



EMPLOYMENT TRIBUNALS

Claimant: Mr Hakan Toraman

Respondent: Pimsa Automotive UK Ltd

Heard at: Birmingham (by CVP)

On: 16 - 17 January 2024

Before: Employment Judge Bennett
Mrs S Ray
Mr C Ledbury

Representation:

Claimant: in person, supported by his wife

Respondent: Mr Jagpal (Solicitor)

RESERVED JUDGMENT

1. The judgment of the Tribunal is that the Claimant was a disabled person at the material time by reason of his EUPD.
2. By a majority the complaint of harassment related to disability succeeds.
3. The Respondent must pay the Claimant an award of £1,500 for injury to feelings plus £166 interest (totalling £1,666).

REASONS

Introduction

4. The Respondent is a company that manufactures vehicle components and materials. The Claimant joined the Respondent in March 2021 and worked first as a Production Operative and then as a Team Leader.
5. By a claim form presented on 13 January 2023 the Claimant brought a complaint of disability discrimination against the Respondent, identifying a single act of 'harassment related to disability'. The Claimant also alleged in his claim form that the Respondent had failed to provide a written statement of terms and conditions of employment under s1 Employment Rights Act 1996 ("ERA") but it was confirmed at the outset of the hearing that the Claimant no longer pursued this element of his claim.
6. It is the Claimant's case that he is disabled due to his borderline personality disorder/ emotionally unstable personality disorder ('BPD/EUPD'), the latter being formally diagnosed in August 2021.
7. The Claimant asserts that he was bullied by his manager, Mr Prudent, who joined the Respondent's company in April 2022. The Claimant's claim turns on a single asserted incident of disability related harassment which, according to the Claimant's account, took place in early September 2022 and consisted of Mr Prudent making a 'crazy' gesture by his head and then making a comment acknowledging or referring to the Claimant's mental illness.
8. At a preliminary hearing before Employment Judge Burns on 1 September 2023 it was determined that if the Respondent did not concede disability then the Claimant would need to prove that he was disabled in order for his claim of harassment related to disability to have any prospect of success at the final hearing. The Respondent did not concede the issue of disability but accepts that the Claimant has a mental impairment and a diagnosis of EUPD. It is therefore for this Tribunal to establish whether the Claimant was disabled at the time of the alleged harassment and whether the claimed incident of disability harassment in fact occurred.
9. An agreed bundle of documents was produced for the hearing and where page numbers are referred to below these are references to that bundle. We also had before us witness statements from the Claimant, Mr Lockwood (Managing Director for the Respondent), Mr Prudent (Production Manager for the Respondent), Mr Ahmed (Team Leader for the Respondent) and Mr Hortoglu (Purchasing Specialist for the Respondent) and we heard evidence from each of these witnesses.
10. There was a Turkish interpreter throughout day one of the hearing and from lunchtime on day two. The Claimant had excellent English but wished to have the interpreter on hand in case he struggled with particular concepts or language so it was agreed that

the interpreter would remain present in order for the Claimant to have the option to check his understanding at any point. The Claimant gave his oral evidence mostly via the interpreter but chose to carry out cross-examination of the other witnesses and to give his closing submissions in English.

The issues

11. Following discussion with the Claimant and Mr Jagpal (the representative for the Respondent) at the outset of the hearing, it was agreed that the issues for determination were:

Disability

- (a) Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 (the "EQA") at the time of the events the claim is about? The Tribunal will decide:
- (i) Did the Claimant's mental impairment have a substantial adverse effect on his ability to carry out day-to-day activities?

Harassment

- (b) Did Mr Prudent make a 'crazy' gesture and comment regarding the Claimant's mental impairment in the first week of September 2022 as alleged by the Claimant?
- (c) If so, did the gesture/comment relate to disability?

Remedy

- (d) Should the Tribunal make a recommendation that the Respondent takes steps to reduce any adverse effects on the Claimant? What should it recommend?
- (e) What financial losses has the discrimination caused the Claimant?
- (f) What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

Findings of Fact

12. Where there was a dispute on the facts between the Claimant and the Respondent, the Tribunal made its findings of fact on the balance of probabilities, having carefully considered the evidence of the Claimant and the other witnesses and having considered the various documents to which it was referred.
13. This judgment does not seek to address every issue that was in dispute between the parties. It only deals with the points that are relevant to the issues that the Tribunal must consider in order to decide if the claim succeeds or fails. In reaching our conclusions the Tribunal has considered all of the evidence before it and reached its decision in the round.

