishing this, and any substantial disadvantage by virtue of it lies with the Claimant and there is no reversal of the burden of proof at this stage, *Dippenaar* (paragraph 74.2 above).

89. A great deal of time in closing submissions was spent exploring this aspect, that is the existence and definition of the PCP. Indeed, it was also discussed and clarified as far as the Tribunal understood the evidence during the Tribunal. Mr Lawrence accepted the drafting was not clear and he described it as ambiguous in his closing submissions. There were two ways he said it could be read. One was that the "*mentally fit*" aspect read with "*duties to suit the business*" meant the Claimant was effectively stating he was made to do things, 'come what may' that he could not do and the Respondent's case was that people were not made to work if not well and would not do aspects they could not do because they were not well. The other way was to effectively to find that the words were otiose, and the allegation was in fact about working hours, these being the contractual duties. The Tribunal had initially interpreted the "*duties to suit the business*" as being meaningless as that is the very nature of the contractual duties is that they are to suit the business. They are after all a party to the contract and in this context the one with greater bargaining power. The Tribunal also did not interpret the phrasing "*mentally fit*" to go as far as suggesting that the Respondent and thought it simply could be substituted for "*able to*" which really does not advance matters at all. The Tribunal thought in fact the PCP could be best described as being "*A requirement and/or expectation that employees would carry out*

their contractual duties". Mr Lawrence in relation to that phrasing accepted in submissions that was a PCP that one would often see in many cases and equally accepted that the contractual duties included one's working hours.

90. Having spent considerable time on this and paying due regard to the case law that sets out that one should not reverse engineer (*Ahmed*, paragraph 74.1 above), that PCPs should be widely construed (*Ahmed* and *Ishola*, paragraph 73.1-74.2 above), and that list of issue (*Parekh*, paragraph 75 above) the Tribunal concludes that the claim should not fail by virtue of this and that the relevant PCP has been made out. It interprets the PCP as in fact being and better phrased as "*A requirement to work a 19:00-23:00 shift*" and a separate PCP of "*A requirement to work at 19:00-22:40 shift without any twenty minute break*". This is because of the following:
    90.1. to find that the PCP was read in one of the alternative ways as suggested by the Respondent would mean the Tribunal was not discharging its core duty of hearing and determining the case according to the law and evidence as required by *Parekh*. This would be instead slavishly sticking to issues for their sake. The evidence on this was clear it was the hours of the shift and when shortened by 20 minutes meant the Claimant had not break that were in issue;
    90.2. Mr Lawrence was unable to identify any particular prejudice to his client if the PCP were dealt with in this manner other than depriving him of a potential legal argument. There was no forensic prejudice or difficulty dealing with that case;
    90.3. Where there is ambiguity, which Mr Lawrence in fact accepted was the case, it would not be right to read the PCP in a way that would in effect debar a Claimant who could have had a claim viably continue with an alternative reading. A *"requirement and/or expectation that employees would carry out their contractual duties*", with the PCP in fact splitting into two alternatives as it were identified above was at the core of the dispute and evidence.

91. Therefore, the Tribunal needs to now turn to the substantial disadvantage, which is the issue at paragraph 7.4 above. Once again there was some difficulty in how the Claimant was pursuing his case as he was not engaging with the PCP at issue. Ultimately the conclusions of the Tribunal are the claim however put must fail for the following reasons:
    91.1. In terms of the Claimant having to work from 19:00-23:00, it is accepted that there was a substantial disadvantage for the Claimant having to work those hours compared to the non-disabled. That is because he had to be home by a set time to take his medication. He could not take his medication at work, or he would have difficulty driving. He could not take it upon arriving after the end of his 23:00 shift as that would mean it may still be operative the following day when doing his usual chores and going to his new job. This was supported by the Claimant's evidence before the Tribunal which was corroborated by the fitness to work certificate (see paragraphs 22 and 37 above). The appropriate comparator would be someone who also has two jobs but no disability, they are unlikely to be so fixed to the need to be home by a

certain time to take medication and problems that ensue if that time is missed for one reason or another. Equally, this disadvantage was known by the Respondent, they had it in the return to work form that is already mentioned after all (this being the issue at paragraph 7.5). The problem is that an adjustment was made, he was allowed to leave at 10:40 (although he forfeited his break). This means either there was no PCP at the relevant time, there was a PCP but it was not applied, so on the face of it (subject to the point below) there is no disadvantage, or alternatively a reasonable adjustment was made, namely shortening his time to finish at 10:40 but not having a break;

91.2. In terms of the Claimant having to work from 19:00-22:40 without any break, which increases in importance because of the point above, there is no substantial disadvantage that has been properly shown. Not only does the Claimant have to establish the disadvantage, *Dippenaar* (paragraph 74.2 above), but it also has to be something that relates to the disability at hand, *Bagley* (paragraph 74.5). No Occupational Health of medical evidence supported the need to take a twenty-minute break with an end at 10:40 owing to the depression or anxiety. The reason the break was needed on that evidence was because of the musculoskeletal issues (see paragraph 37 above). Furthermore, the Tribunal found that the agreement reached, and phrasing of Occupational Health advice indicated that a finish at 22:40 was sufficient to resolve the medication timing issue. The Claimant's general allegation of fatigue meaning there was a need for a 20-minute break is not made out on these facts. It is not dealt with in that way in his witness statement (see paragraph 53 and 81 of the Claimant's statement) nor in the substantial disadvantage aspect of the further particulars at p.110. In any event, the Respondent would not have had knowledge of such disadvantage, the issue at paragraph 7.5, the Occupational Health and Return to Work was all aimed at the medication time and he accepted he did not say anything to Simon Jennings in cross-examination that there was a problem with it being 22:40 finish. In an attempt to fix this issue when it was drawn to him during closing submissions he suggested general fatigue, a need to eat and exercise. In terms of eating in live evidence he timetabled that as being between the jobs and there was inadequate material to corroborate the exercise and fatigue matter, as already noted previously, and certainly nothing to show the Respondent would have knowledge, actual or constructive, of such a disadvantage from the 22:40 finish time without a break. In any event the appropriate comparator would be someone who did not have the medication issue but needed to leave at 22:40, perhaps to relieve a partner of caring responsibility so they could do their night shift, they would be equally disadvantage by giving up a tea break. Moreover, during live evidence, the Claimant stated that in fact his desired 22:00 end time was not set in stone, he just wanted a "*conversation*" so that some compromised could be reached and so he seemingly was aggrieved that the solution just had to come from him;

91.3. Finally, it should be stated that the Tribunal rejects the suggestion that the fact the Claimant suggested the adjustment has any effect on the claim and neither that others could potentially have suggested to forgot

their break That is because for one, the law just takes an objective approach and as long as it gets the result the fact it is not the preferred solution does not stop the adjustment being fine (*Linsley*, *Smith*, and *Tarbuck* see paragraphs 74.6-74.8 above). For two, the others are not actually in the same position as he was always allowed to leave at 22:40. The break was something others had to work through on some occasions if busy and a break at the end of the shift does not necessarily connote going home early. After all, it is still working time and the Respondent could have insisted if there was more work to be done or if the individual was on site at the 'end' taking a break so to speak that they do some work.

92. Accordingly, the claim must fail in relation to this PCP. However, the Tribunal wish to make it clear that in so far as there was a suggestion that an earlier finish time would not have been a reasonable step because of some business need meaning it could not be a 22:00 end time or a 22:40 end time with a twenty minute break was not possible, this would have been rejected. That is because of the live evidence of Farai Katsande which was that he would have given permission for this change had he known this is what was needed and there was no business barrier to it as such. Ultimately of course matters never get to this stage in the analysis as a 22:40 end time without any break was a reasonable adjustment to deal with the disadvantage that flowed from the usual 23:00 with 20 minute break as the Claimant was able to get home by then to take his medication and the other issues requiring an earlier finish did not relate to the disability in issue, are not adequately made out on any evidence and the Respondent did not know that the Claimant would be placed at any such disadvantage in any event.

<u>PCP 2: The requirement and/or expectation that employees would carry out duties to full capacity on return from sick leave.</u>

93. The next PCP is set out as being "*The requirement and/or expectation that employees would carry out duties to full capacity on return from sick leave*" (see paragraph 7.3.2).