14. The Claimant joined the Respondent as a Production Operative on 2 March 2021.
15. In filling out a health questionnaire during the job application process the Claimant ticked boxes to indicate 'yes' to the question "are you currently suffering from or have suffered from any of the illnesses listed below" in respect of 'hernia or rupture' and 'depression/anxiety'. He also indicated that he was currently taking a prescribed medicine.
16. On 14th May 2021 the Claimant was promoted to 'trainee team leader'. The Claimant was given an employment contract setting out details of this role, which he signed on 27 May 2021.
17. The Claimant was keen to progress within the company but did not wish to work outside normal working hours due to his mental impairment and also because he needed to support his disabled wife with domestic duties in the evenings and at weekends. We find that the Claimant did do very occasional weekend work in order to secure himself the promotion to team leader however we do not find that it was more than once or twice. The Respondent was unable to put forward evidence of more than one particular occasion when the Claimant worked at the weekend or in an evening. In the Claimant's e-mail at page 55, in a context where it would be in his interests to overplay the amount he had done, he refers to 'occasional' weekend work and we accept that this is an accurate reflection.
18. The Claimant generally sought to avoid engagements out of work time whether that be evening and weekend overtime or social engagements. He attended (and, when asked, helped to organise) work social events but the prospect of attending caused him anxiety beforehand and he only went after discussing it and being encouraged by his wife. The Claimant did not tell his colleagues about his depression and anxiety but he discussed these with Mr Lockwood at an early stage of his employment and confirmed that they would not affect his work and that it did not need any special treatment.
19. The Claimant describes in his impact statement (page 144) the symptoms that he suffers from. We accept this because we found the Claimant's evidence in respect of the core elements of his claim to be generally credible and consistent - both internally within his own account and externally with the documentation. In cross-examination the Claimant gave his evidence clearly and confidently and was prepared to state when he was not certain about, for example, a particular date. The WhatsApp messages and emails from the Claimant in the bundle support our impression of a careful, thorough and accurate individual.
20. The Claimant's impact statement also describes him 'misconstruing conversations', it taking 'all my energy & focus to manage a day at work', suffering 'severe depression & feelings of worthlessness', being 'very blunt & have no filter' which can 'create issues within my relationships', waking up 'fatigued & this becomes much worse throughout a working day' which makes him 'more irritable' and tends to 'aggravate my disorder & mood'.

21. The Claimant's mental impairments did not exhibit themselves outwardly in the workplace. Within a stable and happy working environment the Claimant was able to manage the effects of his conditions well and pre-empt these from interfering with his work. His colleagues, including Mr Lockwood and Mr Prudent, did not see any visible indication that the Claimant was at any point struggling or having to cope with a mental impairment of any sort and they were only aware of the impairment because the Claimant told them.
22. The Claimant was happy and settled in his job at first. He had a very good relationship with Mr Lockwood during the first year of his employment. We note the evidence at page 103-104 in the WhatsApp chat conversation that Mr Lockwood offered to treat the Claimant and his family to a meal when they were on holiday. The tone of the conversation on WhatsApp confirms that the pair enjoyed a good working relationship.
23. The Claimant sought further promotion to the position of production manager in November 2021 (page 46). It was the Claimant's understanding that this role would not involve work outside normal hours and although it would involve a change to his pattern of work and an increase in his responsibilities he felt able to take this on at the time due to his mental impairment being stable.
24. The Claimant did not get the role of production manager and in April 2022 Mr Prudent joined as production manager for the Respondent. Mr Prudent was the Claimant's manager and there were usually twice-daily meetings involving Mr Prudent, the Claimant, and the other team leaders.
25. In May 2022 the Claimant received a pay increase which was instigated by Mr Prudent.
26. On 16 June 2022 (page 105) the Claimant disclosed his diagnosis of EUPD to Mr Lockwood. This was the first time he had disclosed his specific diagnosis of EUPD to the Respondent. In a WhatsApp message he also told Mr Lockwood that he had been suffering with mental health for years. He said that the borderline personality disorder is "why sometimes I struggle at work to express myself properly and it can come across as quite angry". He went on to say "I just wanted to be honest with you & let you know my situation so hopefully you & all my colleagues will understand me better".

29 June 2022

27. On 29 June 2022 at the morning production meeting the Claimant raised the matter with Mr Prudent that he did not have enough staff to be able to fulfil the shipment due for that day. The Claimant left that meeting with the understanding that he should pack only 10 of the 30 boxes that were ordered. Mr Prudent understood that all 30 boxes would be packed. The Claimant oversaw the packing of 10 boxes before he left work that day and he emailed Mr Prudent just after 4.30pm (page 49) to reiterate the problems caused by lack of staff.

28. Mr Prudent emailed the Claimant later in the evening of 29 June 2022 (page 49) and reprimanded him for leaving without informing him that “nothing was packed ready for today's collection or even partially packed”. As a result of this, Mr Prudent said, the Respondent had “missed a delivery which was planned for today”. In cross-examination, when asked whether 10 boxes had been packed, Mr Prudent replied “*from my recall we only sent ...10 boxes which was packed by the afternoon shift*”. When asked by the Claimant ‘Do you accept that I loaded 10 boxes before I left?’ he replied “*No because I have emails which say nothing was packed, he left, I have message from pm team to say they're here to collect 30 boxes...*”
29. We have taken account of the email from the Claimant at the end of his shift on 29 June highlighting the problems caused by shortage of staff and we see this as a sign of an assiduous and conscientious employee. We place weight on his email shortly after the event, on 4 July 2022, which states ‘There was only one scheduled shipment I agreed to, which was 10 boxes which I loaded myself that afternoon’, and the fact that Mr Prudent agreed in oral evidence that 10 boxes were indeed sent. On this basis we are satisfied that the Claimant did pack 10 boxes, which is what he believed had been agreed, and that Mr Prudent was incorrect to say in his email of 29 June 2022 that nothing was packed ‘or even partially packed’.

30 June 2022

30. The following day on 30 June 2022 the Claimant and Mr Prudent had what was widely described as ‘a heated discussion’. The Claimant in his witness statement claims that Mr Prudent swore at him during this discussion. Mr Prudent in his oral evidence stated “*...there would have been a discussion about missed production but I wouldn't swear at a meeting.*” The representative for the Respondent suggested that swearing was inconsistent with the email sent to Mr Prudent by the Claimant on 4 July 2022. We disagree. The 4 July email (page 48) states “also I would like to share about how I feel you treated me and how you spoke to me on 30th of June 2022 about this mix up. I felt humiliated and disheartened. Even if it had have been my mistake, you didn't need to talk to me the way you did. I'm sure no employee would tolerate being spoken to in such a manner.” It is the Tribunal’s view that this e-mail reference could easily and naturally be a reference to Mr Prudent having used swear words and, in fact, this is its obvious interpretation.
31. We have also had regard to the evidence of Mr Ahmed about the Claimant’s relationship with Mr Prudent “*I can't say they were good friends or working together really nice*” and, in response to a question about whether anyone ever lost their temper, “*I can't go into specific details or times they have been arguing about ..one specific incident..but what I can say, yes sometimes...*”. This contradicts Mr Prudent’s oral evidence that it is “*incorrect [that he didn't like the Claimant]. I liked your personality and the way you got on with your team.*” Setting this evidence alongside the Claimant’s own account and the email discussed above, on balance of probabilities we find that there was a heated discussion in which Mr Prudent did swear at the Claimant.

New shift pattern

32. In early August 2022 a new shift pattern was being introduced by Mr Prudent in order to address the increased workload within the business. A draft e-mail to the team leaders, including the Claimant, was sent by Mr Prudent to a colleague for proof-reading on 12 August 2022. The Claimant did not receive a copy of this e-mail but Mr Prudent had a face to face meeting with the Claimant on or about the 16 August 2022 at which Mr Prudent gave the Claimant the information essentially as set out in the draft e-mail and gave him a paper copy of the new shift rota.
33. The content of the discussion between Mr Prudent and the Claimant at this time is disputed. Mr Prudent says that the proposal to change shifts, and require the team leaders to cover night shifts in rotation, was “*up for discussion whether it would be suitable*” and “*not set in stone*” . The Claimant says that he was told by Mr Prudent that he had to accept the new shift pattern or he would either lose his job or have his pay deducted. Before this point Mr Prudent had been unaware of the Claimant’s mental impairment. It is the Claimant’s case that when he told Mr Prudent that he was unable to work nights due to his disability and his wife’s disability Mr Prudent demanded evidence of this. In cross-examination when this was put to Mr Prudent he replied “*no, that's incorrect, I wouldn't ask you to prove it*”.
34. On balance we prefer the evidence of the Claimant regarding the content of this meeting. We reach this conclusion on the basis that the wording of the draft email does not indicate that there is flexibility in the proposal or that it is ‘up for discussion’, as Mr Prudent stated in his oral evidence. The wording of the e-mail states:

‘To support this growth, I need the support of my team leaders to rotate and ensure a responsible person is always on site. This will also ensure opening and closing is done by a dedicated team leader.

As from Monday 22nd of August 2022 we will run with

Two T/L’s on Day Shift

One T/L on PM Shift

I need your support I will continue to review and look for alternative options but for the short term I need your support and flexibility to make this a reality.

With Sezer and Hakan both on Holiday at present, w/c 15 August this will be temporarily covered.

I have added a table below to begin with to visualise the proposed rotation of Team Leaders. ‘

35. It is our view that despite the reference to ‘the proposed rotation’ at the end of this draft e-mail, the new shift pattern – although potentially temporary - was effectively a done deal and was not merely a proposal to be discussed. We also accept that the Claimant made Mr Prudent aware of his mental impairment at this first meeting where night shifts were discussed.