94. As already noted, the burden on proving the PCP and the substantial disadvantage from it rests with the Claimant and there is no reversal of the burden proof at this stage, *Dippenaar* (paragraph 74.2 above). This claim however fails as the Claimant fails to establish either given:

94.1. in so far as the PCP means that the Claimant was required or expected to carry out full capacity on return from sick leave that is simply not made out. On several occasions when the Claimant returned from sick leave, he was not only given phased returns (see paragraph 23 above for example). Additionally, he was not made to do his duties "*to full capacity*". This is evident from him not doing receptions duties, the return to work being on a colour coded system on 1 June 2021 (see paragraph 39 above) and the incident with Adrian Hernandez on 10 May 2021 where the Claimant was not in fact doing the full job because of mandatory

training and he was being told to do tasks which he felt able to do (see paragraph 59 above);

94.2. in any event there was no disadvantage flowing from this that was established. First, to the extent the PCP is just interpreted as usually on return from work you do your job that was not in fact applied to the Claimant. As set out above he was not made to do his full job on his return. Second, the Claimant did not actually set out and Mr Martins did not challenge during cross-examination any particular aspect of the job the Claimant could not do (be it because of fatigue or ability to cope or otherwise, see paragraph 7.4.1-7.4.2 above). For the same reason there is nothing to establish the Respondent knew or could reasonably have expected to know that the Claimant would be placed at any such disadvantage (see paragraph 7.5 above, with those it knew of it made adjustments for after all). This is of course separate to the issue of the timings and breaks. Arguing that a stress risk assessment was necessary to determine this is not an answer.

95. Notwithstanding the above meaning there was no reasonable adjustment 'triggered', having a stress risk assessment is <u>not</u> a reasonable adjustment in law (this is the suggested adjustment at paragraph 7.6.1 above). Effectively this aspect of the case is that he was expected to do his full job which if he had a stress risk assessment *may* have led to something being removed, a stressor, meaning he was not doing the full ambit of the job and so the Claimant was arguing that conducting a stress risk adjustment was a reasonable adjustment. This however is not the law. This is because the law of reasonable adjustment is not concerned with the process but objective steps and failure to consult or deal with a request is by itself not an adjustment. So, the failure to hold in effect a consultive type meeting to determine *if* and *what* adjustments may be suitable, in this case the stress risk assessment is not in law a failure to make reasonable adjustments. This is by virtue of *Tarbuck* and *Cummins* (see paragraph 74.8 above).

96. Accordingly, the claim for failure to make reasonable adjustments owing to the "*requirement and/or expectation that employees would carry out duties to full capacity on return from sick leave*" fails.

<u>Conclusion on failure to make reasonable adjustments</u>

97. In light of the above the claim of failure to make reasonable adjustments is not well founded and is dismissed.

<u>(2) Victimisation</u>

98. The Tribunal now turns to consider the victimisation claim. As there is no issue as to there being the relevant protected acts (see paragraph 7.8 above) the Tribunal will deal with each of the detriments in turn below and under each of these consider if it was because of any protected act.

Detriment 7:Continuous failure to carry out stress risk assessment having raised the matter with Simon Jennings on 1 November 2013, 26 April 2015, 22 May 2015, 24 March 2020, 10 May 2021, 18 August 2021.

99. It was clear and agreed that the Respondent, and Simon Jennings, the line manager with responsibility as it were for advancing the issue did not conduct a stress risk assessment. It was equally clear that the matter was raised several times, see paragraphs 19.2, 21, 22, 23, 25.2, 27, 29, 30, 31, 36, 39, 42 above.

100. A repeated failure to carry out a stress risk assessment, which had been repeatedly requested by the Claimant and advised by Occupational Health is a detriment. The Tribunal wishes to record that the actions of the Respondent in this regard were disappointing and fell below what ordinary industrial practice would entail. However, the Tribunal must deal with the legal claims it is facing and the Tribunal would err if it merely acted out a sympathy for one party or to punish another. In this particular case there is no victimisation in Simon Jennings failure to carry out risk assessment which were raised to him. This is because the case has to fail for causation grounds for the following reasons:

100.1. the only protected act that was relied upon by Mr Martins was the Equality Act 2010 Questionnaire (paragraph 7.8.3) in relation to Simon Jennings actions. That is not surprising. None of the other protected acts relied upon were sent to him or had allegations that were properly levelled against him;