36. In relation to the request for the Claimant to send evidence of disability we consider that this is consistent with Mr Prudent's wish to implement the new shift system. We also consider it persuasive that the Claimant did in fact send such evidence of his and his wife's disabilities and that in the covering e-mail attaching the evidence he makes clear his understanding that he has been informed that he must start doing night shifts and he states 'please see evidence of disabilities attached as requested'. The Claimant refers back to Mr Prudent's request again in his later e-mail of 12 September 2022.
37. The e-mail from the Claimant referred to above was sent on the evening of Sunday 21 August 2022. We note that this was the day before the Claimant was due to do his first night shift according to the proposed rota in the draft e-mail of 12 August. This timeline is consistent with the Claimant's account of events. We find that the Claimant was very offended at having to provide information of his disability and, in particular, his wife's disability.

Events leading up to first week of September 2022

38. In the email from the Claimant to Mr Prudent and Mr Lockwood on 21 August 2022 the Claimant referred to 'my own mental health disorder'.

We find as a fact that Mr Prudent continued to pressure the Claimant to undertake the night shift even after the Claimant provided details of his disability on 21 August. We reach this conclusion on the basis of the Claimant's consistent evidence on the point in:

- (a) his witness statement (paragraph 13);
- (b) the Claimant's WhatsApp message to the Respondent's Turkish HR advisor on or about 12 September which stated: 'Actually no I'm not very good, I'm being bullied at work due to my disability & not being able to meet the new work rota'.
- (c) his email to Mr Lockwood on 12 September where the matter of night shifts is still a live issue;
- (d) the absence of any documentation or reference by the Respondent to any conversation in which the Claimant was informed that he did not need to do night shifts prior to Mr Lockwood's email of 19 September;
- (e) the Claimant's email to Mr Lockwood and HR on 19 September;
- (f) the Claimant's statement in cross-examination that "Mr Prudent said that numerous times. Not once, not twice, numerous times."

First week of September 2022

Mental impairment

39. The Claimant has a substantial medical history. He has suffered from depression since at least 2013. His medical records contain regular references to anxiety and the

Claimant underwent multiple periods of sick leave due to stress at work in his previous role.

40. We accept the evidence from Mr Lockwood and Mr Prudent that the Claimant did not exhibit any overt symptoms of his mental impairment whilst at work from the point of view of an objective observer. However we find that aspects of the Claimant's behaviour which were attributed to his 'personality' or 'character' were in fact a result of his mental impairment. In this respect we have had regard to the type of symptoms that are linked to EUPD according to the medical evidence and also to the Claimant's WhatsApp message to Mr Lockwood in June 2022 (page 105) where he states 'that is why sometimes I struggle at work to express myself properly & it can come across as quite angry....I just wanted to be honest with you & let you know my situation so hopefully you & all my colleagues will understand me better'. We accept that the Claimant exhibited certain emotions more strongly in the workplace that, without his mental impairment, he would have been more able to control.
41. At the relevant time the Claimant was in regular contact with his doctor regarding his mental health issues. The regularity of the Claimant's interactions with his doctor started to increase from August 2022 having, before that, had no doctor's consultation since 10 February 2022. From 23 August 2022 appointments are regular with evidence of the Claimant's mental state starting to destabilise.
42. Whilst there is not a clear breakdown of which symptoms were caused by which impairment, whether that be depression, anxiety or EUPD, we find that the Claimant was suffering from mood swings (as per the medical entry on 1 September 2022 (page 153)) and that his emotional dysregulation was affecting his work relationships, as the Claimant advised the doctor on 23 August 2022.
43. We accept the evidence that the Claimant suffered from ongoing low self esteem, paranoia and depression. We find from the doctor's note on 15 January 2021 (page 161) that these can be symptoms of complex depression or EUPD and we accept that the Claimant's depression and anxiety are linked to, or result from, his EUPD. We also accept - on the basis of the medical entry on 20 Jan 2021 (page 161) as well as the other medical evidence and the Claimant's impact statement combined - that personality disorders are linked to erratic mood swings, extreme rage and anger, self-harm, paranoia and low self-esteem, and hyper-sensitive emotions and unpredictable responses and that the Claimant experienced all of these symptoms and they were likely to recur.

Alleged harassment

44. It is the Claimant's case, and a central issue in his claim, that there was a meeting in around the first week of September 2022 in which he and Mr Prudent disagreed regarding a production matter, leading Mr Prudent to make a gesture near his head insinuating that the Claimant was crazy, followed by a comment to the effect 'Oh yeah, you've got a problem with your head haven't you.'

45. The Respondent denies that such an interaction, involving either a gesture or a comment as alleged, took place. Mr Jagpal for the Respondent submitted that the Claimant had conflated the 'heated discussion' of 30 June 2022 with a production meeting in early September, and had embellished it by confecting details about the hand gesture and comment.
46. We do not accept the Respondent's submission that a reference to 'the first week of September' necessarily means to either Thursday 1st or Friday 2nd September. The 'first week' of September as used by the Claimant in the claim form could equally well refer to the first 7 days of the month or the first full week. This interpretation correlates with the Claimant's email of Monday 12 September 2022 in which he refers to the incident taking place 'last week' and we consider it most likely to be correct.
47. It is agreed by the parties that 'production meetings' took place every day. The Claimant described in his oral evidence how "*Mr Prudent used to walk between the lines and have a chat with us before the meetings...either before or after the meetings there were one-to-one chats with Mr Prudent apart from the meetings.*" Given the proximity of the production meeting area to the shop floor we accept this as plausible and likely.
48. We find that a heated discussion regarding production took place between the Claimant and Mr Prudent sometime between Monday 5th and Friday 9th September 2022. This was not during a morning production meeting with other colleagues present but was a one-on-one chat. We reach this conclusion on the basis of the Claimant's claim form which states 'the Claimant had a verbal discussion with George Prudent', his witness statement which says 'Whilst on the shop floor at the time George Prudent & I...'. We find that the Claimant's description in his email to Mr Lockwood on 12 September of the incident taking place 'at a production meeting' was not necessarily a reference to the daily production meeting with all team leaders present.
49. The Claimant has after the event, in his witness statement and in his own recollection, conflated this meeting of early September with the meeting on 30 June 2022 with regards to exactly what was discussed and who was there. In the course of describing the September discussion in his witness statement we note the reference (in paragraph 15) to an email that relates instead to the 30 June 2022 discussion.
50. Mr Ahmed was not present at the September 2022 meeting. In reaching this finding we have borne in mind that we found that Mr Ahmed was truthful in his responses although his answers appeared to be composed in an effort to be tactful and they were often caveated ("*I can't say specific dates or times...*" and "*...I am not saying it was only between Hakan and George...*"). From this we infer that Mr Ahmed was not as forthcoming as he could have been and we do approach his evidence with some caution.
51. We do not consider that the Claimant's confusion regarding the details of the meeting detract from his reliability in relation to his recollection of the hand gesture and accompanying comment. The Claimant and Mr Prudent had meetings about production matters on at least a daily basis. The Claimant might be expected to remember little about the particular details of one of these whilst remembering clearly

the details of an unexpected incident that happened in such a meeting, and this is what we find happened.

Majority decision

52. It is at this point that the Tribunal diverges in its findings.
53. The majority (the Employment Judge and Mr Ledbury) concludes on a balance of probabilities that Mr Prudent did make a gesture by his head to indicate 'crazy' and that he then made a comment referring to the Claimant's mental illness.
54. We reach this conclusion on the basis that:
 - (a) At the time in question emotions were raised due to the ongoing disagreement between the Claimant and Mr Prudent regarding night shifts, making a 'heated discussion' and immoderate language or behaviour more plausible;
 - (b) Mr Prudent had only recently been made aware of the Claimant's mental impairment and it was fresh in his mind;
 - (c) There is a reasonably contemporary email dated 12 September 2022 from the Claimant to Mr Lockwood describing the event;
 - (d) The Claimant's account is consistent with his WhatsApp message to the Turkish HR advisor about being bullied due to his disability;
 - (e) The Claimant's lack of consistency as between the 12 September 2022 email, his witness statement and in oral evidence regarding the precise words used in our view enhances the credibility of his account as we consider that if the event was concocted, as claimed by the Respondent, the Claimant would have been more likely to stick to a certain specific form of words;
 - (f) In contrast with the lack of consistency regarding the exact words used, the Claimant has been very consistent that a 'crazy' gesture preceded Mr Prudent's words. We find the Claimant's cross-examination evidence on this point was clear and definite;
 - (g) We do not consider it plausible that the Claimant misunderstood or misconstrued Mr Prudent's conduct, as suggested by Mr Jagpal in his closing submissions. We find that a gesture of the sort described and demonstrated by the Claimant during the hearing is simple and specific and it would be difficult to misinterpret or misconstrue it. The gesture and comment were closely related and so the clarity of the 'crazy' gesture suggests to us that the content of the comment - referring to the Claimant's disability - is also more likely to be accurate;
 - (h) We have some concerns regarding the evidence of Mr Prudent. In cross-examination Mr Prudent frequently failed to confirm directly what 'did' happen as opposed to what 'would have' happened and we found his answers evasive

at times. Taking into account our other findings of fact concerning Mr Prudent's relationship with the Claimant we note that in some instances these directly conflict with Mr Prudent's account. On this particular issue we therefore place slightly more weight on the evidence of the Claimant relative to that of Mr Prudent.

55. We find that the hand gesture and comment did not occur in the earlier meeting on 30 June 2022 because, first, Mr Prudent was not aware of the Claimant's mental illness at the time and, second, the Claimant would have raised the matter with Mr Lockwood earlier.