100.2. it is a prerequisite that the relevant individual, in this case Simon Jennings, had knowledge of the protected act, in this case the Equality Act 2010 Questionnaire. That is evident from *Khan, Scott*, *Bowler* and *Dr Al-Rubeyi* (see paragraphs 78.2 and 78.5 above). The Tribunal has concluded that Simon Jennings was missing that relevant knowledge as set out in its factual findings at paragraphs 14-15 above. It follows that Detriment 7 victimisation claim must therefore fail;

100.3. for the avoidance of doubt, this is the case whether knowledge issue is approach as being simply one of the balance of probability that needs to be established by the Claimant or if it is something to which a shifting burden under s.136 Equality Act 2010 applies. It therefore does not matter how the cases of *Scott* and *Bowler* are interpreted (see paragraph 78.5). The Claimant has failed to make out a *prima facie* case that Simon Jennings had the requisite knowledge, it is notable in particular that he was not mentioned in any of the relied upon protected acts, there was nothing to establish the document had been sent to him as a matter of course and the phrasing of the Questionnaire indicates that it was in fact Ian Symonds who answered the questions at issue.

101. In any event, the Tribunal still considered whether had it found that Simon Jennings had the requisite knowledge whether under either a s.136 Equality Act 2010 two stage approach or composite ‘reason why’ the failure to do the stress risk assessment was because of the Equality Act 2010 questionnaire,

or indeed any protected act. It concludes the claim would have also failed for this separate reason as:

101.1. Mr Martin's submissions appeared to be little more than a protected act (or acts) occurred and there is a detriment. The Tribunal already has noted it was surprised by the failure to do the stress risk assessment. But that, and indeed the delay in doing so, is the very detriment in issue. So that would be insufficient to amount to a *prima facie* case as required by s.136 Equality Act 2010 (see *Bailey*, at paragraph 78.3 above). Equally in so far as it is just an assertion of unreasonableness that too is insufficient (see *Bahl v Law Society* [2003] IRLR 640 (EAT) at [93]-[94], approved by the Court of Appeal at [2004] EWCA Civ 1070; [2004] IRLR 799 at [101] and *Commissioner of Police of the Metropolis v Virdi* EAT/0598/07 at [45]). Things that the Tribunal had in mind in dealing with stage 1 of the burden of proof were (a) Simon Jennings email to Occupational Health of 16 July 2013 that for all intents in purposes was asking it to give it information that was tantamount to things that would have been uncovered by a stress risk assessment, see paragraph 18 above (this being after the protected act but before the alleged requests relied upon by the Claimant) (b) that a risk assessment had been undertaken by Simon Jennings, see paragraph 21 above, (c) that Simon Jennings had not carried out a stress risk assessment himself and was asking Occupational Health to do this in January 2014, see paragraph 23 above, (d) that the initial pro forma as it were for a stress risk assessment was provided, see paragraph 31 above. These matters of fact at stage 1 all pointed against the reason being any protected act and there was simply insufficient material put forward by the Claimant at the hearing before the Tribunal to mean that the stage 1 assessment could end in the burden passing to the Respondent, that is insufficient material to show that in the absence of, or ignoring the Respondent's explanation, there were facts from which the Tribunal could decide the lack of stress risk assessment being undertaken was caused by earlier protected acts;

101.2. stepping back and having to decide what the reason for the failure of conducting a stress risk assessment was, that is taking a single stage approach and ignoring the fact the claim fails already on causation grounds and using a two-stage burden approach, the Tribunal concludes it was in no sense whatsoever because of the earlier protected acts. These of course occurred a long time ago and did not appear to mention Simon Jennings. The reason instead the Tribunal concluded was that Simon Jennings had never undertaken a stress risk assessment before, he was asking for Occupational Health to do it (which it did not), and he was then stuck in a position of trying to get Health & Safety to do something in a situation where the Claimant was not able in the day to do the assessment (owing to the other job) and had many periods of sick. The importance of the stress risk assessment in this trial in reality was less in the day-to-day case as far as the Respondent was concerned, Occupational Health were involved, and it appeared to be an issue with 'people' as opposed to particular aspects of the job. In no sense whatsoever was Simon Jennings influenced to not conduct a stress risk assessment because of earlier protected acts.

Detriment 6: Deliberately denied the Claimant's annual leave stating it is fully booked in relation to a request for leave on 30 April 2019.