The dissenting opinion

56. Tribunal member Mrs Ray, dissenting, agreed with the majority up to the point indicated above. However in weighing up the evidence she concludes that Mr Prudent did not make the alleged gesture and comment. She reaches this conclusion on the following grounds:

- (a) Mr Prudent has experience working with learning disabled adults which makes it less likely that he would use such a gesture;
- (b) As the meeting took place on the shop floor the gesture would have been witnessed by other people. It would be improbable for Mr Prudent to make such a gesture where it could be overseen and we have not heard from any witnesses who say they saw it. Mr Ahmed said he did not see it and Mr Hortoglu, who could look down and see the production area, also did not see it;
- (c) The Claimant had not raised any complaints in respect of his 'disability' prior to his email to Mr Lockwood of 12 September 2022. In this email he raises the possibility that Mr Prudent is discriminating against him because of his disability. There is therefore an incentive on him to fabricate the incident of alleged harassment in order to strengthen his case against Mr Prudent.

57. The dissenting opinion is limited to the findings of fact in paragraphs 56 (a), (b) and (c) above. These findings of fact correspond to (and are in the alternative to) the majority's findings in paragraphs 53 and 54 (a)-(h). All other findings are unanimous.

Subsequent events

58. The Claimant went on sick leave between 14 – 16 September 2022. This was due to the Claimant's anxiety being activated by the stress of recent events at work, most notably the pressure from Mr Prudent to do night shifts and what the Claimant perceived to be the inadequate response by the Respondent to an unconnected episode in which one of the Claimant's team members was rude to him.
59. We find that the hand gesture and comment by Mr Prudent reinforced the Claimant's belief that Mr Prudent did not like him but did not directly lead to this period of sick leave. We find this because the Claimant's reference to the incident in his email to Mr

Lockwood of 12 September 2022 appears almost as an after-thought after referring to a different matter and before the main paragraph which focusses on the night shifts.

60. The Claimant returned to work the following week on 20 September 2022. Following a health and safety incident which lead to the Claimant being investigated for gross misconduct the Claimant was suspended with effect from 29 September 2022.
61. A further period of sick leave commenced on 30 September 2022 and the Claimant thereafter remained on a mixture of suspension and sick leave until his employment terminated on 22 December 2022. This period of sickness absence was due to the symptoms of depression and anxiety resulting from the Claimant's mental impairment, which became unmanageable following his suspension.
62. The Tribunal heard evidence from the Claimant about his suspension and his belief that it was a set up by the Respondent in order to dismiss him because he did not wish to carry out shift work or because he was seen as causing trouble. While the Tribunal understands that it was important to the Claimant to put this evidence before the Tribunal it did not assist us in reaching our conclusions on the relevant issues and we therefore do not make any findings of fact in respect of it.

The Law

63. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: ...

...disability;

Section 6 Disability

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

(a) P has a physical or mental impairment, and

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

26 Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) the relevant protected characteristics are-

...disability

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

64. For the purposes of s6 EQA, a substantial adverse effect is one that is more than minor or trivial (s212 EQA), and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person.

65. Schedule 1 par 2(2) EQA provides that *“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”*.

66. The burden of proof is on the Claimant to show that he is a disabled person in accordance with that definition.

67. We have taken into account the *“Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (Guidance) and the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2015)”* and specifically Appendix 1 (Code).

68. Helpful guidance as to the meaning of *“normal Day-to-day activities”* is included in both the Guidance and the Code. Paragraph D3 of the Guidance states that:

In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities,

69. The Code states that day-to-day activities include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. Normal day-to-day activities also encompass the activities which are relevant to working life.

70. A failure to provide a written statement of particulars in accordance with s.1 of the Employment Rights Act 1996, can be brought before the Tribunal pursuant to section 38 of the Employment Act 2002.

Analysis and conclusions

Disability

71. The Respondent having conceded (sensibly, in our view) at the outset that:

(a) the Claimant did have a mental impairment; and that

- (b) if the Tribunal found that the Claimant's mental impairment had a substantial adverse effect on his ability to carry out day-to-day activities, the effects of the impairment were accepted as being long-term;

the question for the Tribunal is whether the Claimant's EUPD had a substantial adverse effect on his ability to carry out day-to-day activities?