102. Detriment 6 can be dealt with more briefly as the facts underpinning it, that leave was denied on the basis that it was fully booked, were not found to have occurred, see paragraph 47-48 above. In fact, the leave was granted, and the issue was that there was a mix up as the request had never been dealt with on the system leading to the phone call. Thus, the claim in terms it has been brought fails on the facts.

Detriment 4: Unfair treatment such as refusing to action reasonable requests including suitable PPE to be used by the Claimant at work which would avoid the need to suffer allergic reactions in the middle of covid pandemic, namely during April 2020 not providing alcohol hand gel with aloe vera instead of soap to clean the Claimant's hands despite a written request.

103. Detriment 4 can also be dealt with briefly. It is premised on a request that was *not* actioned be dealt with but in fact it was dealt with, it was actioned, as already set out in the findings of fact at paragraphs 52-56 above. The claim therefore fails as the detriment did not in fact occur in the terms set out.

Detriment 5: Hostility/oppressive behaviour by Simon Jennings saying "shut up" to the Claimant in a conversation on 23 March 2020 and repeating this in an email of 24 March 2020.

104. In relation to Detriment 5, the Tribunal has concluded that Simon Jennings did say "*shut up*" on 23 March 2020 but there was no email from him with that term as set out at paragraphs 32-33. However, factually even this incident on 23 March 2020 did not amount to hostility or oppressive behaviour. Even if it was just dealt with as whether saying "*shut up*" in a conversation could be a detriment the claim would still fail of course on causation grounds for the same reasons that are set out at paragraph 100.1-100.3, Simon Jennings did not know of the earlier relied upon protected act of the Equality Act Questionnaire. For completeness, the Tribunal determined that in any event the reason for "*shut up*" being said was a heat of the moment exchanged when the Claimant was perceived by Simon Jennings to be behaving inappropriately, and it was not any protected acts which by this stage had occurred some 7-14 years previously that were on his mind.

105. This claim therefore fails.

Detriment 12: Peter Basham continuously instigated and encouraged his manager to build an absence management/capability case against the Claimant, namely the emails of 30 April 2019 and 17 April 2020.

106. In terms of Detriment 12, the factual findings of this are set out at paragraphs 49 and 52 above. The Tribunal accepts that these emails would

meet the *Shamoon* test of detriment as a reasonable worker would take the view that emails of this nature being written about them were disadvantageous. Equally the allegation was sufficiently clear, and Mr Lawrence did not suggest that the phrasing of "*continuously instigated and encouraged to build an absence management*" was such that in fact the allegation had not been made out as a detriment on the facts.

107. Therefore, the issue is simply whether the reason for these emails were the earlier protected acts. The Tribunal concludes both on a simple reason why and on a two-stage burden that is not the case for the following reasons:

107.1. it is correct to record that Mr Martins pointed out that Peter Basham did not attend to give any evidence. That by itself does not amount to something meaning a *prima facie* case is made out. It all depends on the circumstances. The Respondent did not put into evidence the reason for his none attendance. All that said, the following facts were before the Tribunal: (a) there was nothing that related to Peter Basham having any involvement in any protected acts that occurred prior to the detriment save for the first one that dated to 2005-2006, that is the ET1 presented on 10 November 2006, (b) some nearly 15 years had elapsed between the protected act and the detriment, (c) the Claimant had a very high level of sickness absence, (d) the Claimant appeared to maintain that he had no issues with him between July 2017-March 2020 when he was actually 'in the same department' and part of the relevant management structure (see paragraph 61 above). Looking all these elements, there is insufficient material put forward that would overall lead to a conclusion that stage 1 *prima facie* case has been made out;

107.2. in any event, it is highly unlikely that the situation was such that Peter Basham was influence by an event some 15 years previous. The reason why he sent the emails he did was his opinion that he had an exceptional amount of absence and there had been an issue about non-attendance when holiday had not been formally signed off on the system, and the Claimant was it appeared to Peter Basham continuously putting up barriers to not do/attend work. Looked at another way, the Tribunal was satisfied that even without any such protected acts someone who was in materially the same position as the Claimant would have had such an email written about them which shows that it was not the protected act that was properly speaking the cause.

108. Accordingly, this claim fails.

<u>Detriment 11: Peter Basham constant blackmailing and harassing the Claimant in emails to other managers, namely in an email of 24 February 2021 at 16:51 and 25 February 2021 at 02:23.</u>

109. In relation to Detriment 11 the findings of fact are set out at paragraphs 57-58 above, and the points made 107.1 appear to apply with equal force. Factually it is not accepted that it amounted to "*blackmailing*" or "*harassing*" so the detriment is not made out.

110. However, the present issue seems to be a classic scenario envisaged by *Hewage* (see paragraph 78.4 above) where this Tribunal is able to make a positive finding as to the reason for the emails being sent and it had nothing to do with a protected act some circa 16 years previous. The reason those emails were sent, which were *not* targeted purely at the Claimant, was Peter Basham wanting to set out his case for the unfairness at the action that followed the Globis report which he did not have an opportunity to rebut, and he disagreed with its conclusions. It made no difference at all that there had been a complaint some 16 years previous and the Tribunal concludes the same email would have been sent by Peter Basham even without that earlier ET1 as he wanted to get his side across or more colloquially put get matters of 'his chest'. He was dealing with what he perceived as an unfair attack on management as at that time and not in any way drafting an email because of any earlier protected act the Claimant relies upon.

111. Accordingly, this claim fails.

Detriment 2: Being micromanaged, namely on 10 May 2021 by Adrian Hernandez after noting everything the Claimant was doing screaming at him "You can not seat down [sic] and get paid for doing nothing, go and find another job you can do at your own pace".

112. The claim of Detriment 2 being an act of victimisation fails on the facts. The facts found by the Tribunal are at paragraph 59 above. There was no screaming or shouting. Furthermore, on the facts found being told to do work that one could do, given the mandatory training on the computer, was not working out could not reasonably amount to a detriment. Further still, Adrian Hernandez was not cross-examined at all and so the reasons for his actions were not challenged. In any event, the Tribunal was satisfied that the only reason for making the comment is that the Claimant to Adrian Hernandez was not doing anything productive and so needed prompting and it in no way had anything to do with earlier protected acts. Whichever way it is dealt with this claim of victimisation must fail.

Detriment 10: Isolation and lack of support from HR and the upper management who continuously supported the action of its managers on 26 April 2021 and 5 July 2021 by refusing to disclose the email of 24-25 February 2021 in following a Subject Access Request and the refusal to allow the Claimant to make amendments to grievance notes during working time.

113. There are two aspects to detriment 10:

113.1. The first concerns the alleged refusal to disclose two emails of 24-25 February 2021. The first difficulty the Claimant faces is that this was not adequately pursued. The Tribunal was not shown the actual subject access request and the emails themselves did not in fact set out personal information about the Claimant (such as his name, date of birth, address and so on). It was very difficult to see what was identifiable save for one mention of his first name. But even that aside, the second and more

fundamental issue is he *had* copies of the documents in issue and so the Tribunal concludes that a failure to supply the very same documents in a subject access request cannot be in law a detriment in these circumstances. The Claimant is not in any position of disadvantage – after all he relied upon these very emails both internally and at the hearing before this Tribunal.

113.2. The second aspect of detriment 10 is a refusal to allow the Claimant to make amendments to notes taken at an investigation meeting during working time. The key decision makers for this are Karen Beardsell and Kim Wheeler. The factual findings of this are set out above at paragraphs 62-68 above. There is nothing to show that either Karen Beardsell or Kim Wheeler have allowed amendments to be made to notes during working time by others in similar situations. There was no policy that *they* were aware of for this and so the Tribunal is able to conclude that the reason why this request was refused is that it would not occur for anyone else and was not reasonable. Instead, they had offered what was considered by them ample time to make amendments to the notes. Their decision-making process had nothing whatsoever to do with any earlier protected acts.

114. Accordingly, this claim fails.

Detriment 8: failure to provide reasonable adjustments as set out in the reasonable adjustments claim and made on 5 July 2021 (in other words to the extent the Tribunal concludes there has been a failure to provide reasonable adjustments the cause of that was an earlier protected act(s));

115. Detriment 8 was premised on the reasonable adjustments claim succeeding. In short, the Claimant's argument was that the Respondent failed to make a reasonable adjustment, hence the reasonable adjustment claim, and the *reason* it failed, that it breached the duty, was because of an earlier protected act. As the Tribunal has dismissed that claim it follows that this victimisation detriment claim must fail.