72. We have considered Mr Jagpal's submissions on behalf of the Respondent that the Claimant has failed to sufficiently describe exactly what day-to-day activities his mental impairments stop him from doing. Mr Jagpal referred us to the earlier Tribunal's order at page 32 paragraph 6, which sets out the detail that the Tribunal requires in an impact statement. Mr Jagpal submitted that the Claimant has provided only generalised assertions such as that he suffers from mood swings, but he has failed to describe how the mood swings manifest themselves or, importantly, what he cannot do because of the mood swings. Mr Jagpal further criticises what he says is a vague reference to 'struggling to cope with tasks' and says that more specificity is needed.
73. We disagree with the Respondent's submissions. Bearing in mind that the Claimant is a litigant in person we consider that the impact statement adequately sets out the effects of his impairment and the impact on his day-to-day activities. In describing how his mood swings 'cause[s] my mood to change in seconds, several times a day. This has a huge impact on my relationships especially at work...' we are satisfied that the adverse effect is clear and it is not necessary to detail further exactly how this is an adverse effect.
74. The same is true of each of the symptoms that are described by the Claimant in paragraphs 1 to 8 of his impact statement. Although the Claimant does not specify a particular work task that is made harder as a result of his symptoms, we consider that simply having to experience many of the symptoms during his working day, for example, irritability, paranoia and fatigue, amounts to a substantial adverse effect.
75. The Respondent's lack of observation of the Claimant's mental impairment, and its witnesses' observation that he successfully carried out his work and even volunteered for additional responsibility at times does not change our conclusions. We recognise that the Claimant was prepared to do overtime and put himself forward for promotion and additional responsibility. However, we also recognise that he did these things in a carefully controlled manner. He rarely did overtime in the evenings or at weekends because it would be more likely to disrupt both his domestic routine and his own mental stability. He applied for a promotion at a time when he was content in his job, his impairment was under control, and on the understanding that it did not involve night/weekend working.
76. We conclude that the Claimant managed to keep his impairment from negatively affecting his work colleagues but it was nonetheless a constant in his own life. This is apparent from his WhatsApp message to Mr Lockwood in June 2022 in which he explains that his recent diagnosis 'explains a lot of things' and is why 'sometimes I struggle at work to express myself properly'.

77. We also conclude that it is likely that his impairment did show itself at work but that his colleagues were unaware that certain behaviours were manifestations of his condition. According to the above WhatsApp message, the Claimant hoped that his diagnosis would mean 'my colleagues will understand me better' which indicates that the Claimant at least felt that certain elements of his external behaviour were affected day-to-day in the workplace.
78. Mr Jagpal went on to suggest that the symptoms the Claimant describes are ordinary day-to-day effects that most people might feel in the course of their lives. Whilst to some degree we accept this, we conclude that there is a difference in the Claimant's case because, drawing on the evidence in the Claimant's impact statement, witness statement and the description of the symptoms of EUPD according to the medical notes, the Claimant is more susceptible to such symptoms. Not only does the Claimant experience such symptoms on a daily basis – so, more frequently than 'normal' people might expect to - he reacts to minor emotional triggers which would not lead to the same reaction in somebody without EUPD. In addition, the 'everyday' emotions such as stress and anxiety that the Claimant feels, are more likely to snowball out of control and lead to more serious symptoms such as depression and self-harm.
79. Looking further at what the Claimant was unable to do because of his mental impairment we consider that as well as suffering from the substantial adverse effect of actually experiencing the symptom, there was a substantial adverse effect on his ability to cope with any level of criticism without suffering disproportionate anxiety and stress. He was unable to let himself relax with colleagues or have unguarded interactions as he was hyper-sensitive and paranoid. Although he did on occasion socialise with colleagues, this was preceded by periods of worry and anxiety caused by his having significant difficulty in forming and enjoying social relationships.
80. The effort it took the Claimant to maintain his work life had a significant adverse effect on his home life where he was unable to relax and focus on family activities because of preoccupation with work issues.
81. The guidance at paragraphs 68 and 69 confirms that 'normal day to day activities' include taking part in normal social interaction or forming social relationships, as well as having conversations and general work-related activities. We are satisfied that the Claimant's EUPD had a substantial adverse effect on his ability to carry out all of these day-to-day activities.
82. Even when the Claimant's impairment was stable and under control it was liable to reoccur. At the relevant time his condition had flared up due to the increased stress at work and, although he was able to carry out his work, his mental state when carrying out his work was extremely poor due to his EUPD.
83. The Respondent submits that there is no causative link between the Claimant's impact statement and his impairment. We agree that it would have been helpful to have been provided with, for example, more comprehensive medical information regarding EUPD. However, we recognise that the Claimant was representing himself, and not

in his first language. Having taken account of the Claimant's medical evidence that appears in the bundle we have reached findings of fact (above) that personality disorders are linked to and are consistent with the types of symptoms described by the Claimant in his impact statement and we therefore conclude that there is a causative link between the Claimant's impairment and the adverse effects that he describes.

84. Although the Respondent accepted at the outset that if the Tribunal found that there were substantial adverse effects then these would be long-term, Mr Jagpal did refer in his submissions to the Claimant having the burden of proving that the effects are long-term and so we have considered it. Our view is that it can be dealt with briefly. The Claimant has suffered from depression, anxiety, and other symptoms which are linked to EUPD for many years. His medical history is long and although his diagnosis of EUPD was only in August 2021 the various features that led to this diagnosis appear at regular intervals over the course of many preceding years. The diagnosis merely puts a name to the Claimant's assorted symptoms. As such we are more than satisfied that, as at September 2022, the Claimant's mental impairment was long-term.
85. The question of knowledge is also not in issue in this case however for completeness we note that the Respondent had knowledge of the Claimant's impairment by, at the latest, 16 June 2022 when the Claimant told Mr Lockwood in a WhatsApp message that he had been diagnosed with a BPD.
86. In relation to the issue of disability we conclude that the Claimant was disabled at the time of the alleged harassment.

Harassment

87. The Respondent has conceded that if the Tribunal finds that the alleged gesture and comment were made:
- (a) it amounted to unwanted conduct; and
 - (b) The conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
88. The Tribunal has (by a majority) found as a fact that the alleged conduct did take place, for the reasons set out in paragraph 54 of our findings of fact above. The sole issue remaining is whether the conduct 'related to disability'.
89. The requirement in the EQA that the unwanted conduct is 'related to a relevant protected characteristic' is satisfied if there is a suitably close connection between the characteristic (here, disability) and the conduct. The conduct does not need to take place *because of* the disability.
90. Mr Jagpal submitted on behalf of the Respondent that the gesture and words, if they did happen, simply expressed dissent to what had been said and a belief that what had

been said was far-fetched. He submitted that such conduct, used in normal conversation, does not relate to a mental impairment.

91. We do not accept this. We take into account Mr Prudent's knowledge of the Claimant's disability at the time that the gesture and the comment were made. We consider that the gesture, if made without the comment in circumstances in which Mr Prudent was unaware of the Claimant's disability, would not necessarily have satisfied the 'related to disability' requirement. However, the fact is that in the immediate case Mr Prudent was aware of the Claimant's disability. We have found as background fact that there was a poor relationship between the Claimant and Mr Prudent. There was an ongoing dispute between the two about whether the Claimant would have to work new shifts that he felt unable to work because of his disability.
92. It is also highly relevant that, after making the gesture, Mr Prudent made a comment acknowledging or referring to the Claimant's mental illness. This shows that Mr Prudent himself associated the gesture with mental illness. There is a direct link between the unwanted conduct and the Claimant's protected characteristic.
93. In circumstances where we have been able to make clear positive findings regarding whether the unwanted conduct related to disability it is not necessary or helpful to employ the two-stage burden of proof provisions.
94. We therefore find that the claim of disability related harassment succeeds.

Remedy

Recommendation

95. No recommendations were proposed by the Claimant and we do not make any recommendations of our own volition.

Financial loss

96. The aim of compensation in a discrimination case is to put the Claimant in the position, so far as is reasonable, that he would have been had the wrong not occurred. Only those losses caused by the unlawful act will be recoverable. The Claimant confirmed that the only financial loss being sought was that set out in his schedule of loss as relating to the difference in wages during the period of sick leave between 30 September 2022 and the end of his employment.
97. We agree with the Respondent's position, as stated in Mr Jagpal's closing submissions, that the reason for the Claimant's sick leave from 30 September 2022 onwards was because of the Claimant's suspension and investigation in connection with his alleged misconduct and was not a result of the act of disability related harassment. The Claimant's loss of earnings in respect of the difference in pay between sick pay and full pay does not flow from the act of disability related harassment and is therefore not recoverable.

Injury to feelings

98. The Claimant is entitled to an award for injury to feelings. The amount is to be determined by regard to the impact of the discrimination on the employee and what injury they have suffered as a result of the unlawful act.
99. The Claimant was clearly upset, angry and offended by the act of harassment. It contributed to his feeling of being bullied by Mr Prudent. However, to the Claimant's credit he returned to work following the incident and, although he mentioned the incident to Mr Lockwood, it formed only one – arguably minor – part of a much wider complaint. We consider that the injury to feelings suffered by the Claimant in respect of this act was limited. Throughout his case the Claimant referred to many instances of what he believed to be Mr Prudent's bullying or unfriendly behaviour towards him. He was particularly upset about Mr Prudent's persistence in trying to make him work night shifts. In contrast, the Claimant could not be described as being particularly upset or preoccupied with the particular act of unlawful harassment which forms his successful claim.
100. As this was an isolated act of harassment with limited repercussions we consider that the lower end of the lower Vento band is appropriate. In respect of claims presented on or after 6 April 2022, the lower Vento band was between £990 and £9,900. We have concluded that an award at the lower end of this band is justified and we therefore order that the Claimant be awarded the sum of £1,500.
101. We have calculated interest from the date of Friday 9 September 2022 which we consider is the last day in the week when the discrimination took place. We consider that to be where the real impact on injury to feelings lies and we consider that to be an appropriate date from which to award interest. There are 505 days between then and the date of this judgment (26 January 2024). We apply the statutory rate of 8% to that figure. Calculating simple interest accruing from day to day produces an award of interest of £166.

S38 Employment Act 2002

102. As we have (by a majority) found in the Claimant's favour in respect of his discrimination claim we have, in accordance with section 38 EA 2002, considered whether the Respondent was in breach of its duty to provide full and accurate written particulars under s1 ERA. As there is a signed employment contract dated 14 May 2021 in the bundle, and the Claimant agreed that he had been given two employment contracts, we conclude that the Respondent was not in breach of its duty.

Employment Judge Bennett

26 January 2024