Detriment 14: Suffering prejudice and miscarriage of justice, namely most recent example; Peter Basham complained about "my [Claimant's] behaviour" in his email of February 2021. However, Kim Wheeler and Karen Beardsell investigated the Claimant's sickness absence and found that enough reason to justify his comments and instigating emails sent, without considering the Claimant's complaint of failure to carry out stress risk assessment and failure to provide reasonable adjustment as the mitigating factor to the Claimant's ill health. This was clarified at the hearing as the outcome of the grievance in August 2021 being a detriment (that being the alleged miscarriage of justice) along with the use of the word "fine" in response to Peter Basham's amendments in an email of 23 July 2021. The relevant report was at pp.698-719.

116. Detriment 14 is that the:

116.1. outcome of the grievance was in effect biased or wrong, and it was because of the earlier protected act. This aspect however fails as there is

nothing to establish such a *prima facie* case or more bluntly a reason for an independent person to have produced a 'biased' outcome because of earlier protected acts which she had no involvement in. It was simply a bare allegation and indeed this meant that in fact the underlying allegation, the detriment, that there was something wrong with the outcome cannot be found by this Tribunal. Employees may well be dissatisfied that a grievance does not uphold there compliant but that does not mean that it must be biased, let alone that it was in anyway influenced by earlier protected acts. Therefore, the detriment as well as the causation has not been established;

116.2. the use of the word "*fine*" by Karen Beardsell in response to Peter Basham's amendments to the notes indicated some prejudice. This is rejected by the Tribunal as there seemed nothing improper with it. Objectively speaking "*fine*" is the type of response that is often received when amendments are suggested for which there is no material need to alter and it does not, contrary to the Claimant's case, suggest a deliberate engineering of any result. Accordingly, the claim fails as there has been no detriment. Likewise, there is nothing to show any linkage at all with earlier protected acts to enable the burden of proof to transfer and the Tribunal in any event is able to conclude positively that the email was just an immediate response to the amending of notes, and so nothing influenced in any way by earlier protected acts.

<u>Detriment 15 NHSBT does not adhere to its internal polices in matters related to me. Namely, the stress risk assessment / workplace assessments which the Claimant alleged should have been carried out per the Stress Management Policy and Health & Safety Risk Management Policy, and carry out Occupational Health recommendations which should have occurred per the Attendance Policy and delay in providing an outcome to the grievance contrary to what should have occurred in the Grievance Policy.</u>

117. Detriment 15 was not adequately canvassed during the hearing. The specific alleged policy breaches were not dealt with in Mr Martins' cross examination of the Respondent's witnesses. It fails for the following reasons, individually and cumulatively:

117.1. there was insufficient evidence of any alleged breach, at the end of the day it is not clear that simply failing to follow a policy would be something that leads to any burden of proof transferring (see paragraph *Bahl v Law Society* [2003] IRLR 640 (EAT) at [93]-[94], approved by the Court of Appeal at [2004] EWCA Civ 1070; [2004] IRLR 799 at [101] and *Commissioner of Police of the Metropolis v Virdi* EAT/0598/07 at [45]);

117.2. notwithstanding the above, it has to be determined *who* did not apply the relevant policy. As the case was not adequately dealt with during the hearing the Tribunal can only conclude that it would be Simon Jennings as he is the one who should have dealt with the stress risk assessment and Occupational Health side, and Karen Beardsell or Kim Wheeler in relation to the grievance outcome. In relation to Simon Jennings given the rejection of knowledge of the protected act, as already set out above at paragraph 100 above, so the claim must fail for that reason. In relation to Karen

Beardsell and Kim Wheeler, an outcome was provided and there was nothing to suggest a delay had anything to do because of a protected act. In fact, it appeared it was due to the complexity of the grievance, investigation and periods of absence (both by the investigator and others).

118. This claim is therefore dismissed.

Conclusion on victimisation detriment

119. In light of the above, the claim of victimisation detriment is not well founded and is dismissed.

Time limits

120. The claims all failed on the merits and so the issue of time limits was never considered by the Tribunal as it was immaterial.

Employment Judge Caiden
7 December 2023

RESERVED JUDGMENT AND REASONS
SENT TO PARTIES ON 28 December 2023

FOR EMPLOYMENT TRIBUNALS

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